Mr. Claude H. Foisy, Q.C.
Arbitracan Arbitration Services
1000, de Maisonneuve West, Suite 701
Montreal, Quebec
H3A 3K1

Mr. Foisy :

RE : ***University of Ottawa – and – Association of Professors of the University of Ottawa Grievances: G14, G15 and G24 filed on behalf of Professor Denis Rancourt***

This is to advise that we are requesting the following preliminary orders dealing with the conduct of the hearing in the above-noted matter.

1. Use of electronic recording or photographic devices during the hearing

This proceeding commenced on May 2, 2011. At that time, individuals attended at the hearing to take photographs and audio and video recordings of the proceedings. The individuals proceeded to move about the hearing room during the proceedings making video recordings and taking photographs from different vantage points.

The University of Ottawa did not object to the presence of the individuals at the proceeding. It was and remains cognizant of the public interest in the subject matter of the proceedings.

The University does have concern, however, regarding the manner in which the individuals conducted themselves. Their approach was distracting and disruptive to the proceedings. It may be anticipated that it will also be distracting and potentially intimidating to witnesses who testify at the proceedings.

Arbitrators have been called upon to consider the use of recording devices in arbitration proceedings. In a recent award, Arbitrator Tims ruled that a grievor should not be allowed to tape record the arbitration proceeding (*Toronto (City) and CUPE, Local 79 (Gutman)* (2009), 101 C.L.A.S. 201; appended). Arbitrator Knopf reached a similar conclusion in a 1995 decision (*Clarke Institute of Psychiatry and ONA*, 45 L.A.C. (4th) 284; appended). She ruled that media should be allowed to attend the arbitration hearing but should not be allowed to make any electronic record of the proceedings in light of the "potentially inhibiting effects on the proceedings."

In contrast, the Ontario Labour Relations Board allowed a request to tape record a hearing (*Kohut v. National Automobile, Aerospace and Agricultural Implement Workers (C.A.W.-Canada), Local 303*, 1990 CanLII 5705; appended). The Board considered the approach reflected in the *Courts of Justice Act* which authorized a lawyer, a party or a journalist to "unobtrusively making an audio recording at a court hearing, in the manner that has been approved by the judge for the sole purpose of supplementing or replacing handwritten notes" The Board approved a similar approach at its proceedings. It noted that "Critical to the Board's

decision to permit a tape recording is the requirement that any such recording be unobtrusive" (Paragraph 29).

Courts have also addressed the question of the right of third parties to make video and audio recordings of their proceedings. The predominant practise is to allow video recordings of appellate proceedings and to prohibit them in trial proceedings. However, there has been an increased incidence of occasions where video recordings have been allowed of trial proceedings. Where this has occurred, the manner of recording has been strictly controlled by the Court.

We have appended a recent Practice Direction of The Supreme Court of British Columbia issued in 2010. It provides a comprehensive protocol for television coverage of court proceedings which attempts to balance the interests in having video or audio proceedings with maintenance of the integrity of the court process. We would request that the Arbitrator issue the following directions which are partially derived from those developed by the Practice Direction and informed by the practise of courts and administrative tribunals in controlling the impact of video and audio recordings of proceedings:

1. No more than one television camera is allowed which shall be located at a fixed location at the back of the hearing room;
2. The camera must be in place at least 10 minutes prior to the scheduled commencement of the hearing;
3. The camera will be stationary without an operator during the proceedings. The video will be made available on a 'pool' basis to third parties upon request;
4. Cameras and sound recording equipment must be unobtrusive and not distracting. Photographs may be taken prior to the commencement of the proceedings and following the conclusion but not during the proceedings;
5. Any witness, counsel or other participant in the proceedings who objects to being identified pictorially or by voice, or to being portrayed on television including on a video recording posted on the internet must not be recorded;
6. There must be no recording of conversations between counsel or between counsel and their clients or witnesses at any time;
7. None of the electronic record of the proceeding shall be admissible as evidence in the proceeding or upon any review or appeal of the proceeding;
8. The Arbitrator may summarily terminate the authorization for video and/or audio recording at any time upon finding that the conditions imposed by the Arbitrator have been breached or upon finding that the continued recording might prejudice the fairness of the proceeding or the privacy rights of any participant.

With respect to the reservation of authority to terminate the arrangements set out in paragraph 8 above, a similar approach was taken by Arbitrator Knopf in *North Simcoe Hospital Alliance and O.N.A. (Schemmer)* (2007), 165 L.A.C. (4th) 60 (appended) where she had issued an order authorizing the presence of observers including representatives of the media. She made the following direction:

> "Witnesses and observers will be given explicit instructions on each day concerning decorum both in and outside of the hearing. Any disregard of these directions will be

> considered very serious. If, at any time, anyone says or does anything in or outside of the hearing that jeopardizes the integrity of the process or any witness, I expect this to be brought to my attention. If needed, the application to exclude observers can be renewed and reconsidered at any time."

It is requested that the Arbitrator adopt a similar approach to monitoring the compliance with his directions and reserving authority to revisit the allowing of the audio and tape recording of the proceedings and the presence of all observers or particular observers at the hearing.

2. Witness Exclusion Order

The University is seeking a standard order to exclude witnesses from the hearing room until their evidence is heard, with the exception of the grievor and an adviser to the Employer.

The University is concerned about the impact upon witnesses of the dissemination of any video and audio recordings of their evidence. The grievor currently follows a practise of carrying out a running commentary on the proceedings on his Blog (UofOWatch.blogspot.com). This has included a video excerpt of the first day of proceeding with commentary, entitled *Natural Justice as Foreign Concept::: U of O's Dismissal of Denis Rancourt* (link to video) and *University's lawyer Lynn Harnden wants to ban the reasons for a ban in hearings of the Rancourt dismissal case* (link to video).

The University is concerned that witnesses will be intimidated by the prospect of the grievor's 'treatment' of their testimony in internet postings.

Before articulating the type of direction considered appropriate, we would wish to hear the position of APUO on this issue. It may be that it shares the University's concerns and that a protocol can be reached which would protect the interests of witnesses and preserve the integrity of the proceedings.

3. Order Pertaining to Confidentiality of Documents

It is generally understood that documents produced in arbitration proceedings are subject to an implied undertaking with respect to maintenance of their confidentiality. However, to ensure that there is no dispute in relation to this understanding in this proceeding, the University requests that the Arbitrator issue an order that any documents produced by the University as part of the disclosure process preceding and during the hearing remain in the exclusive care, custody and control of APUO and its counsel. The order could also note the right of the grievor to inspect and review such documents as may be necessary to the full and complete prosecution of the grievance but that he would not use the documents or the information provided therein for any purpose whatsoever outside the confines of the arbitration.

It is noted that the nature of the requested order parallels that delivered by Professor Goodfellow in *York University and York University Faculty Assn. (Noble) (Re)* (2006), 92 C.L.A.S. 138 (appended).

We would be prepared to address these issues in a conference call prior to the next scheduled date of hearing.

Yours truly,
Lynn Harnden

c.c. Sean McGee, Nelligan O'Brien Payne
Jean-Yves Leduc, University of Ottawa
Alain Roussy, University of Ottawa

Enclosures