FILE: 1977/78-2
APPEAL

Ref: 1976/77-2

September 13, 1977

REGISTERED MAIL
PERSONAL AND CONFIDENTIAL

Mr. F.

Toronto, Ontario

Dear Mr. F.

Re: Hearing before the Appeal Division of the University Tribunal on June 7, 1977

On June 9th I wrote to formally advise you of the decision of the appeal division of the University Tribunal.

I now enclose for your information a Statement of Reasons for this decision. Mr. Karl Jaffary and Mr. Owen Shime have submitted separate Reasons; Judge Unger has concurred with Mr. Jaffary's Reasons.

Yours sincerely,

PATRICK S. PHILLIPS
Secretary, Academic Tribunal

PSP/cc
Encl.

UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

BETWEEN:

THE UNIVERSITY OF TORONTO

Appellant

and

STEVEN FISCHER

Respondent

REASONS FOR JUDGMENT

O.B. SHIME, Q.C. - CHAIRMAN

KARL JAFFARY, Q.C.

JUDGE I. UNGAR, O.C.

UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

BETWEEN:

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Appellant

and

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Respondent

REASONS FOR JUDGMENT

KARL D. JAFFARY
Barrister & Solicitor
390 Bay Street
Toronto

THE UNIVERSITY TRIBUNAL OF THE
UNIVERSITY OF TORONTO

IN THE MATTER OF The University of Toronto Act, 1971

AND IN THE MATTER OF certain disciplinary proceedings brought against Steven Fischer pursuant to the University of Toronto Code of Behaviour

Owen Shime, Chairman
Karl D. Jaffary, Q.C.
Irena Ungar
) Tuesday, June 7, 1977

BETWEEN:

THE UNIVERSITY OF TORONTO

Appellant

and

Mr. F.

Respondent

REASONS FOR JUDGMENT

Delivered by Karl D. Jaffary

This is an appeal by the Provost against the sanctions imposed on September 29, 1976 by a jury sitting in the Senior Branch of the Trial Division.

Mr. F was charged with six offences. After the better part of a day of trial he pleaded guilty to one of the

date of the offence). Third was a requirement that the suspension and loss of credit be noted on his transcript for the period of the suspension.

Counsel for the University referred us to the reasons of the majority of this Tribunal in the 1976/77-3 case. In that case a one year suspension was under appeal by the student, and in that case the student had lost credit in a course for plagiarism in first year and was before the Tribunal for a further act of plagiarism in second year. The student's appeal was dismissed, with the majority indicating that in those circumstances a one year suspension was too lenient. Counsel for the University submitted that if the present case was not a case for expulsion, then it was questionable whether any case was so serious as to warrant expulsion.

Both Counsel referred us to the sentencing principles outlined by Mr. Sopinka in the 1976/77-3 case, with which we agree.

Counsel for Mr. F. argued that the penalty was already excessive, that Mr. F. was under some strain when the offences were committed, and that he was 21 years of age when they were committed.

The Tribunal was shocked at the offences. It decided that the penalty ought to be increased. It was concerned that no penalty

offences. He was subsequently convicted of three other offences, acquitted of one and the final charge was withdrawn. There was some duplication between the offences which were found to have been committed and those on which an acquittal was recorded or the charge withdrawn.

Mr. F. was registered in the fourth year of Commerce and Finance in the 1975-76 academic session. The offences which he was found to have committed were basically as follows:

1. He plagiarized the whole of an essay in Economics 333, where such essay was worth 50% of the course marks.
2. On a term test in the same course, worth 20% of the course marks, where the question was assigned beforehand, he memorized the answer of another student and submitted it.
3. He plagiarized the whole of an essay in East Asian Studies 222, where such essay was worth approximately 40% of the course marks.
4. He cheated on an examination in Anthropology 220, worth about one half of the course marks.

The trial division jury ordered three sanctions. First was a loss of credit in certain other courses. Second was a suspension for one year from the end of the 1976-77 session (and we note that to be, effectively, a two year suspension from the date of the

was open to it between that of a two year suspension and expulsion. Had the option been available, it would have given consideration to a term in the neighbourhood of five years. The Tribunal asks its secretary, in any discussions as to revisions of the Code of Behaviour, to indicate that the Tribunal, on at least this occasion, has expressed its desire that a term of suspension of up to five years be an available sanction.

The Tribunal considered recommending expulsion in this case, at least in part, so that the facts of the case would go to the Governing Council and the wisdom of that body could be received by the Tribunal. It concluded that a recommendation for expulsion ought not to be made unless the Tribunal, believed expulsion to be, beyond question, the appropriate penalty.

In this case the Tribunal did not agree that expulsion was the only appropriate penalty. The offences, while both serious and numerous, all occurred in the same short period of time. By the time Mr. F. learned that he had been detected in his first offence, all offences had been committed. Granted, he was a fourth year student, and ought to have known better. However, he could possibly have panicked during his final period of fourth year. There was no evidence of offences in other years, and his work in other years would apparently entitle him to a degree now if he were not under suspension. His counsel submitted that he would

have great difficulty ever being admitted to any university if expelled from this one. The Tribunal concluded that the sanction of expulsion should be used only in clearest cases, and here the absence of previous record and the proximity of the offences in time gave rise to doubt as to whether it was the only appropriate penalty.

The Tribunal decided to extend the suspension to the maximum allowable, being two years from the spring of 1977 to the spring of 1979. That extension relies upon the power to suspend for two years from the end of the session in which the Tribunal hears the case. The effect of the suspension will be a three year suspension from the date of the offences.

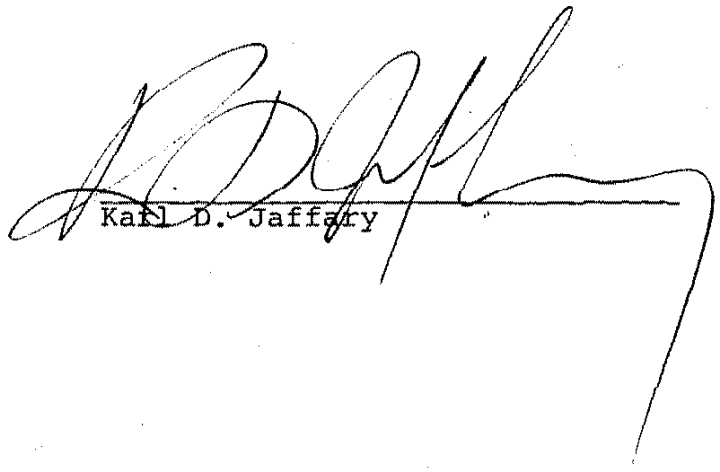
Secondly, the Tribunal directs that the particulars of the suspension be a part of Mr. F 's record until he graduates. The Tribunal believes that this should alert any future instructors to his record.

Finally, the Tribunal directs that these reasons for decision be provided to the Varsity.

The Tribunal notes that the procedure by which a jury is to be directed and instructed on sentence was not strictly followed

at the trial of this matter and, in any event, the designated procedure deprives the jury of addresses by both counsel and instruction on sentencing principles prior to the jury's consideration of sentence. The Tribunal hopes that the present consideration of changes to the Code might consider that issue.

Dated at Toronto this 8th day of June, 1977.



Karl D. Jaffary

IN THE UNIVERSITY TRIBUNAL OF THE UNIVERSITY OF TORONTO

IN THE MATTER OF the University of Toronto Act, 1971

AND IN THE MATTER OF certain disciplinary proceedings brought against Steven Fischer pursuant to the University of Toronto Code of Behaviour

B E T W E E N:

The University of Toronto,

Appellant

- and -

Mr. F.

Respondent

BEFORE:

O. B. SHIME, Q.C.
HER HONOUR JUDGE I. UNGAR
KARL JAFFARY, Q.C.

APPEARANCES:

J. LASKIN	COUNSEL for the Appellant
M. CHYKALIUK	COUNSEL for the Respondent

REASONS FOR DECISION

This is an appeal by the Provost of the University of Toronto to the Appeal Division of The University Tribunal pursuant to section 19 1(b) of the Discipline Structures and Procedures Enactment 1974, from the sanctions imposed by the jury on the Respondent Mr. F. by a jury sitting in the Senior Branch of the Trial Division. The Appellant asks that the sanctions be

varied so as to provide for expulsion in accordance with Section F(2)(vi) and Section G(4) of the Code of Behaviour.

By way of background to this appeal it is necessary to explain that the Governing Council of the University of Toronto enacted a Code of Behaviour regarding academic discipline which applies to students and members of the teaching staff. The Code is enforced by the University Disciplinary Tribunal pursuant to an enactment of the Governing Council. The Tribunal is composed of a Trial Division and an Appeal Division.

The respondent, a student, was found to have committed the following offences by the Trial Division:

(a) That in April, 1976 the respondent did, with intent to deceive, submit a paper entitled "Zoning" for credit in Economics 333 in which he represented as his own the ideas and expression of ideas of others, contrary to section E.1.(a)(ii). His paper quoted at length and without acknowledgment, passages from Babcock,"The Zoning Game" and from Marcus & Groves, "The New Zoning".

(b) That in March, 1976 the respondent did with intent to deceive submit a term test for credit in Economics 333 in which he represented as his own

the ideas and expression of ideas of another student contrary to section E.1.(a)(ii).

(c) That in April, 1976 the respondent did, with intent to deceive submit a paper relating to the Japanese Economy for credit in East Asian Studies 220, in which he represented as his own the ideas and expression of ideas of another student, contrary to section E.1.(a)(ii). It was found that the respondent's paper plagiarized a paper entitled "The Rise of Militarism and its Effects on the Japanese Economy 1930-1940", submitted by a student for credit in Economics 334 in April, 1975.

(d) That in December, 1975 the respondent, with intent to deceive, obtained unauthorized assistance in the writing of an examination in Anthropology 220, in that he obtained, used and copied answers of fellow students and submitted them as his own for credit on the examination, contrary to section E.1.(a)(i).

The respondent pleaded guilty to the first offence during the first day of hearing and he was subsequently convicted of the three other offences by the jury. It is important to note, and it will become more relevant later in these reasons, that the jury

which was empanelled was composed of three students and two professors from the University and that it was unanimous in its findings. The jury under the University's procedures, unlike the juries in criminal cases, is entrusted with the duty of imposing sanctions. Here again the jury was unanimous in imposing the following sentence:

(a) That the respondent was to lose credit for all courses which had not been completed or in which no grade or final evaluation had been registered at the time the offences were committed.

This sentence was imposed pursuant to section F.2(a)(14) of the Code.

(b) That the respondent be suspended, the suspension to end in one year, and that the respondent be eligible to re-register for the summer session in 1978.

(c) That the suspension and loss of credit in his courses be recorded on his transcript and be removed from the transcript at the end of the period of suspension.

The appellant asks that the sanctions be varied on the following grounds:

1. The sanction imposed was grossly inadequate in light of the seriousness and number of academic offences found to have been committed by the respondent.

2. The jury did not hear submissions of counsel nor receive direction from the chairman prior to its deliberations on the sanction to be imposed.

In dealing with the arguments advanced by both parties it is necessary to take a broader look at both the Code and the procedures which govern the conduct of the academic community of students and staff.

It is apparent that the Governing Council of the University in enacting the Code and the procedures intended that the major decisions arising from a breach of the Code should reside in the University community and not be delegated to "outsiders". None of the members of the Tribunal, the Hearing Officers or the University Counsel is to be chosen from the staff or the student body - they may be outsiders; however, the trials are to be jury trials and the jurors are to be chosen from among the students, teaching staff and graduates. I note, in passing, that while the procedures admit graduate jurors to the lists under section 12, the composition of the jury under section 15 provides that the jury "shall be composed of either three members of the teaching staff and two students or two members of the teaching staff and three students" at the option of the accused. No provision is made for choosing graduate jurors. The jury is empowered to decide all questions of fact while the chairman of the hearing or the hearing officer is entitled to "decide and

determine all questions of law including matters of interpretation of the Code and the admissibility of evidence"; as well, he or she "shall charge and assist the jury as to its verdict."

The procedure departs from the normal criminal procedure where normally the trial Judge imposes the penalty, by permitting and indeed requiring the jury which has convicted to impose the appropriate sanction. While it must consult with the chairman prior to the imposition of the sanction, it is only when a majority of the members of the jury are unable to agree on the sanction that the hearing officer is given any authorization, whatsoever, to interfere in the sanctioning part of the process, but since the jury in the instant case were unanimous in their decision as to sanction, that matter need not trouble us at this time.

It is also relevant to consider, in examining the decision-making process, that there is no original jurisdiction in either the Trial Division or in the Appellate Division of the Tribunal to order that a student be expelled from the University. The sole authority of the Tribunal with regard to expulsion is contained in section G.4. That section permits the Tribunal to recommend expulsion to the President "for a recommendation by him to the Governing Council." Indeed, both the Trial Division and the Appellate Division had equal authority in that regard so that a possible dilemma for the President is that he would be faced with competing recommendations by the different Divisions.

It is patently obvious that both the Code and the procedures intend to confine any effective decisions concerning sanctions to the University community - to the jury at the initial stage and to the Governing Council at the final stage, in cases of expulsion. I consider the Governing Council for these purposes to fall within the designation of University community, despite its varied composition. And even then, the Governing Council is not bound by such a recommendation because it may reject a recommendation for expulsion and remit it to the Tribunal.

In these circumstances, given the primacy of the jury in determining sanctions and the obvious intent to repose any final decision to expel within the University community, there must be very cogent reasons, indeed, for the Appeal Division to vary or amend the sanctions imposed by the jury. We act only as a conduit between the jury and the Governing Council, since it is clear that this Appeal Division has no authority to expel a student. The issue thus raised is upon what basis should the Appeal Division vary or modify a decision made by a jury and send it on to the Governing Council. That matter is made all the more difficult in this case because the decision of the jury was unanimous and the jury had before it the clear option of recommending expulsion but chose not to exercise it.

It is also relevant to consider what I regard as very severe

limitations in the sanctions permitted under the Code. There is not a range of sanctions that one might expect. True, there are progressively more severe sanctions ranging from a caution or warning to suspension; however, the period of suspension is limited for all practical purposes to a period of up to two years and there is no range of suspensions that might be imposed between the two years and a recommendation for expulsion. There may be cases, such as this one, where a more severe suspension than two years may be warranted. These limits on the existing sanctions force a very hard decision, between imposing a sanction that one considers too light or recommending a sanction that one considers too severe. There is no middle ground; the options are limited and where one favours the middle ground there is a hesitancy to move to the more severe punishment and thus a tendency to elect the lighter penalty even though it is not a satisfactory resolution of the matter. In short, it is my view, and I infer from the record and the circumstances that the jury faced with the limited options available to it unanimously made a clear choice and on that ground alone I hesitate to interfere with the decision.

The composition of the jury is a matter which also must be considered. The jury, unlike traditional juries, is not randomly selected. It is composed of students who may relate or empathize or, better, understand the position of the student who has breached

the Code. The jury is also composed of professors who may bring a greater overview of the University to the decision-making process. All in all, the jury's decisions reflect the customs and mores of the University community; this is a specialized jury who are intended to apply the University's community standards to decisions. That was obviously the intent of the procedure which excludes outsiders from the jury and these circumstances invite some caution in the Appeal Division imposing its own "outside" standards. That does not preclude an outside look at the situation because the standards at the University as they are reflected by a jury's decision may be so unreasonable or perverse in the circumstances that the Appeal Division may be warranted in disturbing the decision of the jury.

It is my personal view that the standards for "cheating" at the University are too low. Thus, there have been seven documented cases in the period October 1, 1975 to November 30, 1976 including the instant case. A variety of offences were considered - all of the same general category as is found in the instant case. The penalties ranged from censure to a one-year suspension. The present case is the most severe sanction imposed by any branch of the Tribunal.

Two comments may be made with respect to the other six cases. First, the documented cases do not show such widespread cheating as counsel for the University has argued. The number of cases

within that fourteen-month period is not excessive considering the number of students at the University and the total number of tests, essays and examinations that are written. Thus it is possible to infer that the penalties are sufficiently severe that they do have a deterrent effect.

However, I am not so naive as to believe that there are not numerous irregularities that remain undetected - to what extent I have no idea. But, if that is the case and cheating is excessive, then the University has some responsibility to treat with the situation in a more severe fashion. For example, it could provide a minimum sentence of one year's suspension for anyone violating the Code. Certainly censure or cancellation of a credit for a course where a student cheats are not sufficient deterrents.

The last consideration relevant to the University's responsibility is the position taken by the academic staff who sit on juries where students are charged. The inference, from the requirement that members of the teaching staff be on the juries, is that they will bring a broader view to the jury than student jury members who may relate in a greater degree to the student's interests. Certainly, the staff members are placed on the jury because they have some responsibility in maintaining the integrity of the University as a whole and more particularly its standards. Thus, while counsel for the University argues

that to permit the respondent to escape without expulsion will debase the University, I respond with some sympathy to that position. However I sympathize with the argument, I hesitate to give it its due because of the unanimity of the jury decision and particularly the position taken by the staff members of the jury who have a present and viable interest in the standards and integrity of the University. If the staff are prepared to accept and impose the sanctions that they have in this case, should this Appeal Tribunal composed of outsiders dictate a different view? Had there been a reasoned dissent from a member of the jury, I might have taken a very different view in this matter.

I now turn to the particular individual and the one factor present that will undoubtedly exist in future cases and that has existed in past cases before the Tribunal and that is the youth of the respondent. The respondent had completed three and one-half years at University prior to becoming involved in the present situation. While his present conduct casts some shadow on the success in his previous years, he is entitled to the normal democratic presumption of innocence for those years. If he is expelled he will have effectively lost those years and the likelihood of any future rehabilitation through education will be lost. Perhaps that is the risk he ran when he so brazenly committed the offences. But a youth of 19 or 20 may not be the same person at 25 or 30. Is he to be precluded from educational opportunity for the remainder of his life and from the opportunity to rehabilitate himself? I agree with my colleague Mr. Sopinka,

who in another appeal dealing with a different student, indicated that one of the components of "enlightened punishment" is reformation and it is my view that the penalty imposed should reflect that possibility.

I am also of the view that a lengthy suspension coming at such a critical stage in the respondent's life would be tantamount to an expulsion. If the penalty imposed had been for five years or perhaps slightly longer, he undoubtedly could only return with some sacrifice after that period since he would be required to start a new life which would have to be interrupted and he would likely, on return, be more contrite.

However, faced with the choice of complete expulsion, with little possibility of being permitted to return to University, or a suspension, I am hesitant to find that the jury was wrong although my personal preference is for a longer suspension. As a postscript to the actual penalty it is worthwhile to observe that the respondent as a result of these proceedings has been denied the opportunity to continue his chartered accountancy course where he had been enrolled and is currently working as a salesman. Thus, his record at University haunts him in other areas where he seeks expression and the denial of opportunity in fields outside the University as a result of the sanctions imposed is a legitimate consideration when assessing the sanctions imposed.

I am also of the view that since all these offences occurred within the space of a short period of time in the respondent's University career that they be treated differently than if the respondent had engaged in similar conduct over a period of years or if he had been a repeat offender. In this regard, I note that in the 1976/77-3 case the student was given a one-year suspension in what appears to have been a second offence, after he had a previous warning and a zero grade in another course. In that case the University did not seek to enlarge the penalty beyond one year. In some respects, that case was a more serious case than the instant case because the student, by committing a second offence, demonstrated a diminished potential for rehabilitation whereas in this case the student has not been given an opportunity to rehabilitate himself.

I am not unmindful that the penalty imposed should also serve as a deterrent to others who might attempt to "cheat", but I propose to discuss that matter more fully in dealing with the second ground raised by the University in its appeal.

The University claims that the jury did not hear submissions of counsel nor receive direction from the chairman prior to its deliberations on the sanction.

The hearing officer conducted the hearing in a manner that is similar to a court in criminal cases with respect to the finding of

whether or not the student had in fact committed the offences with which he was charged. Both counsel for the University and counsel for the student addressed the jury and the hearing officer charged the jury. The jury returned with its verdict, a finding that the accused had committed three offences. He had pleaded guilty to another offence.

The conduct of the proceedings then moved to the sentencing stage. The basis for the jury determining the sanction is found in section 16(4) of the Governing Council's enactment respecting the Tribunal. That section provides:

> 16(4) Where the jury has convicted the accused, it shall after consultation with the chairman of the hearing or the Hearing Officer, as the case may be, by a majority of its members, determine and impose the appropriate sanction.

The procedural rules that are relevant are as follows:

> 61. The chairman of the hearing or the Hearing Officer, as the case may be, shall be entitled to recommend to the jury an appropriate sanction or sanctions and any such recommendation shall also be recorded by him or her or under his or her supervision.
>
> 62. The accused and his counsel or agent, if any, shall be entitled to be present during the consultation referred to in section 16(4) of the Discipline Structures and

Procedures, 1974 and to hear any recommendation made under section 61.

63. After the consultation and recommendation referred to in section 62, the accused or his counsel or agent, if any, shall be entitled to make representations to the jury as to sanction.

64. The jury, the chairman of the hearing or the Hearing Officer, as the case may be, shall give reasons for the sanction or sanctions imposed, which shall be recorded by the chairman of the hearing or the Hearing Officer, as the case may be, or under his or her supervision.

In the course of the trial proceedings the learned hearing officer commented that the sanctioning rules are "to say the least, strange...". I agree with that observation. I find it abhorrent to any concept of due process or natural justice to find a set of rules which specifically permits the accused or his counsel to be present and make representation to the jury in the sanctioning process but contains no such provision which would permit counsel for the University to be present and make representations. The hearing officer did, however, permit the attendance of counsel for the University. In so doing, he was in my view being eminently fair.

Also, the rules impose an obligation on the jury to consult with

the hearing officer. That term in these circumstances is vague.

In my view, the duty to consult imposes an obligation on the hearing officer to advise the jury, at the very minimum, as to the principles of sentencing and its purpose. The hearing officer should advise the jury during the consultation that sanctions are to reform the accused, to deter others and to protect the University and its community. The circumstances of the particular situation should be considered and distinctions drawn where necessary. For example, some distinction should be made between a first offender and a repeated offender. In this case, the jury should have been advised as to the serious nature of committing multiple offences. In short, it is my view the criteria enumerated by Mr. Sopinka in his reasons in the 1976/77-3 case are appropriate matters to be considered in the consultation process between the hearing officer and the jury. He enumerated the relevant considerations in his reasons and it is useful to repeat them. They are: (a) the character of the person charged; (b) the likelihood of a repetition of the offence; (c) the nature of the offence committed; (d) any extenuating circumstances surrounding the commission of the offence; (e) the detriment to the University occasioned by the offence; and (f) the need to deter others from committing a similar offence.

Any omission to discuss these matters with the jury is not to be taken as a criticism of the hearing officer. The proceedings

before the Trial Division have not as yet had sufficient opportunity to evolve and develop. While I would have preferred a more thorough discussion during the consultation process I do not find that the discussion that took place is fatal to the sentence imposed by the Tribunal or to be more precise, that the proceedings were so deficient that we ought to replace the suspension with a recommendation to expel.

There are two reasons for arriving at that conclusion. First, there was no objection to the form of consultation at the hearing, by the University, who were permitted to attend and make representations. Indeed no criticism is intended of counsel for the University because he, as well as the hearing officer, are new to this unusual procedure which is in its formative stage.

Thus, to totally upset the jury decision at this stage, when everyone had the opportunity to make representations at the hearing if they thought the procedure was deficient, would be manifestly unfair. The better practice might be to remit the matter to the jury for further consultation, but that is difficult here, because of the time that has elapsed.

Secondly, it appears that the jury was cognizant of the matters which I consider to be relevant. The student was examined and cross-examined so that his character in some respects was revealed to them. They knew the nature of the offences committed and that

there were multiple offences. In giving reasons for having selected the sanctions imposed, the foreman of the jury referred to the "series of grave academic offences". In addition, the foreman indicated that "the transcript of this suspension and the loss of credit in his courses will draw to the attention of relevant parties the seriousness of the offences committed and Mr. F. 's present status at the University of Toronto." I infer from that comment that there may have been some consideration as to the impact of the sanctions on others and thus its deterrent effect was weighed by the jury.

However, after reviewing the record I hesitate to conclude that the totality of the sentencing procedure and the jury's understanding of the relevant considerations that should be brought to bear on the matter were as complete as they might have been. While I do not find the sentencing procedure to have been so inadequate as to cause me to alter the type of penalty, i.e., from a suspension to a possible expulsion, I am in sufficient doubt about what occurred that I think the suspension should be varied to provide for a longer suspension than the one the jury imposed. Accordingly, I find that the suspension shall be extended for a period not exceeding two years from the end of the session in which the order of the Tribunal was made, which is the spring of 1979. This extends the suspension for another year. I also direct that the particulars of the suspension be placed

on Mr. F. 's record until he graduates.

In addition, and to ensure that the University community may become aware of these proceedings, I direct that the reasons for the decision be provided to the Varsity.

And, finally, and as a caveat to these reasons, it is my view that the leniency demonstrated by the Tribunal in past cases may have lulled some students into a false sense of security and may not have sufficiently discouraged students from cheating - including the respondent in this case.

It is my personal view that the sentence in this case is not sufficient, although I am not prepared to go so far as to recommend expulsion in all of the circumstances of this case. However, I would hope that the Governing Council would consider amending the Code and its procedures. I am also of the view that students should be warned that in future cases the Appeal Division may adopt a different and more severe attitude to cases of this nature.

Dated at Toronto, Ontario this 7th day of September, 1977.

O. B. SHIME