

# IN THE MATTER OF AN ARBITRATION

Date : October 27, 2011

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**BEFORE :**                      **Claude H. Foisy, Q.C., Arbitrator**

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**UNIVERSITY OF OTTAWA**  
Hereinafter called the « Employer »

And

**ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA (APUO)**  
Hereinafter called (the “Union”)

Grievances : Letters of Reprimand and Dismissal  
of Professor Denis Rancourt

For the Employer : Lynn H. Harnden and Celine Delorme

For the Union: Sean T. McGee

Date of Hearing : Ottawa, October 12, 2011

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**INTERIM AWARD**

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[1] The hearings in this matter commenced on May 2, 2011. On that day preliminary procedural issues were dealt with. A significant number of people attended. With the consent of the parties the proceedings were audio and video recorded and photographs were taken. The Employer requested an Order for the Exclusion of Witnesses. The hearing was adjourned with the understanding that the parties would make written submissions on the requested Order and possibly other procedural matters. The next hearing date was scheduled for October 12, 2011. On September 30, I received the Employer's submissions and on October 7, the Union's reply.

[2] The Employer is not objecting to the audio and video tapings of the proceedings. However, it raised concerns that the manner in which the taping was done on May 2 was distractive and disruptive of the proceedings. It also, given the above, states that it was to be anticipated that such taping would also be distracting and potentially intimidating to witnesses who testify in the proceedings. The Employer made further submissions in relation to its seeking a Witness Exclusion Order. Finally, it sought an Order pertaining to the confidentiality of documents to be entered in evidence.

[3] The Supreme Court of Canada in *Canadian Broadcasting Corporation*<sup>1</sup> restated the principle that court proceedings are to be public, in accordance with Section 2b) of the *Canadian Charter of Rights and Freedoms*<sup>2</sup>.

[4] It found that only the official audio recordings by the court could be released to the media, but that a ban on broadcasting said audio reporting is a valid limitation to free speech granted under section 2b). The court reasoned that the maintaining of decorum and the protection of witnesses was paramount

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<sup>1</sup> 2011, SCC 2 (2011) 1 S.C.R. 19

<sup>2</sup> 2. Everyone has the following fundamental freedoms:  
(b) freedom of thought, belief, opinion and expression,  
including freedom of the press and other media  
of communication

in balancing conflicting rights of free speech and public interest in ensuring an effective and orderly justice system.

[5] Given the legal precedents that audio and video recording of court procedures are not to be broadcast and the nature of the arbitral process, I raised with the parties in a telephone conference the question of whether audio and video recording of this arbitration should be pursued. Although both parties had initially agreed to audio and video recording, given the above and the Employer's important restrictions to recording, I conveyed my inclination not to permit such recording.

[6] At the hearing I informed the parties and the public in attendance that there would be no audio or video recording, but that I would invite those present to make representations on the issue. The Grievor and four other persons made oral representations, arguing for audio and video recording. Further written submissions were received from the Grievor and Dr. Noble, a former replacement professor at the University.

[7] In short, these persons argued that the issue raised in the case of Professor Rancourt is very important in the academic community, all over North America and Europe, that administrative tribunals are suspect in the public perception, that any curtailment of openness brings the administration of justice into disrespect, that the outcome of this case would define the future of the University of Ottawa, that hundreds of students are concerned about the case of Professor Rancourt and want to follow the proceedings, that students have obtained that proceedings of University Senate meetings be broadcast and not broadcasting the arbitration proceedings of this public institution paid with public funds would be a setback in the fight for openness, that audio and video reporting would help disseminate information to a large audience and, more generally, that the openness of the process is essential in a free and democratic society, that education is a public good funded by the public and all arbitration and court proceedings

involving universities should be audio and visually recorded and all documents emanating from such public institutions be made public.

[8] The CBC decision quoted above establishes that in hearings only the official audio recording (a substitute to official stenographic reporting) of the proceedings is to be released to third parties, i.e. the media, and solely for the purpose of enhancing the accuracy of their reports. The court, at paragraph 83, indicated why the broadcasting of court proceedings should not take place:

*“83. The official audio recordings of hearings reproduce the words of people who have participated in court proceedings and were compelled, either morally or legally, to do so. Such people are not free to refuse to appear. A person, whether a party or a witness, who is summoned to testify in court must address his or her testimony to the court, in the courtroom, not to the media’s audience outside the room. To broadcast the audio recordings of hearings would be to alter the forum in which the testimony is given. Of course, except in cases involving ‘in camera’ hearings and publication bans, journalists may – and even must – broadcast or print information they gather during hearings. However, courtrooms have always been heavily regulated. This regulation ensures, ‘inter alia’, that witnesses can participate as calmly as possible in the truth finding process. Possession of a copy of the recording of a hearing does not authorize the holder to alter the environment in which the hearing takes place.”*

[9] At paragraphs 92 and 93 the court further commented on the issue as follows:

*“92. Although I accept that the broadcasting of official audio recordings would add value to media reports and make them more interesting, I cannot find that the prohibition against broadcasting these recordings adversely affects the ability of journalists to describe, analyse or comment rigorously on what takes place in the courts.*

*93. The negative effect that broadcasting the audio recordings would have on the proceedings and the real impact it would have both on those participating in the hearing and on the search for the truth inherent in the judicial process are factors that must be taken into account. The recordings are, first and foremost, a means of keeping a record of such proceedings, and journalists should not use them in a way that would distort that objective. The ‘raison d’être’ of the records must not be altered. They are a means of conserving evidence. To broadcast them in the name of freedom of the press would undermine the integrity of the judicial process, which the open court principle is supposed to guarantee.”*

[10] In Ontario the *Court of Justice Act*<sup>3</sup> prohibits the filming or photographing of any person in a court house. The validity of that provision was confirmed by the Ontario Court of Appeal.<sup>4</sup>

<sup>3</sup> R.S.O. 1990, c.C.43, s. 136(1)(a)(iii)

<sup>4</sup> R. v Squires (1992), 11 O.R. (3rd) 385

[11] To sum up, the state of the law in Ontario is that the media, unless the Judge orders otherwise, can be present in the courtroom and it can have access to official audio recording for the purpose of enhancing the accuracy of their reports, and that such official recording or by extension video taken in a courtroom, cannot be broadcast.

[12] Arbitration is the process set up by the legislature<sup>5</sup> to peacefully resolve disputes that may arise between the parties during the life of a collective agreement. The arbitral board is a quasi judicial tribunal and its decision is final, subject to the narrow confines of judicial review. Arbitrators are appointed by the parties or failing such an agreement, by the Minister, at the request of the parties.

[13] The dispute between the parties (the employer and the union) to a collective agreement is basically private in nature and concerns the narrow issue of whether one of the parties has breached its obligations under the collective contract.

[14] Arbitration proceedings, unlike in the courts, are informal and take place in various types of locations such as hotel rooms, hearing centers and where possible, at the employer's or union's premises. The arbitrator applies the rules of natural justice and although he is the master of his own procedure, will generally apply the procedure applicable before the courts.

[15] The parties litigating before an arbitrator are part of a continuous relationship where discussions on different matters occur almost on a daily basis and where complaints and grievances are discussed, with a view of compromising and arriving at a settlement. It is thus important that arbitral hearings take place in surroundings that favour continued discussion, with a view to arriving at a settlement even while the grievance is being heard in arbitration.

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<sup>5</sup> Labour Relations Act 1995, S.O. 1995 at s.s. 48 and 49

[16] In that context arbitrators, in contrast with courts where official audio recordings of the proceedings take place, have been very reluctant to permit audio recordings. In a recent decision Arbitrator Tims<sup>6</sup> denied the request to tape record, even in the context where the grievor suffered from a disability which prevented her from writing or keyboarding. At paragraphs 20 and 21, Mr. Tims wrote:

*“20. Labour arbitration is intended to provide the parties to a dispute, the City and the Union here, with a fair, timely and an effective means of resolution. Matters addressed at arbitration are significant and of importance to the parties, and arbitration proceedings are therefore appropriately serious with certain formalized procedures. As a matter of practice, however, they do not incorporate all the formalities of judicial process. Rather, as noted in ‘Re Clarke Institute, supra’, arbitration proceedings “adopt an informality and flexibility that is of enormous benefit to the fact finding and analysis functions of a board of arbitration.” (at p. 290) I agree that such informality and flexibility assist arbitrators in their role of resolving the real substance of the matters in dispute before them, and that it is in the interests of both parties that this be considered when making procedural rulings impacting on the conduct of a hearing.*

*21. With this in mind, I share the concerns voiced by the City that in the absence of agreement between the parties, the introduction of a tape recording device would indeed prove intimidating to some participants in the hearing and would effectively stifle “informality and flexibility” in the proceedings to the detriment of the parties. I have considered the jurisprudence of the Ontario Labour Relations Board relied upon by the Union. I am of the view, however, that even with the sorts of conditions addressed by the board and agreed to by the Union here, that tape recording would negatively impact on the conduct of this hearing and would outweigh any comfort or convenience potentially derived by the grievor if she were permitted to do so.”*

[17] In *Clarke Institute*<sup>7</sup> P. Knopf permitted the presence of the media but denied the audio taping of the proceeding. Arbitrator Knopf, at page 290, wrote:

*“However, the board must emphasize that the only official record of these proceedings is that made by the board itself. No notes of the parties, their representatives, or any tape-recording device would be accepted as a formal record of the proceedings. Therefore, it is difficult to imagine any positive purpose for the making of such a recording. The only one offered by counsel for O.N.A. was that it would give the grievors more confidence in the process and allow them to review the record at their leisure at the end of the day. While these are understandable purposes, it cannot be ignored that the presence of a tape recording device will inevitably have a negative effect on the conduct of the hearing. Arbitration proceedings are serious and formalized matters. However, by convention, they do not incorporate the formalized strictures of a judicial process. Instead, they adopt an informality and flexibility that is of enormous benefit to the fact finding and analysis functions of a board of arbitration. The presence of a tape-recording device in such a hearing would have an inhibiting influence on witnesses and all the participants in the process. No matter how well intentioned the grievors may be, a non-professional tape-recording device cannot avoid being intrusive and has little hope of resulting in an accurate record of any real value to even the grievors. The comfort level that the grievors may individually gain by having access to a tape recording of the proceedings is outweighed by the negative effect that the tape-recording device would have on the*

<sup>6</sup> City of Toronto and QP Local 79, 101 C.L.A.S. 201

<sup>7</sup> 1995 45 L.A.C. (4th) 284 (P. Knopf)

*proceedings. We are convinced that prohibiting a tape-recording device will in no way prevent justice or prejudice the grievors."*

[18] In the present instance we are at a very preliminary stage, i.e. before opening statements and the formal introduction of preliminary documents, such as the collective agreement, the grievances, etc. The only documents I have on file were remitted to me during the very brief procedural session on May 2, 2011, namely, two letters of reprimand addressed to Doctor Rancourt dated November 20, 2007, both contested by grievances dated December 10 and 13, 2007, students complaints, a letter of E. Lalonde to the chair of the Board of Governors recommending the dismissal of Mr. Rancourt and the Board of Governor's decision to dismiss the Grievor and his grievance contesting the Employer's decision. Essentially, Professor Rancourt was reprimanded and dismissed because he had engaged in a grading of students practice which was inconsistent with that approved by the Faculty of Science and for continuance of said practice after being told to conform with the established practice, the whole constituting insubordination, and for intimidating students. Professor Rancourt stated in his grievance that he has not violated the Collective Agreement and more particularly the Employer's practice regarding student grading, and denied having intimidated students.

[19] Publicly funded institutions (except for government employees), at the moment, are not considered different or special employers exempt from the application of sections 48 and 49 of the *Labour Relations Act*. I was not made aware of any statute or judicial precedent that recognizes a "fundamental right" of openness and disclosure in regards to university employees working as academics or in other occupations.

[20] I am not chairing a Royal Commission on whether publicly funded institutions such as Universities, Municipalities, Transit Commissions, School Boards, Hydro, etc, should make public all their documents and that all proceedings in which they are involved, whether before courts or arbitration boards, should be audio and visually taped and broadcast. This is a subject for public debating and an

arbitration hearing is not the proper forum for that. An arbitration board is not a Royal Commission which is governed by different rules and objectives. Nor am I chairing an Academic Conference on Pedagogy and the value of grading vs non-grading of students. I am dealing with a matter concerning an employer-employee relationship. I suspect that in the end I will have to decide whether Mr. Rancourt's actions constitute insubordination and, if so, whether the penalty of dismissal is warranted given the circumstances of the case.

[21] I can well imagine that the dismissal of a tenured professor with over 20 years of seniority is the subject of discussion on campus at large, and the academic community in particular, and that it is newsworthy. Visual and audio taping will enhance media reporting but media reporting is not paramount here. These proceedings are public and accessible to the media. The media representatives can take notes and comment on the case as long as their reporting of witnesses' testimonies is not a verbatim rendering so as to defeat the Exclusion of Witnesses Order.

[22] I may add here that the parties (Union and Employer) have expressed to the Board that they do not need official recording of the proceedings for the purpose of helping them manage their respective cases. I do not need it. In the circumstances, the audio and video taping would serve no purpose in the efficient running of this arbitration case.

[23] What makes this case special, however, is the fact that both parties have agreed to the audio and video tapings of the proceedings. This agreement, however, is not so clear, given that the Employer is also seeking important restrictions to the taping and broadcasting and is also requesting an Order for the Exclusion of Witnesses.

[24] The Employer, relying on a recent Practice Direction of the Supreme Court of British Columbia issued in 2010 providing a comprehensive protocol for televising court proceedings, requested that I issue the following directions partially derived from those developed by the Practice Direction:

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.

[25] The Employer is also seeking an Order to exclude witnesses from the hearing room until their evidence is heard, with the exception of the Grievor and an advisor to the Employer. The Employer states that it is concerned about the impact upon witnesses of dissemination of any audio and video recordings of their evidence. It mentions that the Grievor was currently following a practice of carrying out a running commentary on the proceedings on a blog which included a video excerpt of the first day of proceedings, 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 want to ban the reasons for a ban*

in hearings of the Rancourt dismissal case (link to video). The Employer then states that it is concerned that witnesses will be intimidated by the prospect of the Grievor's treatment of their testimony in internet postings.

[26] In relation to the eight limitations being set by the Employer in relation to audio and video taping, the Union did not take issue with the directions sought as contained in paragraphs 2, 4 and 7. However, in relation to paragraphs 1, 3, 5, 6 and 8, it had the following comments:

- “ii. *With respect to paragraph #1, APUO requests that a fixed TV or film camera area be set up at the back of the hearing room. There would not be any predetermined number of cameras. If there are any difficulties presented by the number of cameras proposed that cannot be resolved, they could bring the issue forward for a decision. Give the positioning of the cameras, and in the event that existing audio systems in the hearing room, if any, are not sufficient for sound pickup, we propose that those with cameras be permitted to place unobtrusive microphones and related wiring at the end of the main conference table.*
- iii. *With respect to paragraph #3, APUO is of the view that, while the installation of a stationary camera without an operator, coupled with a media pool arrangement may be workable where two or more media agencies intend to cover the proceedings, this direction is not appropriate in a context where independent and/or academic media is anticipated. APUO proposes that any photographers and/or camera operators, witnesses and observers be given explicit instructions on each day concerning decorum both in and outside of the hearing and they be cautioned beforehand that any disruptions could result in conditions being imposed, up to and including a requirement to leave the room. This may include the limitations on the operation of all equipment.*
- iv. *With respect to paragraph #5, APUO requests that 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 be required to bring a motion before the Arbitrator to do so. We are not aware of any circumstances in this case that should give an “as of right” veto on being recorded.*
- v. *With respect to paragraph #6, APUO wishes to propose a slight change to the University's suggested direction, to state that there be no recording of “off the record” conversations between counsel or of conversations between counsel and their clients or witnesses at any time.*
- vi. *With respect to paragraph #8, APUO requests that the parties be granted the opportunity to make submissions prior to the Arbitrator terminating the authorization for video and/or audio recording.*

[27] In relation to the Exclusion of Witness Order and the comments made regarding Professor Rancourt's blog, the Union wrote the following:

*“Witness Exclusion Order*

*Part of professor Rancourt’s approach in his academic environment has been to criticise and to expose what he believes requires public examination. He has done so through various means including internet blogs, etc. He cannot guarantee that he would not post a comment on this arbitration process, unless of course he is ordered not to do so.*

*It is our view that prior restraint would be inappropriate in these circumstances, but that any concerns should be addressed if they occur and the parties be allowed to make appropriate submissions at that time. In addition, if there are specific requests to prohibit certain forms and forums from making comments, we would want to address those issues specifically.*

*On the other hand, professor Rancourt also understands that there may be particular sensitivities at issue, including the interests of students. We have been instructed that we can advise the Board on his behalf that he will not be commenting on any of the testimony of students or former students.”*

[28] An Exclusion of Witnesses Order is granted so that witnesses to be called should not hear what prior witnesses have said. When such an Order is requested, it is rarely ever denied. Here it is expected that the hearings will take at least 20 days. What was said in Professor Rancourt’s classes may be an issue, and a question of credibility may arise. I therefore grant the Employer’s request excluding witnesses. This means that no witnesses to be called by the parties, except for the Grievor and one representative for each party assisting their legal representatives, are permitted to be in the hearing room until they are called to testify. The parties are to advise their witnesses accordingly.

[29] If audio and visual tapings are broadcast, given the modern technology for disseminating the information, it will be almost impossible to enforce the Exclusion of Witnesses Order. In my opinion, an Exclusion of Witnesses Order is incompatible with permitting the broadcasting of the proceedings. Furthermore, the position taken by the Employer that any person who objects to being audio and/or video-taped should, combined with the Union’s position that said witnesses who object would have to make a motion to be exempt, will place this Board in the position of having to continuously decide whether such taping take place or not. This exercise will be time-consuming and distracting to the issues at hand.

[30] The Grievor argued that all parts of this hearing where witnesses are not heard, for example, opening statements and arguments, should be filmed and broadcast. I see no value for permitting partial transmission of the hearing where statements made do not necessarily conform with the evidence. This position illustrates that this hearing could be used to foster a larger public debate than the narrow issues with which this Board is concerned. I am not chairing a public opinion tribunal, but one that must decide whether the dismissal of professor Rancourt is justified on the basis of the relevant facts entered into evidence and in accordance with the principles developed by the arbitral jurisprudence in similar cases.

[31] For the reasons given by my colleagues Tims and Knopf and for those outlined by the Supreme Court of Canada, I am of the opinion that audio and video tapings should not be permitted in this case.

[32] The Employer is also seeking an Order pertaining to the confidentiality of documents. The parties are in agreement on the principle that documents produced in arbitration proceedings are subject to an implied undertaking with respect to maintenance of their confidentiality. Further to their respective oral representations before me, they have agreed to the following Order, which is taken from a recent decision of the Ontario Labour Relations Board in *Morris Brown & Sons Co. V. UFCW Canada, Local 1993*<sup>8</sup>. I therefore issue the following confidentiality Order:

(A) The parties to the proceedings are directed:

- i) to comply with the following directions;
- ii) to direct their agents, officers, employees and counsel to comply with the following directions; and
- iii) to obtain the agreement of any third party to whom they might properly give any of the documents that such third party shall comply with the following directions.

(B) With respect to the use of documents produced, all parties are directed to follow these requirements:

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<sup>8</sup> 2011 CLB 14302

- i) all documents are to be kept confidential as among the parties;
- ii) no copies are to be made of any document except for the purpose of the hearing of these applications;
- (iii) no copies are to be circulated to third parties, except as necessary for the conduct of the litigation of these applications, and once that purpose has been completed the copies are to be retrieved from the third parties;
- (iv) the documents are to be used for the purpose of this hearing only and for no other or improper purpose;
- (v) all copies of all documents are to be returned to the provider of the documents at the conclusion of these applications and any judicial review proceedings arising out of these applications, save for one copy to be retained by each counsel in their file; and
- (vi) no commercial information contained in any of the documents, and in particular no financial information found in a document, shall be disclosed to any person except for the purposes of these applications, or except as required by law.

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Claude H. Foisy, Q.C., Arbitrator