Form A-34

File No. **2567-10-U**

LABOUR RELATIONS ACT, 1995

RESPONSE TO APPLICATION
UNDER SECTION 96 OF THE ACT
(UNFAIR LABOUR PRACTICE)

BEFORE THE ONTARIO LABOUR RELATIONS BOARD

Between:

Denis Rancourt of Ottawa, Ontario;
former professor, University of Ottawa,
Ottawa, Ontario

Applicant,

- and –

Allan Rock, President,
University of Ottawa, Ottawa, Ontario

Responding Party.

[X] **The responding party states in response to the application:**

OR

[ ] ______________________________ **intervenes in this proceeding and (Name of Intervenor) states in response to the application:**

1. (a) Correct name of the responding party/intervenor:

See Schedule "A" attached.

(b) Address, telephone number, facsimile number and e-mail address of the responding party/ intervenor:

University of Ottawa
Legal Services
550 Cumberland (302)
Ottawa, Ontario

Attention: Mr. Allan Roussy, Legal Counsel

T: 613-562-5800, x 1137
F: 613-562-5178
Email: aroussy@uottawa.ca

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(c) Name, address, telephone number, facsimile number and e-mail address of a contact person for the responding party/intervenor:

Emond Harnden LLP
707 Bank Street
Ottawa, Ontario K1S 3V1

Attention: Mr. Lynn Harnden and Mr. Paul Lalonde

Phone :	**613-563-7660**
Fax :	**613-563-8001**
Email :	**lharnden@emondharnden.com**
	and
	plalonde@emondharnden.com

2. (a) Name, address, telephone number, facsimile number and e-mail address of any other person, trade union, employer or employers' organization who may be affected by the application and who has not already been identified by another party:

N/A

(b) The person, trade union, employer or employers' organization named in paragraph 2(a) is affected by the application for the following reason(s):

N/A

[You must deliver to the person(s) named in paragraph 2(a): a copy of the application, a copy of the Notice to Responding Party and/or Affected Party of Application under Section 96 of the Act, a completed copy of your response, and a blank response form. You must also complete the attached Certificate of Delivery.]

3. The following statements in the application are agreed to:

See Schedule "A" attached.

4. The following statements in the application are not agreed to:

See Schedule "A" attached.

5. In support of its response, the responding party/intervenor relies on the following material facts:

See Schedule "A" attached.

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(Include **all** of the material facts on which you rely including the circumstances, what happened, where and when it happened, and the names of any persons said to have acted improperly. Please note that you will not be allowed to present evidence or make any representations about any material fact that was not set out in the response and filed promptly in the way required by the Board's Rules of Procedure, except with the permission of the Board.)

6. In respect of the order(s) requested by the applicant, the responding party/intervenor states:

   See Schedule "A" attached.

   (Describe your position with respect to the order(s) requested by the applicant.)

7. **[Complete this section only if you are intervening in this case.]**

   The intervenor claims to be affected by the application for the following reasons:

   N/A

8. Other relevant statements:

   See Schedule "A" attached.

Hearing Estimate Information:

[Note to Applicant: If you disagree with the hearing estimate of the responding party/intervenor, you must file with the Board your own Hearing Estimate form (Form A-16) within seven (7) days of receiving this response.]

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9. Estimated number of days to complete the whole case (including evidence and argument): **Three (3)**

10. Number of major witnesses I expect to call: **One (1)**
    (A major witness is one expected to testify for at least one day, including cross-examination.)

11. Number of minor witnesses I expect to call: **Once (1)**
    (A minor witness is one expected to testify for less than one day, including cross-examination.)

12. (a) I [X] do / [ ] do not intend to make preliminary motions or objections.

    (b) The preliminary motions or objections I intend to make are:

    See Schedule "A" attached.

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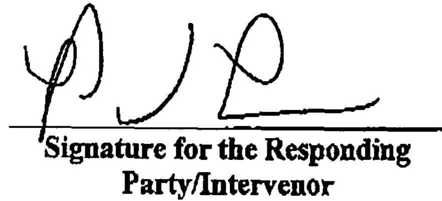
(c) Estimated time required to hear the preliminary objections or motions: **Two (2) to Three (3) hours.**

DATED November 19, 2010.



Signature for the Responding Party/Intervenor

SCHEDULE "A"

Introduction

1. The Applicant's complaint is based entirely on what he alleges were collective agreement violations by the University of Ottawa related to the processing of three (3) grievances he filed following his termination.

2. The remedies the Applicant is seeking would require the University of Ottawa to process three (3) grievances in accordance with his interpretation of the grievance procedure in the applicable collective agreement, and thereby establish that his interpretation of the grievance procedure in the collective agreement is the proper one.

3. However, the Applicant purports to file this complaint against "Allan Rock, President, University of Ottawa, Ottawa, Ontario" (hereinafter "Rock"), not the University of Ottawa.

4. Rock requests that the Application be dismissed because there are no material facts or particulars alleging that he has violated any section of the *Act*. Nor is any remedy requested by the Applicant against Rock personally.

5. Although Rock is the only named Responding Party this Response if filed on behalf of both Rock and the University (hereinafter collectively the "Responding Party").

6. The Responding Party denies sections 56 and 76 of the *Labour Relations Act* were violated as alleged in the Application, and denies the Applicant is entitled to any of the remedies requested.

7. The Responding Party further submits that the present Application should be dismissed by the Board without a hearing for the following reasons:

   a. The Application does not make out a *prima facie* case of a violation of section 56 and 76 the *Act* and/or the remedies requested.

   b. Furthermore, and, in the alternative, this is an appropriate case for the Board to exercise its discretion to dismiss the Application without a hearing. No labour relations purpose would be served by processing the Application as the proper forum for the hearing of the Applicant's complaints herein is grievance arbitration.

Response to the Applicant's statements / allegations

8. Unless specifically provided otherwise below, the Responding Party agrees with the factual assertions in the Application.

9. However, the Responding Party disagrees with all of the legal conclusions and arguments made by the Applicant based on those factual assertions.

10. With respect to the statements beginning at page 3 of 13 of the Application under the heading "Collective Agreement Jurisdiction", the Responding Party states:

a. The Responding Party denies that the alleged violations of the collective agreement in the grievances known as G25, G26, and G27 (the "grievances") were only discovered by the Applicant on the grievance filing dates and were filed in a timely manner under the collective agreement as alleged.

b. Although the three grievances were filed correctly pursuant to the terms of the collective agreement, the Responding Party takes the position that the grievances are not arbitrable.

11. With respect to the statements beginning at page 4 of 13 of the Application under the heading "Applicant's Right to the Step-1 process", the Responding Party states:

a. Although the Applicant has a right under the collective agreement to the Step-1 grievance process, the Responding Party denies he has an "unqualified right" to same as alleged. For example, former employees who were dismissed by the University are considered terminated until the decision is reversed by the University or through settlement or arbitration (see article 13.2.10 of the collective agreement). As such they do not have standing to file grievances under the collective agreement **(An excerpt of the relevant portions of the collective agreement is attached.)**

b. The Responding Party denies it has intimidated the Applicant to accept an abrogation of his right to the Step-1 grievance process for the grievances at issue in this Application contrary to section 76 of the *Act* as alleged, and further denies it has violated the Act by refusing its binding obligations pursuant to section 59 (or 56) of the Act as alleged.

12. With respect to the statements beginning at page 5 of 13 of the Application under the heading "Grievance G25", the Responding Party states:

a. The Responding Party denies the November 23, 2009, email in which Applicant's grievance known as G25 was characterized as "inarbitrable" constituted a threat as alleged. It was simply a communication of the Responding Party's position with respect to the grievance.

b. The Responding Party denies the December 8, 2009, email indicating that the Responding Party would not schedule a Step 1 meeting due to the fact that grievance G25 was in its view inarbitrable because the grievor was no longer employed constituted a further intimidation or an illegitimate attempt to dissuade the Applicant from pursuing access to the Applicant's Step-1 and further collective agreement rights as alleged.

c. The Responding Party denies its November 23, 2009, and December 8, 2009, emails with respect to its position regarding the G25 grievance were contradictory as alleged.

d. The Responding Party denies the Step-1 grievance process is "required" to be held under the collective agreement as alleged. For example, the timelines with respect to the Step-1 grievance process are directory, not mandatory, and the meeting may be waived. Therefore a grievance may proceed to arbitration absent a Step-1 meeting (see articles 13.2.3, 13.4.2 and 13.4.3) **(An excerpt of the relevant portions of the collective agreement is attached.)**

e. The Responding Party denies its objection to the G25 grievance as inarbitrable was an attempt to intimidate by stone-walling so as to discourage all future grievances that could arise from several on-going access to information requests and appeals as alleged.

f. Although the Responding Party agrees its denial of the grievance occurred within the context of the Applicant's unresolved firing (in the sense that the firing has been grieved, is making its way through the grievance process, and has been referred to arbitration by the Applicant), it denies the Applicant's firing constitutes "a major academic freedom case in Canada" or an "administrative mobbing" as alleged. The reasons for the Applicant's dismissal were addressed in some detail when André E. Lalonde, Dean, Faculty of Science recommended his termination to the Board of Governors of the University of Ottawa **(A copy of the letter from Mr. Lalonde to Marc Jolicoeur, Chair of the Board of Governors recommending the Applicant's dismissal is attached.)**

13. With respect to the statements beginning at page 7 of 13 of the Application under the headings "Grievance G26" and "Grievance G27", the Responding Party states:

a. The Responding Party denies it is required to hold a Step-1 meeting for the Applicant's grievances known as G26 and G27 under the terms of the collective agreement as alleged.

b. The Responding Party denies its failure to respond to the Applicant's G26 and G27 grievances and hold a Step-1 meeting constituted intimidation as alleged. The Responding Party further denies the applicant had a statutory right to any such meeting, or that the Responding Party had a legal duty to initiate any such meeting.

14. With respect to the statements beginning at page 8 of 13 of the Application under the heading "Applicant's further attempt to access the Step-1 resolution process", the Responding Party states:

a. The Responding Party denies its two November 2, 2010 responses to the Applicant's November 1, 2010, letter were contradictory as alleged.

b. The Responding Party denies there is no basis in the collective agreement for agreeing to a Step-1 grievance process pending the complete resolution of a separate grievance as alleged, and further denies it that is absurd and contrary to the extensive past practice to do so. Of the over twenty (20) grievances the Applicant has filed since 2006, the three (3) grievances at issue are the only ones he filed following his dismissal.

c. The Responding Party denies that its position to convene a Step-1 grievance process for the G27 grievance constituted sustained stone-walling intended to intimidate the Applicant away from seeking access to his rights and intended to "make timid" the Applicant as alleged. The Responding Party has taken that position because it makes good labour relations sense. It will be the Responding Party's position that if the Applicant's dismissal is upheld at arbitration, grievances G25, G26 and G27 will not be arbitrable because he was not an employee in the bargaining unit when they were filed. Therefore whether or not his termination is upheld will to a large extent govern the Responding Party's position with respect to any subsequent Step-1 grievance (see article 13.2.10 of the collective agreement) **(An excerpt of the relevant portions of the collective agreement is attached.)**

Responding Party's position with respect to remedies

15. The Application should be dismissed without a hearing for the reasons outlined below in the next section.

16. In the alternative to 15. the Responding Party denies there was any violation of the *Act* as alleged, and denies the Applicant is entitled to any of the remedies requested:

    a. The Responding Party states that section 56 of the *Act* cannot be violated, but even if it can, such violation cannot be the subject of a section 96 complaint or the basis for a remedy therein.

    b. In the alternative to a., the Responding Party denies it violated section 56 of the *Act* as alleged, and denies the Applicant is entitled to any of the remedies requested.

    c. The Responding Party denies it violated section 76 of the *Act* as alleged, and denies the Applicant is entitled to any of the remedies requested.

Request that the Application be dismissed without a hearing

17. The Applicant's complaint is based on what he alleges were collective agreement violations by the University related to its processing of three (3) grievances he filed following his termination, and the University's failure to process the grievances in accordance with that procedure.

18. The remedies the Applicant is seeking would require the University to process three (3) grievances in accordance with his interpretation of the grievance procedure in the applicable collective agreement, and thereby establish that his interpretation of the grievance procedure in the collective agreement is the proper one.

19. However, the Applicant purports to file this complaint against "Allan Rock, President, University of Ottawa, Ottawa, Ontario" (hereinafter "Rock"), not the University of Ottawa.

20. Rock requests that the Application be dismissed because there are no material facts or particulars alleging that he has violated any section of the *Act*. Nor is any remedy requested by the Applicant against Rock personally.

21. The Responding Party further submits that the present Application should be dismissed by the Board without a hearing for the following reasons:

    a. The Application does not make out a *prima facie* case of a violation of section 56 and 76 the *Act* and/or the remedies requested. A dispute regarding the proper interpretation of the grievance procedure in the collective agreement does not constitute a *prima facie* case for a violation of section 56 or 76 of the *Act*.

    b. Furthermore, and in the alternative, this is an appropriate case for the Board to exercise its discretion to dismiss the Application without a hearing. No labour relations purpose would be served by processing the Application as the proper forum for the hearing of the Applicant's complaints herein is grievance arbitration. The proper interpretation of the grievance

procedure in the collective agreement and the remedies requested the Applicant herein are within the proper jurisdiction of an arbitrator.

The Law

No *Prima Facie* Case

22. The Board has the authority to dismiss an application without a hearing or consultation where it fails to make out a *prima facie* case for the remedies requested pursuant to Rule 39 of the Board's Rules of Procedure, which provides:

> 39.1 Where the Board considers that an application does not make out a case for the orders or remedies requested, even if all of the facts stated in the application are assumed to be true, the Board may dismiss the application without a hearing or consultation. In its decision, the Board will set out its reasons.

23. Where there are no material facts or particulars alleging that a named responding party has violated any section of the *Act*, the application should be dismissed as against that party **(see *Ready Bake Foods Inc.,* [2007] O.L.R.B. Rep. 166 at para. 17 attached).**

Section 56

24. Section 56 of the *Act* establishes that a collective agreement negotiated under the *Act* is binding upon the union, the employer, and the employees in the bargaining unit:

> **56.** A collective agreement is, subject to and for the purposes of this Act, binding upon the employer and upon the trade union that is a party to the agreement whether or not the trade union is certified and upon the employees in the bargaining unit defined in the agreement.

25. There is some uncertainty in the Board's jurisprudence as to whether a party can violate section 56 of the Act and whether that violation can be the subject of a section 96 complaint at all (the Responding Party states that it cannot). However, there is no dispute that if section 56 can be violated, the test is quite stringent **(see *McMaster University,* [2007] O.L.R.D. No. 4604 at para. 17 and 19 attached).**

26. There must be a breach of the collective agreement and the breach must amount to a repudiation or disregarding of the collective agreement. That point is critical because it means the Board could find a violation of the Collective Agreement but not a violation of section 56. In other words, the Board could conduct the whole case and not be able to give a remedy or resolve the contractual issue between the parties **(see *McMaster University,* [2007] O.L.R.D. No. 4604 at para. 17 and 19 attached).**

Section 76

27. Section 76 of the *Act* establishes that an employer (amongst others) cannot seek by intimidation or coercion to compel any person from exercising any right under the *Act*:

> **76.** No person, trade union or employers' organization shall seek by intimidation or coercion to compel any person to become or refrain from becoming or to continue to be or to cease to be a member of a trade union or of an employers' organization or to refrain from exercising any other rights under this Act or from performing any obligations under this Act.

28. Although it may be argued that a collective agreement is an outcome of labour legislation because it flows from the statutory bargaining process and its provisions may reflect rights or obligations in the Act, the Board has said this does not mean that the exercise of a right in a collective agreement is transmutable into the exercise of a right under the *Act*. It must be the exercise of a right present in the Act, such as the requirement for there to be a grievance arbitration process in collective agreements pursuant to section 48(1) of the Act, that is violated **(see *Ontario (Ministry of Community & Social Services)*, [2000] O.L.R.B. Rep. 135 attached).**

29. Furthermore, for there to be a violation of section 76 there must be intimidation or coercion of a sort which seeks to compel a person, amongst other things, to refrain from exercising any of the rights they might enjoy under the *Act*. That is, there must be a threat or other intimidating or coercive action coupled with an express or implied demand that a person (for example) refrain from exercising a right under the *Act* or from performing an obligation under the *Act* **(see *Atlas Specialty Steels*, [1991] O.L.R.B. Rep. 728 at para. 12 attached).**

Board Discretion to Dismiss Application

30. Even where a *prima facie* case is made out, the Board retains jurisdiction not to inquire into a complaint pursuant to section 96(1) of the *Act* **(see *Allied Construction Employees Local 1030*, 2001 CanLII 12000 (ON L.R.B.) at para. 8 attached).**

31. The Board explained the considerations involved when it decides whether or not to exercise that discretion in ***Brant Haldiman-Norfolk Catholic District School Board*, [2001] O.L.R.B. Rep. 292 at p. 301 (see attached):**

> The fact that a complaint is filed, does not mean that the Board is obliged to enquire into it. Rather the Legislature has given the Board a *discretion* in this regard; and in the exercise of that discretion, the Board looks at such factors as: any delay in filing the complaint; whether the case makes out an arguable case for a breach of the provisions of the *Act* relied upon by the complainant; the likelihood of success; the nature and utility of any remedy that might flow; the cost implications for the parties and the public; whether, overall, some statutory or labour relations purpose would be served by the litigation exercise; and so on. It is important for the Board to expend its limited resources in a manner that is consistent with the objects of the statute (see section 2 of the Act), and that is sensitive to labour relations realities.

Board Discretion to Defer to Arbitration

32. The Board will consider the following questions when deciding whether to exercise its jurisdiction to defer a complaint to arbitration, and will exercise that discretion when they are answered in the affirmative **(*Toronto District School Board*, [2002] O.L.R.B. Rep. 956 at para. 11):**

a. Will deferral encourage the practice and procedure of collective bargaining?
b. Is the nature of the dispute primarily contractual, or does the dispute primarily involve the question of statutory rights? In determining the answer to that question, one must consider whether the alleged conduct of the employer can be viewed as a total repudiation of the collective bargaining process, or if the dispute before the Board requires important elaboration and application of key provisions of the Act.
c. Would the relief available in the arbitration process be adequate to remedy the alleged conduct of the employer?

Conclusion

33. Rock requests that the Application be dismissed because there are no material facts or particulars alleging that he, the named Responding Party, has violated any section of the *Act*. Nor is any remedy requested by the Applicant against Rock personally.

34. The Responding Party further submits the Application should be dismissed on the basis that no *prima facie* case for a violation of section 56 and 76 of the *Act* or the remedies requested has been pleaded:

    a. The complaint is based entirely on a dispute between the parties regarding the proper interpretation of the grievance procedure in the collective agreement. Such a disagreement does not constitute a repudiation or disregard of the collective agreement on the part of the Responding Party as is required to establish a violation of section 56. Furthermore, the Responding Party has confirmed the applicability of the collective agreement by proceeding through the grievance process towards arbitration with respect to the Applicant's discharge grievance pursuant to the terms of the collective agreement.

    b. Nor does the fact the Responding Party has taken a different view of the proper interpretation of the grievance procedure than the Applicant and refused to proceed in processing the three grievances as demanded by the Applicant constitute intimidation or coercion pursuant to section 76. Furthermore, the right the Applicant is allegedly being intimidated, coerced, or compelled not to exercise (i.e. the right to proceed to Step-1 of the grievance procedure) is not a right under the *Act* but under the collective agreement and therefore section 76 does not apply.

35. Even if a *prima facie* case has been pled, the Responding Party submits the Board should exercise its discretion to dismiss the Application without a hearing. The complaint is at its core a dispute between the parties regarding the proper interpretation of the grievance procedure in the collective agreement, and the relief requested by the Applicant would be available at arbitration if the Responding Party is determined to have violated the grievance procedure in the collective agreement as alleged by the Applicant. No labour relations purpose would be served by the litigation exercise before the Board as opposed to an arbitrator.

36. In the alternative, the Responding Party submits that the Board should defer the complaint to the grievance process.

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