
IN THE MATTER OF AN ARBITRATION

BETWEEN

**THE ASSOCIATION OF PROFESSORS OF THE
UNIVERSITY OF OTTAWA (APUO)**

("the Association")

and

THE UNIVERSITY OF OTTAWA

("the Employer")

RE: Policy Grievance Respecting Records and Communications with Academic Staff

BEFORE: Philip Chodos, Arbitrator

APPEARANCES:

For the Association: Mariette Pilon, Counsel, Canadian Association of University Teachers (CAUT), John Henderson, Counsel, APUO, and Renata Green, Administrator, APUO

For the Employer: Michelle Flaherty, Counsel, University of Ottawa, and Louise Pagé-Valin, Associate Vice-President, Human Resources, University of Ottawa

HEARD AT OTTAWA, ONTARIO, MARCH 26, MAY 2, JUNE 21, SEPTEMBER 25 AND 26, OCTOBER 2 AND 3, NOVEMBER 20 AND 21, DECEMBER 11, 2007; JANUARY 16 AND 30, AND MARCH 12 AND 18, 2008.

AWARD

[1] This dispute arises out of an access to information request submitted pursuant to the Freedom of Information and Protection of Privacy Act, R.S.O. 1990, chapter F.31 (hereinafter referred to as the FIPPA or the Act). As of June 1, 2006, the FIPPA applies to universities in the province of Ontario, including the University of Ottawa,

[2] As a consequence of an access to information request, the University Administration sent an email on November 9, 2006, to all of the members of the Association's bargaining unit. The English text of that email reads as follows (Exhibit U-2):

The University of Ottawa has recently received a request for documentation under the Freedom of Information and Protection of Privacy Act. I am attaching below the note to this effect forwarded by the Secretary's office. The identity of the requester is protected by the Law.

This request applies to all academic and support staff and to all faculties and services of the University. However, given the nature of the information that is requested, this request takes considerable importance in our Faculty.

All members of the support and academic staff of the Faculty must provide the Dean's office, before the 21st of November, printed or electronic copies (on a CD) of all documents in their possession that are the object of this request. If you have more than a few documents and if complying with the law requires a significant effort on your behalf, you should first complete an estimate of the work involved to search for and to print the requested documents before proceeding with the work. This is because the Law makes a provision for fees to be levied from the requester to provide the documents. To complete this estimate, please complete the form in Appendix B (pages 16 to 19 inclusively) of the document available at the internet address indicated below. Please note that this is an estimate only and the actual work to complete the search should only be completed once the monies have been paid to the University by the requester. In other words, complete the estimate and wait until further notice before proceeding.

Please note that the University has the capacity to search your email accounts for the documents requested. If you would like to avail yourself of this service, please provide your consent to have your e-mails searched using the keywords outlined in the request. Should you opt for this service, you would still be responsible under the Law to search your computer for other types of electronic documents (e.g. word processor files, spreadsheets, etc..) that refer to the keywords indicated in the request, as well as searching all your filing cabinets for paper files and documents.

I ask that you address all questions of legal nature relative to this request to the office of Ms. Pamela Harrod, Secretary of the University (extension. . .).

[3] Attached to the above-noted email was a message from Pamela A. Harrod, Secretary of the University, which stated the following (Exhibit U-2):

Please be advised that we have received a request for documentation under the Freedom of Information and Protection of Privacy Act. The requestor is seeking to obtain copies of all documents, written or electronic, which mention or refer to any of the following:

- a) Denis G. Rancourt (all documents, including complaints, grievances, privileges etc.)
- b) Courses PHY 1702, PHY 1703, PHY 8391, and SCI 1101, SCI 1984, SCI 1902, SCI 5984
- c) Mr. Rancourt's research direction in "Science and/in Society" including the graduate student ...
- d) The website www.alternativevoices.ca
- e) The Free documentary film series hosted by Mr. Rancourt or its Cinema Politica affiliation
- f) The CHUO 89.1 FM Radio show – The Train

Kindly review all soft and hardcopies of documents including e-mails, minutes of meetings etc.

Please provide our office with a hardcopy of all documents by no later than November 21, 2006.

If you have significant documentation related to the above please complete the fee estimate form (please refer to <http://www.ipc.on.ca/images/Resources/fees.pdf> at page 16) by the same date as well as providing us with an overview of the documents in your possession.

[4] Upon receipt of the above-noted email, the Association filed the subject grievance, which reads as follows (Exhibit U-1):

The Association hereby grieves against:

- (a) the notices to members on or about 9 November 2006 regarding a request under FIFPA, including all actions and directives to members from the office of the University Secretary related thereto;
- (b) the letter to the Association dated 24 November 2006.

Without admitting the necessity to provide specific grounds for the grievance, and without restricting itself to the following, the Association states the following grounds:

- 1) records of APUO members are not in the control or under the custody of the University;
- 2) the University does not have the right to demand, or the right of access to, copies of all documents, whether in printed or electronic form, which are in the possession of an APUO member, including those at a location other than the University;
- 3) e-mails sent and received using the University e-mail system are not documents for which the University has custody or control;
- 4) in response to a request under FIPPA, the University does not have the unilateral right to change existing working conditions nor to violate the established principles of privacy which prohibit the interference in the professional activities of an APUO member or any action that would inhibit the free exchange of information and ideas between academics;
- 5) the actions of the University contravene, *inter alia*, articles 5.1, 5.3, 9 and 10.3 of the collective agreement, Policy 90, past practice at the University, generally recognized practice in the university sector and academic freedom.

Remedy

As remedy for the above noted grievance, the Association seeks a withdrawal of the claims made by the employer respecting members' records and communications and a retraction of the demand for access to said documents, and/or declarations from an arbitrator accordingly, cease and desist orders, as well as damages, or such other orders as may be deemed appropriate by an arbitrator.

[5] There is no dispute that the Association's grievance was timely, and that the undersigned was duly appointed by the parties to hear this matter, and has the authority to issue an award pursuant to the grievance.

[6] The University Administration has agreed to put this matter on hold pending the resolution of this grievance. It should be noted that in a letter dated February 20, 2008, the adjudicator appointed by the Information and Privacy Commissioner pursuant to an appeal filed by the requestor decided to "place this appeal on hold pending release of the arbitrator's decision".

[7] It should also be noted that in the course of this hearing the University has submitted in evidence, on a without prejudice basis, a series of correspondence between its Counsel, Ms. Flaherty, and the Association. These exchanges of correspondence took place between

March 9 and 25, 2007. This correspondence in essence sets out the University's position with respect to the matters in dispute. In a letter dated March 9, 2007, Ms. Flaherty stated, in part (Exhibit E-9):

The University is no longer asserting an "innate" right to read emails in its possession. Rather, our position is that the University has certain management rights under the collective agreement, which it will exercise pursuant to the terms of the collective agreement and common law obligations. The University is not, in this context, seeking to broaden the scope of its existing management rights.

We are also not asserting that all emails written and received on the University e-mail system are records within our custody and control for the purposes of the *Freedom of Information and Protection of Privacy Act*. Rather, we have agreed to have that issue determined by an arbitrator and we will abide by the ultimate decision. We will not require APUO members to produce documents or information which the arbitrator rules are not in the custody and control of the University.

[8] John Henderson, Counsel for APUO responded as follows (Exhibit E-10):

RE: APUO Policy Grievances – Communications & FIPPA

This is further to your letter of 9 March 2007 and our subsequent conversation in which you suggested that APUO clarify the concerns that remain.

With respect to the middle paragraph of your letter of 9 March, and the general claims by the employer (outside of the scope of the FIPPA request) regarding access to electronic communications, we would need confirmation that (1) the employer is no longer asserting any of the claims contained in pages 2 and 3 of the letter of 14 November 2006, and (2) whatever management rights may have existed prior to the 14 November 2006 letter, these are not being described by any of the content of that letter.

With respect to the issues arising from the requester under FIPPA, and

- the directive to APUO members from Pamela Harrod on or about 9 November 2006,
 - the electronic directive to members from Christine Powell on or about 10 November 2006, as well as all related communications to members from the office of the dean or University Secretary,
 - the letter from Louise Pagé-Valin of 14 November 2006,
 - the letter from Pamela Harrod of 24 November 2006, and
 - the letter from Pamela Harrod of 21 December 2006,
-

we would appreciate confirmation that the employer is no longer asserting that all records, documents or information in the possession of APUO members, at whatever location, in electronic or printed format, including e-mails written and received on the University e-mail system, are records within the University's custody and control, nor that the University has the right to demand access to all such materials, nor that such materials must be produced to the University in order for a determination of custody and control to be made. These issues are to be determined by an arbitrator appointed to hear the APUO grievance.

Your confirmation of the above will assist us in determining the scope of the upcoming arbitration.

I look forward to hearing from you at the earliest opportunity.

[9] On March 20, 2007, Ms. Flaherty replied to Mr. Henderson's letter as follows (Exhibit E-11):

I am responding to John's letter of March 19, 2007. I confirm that the employer is no longer asserting any of the claims contained in pages 2 and 3 of the letter of November 14, 2006. The University withdraws the November 14th 2006 letter in its entirety. I also confirm that the employer is no longer asserting that all records, documents or information in the possession of the APUO members (at whatever location, in electronic or printed format, including emails written and received on the University email system) are records within the custody and control of the University or that the University has the right to demand access to all such materials, or that all such materials must be produced to the University in order for a determination of custody and control to be made. These are issues to be determined by the arbitrator appointed to hear the APUO policy grievance.

...

[10] Ms. Flaherty essentially reiterated the University's position as described in Exhibit E-11 in further correspondence dated March 25, 2007.

[11]As noted above, it is the Association's contention that much, if not all, of the information, documentation, etc., requested by the University in the email of November 9, 2006, is in the custody and control of the individual faculty members rather than the University per se. The Association further contends that the University's assertion that it is required, and has the authority to request access from academic staff of a variety of documentation, materials, etc., constitutes a violation of the collective agreement between the parties. In support of this contention the Association adduced a considerable amount of evidence through the testimony of a number of academic staff of the University, among others. Before summarizing this evidence I believe it would be useful at this point to refer to

some of the testimony of one of the two witnesses called by the Employer, Mr. Pierre-Yves Boucher, who provided a detailed overview of the administrative structure of the University of Ottawa as set out in statute (the balance of Mr. Boucher's testimony, including his experience and relationship with the University, is outlined below). Mr. Boucher's evidence was not disputed by the Association, who did not cross-examine him.

[12] The University is governed by public statute: the University of Ottawa Act, S.O. 1965, C.137 (Exhibit E-6). Mr. Boucher noted that universities are generally bicameral institutions; that is, the academic functions of universities are within the province of academics but are overseen by outsiders who are sit on the Board of Governors. There is also a Senate, which is almost entirely composed of persons who are internal to the University and are members of the academic community. Section 9 of the Act provides that a board of governors is to consist of a maximum of 32 people; of this number, four are appointed by the Lieutenant-Governor-in-Council, two are appointed by the Senate from its ranks, two are appointed by the Alumni Association, eight are appointed by St. Paul University, which is a federated institution, and 12 are appointed by the Board itself. The University has also added to the Board's ranks two additional academics, two support staff and two students.

[13] According to Mr. Boucher, the Senate deals with academic matters and the Board deals with all other matters (i.e., finances, physical plans, staffing, etc.). He observed that there would be issues straddling both organizations (for example tenure). The University is also authorized to constitute a joint committee for matters concerning both the Senate and the Board; it can make recommendations to both bodies. Pursuant to the collective agreement, the Joint Committee has been delegated to make final decisions on tenure, promotions, leaves, and has also been involved with procedures for the appointment of the Vice-Rector and Secretary.

[14] Section 17 of the Act outlines the powers of the Senate, which are detailed in paragraphs (a) to (f). Paragraph (a) notes that the Senate has the power "to control, regulate and determine the educational policy of the University according to Christian principles and its bilingual tradition and character." Paragraph (b) confers on the Senate the power "to determine the courses of study and standards of admission to the University and continued membership therein, and qualifications for degrees and diplomas." The Senate is composed of a Chancellor, who is the Head of the Institution; Mr. Boucher noted that this is an honorary position. There is also the President and the Vice-Chancellor; the President and Rector are interchangeable terms. There is also the Vice-Rector Academic, and Provost who

Mr. Boucher described as being responsible for “everything that is academic.” The Vice-Rector Administrative is responsible for the physical plans, staffing, finance and risk-management. The Vice-Rector Research is responsible for all research matters and the Vice-Rector University Relations deals with fundraising and community relations. Mr. Boucher observed that the University Secretary (a position which he had occupied) functions like a corporate secretary and, among other things, provides legal support and advice and assistance to the Senate. Section 15 of the Act establishes the composition of the Senate, which includes the Chancellor, the Rector, the Vice-Rectors and the Secretary; it also includes the dean and the secretary of each faculty. Paragraph (d) provides that the membership includes “one professor or associate professor on the teaching staff of each faculty. . . elected by the council of each faculty for a term of three years.” There are currently 78 members of the Senate, who are all internal.

[15] Section 18 of the Act sets out the government structure of faculties:

18.-- (1) Every faculty established by the University shall be governed by a council, which shall consist of the Dean, the Associate Dean, if any, the Vice-Dean, the Secretary and such other members as may be determined by the Senate.

(2) (Powers of councils of faculties) The councils of the faculties may appoint examiners and make by-laws for the good and efficient management of the affairs of the faculty, provided that no such by-law is valid until approved by the Senate with regard to matters of a purely academic nature and by the Board with regard to all other matters.

[16] Mr. Boucher noted that the Faculty of Graduate Studies is structured differently. While the Faculty has a dean and a vice-dean, all of the teaching staff are from other faculties. There are, however, professors who are admitted to the Faculty, which is not normally involved in hiring or workload issues. The Faculty of Graduate Studies has two councils: one for science and one for the humanities, which address matters within the jurisdiction of graduate studies. Some of the by-laws of the Faculty require approval of the Senate, and in some cases the approval of the Board where it impacts on the powers of the Board (for example, where there are financial issues, such as the creation of a new department, that issue would go to the Executive Committee of the Board).

[17] Mr. Boucher described the structure of faculty departments. He observed that while each is structured differently, they usually have a departmental council with student representatives and a departmental chair, who is considered “the first among equals” and is appointed for a three-year term. Issues such as tenure, promotions and hiring normally

start at the department level; that is, the department would identify what positions are required and would bring the matter to the Dean. The powers of the faculty councils are set out in section 18.(1) and (2).

[18] Mr. Boucher stated that the councils run the faculties, subject to the authority of the Board (if there are financial implications) or of the Senate (concerning academic issues). With respect to hiring of staff, the powers of the departmental councils vary; they have nothing to do with specific tenure or promotions, although they may set guidelines. Such requests would go to the Departmental Teaching Personnel Committee (DTPC); however, if there isn't one, the authority is assumed by the departmental council. Mr. Boucher noted that the "Departmental assembly", which is described in section 5.5.2 of the collective agreement, is the same as the departmental council. He observed that universities are collegial organizations and there is interaction between the different parts of the organization. Mr. Boucher noted that the DTPC is defined in section 15.1.2; it deals with teaching personnel issues such as tenure, promotions and leave, and its members are elected. Per section 14.2.2, if there is no DTPC then these matters are dealt with initially by the Faculty Teaching Personnel Committee (FTPC). While in accordance with section 11 of the Act all matters dealing with employment are the responsibility of the Board, tenure involves both academic and employment matters and is dealt with by the Joint Committee; this Committee consists of three members elected by the Senate, three members appointed by the Board, as well as the President, the Vice-President Academic, and the Vice-President Research. Mr. Boucher was Secretary of this Committee.

[19] Mr. Boucher stated that the creation of a new course would normally originate within the particular academic discipline. At the departmental level there may be an academic committee that would review programs or suggest a new course; this would go to the departmental council then to the faculty, which may make a recommendation to the faculty executive; that is the deans, vice-deans, secretary and departmental chairs. If it were an independent program it would go to the Committee of Undergraduate Studies, which is composed of all representatives of faculties of the University, or to the Committee of Graduate Studies. It would then proceed to the Executive Committee of the Senate, which is mandated by the Act. This Committee has six or seven members from the Senate who are elected by the Senate. Some matters are delegated to the Committee for a final decision; that is, modifying a course or course description.

[20] The first of the Association's witnesses was Professor Robert Leclerc. Professor Leclerc has been a member of the academic staff of the University of Ottawa for 28 years.

He is also a member of the College of Psychologists of Ontario and of l'Ordre des psychologues du Québec. He was also President of the Association from 2004 to 2006. As of January 2007 until December 2007, he is on sabbatical leave during which time he is pursuing certain research projects. He has also performed other roles on behalf of the Association, including as a liaison officer where he was responsible for handling grievances and speaking on behalf of the Association in respect of several different matters.

[21] Professor Leclerc received Ms. Harrod's original message by email on or about November 6, 2006. The other letter (Exhibit U-2) was forwarded to him on November 9, 2006, in his capacity as President of the Association. Professor Leclerc stated that when he received Ms. Harrod's message he was surprised, as he had not received such a request before, and he became quite concerned about its implications. He stated that he did not comply with the request because he felt that the documents that he used for his work belonged to him and were under his exclusive control. He was concerned that the University was seeking documents that it was not entitled to. In response, he wrote to Ms. Harrod on November 13, 2006, in which he observed that (Exhibit U-5): "... Contrary to the provisions of the Freedom of Information and Protection of Privacy Act and to the terms of Policy 90 of the University, the University is attempting to obtain documents which are neither in its custody nor under its control. . . . Therefore, the APUO is advising its members that they not comply with this request." The Association also sent a memorandum to its members on November 13, 2006, outlining its position as stated in the November 13, 2006, letter to Ms. Harrod. Professor Leclerc explained that the Association regarded this as an issue addressing academic freedom. He noted that they had discussions with the Canadian Association of University Teachers (CAUT) concerning this issue.

[22] By letter dated November 24, 2006, Ms. Harrod responded to Professor Leclerc as follows (Exhibit U-7):

Re: Employer's request for records related to a FIPPA request

Thank you for your letter dated November 13, 2006 in relation to the above. I appreciate and understand the concerns that you have raised. However, I would like to explain the process for addressing access to information requests.

Once an access request is made to the University, its first obligation is to gather the records relevant to the request. When the records are gathered, the FIPPA Co-ordinator (currently the Office of the Secretary) will decide, based on either factors relevant to the review of the records, and/or consultations with affected parties, whether a record is *excluded* from the Act or *exempt* from

disclosure. It is important to appreciate that even where a record may be excluded from the Act, as where it is not considered to be in the 'custody or under the control' of the University, the record must nonetheless be gathered and provided to the FIPPA Co-ordinator for consideration. This gathering of records enables the FIPPA Co-ordinator to, for example, claim that a record is excluded and advise the requester accordingly. Should the requester appeal this determination, this collection of the relevant records would be subject to production to the Information and Privacy Commissioner/Ontario (IPC) under the Act. Ultimately, the IPC would determine whether a record is in the 'custody or under the control' of an institution in an appeal. The IPC, like the decision-maker within the University, requires the record in order to make these determinations.

The University is required to maintain a full record of the request and all the records relevant to it, as part of its duty to respond to the request under the Act. Therefore, once the records are gathered, the staff working on the request will be pleased, with the consent of the member, to consult with the Association to get its views in relation to whether the records are 'in the custody or under the control' of the institution. Should the University be of the view that the records are excluded, the requester will be advised accordingly.

The University is subject to *FIPPA* and in turn, so are its employees, including professors. Though the Act provides for exclusions and exemptions of certain records, there is no provision for the exclusion of records held by a particular class of employees.

Your cooperation in this process would be most appreciated.

[Emphasis in the original]

[23] The collective agreement between the parties is a very detailed and comprehensive document consisting, in bilingual format, of over 300 pages. Among other things, it sets out in considerable detail the activities, responsibilities and roles of the academic staff. Article 20, entitled "Academic activities", provides as follows:

ARTICLE 20
Academic activities

Section 20.1
General provisions

The functions of a member of the academic staff include, in varying proportions:

- (a) teaching activities;
 - (b) scholarly activities revealed by research, artistic or literary creation, or professional work;
-

(c) academic service activities.

Specific activities corresponding to those 3 functions are listed in the next 3 sections, it being understood that these lists are not exhaustive and are not in order of priority.

...

[24] Professor Leclerc outlined what constitutes “teaching activities”. While professors are expected to follow, in general terms, the course description, each professor decides on the actual content as well as the process for assessing students. At the departmental level, the chair of the department, in consultation with the Undergraduate Programs Committee, considers the assignment of the teaching workload. Based on their area of expertise, the professors identify the courses that they wish to teach; there would then be a discussion between the faculty member and the chair respecting the teaching load. The dean of the faculty finalizes the workload at the departmental level with the DTPC. The DTPC confirms the proposal for the teaching load, which is then sent to the Faculty Teaching Personnel Committee (FTPC). The FTPC looks at the teaching load of all professors within the faculty; the members of the FTPC are all members of the bargaining unit except for the Dean who is the Chair. The FTPC examines proposals for teaching workloads and makes recommendations to the Dean, who makes a final determination.

[25] Professor Leclerc described his experience respecting his teaching responsibilities. As an example, he taught a course in “behaviour modification,” which he created several years ago. He was responsible for creating the course outline at the beginning of the course, which is provided to students along with information regarding the requirements of the course, the timetable for exams and the assessments, including papers that would be required to be written. Professor Leclerc noted that he alone decides the content of a course. At the departmental level, they look at each program and how it lines up with the courses under different programs. In the case of existing courses, they allocate the course to a particular program or open it to different programs. The Undergraduate Programs Committee considers the need for any new courses and the DTPC then proposes the new course. The course proposal would then go to the FTPC, which is chaired by the Dean. If the Dean endorses the proposal, the University Senate decides on the creation of a new course. The Senate is chaired by the President of the University and also consists of the Vice-President, a number of members of the bargaining unit — who are full voting members — as well as student representatives. Professor Leclerc observed that faculty members sitting on the Senate do not speak on behalf of the Association. He emphasized as well that

the content of the course and how it would be taught is the exclusive prerogative of the professor.

[26] With respect to what is encompassed by the term “scholarly activities” per section 20.1(b) of the collective agreement, Professor Leclerc explained that this refers to a number of things, from laboratory activities with animals, to musical expression. He noted that the professor would decide on the content of scholarly activities, which would be related to his or her training, experience and expertise. He observed that academic staff are hired on the basis of their ability to meet the job requirements; in his case, it was because of his expertise in the domain of learning within psychology.

[27] With respect to the pursuit of research, Professor Leclerc noted that they act entirely independently; academic staff seeks out research grants, if required. In pursuit of these activities, he would contact community agencies that could provide participants for his research. He has done both animal laboratory research and research with human participants. There is an internal process for obtaining research funding; all research projects go through the Ethics Committee. Even if the project does not require funding, they must obtain the approval of the Ethics Committee if they are dealing with humans. Professor Leclerc referred to a letter from the Protocol Officer for Ethics and Research addressed to him and a research assistant approving a research project that he had submitted. He also referred to a related document – “Consent Form for Service Coordination” – that describes in detail the proposed research project. This document, which is issued under the auspices of the Ontario Ministry of Social Services, is signed by the researcher, among others, and states that: “. . . Finally, The University of Ottawa agrees to indemnify, defend and hold Service Coordination harmless from any cost, charge, damages, expense or loss which he, or any member of his research team, causes as a result of any accidental or unauthorized access or disclosure of personal information concerning Service Coordination’s clients or any breach of any part of this agreement. . . .” Professor Leclerc observed that he was asked to give a workshop related to his involvement with the mental retardation community. As the lead up to this workshop, he was contacted both by phone and by email by Service Coordination. In his emails, he outlined the details concerning the workshop. Through these exchanges he discussed the content of the material to ensure its relevance. As part of this process, he would take notes and incorporate the input of Service Coordination regarding the needs of the participants in the workshop. Following this workshop, he kept track of all the materials in case he might require them again; he keeps these materials in his office at the University in a file as well as on his computer. He has a number of different folders (that is, a research folder and a workshop

folder) and in addition he would keep some exchanges in an Ethics Committee folder. He noted that he is the only person that has access to these documents.

[28] Service Coordination directed individuals to a service in the community (for example, residential services and workshops). Part of their concerns was whether they had all the relevant information to allow them to make a decision about their clients. They were concerned about the large divergence of information in their files. He took notes of their discussions about how they gather information and the project turned out to involve a critical analysis of their files. He noted that there was a test trial as part of the project to provide him with anonymous psychological assessment reports at Service Coordination. Among other things, the project involved collaboration with a colleague who works out of Ohio State University; they had exchanges by email describing the project that he was doing. These emails are on his computer. The University was not copied on these exchanges, nor did it receive copies of his email exchanges with Service Coordination.

[29] Professor Leclerc also referred to his communications with a fourth-year honour student in psychology who assisted him in this research project. A written form is distributed as part of a package of documents presented to all honour psychology students at the beginning of the school year informing them of the professor's research interests. This student communicated with him by email expressing an interest in having him act as her fourth year thesis supervisor. Professor Leclerc responded, again by email, setting up a meeting where he discussed with her the projects that he was working on. He then sent an email to the professor in charge of the honours thesis course advising the professor that he was willing to supervise this student. He received a reply acknowledging that he had the supervisory role.

[30] Professor Leclerc stated that the student would be subject to two assessment levels; he would grade the thesis as well as provide an assessment of what the student learned from this exercise. This would be communicated to the professor in charge of the course. This communication would also be on his computer. Another professor would also look at the thesis and the professor in charge of the course would issue the final grade that appears on the student's file. The student's file would then be communicated to the chair of the program and to the faculty administration. It is his understanding that the faculty administration would then communicate it to the Registrar.

[31] Professor Leclerc noted that in collaboration with Service Coordination they would issue a first version of the Consent Form for Service Coordination (Exhibit U-9) for review by the Ethics Committee. A copy of the form is kept by Service Coordination, the

research assistant, himself and the Ethics Committee. As part of this project, he used psychology reports from 2001 to 2004, which were in Service Coordination files. There were over 100 reports, which were made anonymous and transferred to his office. He is the only one having access to these documents, which are kept in a locked file cabinet. The final product of his project was a presentation at a conference of the American Association of Mental Retardation (AAMR) Quebec Section, which took place in May 2006. The previous December, he presented a proposal by email for a presentation, which was accepted. Professor Leclerc stated that he did not send a copy of his presentation to the University.

[32] Professor Leclerc described the AAMR work as a peer review process. He noted that the purpose of his analysis was for publication of an article in the journal of the AAMR. He continued to have contact with Service Coordination to explore other projects. These communications were largely by email as well as direct exchanges. Again, no one else at the University was copied on these emails.

[33] Professor Leclerc also elaborated on the process leading to his sabbatical leave. The first step was a letter he sent to the Dean applying for sabbatical leave. Among other things, the letter made reference to the criteria in the collective agreement for approval of sabbatical leave. The next step was for the DTPC to process his request (that is, examine the application and the project itself) and review a report following his last sabbatical leave. The Dean had asked the chair of the DTPC to review Professor Leclerc's request and make a recommendation. The Faculty Teaching Personnel Committee (FTPC) examined his application, and the minutes of the Committee meeting were sent as an attachment in a letter addressed to the Dean. The recommendations of the Committee as well as those of the Dean were then sent to the Joint Committee of the Senate of Board of Governors for approval. A letter from the Dean, dated January 24, 2006, advised him that his request for a sabbatical leave had been approved.

[34] During his sabbatical, Professor Leclerc worked on three projects. As part of this work, he was required to contact l'Association pour L'integration sociale d'Ottawa directly as well as by email. He noted that he receives a great deal of information by email from the Association about documents that they have on file. These emails are sent only to him. The other project he worked on required him to deal with Service Coordination, again primarily by email, for which only he was copied. At the end of his sabbatical, a report This report, which is sent to the Dean and was due within six months, must state what he did, any publications or presentations he made and those that he planned to do in the near future..

[35] Professor Leclerc noted that he has in his computer articles on files and copies of journal files ; he also has hardcopies of some published works. He would have email exchanges with colleagues (for example, with the colleague at Ohio State University) who have similar interests. He would not send a copy to the University, in part because of concerns that there could be legal and ethical issues with respect to the documents associated with the projects. During his sabbatical year, he had periodic contact with students (for example, requests to act as an honour thesis supervisor). Again, he would be the only recipient of these emails and no one would be copied on them. As well, he had received emails from two former students asking for letters of recommendation for graduate school. This involved an exchange of three emails, which are currently on his computer, and resulted in a letter of recommendation to a university. He did not copy the University of Ottawa on his letter.

[36] Professor Leclerc observed that he has been teaching for 30 years. During this time, he has had many communications with students, some specifically related to the course (for example, concerning assignments) and others related to letters of recommendation. Communications in the context of a revision of a student's work are of a more general nature relating to his area of expertise. Communications with students in his class can also deal with personal matters (for example, when a student is unable to show up for an exam or cannot hand in a paper for personal reasons).

[37] Professor Leclerc testified concerning his experience with "academic service activities," as that term is used in section 20.1(c) of the collective agreement. He observed that he has engaged in extensive communications with colleagues, for example, relating to his research in the field of autism. There would have been exchanges of confidential information, as he was expressing problems relating to third parties. He would also have similar communications with psychologists in the field. He would not copy the University on these communications.

[38] Professor Leclerc referred to the list of activities under "Academic service" (paragraphs (a) to (k)) in section 20.4 of the collective agreement. Paragraph (c) specifically refers to his work as an officer of the Association. His work as chair of a number of committees is subsumed under paragraph (b). He has also participated in the CAUT and the OCUFA (Ontario Confederation of University Faculty Associations), which are specifically identified in paragraph (d). With respect to paragraph (b) ("participating in the work of committees of a department, a faculty, or the university. . ."), Professor Leclerc noted that he was a member of the School of Psychology Council as well as the president of its Ethics

Committee. He was also President of the Senate Committee on Teaching. He observed that all faculty members are invited to presentations made by candidates for a position and he has provided an assessment to the selection committee. Comments concerning these presentations would be sent by him via email and would not be copied to the University Administration. When he was the president and as liaison officer of the Association, Professor Leclerc consulted the files of members of the bargaining unit concerning, for example, grievances. In consulting these files, he encountered communications between students and colleagues. With respect to his involvement with the OCUFA, he would receive communications by email and on paper. These communications are kept in his office. When he received emails in his capacity as President of the Association, he kept a hardcopy of attached documents in his office as well as in the Association's office. In his capacity as a professor, he also keeps hardcopies of minutes of the School Council and communications from the Dean's office (for example, the annual report). He would also receive as attachment drafts of papers prepared by students as well as drafts from Service Coordination and from the Coordinator of the Ethics Committee.

[39] Professor Leclerc also stated that he has a part-time practice as a psychologist for which he has an office off-campus; most of the documents related to that practice are kept at his home; however, he has some documents on his computer at his University office e.g. email exchanges. He observed that he also uses his home computer for University matters.

[40] Professor Leclerc made certain observations concerning the request received from Ms. Harrod. He had significant concerns about this request. In his view, all of the documents in his possession are under his control; as an independent professional, this is how he operates. In order to carry out his work in teaching, research and as a faculty representative, he needs to have control of documents that emanate to and from his office computer. Much of his work involves going through peers; academic staff need to have control over their own documents in their exchanges with colleagues and students. If they do not have control, the trust relationship would be put in question.

[41] Professor Leclerc also referred to article 9 of the collective agreement ("Academic Freedom"). He viewed Ms. Harrod's request as being similar to someone wanting to go through his files. The materials that he has in his control (such as exchanges with professors and students) are important to his job and would also include notes concerning representations from candidates to the Psychology Department as well as agendas of the APUO, OCUFA and CUAT meetings. He observed that he also has written notes that are

personal to him and could be somewhat controversial; he would not want the University making judgments on these comments.

[42] In cross-examination, Professor Leclerc acknowledged that he is an employee of the University. The bargaining unit that the Association represents consists of professors, librarians, some counsellors as well as others.; the deans of faculties are not members and neither are the vice-deans. As well, visiting professors would not be members of the bargaining unit. He stated that the Association has an office on-campus pursuant to a lease agreement with the University. It has its own employees and the President of the Association has a key to lock the office, as do the Association's employees. He agreed that the University cannot enter the Association's premises without permission, except for Protection Services who deal with security functions and parking, who can enter without permission in exceptional circumstances (for example, if the alarms goes off). The University cannot access Association documents, which deal with labour relations issues as well as other related matters. He agreed that they belong to the Association and cannot be accessed by the University without permission.

[43] Professor Leclerc was questioned concerning the computers and email system. He has one computer at home as well as one at the office, and he uses both for research, teaching, and communications with students and staff. While he uses the office computer primarily for these functions, he also uses his home computer which he purchased with his own funds and for which he was not reimbursed. He also purchased the office computer and was not reimbursed for that either. With respect to his private practice off-campus, Professor Leclerc mostly uses his own computer, although he might have email exchanges with clients using the University's computer. He has both an email account with the University and a private account. When he does work related to teaching, as well as for his research work he uses both accounts, With respect to his private practice, he uses mostly his private email account. When he was President of the Association, he used the Association's account for email exchanges, although he might also have used the University's account. When he communicates with Association members, he normally uses the University's account. He observed that the Association's officers work not only from its office but also from their own University offices. He might also keep a hardcopy of communications; he would not distinguish between the three email accounts with respect to the hardcopy. His office computer is connected to a University server, which is maintained by the University. When he saves documents, they stay on his office computer hard drive rather than the University's server. If he is experiencing technical problems with his office computer, he receives assistance from employees of the University.

[44] Professor Leclerc was shown an email dated December 7, 2006, from the Association to its members. He explained that the purpose of the email was to caution members concerning the use of the University's email system, particularly when communicating with the Association office in light of the University's "inate right" to read emails on its system. He acknowledged that in December 2006 the Association did not have its own server.

[45] He stated that the allocation of office space is established by the faculty through a committee that reports to the Executive Committee and the chair of the faculty, who is also a member of the Association. This recommendation is made to the School of Psychology Council. While the Dean is not a member of the Council, he or she would set up parameters on space allocation and it is the Dean who has the ultimate decision-making authority with respect to space allocation.

[46] Professor Leclerc also stated that when he has had research assistants they were paid from grants and were not considered employees of the University. The University however managed the transfer of funds from research grants with respect to payouts to the assistants.

[47] Professor Leclerc testified that he keeps hardcopies of documents in his file cabinets located in his office and in his laboratory which are locked; he is the only one who has a key. The University's Protective Services can access his office and laboratory in an emergency, and University staff also cleans the office and laboratory. He stated that he sees clients at a private office off-campus on a one-on-one basis. He does consulting to an outside agency, which involves mostly providing training to its members. All of the documents relating to his private practice are under his control and would invariably contain personal information about his clients. His clients pay him for his private services; for consulting work, he is paid by the agency. With respect to his work with agencies, he has, from time to time, provided handouts that he has authored but which cannot be reproduced unless he agrees. When he does perform consulting work, he physically attends at the office of the agency. He works on documents related to agency work on his computer at home but he may proofread them at the University.

[48] Professor Leclerc was questioned concerning the ambit of article 33 ("Outside professional activities") of the collective agreement. This provision recognizes the right of academic staff to engage in outside professional activities, "... provided that such activity does not conflict or interfere with the fulfilment of the member's obligations to the employer pursuant to articles 21 and 22 of this agreement." Professors are required to

consult with the Dean about proposed outside activities. He has informed the Dean of his outside work and advised him in general terms about these activities, sufficient for the Dean to determine whether there was a conflict. It is the University's responsibility to determine if there is a conflict arising out of proposed outside activities.

[49] With respect to the content of teaching, Professor Leclerc noted that students are provided with the course's description. Within the parameters of this description, he decides on what textbooks, if any, would be used, the format of teaching and the students' evaluations. The Senate, whose approval is also required before the course can be offered, ultimately approves the course description. The Senate also has a set of guidelines for the students' evaluations and a professor is expected to conduct the evaluations within those guidelines. If a professor does not respect those guidelines, Professor Leclerc anticipated that the Dean would intervene. If there is a problem with the students' evaluations, the Dean might also intervene in response to a student complaint. He observed that enforcement of the guidelines depends on the context of the problem that might arise, which may require an analysis of the course content and course strategies. The students evaluate a professor's teaching, which is relevant in respect of a promotion. There is a process for the Dean to follow regarding alleged poor performance, which is set out in article 24 of the collective agreement.

[50] With respect to the assignment of workload, Professor Leclerc testified that this is a collegial process, but the ultimate decision-maker is the Dean. It is open to a professor to grieve workload decisions.

[51] With respect to his sabbatical leave, Professor Leclerc agreed that he remained an employee of the University during the sabbatical period and received 100 percent of his salary. Pursuant to article 20 of the collective agreement, he was not required to teach during the sabbatical, as he was expected to devote his time to research.

[52] Professor Leclerc was referred to a document entitled "Policy 48 – Grants and Contracts Administered by the University" (Exhibit E-2). He observed that when carrying out a specific project he is required to receive the approval of the University's Ethics Review Board. The Board's role is to ensure that research projects involving humans are carried out in accordance with rules respecting confidentiality, as well as to ensure that the participants have given their informed consent. He agreed that without the Board's approval he could not have proceeded with his proposed research project, set out in Exhibit U-8. The last time he received a grant was in the late 1980s. At that time, the University was a party to the agreement with the funding agency; the University managed the funds that he received

from the funding agency. He is not aware whether Policy 48 existed at the time, including paragraph 7, which states that:

7. No professor may be the principal investigator for any grant or contract between an agency or company and the University that interferes with the fulfillment of the professor's scheduled duties or with the professor's obligations to the University as set out in the relevant collective agreement unless authorized in writing by the dean.

[53] Professor Leclerc was asked to review his academic activities, as outlined in article 20 of the collective agreement. With respect to "teaching", and in particular "giving courses", he stated that he maintains records of his articles as well as notes respecting consulting materials, including those from textbooks and course content documents. He would create documents in *PowerPoint* as well as notes to students. Also, students would provide short presentations on a topic and he would list relevant precedents for students to use for their presentations. When conducting a seminar he invites students to research topics based on a reference list that he provides. He has also produced a casebook of materials for students. With respect to "guiding tutorials and laboratories," he noted that there is a laboratory component to his course that requires him to put together laboratory exercises consisting of worksheets. He also supervises "individual study projects," which would involve identifying sources of journal articles and lists of references. He would have drafts of papers as well as notes of discussions with students. With respect to paragraph (b) ("preparing and correcting assignments. . ."), he might prepare test questions; he has an accumulated bank of multiple choice questions for the students. He also prepares corrections keys given to teaching assistants for marking essays.

[54] With respect to paragraph (c) ("guiding the work of teaching assistants. . ."), he would prepare documents outlining the work that they are required to do, as well as provide teaching assistants with handouts as part of a course preparation. He might also have notes of discussions that he has had with teaching assistants. Regarding paragraph (d) ("supervising, guiding and evaluating students' individual work. . ."), he would have documents similar to paragraph (c); however, there would be some differences (for example, projects approved by the Ethics Board). With respect to paragraph (e) ("granting individual consultations. . ."), while he is not involved in this very frequently there might be an exchange of emails respecting letters of reference. Under paragraph (f) ("participating in the development of teaching methods, programs or course content"), he has participated by providing feedback on program exchanges which would involve emails back and forth. Regarding paragraph (h) ("writing textbooks"), while he has not produced a textbook he has

produced casebooks as well as journal articles. Under paragraph (i) (“serving as a thesis examiner. . .”), as a thesis examiner involved primarily in reading critically a thesis document he would take notes from the document. With respect to the residual provision (“All other activities. . .”), this would include attending conferences on teaching where he would take notes and receive handouts; some of these seminars would be external to the University,

[55] Professor Leclerc also testified concerning the various scholarly activities under the subheadings found in section 20.3.2.1 of the collective agreement. Pursuant to paragraph (a), under the heading “Research”, he noted that he would be involved in exchanges of emails with colleagues and students regarding specific information concerning his research (for example, copies of psychological assessments and raw data). The same would hold true for paragraph (b). Regarding paragraph (c) (“presenting the results of research for critical studies. . .”), he would have presentation notes as well as personal ones and exchanges of emails with a number of people. Paragraphs (d) to (g) would include documents such as articles, books, research notes, data, emails and copies of psychological assessments. He has not been involved in the “editing of a scholarly publication” as outlined in paragraph (h).

[56] With respect to “Professional activities” as described section 20.3.4 of the collective agreement, Professor Leclerc differentiated this from his research and private practice. He noted that he is a founder and member of the Francophone Association of Psychologists in Ontario, which is subsumed under this provision. Any documents that he would create in that capacity would not be subject to access by the University.

[57] Professor Leclerc reviewed his activities as described under the heading “Academic service” found at section 20.4 of the collective agreement. He was not involved in “administrative activities such as chairing a department. . .” However, he has participated in school committees (for example, he was President of the Ethics Committee when it was within the School of Psychology; he was also President of the Senate Committee on Teaching). As part of his work on these committees, there was a need to take notes and minutes; he made his own personal notes that he kept in his office; he views these notes as personal to him. Paragraph (c) refers to work with the Association. The University would not have access to documents relating to the Association except for minutes of the Joint Committee meetings. With respect to paragraph (d) (“contributing to the effective operation of CAUT, OCUFA. . .”), he maintained that any documents generated through this work would not usually be accessible to the University. Regarding paragraph (e) (“counselling or

advising students”), he would have notes concerning personal information about students, including addresses, telephone numbers and the specific nature of a student’s request. He has been a chair of a thesis committee (paragraph (f)). In that capacity, he would generate notes regarding research as well as some notes involving exchanges between the Committee and students. He also referred submissions to scholarly publications (paragraph (g)); that is, assessing proposed published work as a peer reviewer and outside referee. He was also an examiner of research grant proposals for the Natural Science and Engineering Research Council (NSERC) (i.e. paragraph (j)). This required preparation of a document concerning feedback assessment for a proposal to the NSERC. The University did not receive a copy of this document.

[58] Professor Leclerc agreed that the University makes the ultimate decision respecting promotions and hiring, as is also true for disciplinary matters. He noted that the Faculty of Graduate and Postdoctoral Studies must grant approval with respect to taking on graduating students. With respect to section 40.9 (“Professional expenses reimbursement”), Professor Leclerc observed that he has not received reimbursement for his computers, although this could have been included under this provision.

[59] Professor Leclerc sits on the Senate Committee on Individual Cases, which is the body to which a student can appeal with respect to his or her grades. This Committee makes recommendations to the Senate who has the ultimate authority with respect to a student’s grade.

[60] Professor Frans De Bruyn is a professor of English Literature and is currently Chair of the Department of English. He has been at the University for 26 years. He has also been the Director of both graduate and undergraduate studies and was Secretary-Treasurer of the Association for three years as well as a liaison officer dealing with grievances for an additional two-year period. He is currently the chief negotiator for the 2008 round of negotiations.

[61] Professor De Bruyn stated that the message from Ms. Harrod was brought to his attention by the Association. He was surprised by the request, and in particular its scope. He did not respond to it since it was not sent directly to him.

[62] Professor De Bruyn has an email account at the University, which is provided to him by the Employer. He has a computer, which is provided to all professors in accordance with recent University policy. In the past, he had purchased his own computer or used grant funding.

[63] Professor De Bruyn reviewed the types of documents that he might utilize as part of his teaching activities. These include course notes, which are mostly in handwritten form and are stored in his office at the University in a file cabinet; he also has some of these notes on his computer. No one else has copies of these notes. At the beginning of his course, he provides students with the course outline in a printed format (which is also available electronically) describing the nature and objectives of the course, including rules and regulations respecting assignments, and the University's course policy. These also contain a class-by-class outline indicating the text and subject for each class. A course outline is also filed with the undergraduate advisor in the English Department, who is not a member of the bargaining unit. He occasionally distributes to students photocopies of texts that are difficult to obtain, as well as on occasion additions to the course outline, exam questionnaires, instructions for the term papers and essays. He keeps the final exam questionnaires, which are also filed with the undergraduate advisor.

[64] He observed that if a student appeals a grade, it would be reviewed by an ad hoc committee, which would receive the instructions or exam questionnaire (for example, a mid-term test). He noted that for graduate student seminars he prepares "custom-made" course material designed around a particular subject. As well as a primary text, he would use the results of his own research. He would have notes taken from previous research trips. He would also access materials electronically through his computer and occasionally make photocopies for his courses or print them out from his computer. He would also bring notes to class, which he would store in a file folder and he would have the only copy.

[65] Professor De Bruyn observed that in preparing seminars he might consult with colleagues, either through oral exchanges, by email or by phone. He would have the only copies of any such emails. Students can correspond with him by email to seek clarification about courses or assignments. If a student is ill, he might receive an email to explain the student's absence; he alone would have access to emails from students. He also communicates with colleagues outside the University regarding areas of research and concerning publications, which could include editors of journals. He also responds to requests to act as an external evaluator in the context of applications for tenure or a promotion. For the last six years or so, he was President of the Canadian Society for Eighteenth-Century Studies.; in that capacity he has communicated broadly with colleagues concerning the organization of annual conferences, the payment of dues, as well as correspondence regarding journal articles. Approximately 10 years ago he organized a conference of 180 participants, which required him to communicate widely, either by letter,

electronically or by phone. He would take notes during phone conversations as an aide-memoire, and he would have the only copy.

[66] With respect to his research activities, he would have a large number of notes on his computer concerning research on various topics. He would have the only copy of this material. He also publishes in scholarly journals; he would make use of research materials in his office and in libraries, both at the University and elsewhere. Once he has completed an essay, he sends it off to an editor or to a journal for review. He does not require authorization from the University when he sends off an essay, nor does he require authorization before it is published. He would have the only copy at the University. It has happened that a draft was refused for publication and he was so notified by the editor by email or regular mail, which he kept on file. Again, he would have the only copy. All publications are found in the University's library. He observed that his research material is stored both in files and on his computers.

[67] Professor De Bruyn has also applied for University grants; when he applies for a grant he prepares a written proposal and when necessary he would review his research notes, etc. His last grant application was to the Social Science and Research Council (SSHRC) for the period 2002-2005. The application itself consists of a description of the research project and various supporting documentation, including budgets, a description of how research assistants would participate in the work, a bibliography of sources used in the work, and sample publications. The University plays a role in bringing the proposal to the SSHRC. Applications are collected at the Office of the Associate Dean of Research and then the Research Services forwards them to the SSHRC. The Associate Dean of Research has also been asked to read a grant application and critique it. The SSHRC requires that the University itself forward the grant applications to it; the Council would then send the applications to two external evaluators, who would refer their evaluations to a SSHRC committee. This committee would then rank them and submit them to the SSHRC with its recommendation as to whether it should be funded. Notification is then sent to him and to Research Services at the University. If the grant were approved, the money would be put into a research account, which is administered by the department; it would gather up receipts and release the funds as well as pay the research assistants. He would decide what he wanted to do with the money subject to guidelines and the budget for the grant. He would submit receipts for travel and accommodation, which would be charged to his research account. He stated that he did not have to make expenditures but was required to follow guidelines, mostly emanating from the SSHRC but also as set out in the collective agreement (for example, regarding per diems). He would submit the final report to the

SSHRC detailing what he had accomplished. The ultimate form of accountability is the publication of the research. Professor De Bruyn noted that he does not have to provide the University with a copy of the report that he submits to the SSHRC.

[68] All aspects of his work at the University are subject to an annual review, including the evaluation of his courses. He would also submit through his curriculum vitae a list of publications and other contributions made both within and outside the University. Professor De Bruyn observed that as Chair of the Department he is responsible for its academic aspects; he is closely involved in the hiring of new faculty members and the allocation of workload, including teaching assignments. He is also involved in applications from colleagues regarding tenure, promotions and sabbaticals. In his role as Chair, he would use documentation such as personnel files, including those of his colleagues, when addressing matters such as tenure or promotions. He has direct access to personnel files; however, he does not keep a copy of these files.

[69] With respect to the allocation of workload among academic staff, every fall a request for proposals on seminars is circulated and reviewed by the undergraduate or graduate committee for approval. They would then send a form asking colleagues what they wished to teach, the time available for teaching, including which first year courses they wished to teach and which upper year courses. They then work out a timetable using these preferences. The timetable information is stored in a binder that is kept in the Chair's office. A clean copy of the schedule would be given to the departmental administrator and ultimately to the dean of the faculty. He also noted that the collective agreement sets out provisions for the equitable allocation of work.

[70] Complaints from students can be brought to his attention, either verbally or by email. A student can file an appeal with the Administrator's Office, which would require full documentation.

[71] Professor De Bruyn observed that there is no requirement on the part of the University for him to engage in outside evaluation work or to participate in the Canadian Society for Eighteenth-Century Studies. The decision to pursue a certain type of research is his alone. Initially, he was hired as a specialist and his contract requires that he maintain the qualifications for which he was hired. Once a professor has tenure, he or she can pursue an entirely different area of research.

[72] With respect to course content, Professor De Bruyn stated that there is a general course description and he is expected to stick to that broad area. He has considerable

latitude within the general rubric of a particular course. He noted that it is entirely permissible for two individuals teaching the same course to use different texts and take a completely different approach to the subject.

[73] Professor De Bruyn maintained that if the University had access to all of the documents described in his testimony it would have a “chilling effect” on his work, albeit it would be less problematic in his area where he is dealing with “long dead authors”. He could imagine situations where he might couch evaluations differently if this information was not solely under his supervision. While course material is not a concern for him, some professors would want to retain direct control over use of material they have prepared.

[74] In cross-examination, Professor De Bruyn testified that he has a desktop computer which belongs to the University. He also has a laptop bought through a SSHRC grant. He has a computer in his home that he purchased with his own funds. He uses both the laptop and the office computer for research and teaching; he does not use his own computer for work purposes. He uses the desktop as well for his functions as the departmental chair. He has only a University email account. When he was a liaison officer with the Association he did not have a separate email account. When he saves a document from his desktop it goes to a central server. In addition, he uses a memory stick to back up documents.

[75] Professor De Bruyn currently has a research assistant who is paid out of the operating budget of the University. He acknowledged that the assistant might have access to his research material.

[76] As Chair, he is provided with secretarial and administrative support assistance. There are four administrative support persons in the department. The departmental administrator does all the administration, including allocation of rooms and equipment, budgets, administration of union contracts for part-time staff as well as administering research grants (i.e., when a professor wishes to claim for expenses against a grant, the professor would approach the administrator). He stated that the graduate and undergraduate student advisors assist in processing the registration of students, provides them with academic advice and assists with fellowship applications. There is also a receptionist who supports the other three in their tasks. The staff maintains a file system concerning their role vis-à-vis the students, and they also maintain documents relating to the work of the Chair. As a professor, he is given very little support with respect to research, except for assistance in the administration of the research grant. He pulls together materials, making copies for which he uses a private copy service.

[77] Professor De Bruyn was led through the various provisions of article 20 of the collective agreement. With respect to assigning teaching workload, he observed that once he prepares a draft of the schedule it is subject to the approval of the Dean. With respect to section 20.4 (“Academic service”) of the collective agreement, he noted that this work could consist of sitting on committees. With respect to email communications with students, he maintained that there is a distinction between communications that he receives as a professor and as the Chair. His communications with student as Chair would not relate to his teaching or research. His emails are password protected; no one else has access. He sometimes prints out emails with his own printer in his office. He is responsible for his own printer, but may be able to have it serviced by the University. He does not share a network printer with other staff. He saves documents related to the Association in separate file folders.

[78] Professor De Bruyn referred to his “Administrative Experience,” as outlined in his curriculum vitae (Exhibit U-11). He observed that this experience is relevant to “academic service” per section 20.4 of the collective agreement. His responsibilities when he was Director of Graduate Studies included assisting students in applying for scholarships, reviewing and ranking scholarship applications as well as applications to the program. He was also involved in setting up schedules for doctoral comprehensive exams. The Graduate Studies Director and Committee review all thesis proposals at the M.A. and Ph.D. levels. He stated that documents generated by the Director do not generally relate to teaching or research. For the most part, this work does not overlap with those functions. He agreed that documents generated by the Director would be in the possession of the University, except perhaps informal problems brought forward by students. These Documents would not relate to teaching or research, and would be in the possession of the University.

[79] As a member of the DTPC, Professor De Bruyn had responsibility for some aspects of academic employment, including requests for tenure, contract renewal and sabbaticals (see section 15.2 of the collective agreement) which included making recommendations to the Dean and to the FTPC and through them to the University Senate and Board of Governors. Some of the records generated by the DTPC deal with labour and employment activities; he also agreed that the records of the Hiring and Selection Committee relate to labour and employment activities. That Committee reviews annual reports from each professor listing research, teaching activities, etc. These activities are pursuant to article 23 of the collective agreement addressing “Review and Evaluation.” The Committee may counsel a colleague if there are concerns or kudos. He noted that the

Committee's work constitutes a review and not an evaluation, which is the responsibility of the Dean.

[80] Professor De Bruyn agreed that when he was involved in the activities of the Association many of the records generated were in the possession of the Association. Any records he has relating to his role he would hold in his capacity as an officer of the Association and not as an employee of the University.

[81] When he was Chair of the Graduate Scholarship Committee for the SSHRC fellowships, he was responsible for receiving all applications and ranking them; these applications would be from students, and records generated from this process are in the possession of the University. As a member of the Faculty of Arts Undergraduate Curriculum Committee he would have done a general review when changes were proposed; the focus would be on new courses in the faculty. The Committee would make recommendations, which would ultimately be determined by the Senate. Any records generated by the Committee would be in the possession of the University. He noted that these records would not be related to research or teaching materials. With respect to the work of the University's Research Grant Committee, he observed that documents generated by this Committee would relate to research from Association members and would include a description of the members' proposed research. Records reviewed by the Committee for the Humanities do not relate specifically to research or teaching.

[82] Professor De Bruyn maintained that it is possible to get a SSHRC grant without being associated with the University. He agreed that there are policies and guidelines from the SSHRC concerning the University's role. The University has some obligations regarding the administration of granting money; the funds are transferred to the research account at the University. In some areas the University might match funds from the granting institution; this usually involves agreements to release a staff member from teaching responsibilities. The University makes a commitment at the time of the making of the grant. He agrees that the research assistant, who is paid out of grant funds, must comply with the University's collective agreement and policy

[83] Professor De Bruyn agreed that potential consequences of plagiarism allegations could include loss of employment from the University. He also agreed that academic staff are required to respect the course descriptions as approved by the Senate. With respect to the impact of Exhibit U-2 on his work as a professor, he maintained that the requested documents that did not relate to research or teaching would already be in the Employer's possession, with the possible exception of external evaluations that he might be involved

with. These tend to be in areas of his research. Even if those elements are excluded from the request, he might have a concern about other matters for example, notes regarding personal evaluations. He stated that he “hesitates to categorically say that I would have no other concerns.”

[84] In re-examination, Professor De Bruyn elaborated on some aspects of his testimony. With respect to his teaching responsibilities, he noted that he chooses the readings, the text that the students will use and any supplementary material, and he determines the teaching methodology that he will employ. However, for first year courses there are professor manuals that provide direction to ensure uniformity of purpose, as these courses are taught throughout the University by several staff.

[85] He has been requested by the University to provide documents in his possession; for example, when he made an application for a promotion or tenure he provided documentation demonstrating that he met the program and goals of the department and also that his teaching was up-to-date. He met those objectives by providing course outlines, copies of exams and assignment of instructions. It is up to the professor to determine what documents should be provided. The DTTC examines this material and determines if it meets the needs of departments and is up-to-date. Its conclusion is then forwarded to the Dean and the FTTC. With respect to an application for tenure, he would also provide results of research and publications to external evaluators who conduct evaluations according to the criteria set out in the collective agreement. A third kind of material requested by the Employer is the annual report, consisting of an updated curriculum vitae and statements regarding research. Professor De Bruyn maintained that he has not been asked to provide any document that was not required under the collective agreement.

[86] Professor Atef Fahim also testified on behalf of the Association. He is the current President of the Association; he also held that position in the 1990s. He is a full-time professor in the Mechanical Engineering Department and has been employed with the University of Ottawa since 1984. Professor Fahim sits on a number of committees; he is currently Chair of the Curriculum Committee of the Department and a member of the Pension Plan Committee of the University.

[87] When Ms. Harrod’s message was brought to his attention, Professor Fahim stated that at first he did not think much of it, as he viewed it as a “polite, non-mandatory request.” However, he became concerned when he realized that the Administration was seeking emails. At that point, he contacted the Executive Committee of the Association concerning this matter.

[88] Professor Fahim teaches a course entitled “Computer Aided Design and Manufacturing (CAD/CAM),” which he has been teaching for 22 years. He prepares the content of this course two and one-half years ahead of time. He selects devices that students are required to design; the students, who work in groups, are assigned a comprehensive design project to manage, including budgeting. He noted that the course would cover at least 60 percent of the course material that they had taken. The description projects are provided to second year students as a preview so that they know what is expected of them in the fourth year of the program. This semester he is overseeing 10 large projects with 38 groups. Professor Fahim stated that he does not need authorization from the University for these projects. On occasion, he consults with colleagues, including acquaintances from other universities, as sounding boards for his projects.

[89] The Canadian Engineering Accreditation Board approves engineering departments. It has no say on the content of a course, but determines the number of hours of mathematics, physics and design required in the four-year curriculum. If a department is accredited, students who graduate are considered full-fledged engineers. Professor Fahim presents projects to students electronically on the Web as well as by email and through chat groups; there is a Web site dedicated to the course. Second year students have access to the public part of the Web site. In fourth year, at a first meeting, students decide on a group and team members. The projects and subprojects assigned to each team are determined randomly. The description of a project is found on the Web site, which requires a password and is only accessible by fourth year students. As well, a Ph.D. student acts as an engineering consultant on a course. Professor Fahim also has two or three teaching assistants who can access the Web site. In addition, three other professors in the department who have volunteered to act as resource persons, can also access the Web site.

[90] Professor Fahim prepares information concerning design knowledge, various sources of descriptions of the project and tasks for each group. He noted that he has exclusive responsibility for the Web site, he does not require approval from the University nor does he submit it to the chair of the department. The students are required to submit the entire project documentation at the end of the semester, including information on the administration of the project, time charts, minutes of all the meetings they had, as well as important correspondence concerning the project between the student and himself, so that everything can be traced back concerning the engineering analysis of every component that they design as well as the design software description that they generate. They also submit engineering designs on papers and on CDs. Barring any complaint by a student with respect to marks, this documentation would only be accessible by him and his assistants. This

particular methodology has been followed for the last four or five years, although the basic principle has been in place since 1985. The project reports are typically between 500 to 1,000 pages. During accreditation they are required to show samples of the examination book. Over a seven-year period between accreditation, he would reduce this to one per year; the ones he does not select he shreds, but he keeps the CDs in his office.

[91] Professor Fahim stated that, for the accreditation process, a report is prepared by the chair of the department showing the progression of the students, including how many passed, how many failed and how many changed programs. A second component would be the curriculum for each course, including a digest of knowledge given in number of hours. The third part would be the physical resources and support services available, including such matters as the library resources available. Additional information provided includes the number of professors, the number of students per professor, as well as technicians, etc. In preparation for this report, each departmental member would provide the course content to the chair, all of which is placed in a binder provided by each professor for evaluators; this would include an outline of the course, any lecture notes, exams, and selective results of exams. An external consultant would examine some of the binders and they would then be returned to the professors. There is also an appraisal process done by the Ontario Ministry of Education. As the Associate Director of the Ottawa-Carleton Institute of Mechanical and Aerospace Engineering, Professor Fahim prepares appraisal briefs for the two Ottawa universities, which are presented to the Ministry of Education. Consultants would visit and submit reports to the Ontario Graduate Student Council, which assesses the quality of the program. The Ministry then approves the program and indicates whether it will provide funding. As part of the appraisal process, the faculty members supply him with briefs that include their curriculum vitae, which are put in the second binder. The faculty members also provide information concerning operating grants received from various agencies, the Ontario Government, centres of excellence, etc.

[92] Professor Fahim is also Chair of the Mechanical Engineering Student Design Competition Committee under the auspices of the Canadian Society of Mechanical Engineers, of which he is on the Board of Directors. In this capacity he examines design entries from across the country, which are normally forwarded to him electronically as well as in paper document form. They are then submitted to judges. He noted that documents related to the Committee would be found in his office as well as on his computer.

[93] The Institute's role is to coordinate graduate studies at both universities in mechanical engineering; i.e., to ensure homogeneous entry requirements, arrange for

defence of the thesis and organize seminars. While each university is autonomous, the Institute is an umbrella group for both of them. He would call and chair meetings of the Institute where they would work out policies and forward them to departments. Professor Fahim would communicate with potential applicants for graduate studies and respond to their queries; graduate students would raise with him any problems that they might have.

[94] Professor Fahim has at his home three computers and a laptop, which belong to him. In addition, he has another computer and laptop at his home that he obtained through grants. In his office, he has a computer as well as a server; there are 22 others used by graduate students that were obtained through grants. He also uses the server at the University.

[95] Professor Fahim has seven email accounts: two are under the University of Ottawa; one is a service provider for the Internet that he uses at his home; one gmail account from *Google*; a hotmail account from *Microsoft*; one *Yahoo* account; and his own account (Fahim.ca). He is the sole user of all seven accounts. In his office, where he has two large file cabinets, part of a drawer in one cabinet is used for documents concerning the Institute, including minutes of meetings, complaints, and copies of emails or notes or papers concerning procedures and policies. Both the University of Ottawa and Carleton University have copies of the minutes of meetings that are held in the School of Graduate Studies and Research at the University of Ottawa as well as at Carleton University.

[96] Professor Fahim reviews and approves all applications for graduate studies; he scans these and puts them on his server. They are available for review only by members of the Institute who wish to choose graduate studies. The University has access to the paper file, which is in the School of Graduate Studies. In a given day, Professor Fahim stated that he will receive between 10 to 20 emails from students in his capacity as Associate Director; normally, they would not be copied elsewhere, although he might send a copy to the administrator who handles Institute business.

[97] He uses the University account for emails. He receives emails from graduate students concerning procedural issues at the University; these emails can consist of complaints about a supervisor or about the program, as well as queries about the procedure to follow. If he receives a complaint, he attempts to smooth things over informally. If the problem escalates, he would advise the student to approach the chair or the School of Graduate Studies to work things out. Notwithstanding these efforts, if the complaint proceeds, the student is advised to forward the matter to the chair. If however it is resolved, he retains an electronic copy in the archival part of his computer. They would also be on the

University's backup server. Anyone can have access to the backup server; emails, however, go directly to his computer. Some emails would go to the Fahim.ca account and would pass through the exchange server that is backed up. In fact, all emails on his computer are backed up by him on the University's server, which is something that he personally elects to do. He had no concerns about this until he became aware of Exhibit U-2. In his view, no one should have access to his emails unless they are official University documents. He had assumed that no one other than himself had access to emails that were on the backup server.

[98] Professor Fahim noted that in the normal course he would receive 150 to 200 emails per week from students who take his design course. These would include the agendas of meetings of each group or team, and the minutes as well as task assignments of each member of the group. These emails are channelled through the appropriate folder in his mail system. At the end of the semester, he archives the folder. All of the teaching assistants receive copies of the students' emails and his responses. He also receives information concerning conflicts that may arise; there is a procedure on the Web site with respect to complaints about a student; and he would be copied on these complaints. The student who is the subject of a complaint is expected to respond with a copy to Professor Fahim. If the issue is not resolved, he would meet with the protagonists and attempt to resolve it or work out a solution. He would ask them to document their solution, which he would keep on file. Professor Fahim also receives emails on personal issues from students concerning problems at home or health problems. In some cases, he might email a response when he cannot reach a student; these emails also remain on his system. He also receives requests for recommendation letters for employment in graduate studies by email and he may respond by email. The actual letter of recommendation or form may be filed electronically and mailed to the requestor or delivered by hand. The University would not be copied.

[99] With respect to his research activities, Professor Fahim noted that he has graduate students working with mechanical engineering students; currently, he has 16 graduate students. He has had an operating research grant from the NSERC since 1984, as well as other NSERC grants. He also has a contract in his capacity as a university professor with Materials and Manufacturing Ontario.

[100] Professor Fahim observed that his office and computer would contain books and papers in the public domains that he accesses online. He would also have scraps of papers stapled to documents. One would also find in his office the drafts of papers for a thesis as it is being developed, as well as manuscripts that have been published. Others may have these

documents, in particular graduate students and colleagues with whom he is collaborating. Often the correspondence would be made electronically. This material could constitute research that might result in patents, accordingly it is important to maintain confidentiality. Only those that are directly involved in the research would have access to this material; that is, himself, graduate students and collaborators from other universities.

[101] Professor Fahim also retains in his office documents relating to his participation on the Pension Investment Committee, including minutes of meetings, correspondence from chairs of the Committee and responses. He would have as well correspondence between himself and members of the Association and documentation from consultants. He observed that the University administers the pension plan. The Committee would also have members from outside as advisors. Documents emanating from the Committee would also be in the possession of the Secretary of the University and with the Pension Plan Director.

[102] With respect to his communications as an officer and member of the Association, Professor Fahim stated that there would be private exchanges — often by email— with respect to, among other things, discussions with members of the Ad Hoc Restructuring Committee, which examines enhancement of benefits. He would use his engineering account for this purpose. With respect to his work on committees, he keeps personal notes that he retains on his office computer or at home. These are password protected and would consist of comments, analysis and discussion of ideas.

[103] Professor Fahim testified that Professor Leclerc briefed him in his capacity as outgoing President of the Association in January 2007 concerning Ms. Harrod's message. He thought it was necessary to respond, as per the email dated December 7, 2006 (Exhibit E-1). He noted that whether emails are professional or personal, they all come into one account. He stated that he does not know how to structure his work to worry about which email account he should use, although this now appears to be a matter of concern.

[104] Professor Fahim referred to a Memorandum of Agreement between the University and the Association (Exhibit U-19), which addresses the issue of communications involving the Association. Paragraphs 5 and 6 deal with electronic communications to and from Association accounts. He noted that in discussions with the Employer they became aware that there was no audit policy regarding access by IT personnel who access servers for maintenance purposes. In the absence of a policy, IT personnel can access sensitive information without any record of having done so. They asked the University to look at this issue. The Administration stated that it was not

appropriate to ask IT personnel at this time (in view of an ongoing certification process) to sign an undertaking in respect of this matter.

[105] According to Professor Fahim, he anticipates that he would take the documents in his office with him on his retirement. He said that it is the general practice for academic staff who are leaving to back up their hard drive on a CD, wipe out the hard drive and leave the CD behind.

[106] Professor Fahim identified a number of documents (Exhibits U-30 to U-39), which, as he described, outline how his research grant funding is administered. For example, Exhibit U-31, a document taken from the NSERC Web site entitled "Annual Funding of Grants," notes that:

Most grant funds are paid through a Common Grant Account and sent directly to the Institution's business officer for retention on the Grantee's behalf. The Institution, through its business officer, maintains control of the grant funds, disburses salaries and other expenditures authorized by the Grantee, and provides periodic reports to the Grantee and to the Agencies on the status of grant funds.

[107] In another document from the NSERC entitled "Responsibilities and Accountability" (Exhibit U-30), it states that:

Grants are awarded to eligible researchers and are administered through the Institution's administration systems. The Grantee authorizes expenditures in accordance with Agency policies and requirements, as outlined in the relevant Agency Guide or its Web site or as stated as a condition of a grant, and with Institution policies. No one may initiate or authorize expenditures from a grant account without the Grantee's delegated authority.

Each Institution establishes appropriate procedures, systems and controls to ensure that Agency policies and requirements are followed. The Institution has the right and responsibility to withhold and withdraw approval of expenditures proposed by a Grantee that contravene the Agency's requirements or the Institution's policies and, when appropriate, seek advice or ruling from the Agency.

[108] Professor Fahim noted that he was Secretary of the Gloucester Childcare Services, a voluntary service organization, and was at various times its vice-president and as well sitting on various sub-committees. He has stored in his office or at home various documents relating to this organization. Only he has access to these documents, which are also on his computer. As a member of the Board of Directors of the Canadian Society of Mechanical Engineers, he exchanges documents electronically; these may include

communications with members, requests for entry to competitions, requests for membership, etc. They would be stored on his computer at the office or at home. He noted that this is not a University body.

[109] Professor Fahim also referred to a template Memorandum of Understanding taken from the NSERC's Web site. This document contemplates a signed agreement between the granting agency and the academic institution; however, it also outlines the roles and responsibilities of the grant holder. Professor Fahim described the role of the institution as being primarily to provide an administrative system for the grant. He maintained that, provided the grantees follow the rules of the granting agency, they could operate at their own discretion.

[110] Professor Fahim stated that in his 23 years teaching at the University he never received a formal request from the University to access documents in his possession. He also stated that if a chair had asked him to provide a particular paper with a view to exchanging information between professors who might be involved in the same area of research, he would provide a copy; however, he would cover up any notes that he might have made before passing the document on to the researcher. On occasion, he might receive a copy of minutes from another committee member or provide that member with a copy of his minutes, which may have some notes.

[111] Professor Fahim commented on the impact that it would have on his work if the University could access his documents or his computer. He observed that often his notes represent his thoughts and his decision-making process and are therefore incomplete. At times, his preliminary decision-making may involve contradictory or tentative conclusions. If the University had access to this documentation he would tend not to document these thoughts because he would not want anyone to "probe his mind." He has counselled students that a design or idea is theirs until it is released; likewise, he believes that no one should look at his document until it is ready for release, as it could curtail his thinking and decision-making process. He stated that once he publishes a document or puts forward minutes of a meeting, he has no problem with access. But before that point, it should not be subject to access.

[112] Professor Fahim also maintained that the right of the University to access his documents could have an impact on his outside activities. He noted that often in the evenings he performs work related to both the University and his outside activities. For example, the Society of Mechanical Engineers Office hours are from 9:00 a.m. to 5:00 p.m.; he would have to find ways to communicate with them during these working hours without

leaving a trace at his office, or find alternative ways of communicating, thereby making his outside work more complicated, if not impossible.

[113] Professor Fahim also identified a letter from the Association addressed to Louise Pagé-Valin, Associate Vice-President, Human Resources Services, University of Ottawa, proposing a Memorandum of Agreement (attached) respecting confidentiality of electronic communications involving the Association.

[114] In cross-examination, Professor Fahim stated that he sits on a number of University committees in his capacity as President of the Association. The records produced by these committees would be on behalf of the Association and not in his capacity as an employee, with the possible exception of the Campus Campaign when he was not representing the Association. He is appointed by the Association to sit on the Pension Committee and in the official records of that Committee he would communicate with the Association. He stated that he also has his personal opinions on these matters, which he may or may not share with the Association. With respect to the records of the Catering Committee, this information “would never go back to APUO.” As a participant in the 1990s Vision Campaign, he expressed his own personal views; any notes that he made would be kept in his office as well as minutes of meetings and drafts.

[115] Professor Fahim was asked about the design course he teaches to engineering students. He agreed that the University Senate would approve the course description. He stated that he does not use University resources, but the students themselves provide resources for what they build. The design construction would not be built on University property.

[116] With respect to the accreditation process, the faculty provides written material in support of this process. The Dean is not involved except as a conduit to the Accreditation Committee. He stated that the Accreditation Board is given a password allowing it access to his course Web site, part of which is public while the other part is password protected. He agreed that if the Accreditation Committee raises issues concerning resources, the Dean would be expected to provide resources to remedy the situation (for example, if there is a problem with laboratory space or lack of personnel). The Dean is interviewed as part of the accreditation process as well as the Vice-President, Academic. While the Dean may be advised of any issue respecting curriculum, according to Professor Fahim, he cannot direct the department, although the Dean does chair the faculty’s Council. Any issues with regard to curriculum rest with the Council and not with the Dean, although he may provide input. He acknowledged that students could appeal to an appeal committee, which cannot review

the substance of the material, but can examine whether the process of evaluation was unfair.

[117] As Chair of the Mechanical Engineering Student Design Competition Committee he does not hold records in his capacity as an employee of the University; this Committee is not a University of Ottawa body.

[118] Professor Fahim identified two documents submitted by Counsel for the Employer. One is entitled "Operation of the Ottawa-Carleton Institute in Mechanical and Aerospace Engineering" (Exhibit E-4), and the other issued by the University of Ottawa and Carleton University is entitled "Joint Graduate Programs" (Exhibit E-5). With respect to the former, Professor Fahim stated that, in essence, it represents the functions of the Institute; there is now a segregation of evaluation in the admission procedure.

[119] Professor Fahim stated that emails to the University go to either an exchange server or to the old mail server. They are migrating everyone to the exchange server, but students do not use this server. Some departments have their own mail server; however, all emails to the University pass through the old server. In the Engineering Faculty, there are three email mechanisms: the old mail server for the University, the new exchange server, and the Engineering Faculty mail server. He agreed that all the servers are University servers.

[120] Professor Fahim observed that he was aware, as noted in Ms. Harrod's letter, "... that the University has the capacity to search your email accounts for the documents requested. ..."

[121] Professor Richard Blute has been a professor in the Department of Mathematics and Statistics at the University of Ottawa since 1993; he received tenure in 1999. He is currently teaching two courses: one in mathematical methods and the other a modern history of mathematics, which is a third-year course. He identified a printout of the Web site for the first course, which, among other things, has a breakdown for each lecture designed by him. He noted that he determines the content of each lecture as well as selecting course exercises. This Web site covers virtually everything set out in the University calendar respecting this course. In addition to three sessions in English, there is also one in French. According to Professor Blute, the French session is quite different, but the English one pretty much follows his course outline. He observed that he has a "very complete set of notes," copies of which he provides to other professors. He stated that he does not obtain approval from the University before posting this course material.

[122] The Department of Mathematics is part of the Faculty of Social Sciences. There are 32 full-time positions, as well as part-time teachers and 12 postdoctoral fellows. The Chair of the Mathematics Department assigns courses every February or March for the upcoming year. Academic staff is given a form in which they indicate the courses that they would like to teach in order of preference. With respect to course content, the Chair would become involved only if there was a problem (i.e., a student complaint or an issue that someone is teaching outside the parameters of the course description).

[123] Professor Blute is also a member of a research group referred to as the Logic and Foundations of Computing Group, an interdisciplinary group of researchers from both the University of Ottawa and Carleton University, which include members of the Computer Science Department. This Group holds weekly seminars and sponsors conferences; it also pools research money to hire postdoctoral fellows. According to Professor Blute, the activities of this Group subsume all three of the functions identified under “Academic activities” in section 20.1 of the collective agreement; that is, “(a) teaching activities; (b) scholarly activities revealed by research, artistic or literary creation, or professional work; (c) academic service activities.” The weekly seminars are designed to provide educational studies and are an opportunity for graduate students to present their research. As part of his activities with this Group he has written several papers in collaboration with others in the Group, which have involved frequent communications with the other members. In his view, the documents emanating from this work fall within the rubric of “scholarly activities” per section 20.1 of the collective agreement. The Group also organizes conferences involving participants from all over Europe; for this purpose, they often use emails, which are also often used for organizing seminars. Professor Blute identified this activity as coming under the description of “academic service activities.”

[124] He noted that he uses email communications when making decisions about hiring postdoctoral fellows. They also trade research papers back and forth, both physically and electronically, and solicit comments. He observed that the University Administration would not have a copy of any of the documents that the Group uses, nor would it be involved in, for example, deciding whom to hire as a postdoctoral fellow or in any decision respecting research issues.

[125] Professor Blute also referred to another research organization that he belongs to: “Category Theory Research Center” (Exhibit U-40). He described it as being very similar to the other Group except that it deals with category theory. It also holds meetings and hires postdoctoral fellows, and at one point had graduate students. Here again it is common to

send announcements of seminars by email as well as concerning the organization of conferences. The Group exchanges ideas through draft papers and provides comments on papers. This Group includes several universities. The University of Ottawa does not have a copy of any of the documents that this Group uses. He estimated that approximately 30 percent of his time is devoted to these two research groups, including work with graduate students.

[126] Professor Blute stated that when he received Exhibit U-2 he was “very upset by it”; he felt that it was inappropriate and constituted an intrusion that violated the spirit of academia. It seemed to him a violation of his right to privacy and his independence as a researcher.

[127] Professor Blute observed that one would find in his office many research papers, some written by him and some by others, perhaps as many as 1,000. There would also be some papers that he was preparing that would be in draft form. Throughout his office one would find many lecture notes, many textbooks as well as personal documents not relevant to education. He would also have copies of exams, both blank and graded, which students had never picked up. With the possible exception of the oral exams, the University would not have copies of the documents found in his office. He maintained that the University would have no right of access to the completed exams except perhaps if a student filed a complaint about a grade.

[128] Professor Blute has one computer in his office as well as one at home. His office computer has a directory for every course that he has taught over the last few years, which would include the course outline, exams and assignments. He also has a directory for every paper that he has written; this would contain files he is working on. He has another directory containing various Association-related files and personal items. He had previously been Chair of the CAUT Defence Fund and there may be a directory for that as well. He also has a separate directory for various conferences that he has organized. He often communicates with both undergraduate and graduate students by email, which would remain on his computer. He would also store on his computer email communications with his colleagues at the University. His communications with colleagues outside the University are entirely by email, usually dealing with a paper that he is writing. He might also ask advice about hiring, plans concerning conferences as well as personal matters unrelated to academics. He stated that if he were to leave the University he would treat the documents in his office or on his computer as belonging to him; if they were not, it would affect how he does his job. He was aware that the University was recently subject to the privacy

legislation. Even if he were told that the University's access request did not apply to research materials, it would bother him that the University could access his files.

[129] In cross-examination, Professor Blute was asked about the hiring of postdoctoral fellows. He responded that funding for this purpose comes from research funds, including two Canadian research institutes with which the University's Mathematics Department is associated. They also receive bursary money administered by the University. They would be paid \$40,000, of which \$5,000 would come from the University for each course taught. The Research Group would come up with \$15,000, and \$20,000 would come from grants. Individuals would receive a cheque from the University, which has a monitoring role as to how grants are administered. Postdoctoral fellows have to be registered by the Faculty of Graduate and Postdoctoral Studies. The Research Group would select a candidate, whose name would be referred to the DTTC, which ensures that the person is suitable and that there is enough money to cover the person's salary.

[130] Professor Blute has served on the DTTC and is currently on the FTTC. He has also been President of the Association. He stated that he would be given a large binder of all relevant files for the next FTTC meeting. He would read the files prior to the meeting and leave the binder behind at the meeting. He stated that in his view the FTTC documents belong to the University, and not to him.

[131] He anticipated receiving documents relating to his upcoming role as Chair of the Graduate Programs. He has received emails from the current Director providing advice on the role and he sees these emails as being of a personal nature. He does expect that the Director will pass on relevant files to him (for example, graduate students' applications).

[132] Professor Blute stated that there are probably documents in his possession concerning the organization of conferences that relate to all three of the activities noted in section 20.1 of the collective agreement.

[133] In response to a question as to whether there are any records from the two research groups in his possession that do not relate to teaching, research or organizing conferences and are not of a personal nature, Professor Blute responded "no". He stated that he is aware of a case where the University or Dean intervened concerning the content of a course. He also agreed that the Dean makes the ultimate determination with regard to academic workload.

[134] In re-examination, Professor Blute clarified that he will only become Director of the Graduate Programs on July 1, 2008. With respect to the issue of University intervention regarding curriculum, he observed that the Association is currently representing the individual in question and that the case is ongoing.

[135] Professor Antoine Morin has been employed with the University of Ottawa since 1989, and is a member of the Department of Biology where he lectures in Zoology, Ecology, Conservation Biology and Bio Statistics. He is currently a member of the DTPC and the Executive Committee of the Association. He has participated on a number of faculty committees (for example, the Bilingualism Committee where he was the professors' representative from the Faculty of Social Sciences). He also participated on the Individual Case Committee at the faculty level; this Committee deals with students who are appealing their grades and also addresses issues concerning, for example, plagiarism.

[136] With respect to research, Professor Morin has completed two manuscripts, which have been submitted for publication, and has also submitted a grant application to the NSERC. He participates in the DTPC and the Executive Committee of the Association on whose behalf he is the representative of the Anomalies Committee, which deals with partitioning of funds to correct salary anomalies. He is also the associate editor of a scientific journal and has reviewed two manuscripts for international journals. In addition to the above, he edits a Web site of a scientific society and is the coordinator of BIODIDAC, which is a repository of images, photos and diagrams that are used to teach biology. Professor Morin described these tasks as following under the rubric of administrative tasks.

[137] Professor Morin testified that when he received Exhibit U-2 by email he complied with it; he had recently installed a program provided by *Google* that simplified the search for text and he used it to identify the documents, which consisted entirely of emails originating from Dr. Rancourt, and which had been widely distributed by Dr. Rancourt on campus. There were no individual communications from Dr. Rancourt to Professor Morin. Professor Morin stated that he complied with the request to "make it go away." He thought that Dr. Rancourt had asked for the information.

[138] Professor Morin described the documents, etc, that one could find in his office. These would include books and manuscripts in various stages of preparation, which he would have written alone or with collaborators. His collaborators would have copies as well as current or past graduate students, researchers and co-authors at other institutions; no one else would have copies of the draft papers. He would also have grant applications that he has prepared, or that he is in the process of preparing. If these were collaborative grants,

his collaborators would also have copies, as would the granting institutions. He has sometimes sent documents to external referees who should have destroyed them after their evaluation. He is currently preparing a collaborative grant with a researcher from the Department of Fisheries and Oceans for submission to the NSERC. He would also have grant applications he received from other agencies for evaluation, both electronically and in paper format. After reviewing them, he destroys them. He stated that he “would never send a copy to the University of Ottawa.” He would have manuscripts from other researchers, mostly from outside the University, sent either by the author seeking his comments or by editors. The University would not have copies of these documents. He would also have documents in his office relating to the Anomalies Committee; that is, letters from teachers asking that their cases be examined; the Association would also have a copy of this correspondence. He would also have notes that he prepared for the Committee (i.e., analysis of the data and reports that he made to the Executive Committee of the Association).

[139] Professor Morin has a laptop and two desktop computers in his office, six or seven computers in his laboratory and three computers in his home. One desktop computer in his office is his workstation and the other is a Web server. Research data would be found on the file server in his laboratory, which has a bigger hard disk and also has a backup at the University. As well as data, it would have copies of emails. The North American Benthological Society posts its Web site on his “Web server computer” which is also the Web site for his laboratory, where he provides information for studies and courses that he is teaching. The six computers in the laboratory are used exclusively by him and his students, who have to log on. Only authorized people have access. Data are not stored on local computers but rather on a server with a larger hard disk. Students can access common areas on the server, and they can save their own data on another part of the server, which only individual students can access. He has access to all the drives and can access each student’s data. Each individual decides what goes into the common area.

[140] Processor Morin stated that emails from colleagues are usually archived either on the University’s server or on private space on his server in the laboratory. He has access to the University’s server and administrators who look after the servers probably have access as well. He assumes that this would be treated as private information. He has had previous contact with representatives of the computer servers who asked for permission to monitor traffic as part of an investigation after his own computer had been compromised by a hacker.

[141] Professor Morin stated that he communicates with graduate students by email as well as in face-to-face meetings. These emails relate to research they are engaged in and would include technical questions put to him or progress reports; copies of the latter would be filed with the department; each student has a file in the Graduate Office. The secretaries and the Chair of the Graduate Programs could access these files. He would also respond to communications from his graduate students by email or telephone. He observed that possibly the computer technical services staff of the University could have access with his permission. He would also communicate by email in his capacity as the Coordinator of BIODIDAC, including requests for certain images and the sharing of images, or communications with respect to technical difficulties regarding access. He noted that emails are stored in an email account on the University's server; older emails are stored in his personal server archive. as the Web site editor of "NABS" he would also communicate by email with various officers of the Society or its members concerning the content of the Web site and its development and possibly with respect to technical problems concerning access. All of these emails are stored on his account at the University server. He also has many email exchanges with colleagues concerning, for example, the attendance at meetings, participation in seminars or seeking his opinion on the latest paper. All are stored on his email account; he would not forward copies elsewhere.

[142] Progress reports are sent to him and filed with the Graduate Programs Office; these reports are found in his file cabinets. A file for each student includes forms that the student completed, a copy of the student's academic records as well as reference letters, annual progress reports and whatever else the Committee wants to put in the student's file. He assumed that the Graduate Programs Office controls and has access to these files, and that students can access their files, as could the students' supervisor, although it is his understanding that it not open to everyone.

[143] According to Professor Morin, should he resign from his position he would delete his emails and the paper documentation in his office would be destroyed. The only things that he would leave behind would be books that he purchased with research funds, which belong to the University according to the relevant rules.

[144] The Association requested that Michael Catano testify as to the academic communities' views and in particular those of the CAUT, regarding the issue of academic freedom. Mr. Catano is a professor at St. Mary's University and is an active participant over a number of years with the CAUT. The Employer objected to the admissibility of Professor Catano's testimony on the grounds that it has no relevance to the matters at issue. Counsel

for the University noted that Professor Catano is not and never has been a member of the academic staff of the University of Ottawa, cannot be qualified in any way as an expert concerning the collective agreement between the parties and has no direct familiarity with the matters in dispute. The Association argued that Professor Catano's testimony would shed light on the policy, rules and practices at Canadian universities with respect to issues related to academic freedom, which goes to the heart of this grievance.

[145] I permitted Professor Catano to testify, subject to further consideration of the relevance of his evidence. Having reviewed his testimony, I am of the view that his evidence bears no relevance to the matters at issue in this proceeding. Professor Catano testified at some length about the academic communities' views on academic freedom, and in particular the various policies promulgated by the CAUT and its members on this matter. However, Professor Catano did not, and cannot, testify concerning whether the CAUT's views on this issue were incorporated into the collective agreement between the University and the Association. No doubt, the Association was well aware of these policies and subscribed to them; it may well have influenced its position at the bargaining table. However, it cannot be said that the University had fully endorsed these views or that the collective agreement in fact reflects them in whole or in part. In short, Professor Catano's testimony cannot be said to shed any light on the interpretation or application of the collective agreement. As noted by Counsel for the Employer, Professor Catano has not been qualified as an expert on any of the matters relating to this proceeding, he was not a participant in the bargaining process leading up to the collective agreement between the parties and nor does he have any direct knowledge of the facts relevant to this proceeding. Accordingly, I have set aside his testimony.

[146] The Employer called two witnesses: Pierre-Yves Boucher and François Houle. Mr. Boucher (part of his testimony has been referred to above) has a longstanding association with the University of Ottawa. He graduated from the University with a Bachelor of Arts degree and subsequently obtained degrees in both common and civil law from the University. He was admitted to the Law Society of Upper Canada in 1967. From 1967 to 1970, he was the Executive Assistant to the Vice-Rector Academic at the University, and from 1970 to 1971 he was Legal Counsel and Assistant Secretary, a role which he also assumed from 1975 to 1982. From 1982 to 1989, he was the Associate Executive Director/Legal Counsel to the Association of Universities and Colleges of Canada, later becoming its Executive Vice-President/Legal Counsel. In 1990, he returned to the University of Ottawa as Secretary until his retirement in 2007. During his tenure as Secretary, Mr. Boucher assumed a number of duties, including Secretary to the Board of

Governors and Secretary to the Audit Committee; he was also a member of the University Senate and a member of the Executive Committee of the Senate.

[147] Mr. Boucher stated that prior to retiring on June 30, 2006 he was involved in dealing with the application of the FIPPA to the University. He observed that universities resisted being brought under this legislation, a view that was supported by the Council of Ontario Universities. Prior to the amendments to the Act, the University had developed its own policy (Policy 90) on access to information (Exhibit U-3). Mr. Boucher referred to a Research Report dated August 2004, which was prepared by the Ontario Confederation of University Faculty Associations (OCUFA). The OCUFA groups all university faculty associations in Ontario, including the APUO. The University had received an information request from the OCUFA on faculty hiring projections; in the response which he had prepared on behalf of the University, he refused to provide the information requested on the grounds that “disclosure of such information is expected to prejudice the economic or financial interests or the competitive position” of the University. (Exhibit E-7).

[148] Mr. Boucher stated that he is aware that the FIPPA does not apply to research or teaching materials. He observed that some of the exemptions were as a result of the OCUFA lobbying, and others because of lobbying from the Council of Ontario Universities. Mr. Boucher also observed that the University has access to a professor’s research material; he is not aware of any case where they had reason to access material without the consent of a professor. He is aware of one instance of a case involving researchers at the Royal Ottawa Hospital, who are affiliated with the University.

[149] He noted that if there were a submission to funding councils it would require a countersignature from the University. Also, there may be research protocols restricting data that concerns human subjects. He observed as well that sabbatical leave applications received by the University would contain detailed information concerning the professor’s curriculum vitae, as well as published articles. In addition, if a professor were applying for tenure the Joint Committee would rely on written dossiers provided by academic staff to make a decision. Mr. Boucher stated that he does not know of any university that would allow research data to be kept secret.

[150] The Employer’s next witness was Professor François Houle. Professor Houle has been the Dean of the Faculty of Social Sciences since July 2005, and was Associate Vice-President of the University from 2001 to 2005. During that period he was a member of the Senate and was on the Executive Committee for the Senate and the Council for the Evaluation of Undergraduate Programs. From 1992 to 1993, he was Chair of the Political

Science Department. He has also been Chair of the Undergraduate Studies Committee, the Graduate Studies Committee, the Admission Committee for Graduate Students as well as on the Hiring Committee. He has also sat on the FTPC. The Faculty of Social Sciences, which has 7,000 students and 250 faculty members, is the largest faculty at the University.

[151] Professor Houle referred to the Faculty of Social Sciences' By-laws (Exhibit E-14). By-law number 1 deals with the mandate and membership of the Faculty Council, which includes the deans, vice-deans and chairs of all the academic units. From one to four professors from each department sit on the Council; students are also represented. Professor Houle observed that the role of the Council is mainly to review and vote on everything that is going to the Senate (e.g. the creation of programs, changes to courses, the creation of an academic unit). As the Dean, he chairs the Council and organizes its agenda. Documents or records before the Council include all proposals dealing with academic changes. These would include the justification for changes to a program as well as the proposal as such, and the consequences of the changes. Every matter coming before the Council would have supportive documents. All course descriptions are voted by the Council following a detailed discussion about content. Learning objectives for courses would also be discussed. The Council would also have evaluations from students. The Council would also receive policy in support of faculty research (i.e. centres for research and laboratories). All of these functions receive money from the Faculty. If the Council agrees to create a centre, it would indicate the kind of research to be done, how it would be structured, the kind of reporting (i.e., on an annual basis) and the provision of research assistantships. The Council would not have documents containing the substance of a professor's research.

[152] The Faculty requires a report at the end of the year as a condition for providing research support. This report would include what has been published, the students that have been hired and the names of persons invited to conferences. For research projects the report would only note the results.

[153] By-law 2 number deals with the standing committees of the Faculty Council. This would include the Executive Committee, the Undergraduate Studies Committee, the Graduate Studies Committee and the FTPC. The Executive Committee, which includes the Dean, the Vice-Dean, chairs, administrative staff personnel and two students, would review documents going to the Faculty Council, which would discuss changes to policy and advise the Dean on academic and strategic planning. All changes to policy would be accompanied by supporting documents; the Executive Committee would also maintain minutes of their

meetings. Documents also originate from the Graduate Studies Committee, the Committee on Research, etc.

[154] The Committee for Undergraduate Studies consists of the Vice-Dean, Academic Studies, who chairs the Committee, one person from each academic unit (usually the Chair) as well as some students. This Committee is responsible for studying most proposals (for example, changes to programs and requirements for admission, creation of courses and the review of program evaluations). All proposals for the creation of or a change to a program have to be documented, outlining the advantages and disadvantages of the proposals. Records of teaching materials or research do not come before the Committee. The Graduate Studies Committee is very similar to the Undergraduate Studies Committee, with the same composition and a similar mandate. There is a faculty of graduate studies and proposals would often go to that faculty as well as before the Senate. It would not receive records of teaching materials or research.

[155] By-law number 2.5 governs the FTPC, which consists of five faculty members elected by all “regular” members of the Faculty. This Committee reviews proposals for contracts, renewals, promotions and sabbatical leave proposals requesting a reduced workload. The Committee would make recommendations, which, depending on their subject matter, would be submitted to different organizations. The Dean would also make recommendations, which would be separate from those of the Committee, although they usually do not diverge. Both the Committee and the Dean must justify their recommendations.

[156] With respect to consideration for a promotion, the Committee would receive an updated curriculum vitae that must include degrees obtained, publications, grants and teaching experience. It would also include the students’ evaluations of a professor. Professor Houle noted that every course has to be evaluated by students, although the evaluations are only considered if there is a minimum of six students in the course. When the evaluation forms are completed, they are submitted to an office within the Faculty Administration.

[157] When a professor is seeking a promotion, the Committee would also receive a letter from the academic members, which would include a list of referees as well as the curriculum vitae. There are three elements that are evaluated with respect to promotions: (1) service to the community; (2) teaching; and (3) research. The Committee examines the evaluations and would also ask for comments from the departments, i.e. either the DTFC or the Chair. The comments would be in the form of a letter from the Chair or minutes from DTFC meetings. The FTFC would submit two recommendations: one by the Committee

itself and one by the Dean. The recommendations would be sent to the Joint Committee of the Senate and the Board of Governors, who would make the final decision. The Joint Committee would receive the recommendation of the FTPC, its justifications and the results of the vote; it would also receive the Dean's recommendation and justification and all documents used to make the recommendations (that is, the curriculum vitae, the students' evaluations, external evaluations, etc). The external evaluations would emanate from three or four evaluators who would have received the curriculum vitae, the covering letter and samples of publications. Each evaluator would write a report with a recommendation that would be reviewed by the Chair or the FTPC. Members of the Committee do not use the documents put to the FTPC with respect to promotions for any other purpose; there is a distinct file respecting a member's promotion.

[158] With respect to leave applications, the member would provide to the Faculty his or her curriculum vitae, an explanation as to what the member proposes to do during the leave period, the reasons for the leave, the results expected, as well as a percentage of the salary that the member is seeking. When a faculty member returns from a sabbatical, he or she is expected to write a report on the results, perhaps a draft of a book or the results of research. The FTPC would make a recommendation to the Joint Committee. If the recommendation is a negative one, it is not forwarded to the Joint Committee. Professor Houle noted that documents received by the Committee are not used for any other purpose, except perhaps for a subsequent application. The same is true of documents received in respect of requests for unpaid leave. The Committee also deals with requests for tenure in the same way as requests for promotion. A professor can also request a reduced workload; the professor would submit a covering letter explaining the reasons. The decision would be made by both the Committee and the Dean, which would be submitted to the Joint Committee. No other documents are required, but a member can include other documents if he or she so wishes. These documents might be a medical certificate, copies of contracts with other agencies, etc. Again, this documentation is not used for any other purpose.

[159] Professor Houle explained that the Faculty consists of eight academic units: three departments, four schools and one institute. The role of the Chair in each case is to ensure that a department works well; the Chair is "first amongst equals." The Chair ensures that the department is well managed, oversees hiring processes and the timetable for courses. By-law number 3.1 outlines in detail the mandate of the department chairs. For example, paragraph (f) of 3.1.1 provides that department chairs would "sit on the Faculty's Executive Committee and the Faculty Council; chair the Departmental Assembly, as well as the teaching personnel and hiring committees."

[160] The role of the Departmental Assembly is set out in By-law number 3.1.3, which notes that “. . . each department is governed by a departmental assembly.” The Assembly makes recommendations on programs, changes to programs, or hiring; they would vote on these matters and send their recommendations to a research committee or a faculty council. The Assembly would deal with documents such as proposals and reasons for change, descriptions of programs, etc. Professor Houle observed that the Assembly would not receive records of a faculty member’s research or teaching. The By-laws provide for departmental standing committees that would include the DTPC. Professor Houle stated that the roles of these committees are similar to those of the faculty committees, but they would discuss how different courses overlap. Any documents that they would receive would be similar to those of the faculty committees. They would not receive research material from a faculty member but might examine a teaching syllabus if, for example, there was a complaint that two courses are similar.

[161] The Admissions Committee is also mandated by the By-laws. This Committee would examine a student’s file, which would include the student’s grade, the student’s curriculum vitae and letters of reference. Professor Houle stated that every year each faculty member must provide a report on his or her activities, as per section 23.1.2.1 of the collective agreement. The DTPC would receive the report along with the curriculum vitae, and any publications or grants would be noted. The academic staff member would also include information concerning service to the community, plans for research in the upcoming year and whether the member plans to ask for a promotion. He observed that the purpose of the report is to determine if the member has fulfilled his or her workload and responsibilities.

[162] Upon receiving comments from the DTPC or the Chair, the Dean would review this information and provide an evaluation with respect to workload to the member; this would be sent to the department of the faculty member and placed on the member’s file. As the Dean, Professor Houle would have access to that file, which would contain a number of pieces of information covering the entire career record of the member. Article 12 of the collective agreement (“Member’s file”) deals at length with the content of a member’s file and questions such as access and confidentiality. Section 12.1.1 provides as follows:

A member’s file consists of 3 sections: personal, confidential and open. The first is kept at Human Resources Service; the other two are kept in the dean’s office. Copies of documents from the open sector of the file may be kept in the department. Documents kept in any other locator or in any other manner shall not be considered part of a member’s file pursuant to this agreement and,

until placed in said file, shall not be used for assessment or evaluation of a member or to a member's detriment.

[163] Professor Houle stated that if there were confidential material (for example, a complaint from a student) it would be kept in a separate confidential file. He noted that in principle everything is accessible to the member, but names might be removed.

[164] With respect to the students' evaluations, Professor Houle observed that each evaluation consists of two parts; a series of multiple choice questions constitutes the first part and is sent to the University in the person of Joanne Beauchesne, who is in charge of the evaluations of all courses. The results would be examined and presented for all the classes. Two reports are released to the faculty members, one of which is an "A-Report", which refers to three of the questions. The A-Report is received by faculty members, the chair of the department and the Dean. Section 24.3.2.1 of the collective agreement sets out, among other things, the content of the A-Report. According to Professor Houle, the last page of the evaluation (the comment section) is sealed and only opened by the faculty member.

[165] The By-laws also mandate the establishment of a "hiring committee," which consist of two to four faculty members normally elected by the Departmental Assembly. The Chair strikes a committee when a faculty member is to be hired. It would receive the curriculum vitae, publications, any letters of recommendation as well as a description of the position. The Committee would meet with the candidates to make a recommendation to the Departmental Assembly as to who should be hired. The documents would only be used for the purposes of hiring. Professor Houle noted that school structures and departments are almost identical, although schools are normally larger and some may have a management committee. There are some inter-disciplinary programs that are managed by the Faculty directly rather than by a particular department. There is also a "programs coordinator" who chairs the Programs Committee and would assume some of the responsibilities of a department chair, including establishing a timetable. The Coordinator would have access to the same documents as the Chair and in addition would receive an evaluation of programs.

[166] There is also a Globalization Program Committee consisting of faculty members who may belong to different departmental units; it would deal with coordinating different courses to ensure that there is no overlap and would receive similar kinds of documents (e.g. a syllabus from the faculty member). Syllabuses from the Faculty of Social Sciences are provided by the professor to the Chair at the beginning of each term to ensure that the

regulations of the Faculty are respected (for example that no one evaluation comprises more than 70 percent of the marks).

[167] By-law number 5.1.1 sets out the role of the Dean; in essence, the Dean ensures that the Faculty fulfills all of the mandate that it receives from the University, manages the finances of the Faculty and engages in personnel management (for example, doing an annual evaluation of the members and assigning teaching loads). Professor Houle noted that the Faculty of Social Sciences also has three vice-deans but they do not have independent decision-making powers.

[168] According to Professor Houle, all programs are evaluated every seven years. A brief referred to as a "Self Report" is prepared by the academic unit and submitted to the Senate Committee for evaluation of undergraduate programs. External evaluators would prepare a report after meeting with the Dean, faculty members and some students. The department would have an opportunity to comment on that report, as would the Dean, who would receive both the external evaluation and the comments from the department. The Dean's comments would be submitted to the Senate Committee, which makes the final recommendation to the Senate and to the Board of Governors. Any changes recommended to the department would be expected to be followed through and it would have to provide further reports to the Senate until it is satisfied.

[169] Departments recommend hiring staff to the Dean, who would meet with the candidates and attend presentations made by them. The Departmental Assembly and the Chair would make a recommendation on hiring to the Dean, who would then submit a recommendation to the Vice-President Academic. The Dean however is not bound by the recommendation.

[170] "Workload attribution" includes research, teaching and community service. The Dean has the ultimate responsibility for determining workload with respect to teaching. The Dean would also receive an annual report concerning the evaluation of a professor's performance. If the Dean has concerns, he would notify the professor.

[171] Professor Houle noted that a supervisor of graduate students has to be involved in the research itself. The supervisor would be expected to apply to become a member of the Faculty of Graduate Studies. The application would be examined by the DTFC and the Chair, who would make a recommendation to the FTFC and it, in turn, would make its recommendation to the Faculty of Graduate Studies, as would the Dean. The application to

graduate studies consists largely of the supervisor's curriculum vitae, a list of publications, grants and contracts.

[172] A recommendation for the creation of a new course or program would usually emanate from the academic unit; if it is inter-disciplinary, it may be initiated at the faculty level. Sometimes, the impetus comes from the University Administration. This matter would always be voted upon by the Senate, and usually by the Faculty Assembly as well. Courses are managed by the academic unit and would have to be determined by a vote by the department and approved by the Faculty. Normally, all proposed changes to courses or programs are reviewed by the Program Committee and then referred to the Departmental Assembly, the Faculty, the Undergraduate Studies Committee, the University Undergraduate Council, the Executive Committee of the Senate and finally to the Senate.

[173] Professor Houle stated that the Committee on Research provides support through research within the Faculty, ensures that the members are aware of research and identifies strategic areas for research development at the faculty level. The Vice-Dean Research and five faculty members from different academic units sit on the Committee. He observed that if a faculty member applies to, for example the SSHRC for a grant, the application must be signed by the Faculty to ensure that it conforms to University policy. The University also receives applications for research projects, which are funded by the Faculty itself. The Vice-Dean and Committee would make a recommendation to the Dean, which he would normally accept.

[174] To apply for internal funding, the professor must submit his or her curriculum vitae and information on the research project, including the subject matter, methodology, the result expected (e.g. publication), and whether the professor has sought approval of the Ethics Committee. The Research Committee also addresses applications for reduction of teaching workload ("Teaching Releases"); this would be linked to a proposed research project. The Research Committee would make a recommendation to the Dean, who is responsible for allocating all teaching releases. There is no reduction in salary for a reduction of teaching workload. For this purpose, the professor would again submit his or her curriculum vitae, the nature of the research project, the teaching load for the last three years, a list of graduate students the professor supervised, and if the professor has submitted a research application to the SSHRC, that as well. A faculty member may also receive a teaching release from the SSHRC; the Dean, who will consider the research to be done and the usual teaching workload, must approve such an application. The professor would always submit to the Dean the SSHRC application along with the request for release.

[175] The Ethics Committee must review and approve all research activities that have an ethical component; that is, everything having to do with human subjects.

[176] The University also has a faculty facilitator who helps faculty members prepare SSHRC grant applications; the facilitator may review drafts and provide advice if requested by the faculty member. An application to the Canadian Fund for Innovation, which deals primarily with infrastructure issues, must be approved by the University, as it requires space and equipment. The application is done in the name of the University and the parties to the application are the University itself and the researcher, who is usually a Canada research chair.

[177] The University also has “Research Centres”, a group of researchers who develop a particular area and are expected to obtain outside grants and contracts. The Faculty would initiate a proposal to create a centre; the proposal would include the objectives, main activities, list of members, the structure as well as outcomes (in terms of publications and grants) and supervision of graduate students. The University Administration would need to approve the creation of the Centre, as it requires space and a budget.

[178] Professor Houle observed that every course taught at the University has a course description that must be approved by the six or seven committees noted above. The faculty members are expected to teach that subject; however, the methodology, emphasis and framework are not the responsibility of the Dean. With respect to research, he observed that faculty members obtain grants and the University manages the funding. Part of the funding is given to the University for over-head compensation.

[179] The Faculty also prepares a self-evaluation of programs, which consists of two volumes. The first volume contains information on the number of students, the structure of the program, the number of graduates and evaluations by students based on a questionnaire sent to former students as well as another questionnaire sent to current students. The second volume contains the curriculum vitae of the professors in the program. This documentation is received by the FTPC whose mandate, structure and membership are outlined in article 14 of the collective agreement.

[180] Professor Houle was asked about Exhibit U-2. He stated that given the new regulations, it was a “normal request to receive”.

[181] In cross-examination, Professor House stated that the Faculty receives \$14 million in total from all sources for research; about \$150,000 is invested by the Faculty

itself in research. The Faculty also provides from \$15,000 to \$30,000 as a start-up for each new faculty member over the first three years; this is not considered part of the overall research funding of \$14 million.

[182] With respect to a Teaching Release, he explained that there are two types: (1) from the SSHRC as part of its policy; and (2) for family-related reasons pursuant to Regulation 94. The Faculty also has a policy of granting five releases per year to allow members to support research. The first priority is given to faculty members who get SSHRC grants but no SSHRC releases. The faculty member must also be supervising at the graduate level and hire graduate assistants. He observed that the rationale for these releases is that by hiring graduate assistants, professors are enhancing their students' research skills.

[183] Professor Houle testified that the role of the Program Coordinator for Multidisciplinary Programs is not currently defined in the collective agreement; however, the Coordinator is a member of the Association.

[184] Professor Houle was asked about his perceived role of the Dean in light of the provisions of the collective agreement respecting collegiality, and in particular sections 5.1.2, 5.2.1.1 and 5.4. He responded that when assigning a teaching load he looks at the collective agreement, and when he writes a report concerning service to the community. He would also discuss problems regarding teaching or research with the faculty member.

[185] Professor Houle was also questioned concerning the process for promotion and the report of external evaluators. He observed that the FTPC and the Dean make recommendations on these matters. While the evaluations are an important part of their decision-making, they do not necessarily accept the external evaluations, although in most cases the Dean, the FTPC and the evaluators "are all on the same wavelength."

Arguments

For the Association

[186] On behalf of the Association, Ms. Pilon submitted that the request from Ms. Harrod, on behalf of the University Administration in the form of Exhibit U-2, constituted a violation of the collective agreement. In her submission, the request is not justified by invoking the FIPPA; the application of the FIPPA to the University did not alter the fact that documents in the possession of academic staff are not within the custody and control of the University. This grievance addresses in particular sections 5.1.2, 5.3.3, 5.3.4

and article 9 (“Academic Freedom”) of the collective agreement. The provisions of the collective agreement specifically references past practices, which is important in understanding how the University functions. Counsel also referred to section 10.3.2(e), which states that the Employer “shall not inhibit the free exchange and dissemination of ideas or information, nor deliberately interfere with any colleague’s performance of workload duties.” This is recognition of the culture of this Institution, which is also reinforced by the University’s own policy (Exhibit U-3). Counsel also noted that section 5.4.1, which addresses “Collegial process,” is also relevant, as is article 20, which deals with “Academic activities.”

[187] Ms. Pilon observed that the legislature has not defined “custody and control.” The decisions respecting this matter refer to “customary control,” which brings into play, among other things, the collective agreement.

[188] Counsel pointed out that the Association’s witnesses all stated that they never expected that documents in their possession would be under the control of the University. These witnesses had considerable experience at the University, came from a number of disciplines and had been involved in various aspects of the University (i.e., teaching, research, as well as administration). Ms. Pilon maintained that neither Professor Houle nor Mr. Boucher, who testified on behalf of the Employer, contradicted the testimony of the five Association witnesses.

[189] Ms. Pilon referred to The Association of Professors of the University of Ottawa v. The University of Ottawa (Grievance of Professor Anne Jefferson) (unreported award of Claude H. Foisy, Q.C., dated March 6, 1998), which dealt with the removal of a professor from the classroom. In upholding the grievance, the arbitrator found that the University had failed to consult with the Association, as is required under the collective agreement. Likewise, in this instance the University failed to consult with the Association prior to issuing Exhibit U-2. In so doing, the University failed to respect section 5.3.4 of the collective agreement.

[190] Ms. Pilon submitted that in order to give meaning to article 9 one must have due regard to the working conditions of academic staff. If the University asserts the right to custody and control of documents in the possession of members of the bargaining unit, those members will always fear that any of their documents could be revealed to the University. Ms. Pilon referred to the Supreme Court judgment in Mckinney v. University of Guelph, [1990] 3 S.C.R. 229; (1990), 76 D.L.R. (4th) 545, where the Court noted that academic freedom concerns the prevention of “censorship of ideas.” To protect against this,

academic staff have to be assured that documents in their possession are not accessible by the University. In York University v. York University Faculty Association (unreported award of Russell Goodfellow dated September 26, 2007), the arbitrator upheld the grievance objecting to a media release that the Union maintained had violated academic freedom. In that case, the arbitrator found that the actions of the University could reasonably be seen as having an inhibiting effect on the work of academic staff, and consequently constituted a violation of the academic freedom provision. In the instant case, the academic staff have testified as to why a claim of control and custody by the University would have a deterrent effect on the development of new ideas. Professor Fahim spoke of the importance of having control over the development of ideas with respect to research and what is done in the classroom. The University's assertion of control would, in fact, have a chilling effect on the development of ideas, both in the classroom and in research.

[191] With regard to article 20 ("Academic activities"), there was considerable evidence demonstrating the degree of autonomy exercised by academic staff at the University, both in respect of teaching and research. It is, in fact, one of the unique components of academic staff that they do have considerable latitude in fulfilling their duties, including the content of courses and teaching methodology used, albeit within the confines of the course description and the specific courses that staff are assigned. While they are employees of the University, they can determine the specific ways in which they fulfill their academic duties; this impacts on the documents in their possession and control. To allow the University to exercise control over their documents would constitute a direct violation of articles 9 and 20 of the collective agreement.

[192] Ms. Pilon stated that section 5.1.2 specifically incorporates past practices into the collective agreement. She observed that both Professor De Bruyn and Professor Fahim, who had been working at the University for many years, had never been asked to give over documents in their possession. While there are documents in a professor's office that are in the control of the University, the University would invariably have copies of these documents and consequently there would be no need to obtain them as part of a request under the FIPPA.

[193] Ms. Pilon referred to Policy 90 of the University, and in particular the "Scope" of the Policy, which was published in July 2004. This Policy defines what is in the custody and control of the University, which is also reinforced by section 10.3.2(e) of the collective agreement.

[194] With respect to testimony concerning the application of grants, this testimony revealed that while the University acts as the administrator of funding, it does not have the power to direct or interfere in the research which is the subject-matter of the grants. The receipt of funding does not result in professors losing control of their own documents. Both Professor Fahim and Professor Blute participated in outside committees, an activity they undertook on their own. This outside activity is not part of their workload and duties; it does however require communication with colleagues to generate ideas. Documents relating to this activity are clearly within the exclusive custody and control of the professors.

[195] Ms. Pilon noted that Mr. Boucher, who was certainly in a position to comment on Policy 90, did not do so, nor did he contradict the Association's witnesses. Furthermore, Ms. Harrod never testified to explain why the University felt that it was a requirement under the FIPPA to seek documents from academic staff.

[196] Ms. Pilon contrasted section 10 of the FIPPA with the exemptions under sections 12 to 23. While these exemptions are very detailed, section 10 contains no definition. She referred to several decisions of the Commissioner that address the issue of control. For example, in Township of King (Order MO-1251) the Commissioner referred to the "customary practice" of the Township as well as that of consultants retained by the Township. When comparing the customary practice of consultants, the difference between their relationship with their clients and that between the University and academic staff it is quite striking, particularly in view of article 20. In Halton Regional Police (Order MO-2142), the Commissioner's decision specifically referred to agreements between the Institution as being, at least in part, determinative of the issue of control.

[197] Counsel noted that section 65.(1)(8.1) of the FIPPA sets out, in paragraphs (a) and (b), exemptions to the application of the Act, including research conducted or proposed by an employee of an educational institution or with respect to teaching. However, this provision does not give an answer to this grievance. If this section exempted the records requested by Exhibit U-2, then it would not have been necessary to send the letter to academic staff. While in various exchanges of emails between the University and the Association the University changed its position, the University had not withdrawn Exhibit U-2. If the Employer maintains that it still requires Exhibit U-2 in order to make a determination as to which documents fall within the exceptions of section 65, then we are back to the original problem as to the application of the collective agreement. An examination of the legislative debates indicates that academic freedom was under consideration. However, the debates make no reference to section 65 and the exemptions

therein; essentially, one must fall back on an analysis of section 10 and the matter of “custody and control.”

[198] In conclusion, counsel stated that Exhibit U-2 is either too vague or too broad. From an examination of the original letter of the requestor (Exhibit U-28) it is apparent that it refers mostly to documents already in the control of the administration. There was in fact no need for the broad language used in Exhibit U-2 in order to satisfy the request. The transformation of Exhibit U-28 into Exhibit U-2 is contrary to the collective agreement, and in particular contrary to sections 5.3.3 and 5.3.4.

[199] As to remedy, the Association is seeking a declaration to the effect that Exhibit U-2 was improper and contrary to the collective agreement, and that documents in the possession of members of the bargaining unit, whether in print or electronic form, are not in the custody or control of the University - with the exception of those held by members in an administrative role such as the chair of a department, a vice-dean, a chair of a committee, as well as such documents related to the administrative functions that are not already in the University’s possession.

For the Employer

[200] Counsel for the University agreed that this matter is properly before the arbitrator, and requires a determination with respect to the interpretation and application of the collective agreement. Ms. Flaherty framed the issue to be determined as the following: For the purposes of the FIPPA, and having regard to the collective agreement, does the University have custody or control over certain categories of documents or records in whatever form and whether located at the University or elsewhere, such that the University can require the Association members to produce them in response to a FIPPA Access Request? In essence, the Employer is seeking a direction from the arbitrator as to what documents are in the custody and control of the University.

[201] Ms. Flaherty noted that the request for information (Exhibit U-28) came hot on the heels of the amendments to the FIPPA in June 2006. In response to the grievance, the Employer has taken a step back and is seeking direction from the arbitrator. Ms. Flaherty stated that the question of custody and control depends on the nature of the documents in accordance with the case law from the Commissioner and the tests set out therein. The Association’s assertion that the University already has the pertinent documents in its possession places the University in an untenable position. It is obliged under the FIPPA to provide access; the Association’s argument presupposes that the University has all the

documents being requested, yet the statute and the Commissioner's interpretation do not allow the Administration to make that assumption. In Re University of Alberta v. Non-Academic Staff Association (2006), 151 L.A.C. (4th) 365 (Sims), there was a dispute as to whether information can be revealed concerning a job posting, the employer arguing that the information was personal in nature and required consent prior to release. The arbitrator held that the collective agreement had to be read in conjunction with the relevant statute. A similar conclusion was reached in Canadian Office and Professional Employees Union, Local 378, v. Coast Mountain Bus Company Ltd., [2007] 165 L.A.C. (4th) 141 (Dorsey) – namely, that the collective agreement must be read in compliance with the Act.

[202] Counsel for the Employer stated that she agreed with the Association's interpretation of section 65.(1)(8.5) that it excludes research and teaching material; that is, the Act cannot require production of these kinds of documents. While the FIPPA did not change the nature of the documents, it did dictate a new context – namely, what documents are in the custody and control of the University for purposes of the Act.

[203] Ms. Flaherty referred to the Commissioner's decision in Ontario Energy Board (Order PO-2479), where the Commissioner noted a number of factors that may be relevant to the issue of custody or control, including "What is the customary practice of an institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?" Ms. Flaherty submitted that the first question to be determined is whether the material requested is teaching material, research material or related to labour relations, in which case the documents are excluded. If the documents are not caught by these exceptions, one should look to the criteria set out in Ontario Energy Board. She observed that while the FIPPA does not apply to research material, the University does have an important role to play in funding through the administration of grants.

[204] Ms. Flaherty stated that the certain documents clearly do not meet the custody and control test under the FIPPA, for example personal exchanges between staff as well as communications between the Association and its members. Ms. Flaherty observed that the notion of academic freedom does not supersede either the statute or the collective agreement, however one informs the other. It is clear that the legislature, when enacting the FIPPA, was entirely cognizant of the issue of academic freedom. Ms. Flaherty noted that Professor De Bruyn testified in cross-examination that if a request for documents did not relate to teaching or research he would not be concerned. He also testified that he had been requested to provide documentation by the University (for example, when applying for

tenure). While there had never been a request such as Exhibit U-2 before, this was largely because it was only recently that the University was subject to the FIPPA. Ms. Flaherty also maintained that section 10.3.2(e), and its prohibition against inhibiting the free exchange of opinions is in fact captured by the FIPPA by the exemption from access for research activities.

[205] Counsel submitted a chart she prepared which describes the records referred to by the various witnesses, under the headings of “Research,” “Teaching,” “Labour Relations” and “Other”. Ms. Flaherty also referred to article 20 of the collective agreement, which, among other things, describes, at section 20.2, paragraphs (a) to (e), what constitutes teaching activities. She agreed that these provisions should be defined broadly. she stated as well that in the Employer’s view the references under the “Teaching” column of her chart are excluded by the FIPPA (for example, with respect to the evidence of Professor de Bruyn, “teaching notes, course outline, unpublished texts distributed to students, exam questions, results of own research, texts published with own notes in margins, consultation with colleagues”). Counsel also noted section 20.3.2, which outlines activities that are considered to fall under the rubric of research. She agreed that there was no dispute as to the witnesses testimony as to what constituted research; this again should be defined broadly.

[206] With respect to “Labour Relations,” the Employer does not take issue with any documents that the Association witnesses identified as falling under that heading. As to documents described under the column “Other,” Ms. Flaherty observed that these documents related primarily to participation in committees. She noted that the Association agreed that the administrative work of chairs, vice-deans, etc., should be considered as documents within the custody and control of the University. According to Ms. Flaherty, to the extent that these documents do not relate to research, the FIPPA applies to them, and they meet the Ontario Energy Board (*supra*) test as being within the custody and control of the University.

[207] She observed that some of the documents used by the Admissions Committee might be subject to disclosure, but may also constitute personal information. Ms. Flaherty also noted that Professor De Bruyn had referred to budgeting and financial documents that he received in his capacity as chair of the department. She submitted that these documents should be considered under the custody and control of the University. However, the documents that he received in his executive role with the Scholarly Society are not under the custody or control of the University. With respect to personal notes of meetings, Ms. Flaherty stated that if they do not relate to teaching or research they may be subject to

custody and control; however, the Employer is of the view that personal notes respecting administrative matters are not in the custody and control of the University, in part because there may be personal information but also because there is no customary practice to have custody and control of such documents.

[208] With respect to Policy 90, counsel noted that this document preceded the FIPPA and was superseded by it. As a consequence of the amendments to FIPPA, it is the Commission that has provided the applicable test with regard to custody and control.

[209] On the matter of remedy, counsel stated that the evidence could not be exhaustive nor could the reasons provided in this award. The Employer is looking for guidelines as to what is under the University's custody and control and what constitutes teaching, research and labour relations activities. The Employer requests that the arbitrator not grant a specific remedy with regard to the scope of Exhibit U-2.

Rebuttal

[210] The Association replied to the Employer's submissions as follows. Ms. Pilon noted that section 10.(1) of the FIPPA did not supersede the collective agreement. She submitted that the criteria in the case law of the Commission did not reflect the particularities of the University's circumstances, although there are some aspects of the criteria that have applicability (for example, the "customary practice" of the Institution). Ms. Pilon also maintained that while the exemptions under the Act are clear, as noted above there is no definitive test for what constitutes custody and control in an academic context. Accordingly, it is necessary to look at the collective agreement to make that determination.

[211] With respect to the testimony of Professor De Bruyn, while he had provided documents to the University in several circumstances, he had done so on a voluntary basis for a specific purpose pursuant to the collective agreement (for example, sabbatical leave). None of the witnesses contended that a course's outline belongs to them alone or that the University should not have access to it, however that the exchange of emails leading up to its production should not be subject to the University's control.

[212] With respect to the exception under section 65.(1)(8.1), the Association argued that one should analyze the collective agreement, which circumscribes the rights of management; the collective agreement must be complied with, subject to any overriding statutory requirement. If the statute does not define custody and control, then one must

look to the collective agreement and past practices. That is, one must first look at section 65.(1) of the Act to see what is not covered by the legislation and then use the test of custody and control only in respect of matters not exempted by section 65.(1). The Employer acknowledges that the collective agreement cannot be ignored and that past practices should be used to define custody and control. According to the Association, each method comes to the same result, but the Employer's methodology is more complicated and does not address all of the issues.

[213] Ms. Pilon also submitted that the Employer's chart with respect to the evidence did not address the entire issue. Ms. Flaherty characterized some of the information held by the University as "personal information" and therefore not subject to access. However, this does not answer the question raised by the grievance. In fact, section 21, regarding exemption for personal information, is not disputed by the grievance.

[214] Ms. Pilon referred to page 6 of the Employer's chart where it characterized "professional activities with third parties" as not being in the University's custody or control. This is part of the mandate of the University and is an example of the professional activities of academic staff. There are documents in the possession of faculty members related to activities that are subsumed under article 20 of the collective agreement; while covered by the mandate of the University, they are not in its custody or control by operation of the collective agreement.

[215] Ms. Pilon also argued that while Ms. Flaherty maintained that the interpretation of teaching and research under the Act (i.e. the exemptions) should be given a liberal interpretation, nevertheless the case law suggests that a broad interpretation should be given to the right of access, particularly in light of section 1 of the Act; that is, the interpretation of exemptions should be interpreted restrictively. For example, it is unlikely that the exemptions would subsume emails concerning consultations on the teaching techniques of other staff. For example, a question may arise as to whether "personal notes of Committee meetings," which is referred to in the Employer's chart at page 7 under "Other," is subject to access. This is a matter of considerable concern for faculty members and is one of the major reasons for the grievance.

[216] Ms. Pilon suggested that this demonstrates that the Employer's proposal is not a practical way to answer the questions raised by the grievance, as it would continue to create a great deal of ambiguity and still require the need to determine the issue of custody and control. An analysis under section 65 of the FIPPA is not an answer to the grievance, as it

does not cover documents used in fulfilling section 20.1(c) (“Academic service activities”), nor does it necessarily cover all the activities under “teaching” and “scholarly activities.”

[217] In conclusion, Ms. Pilon stated that the Association is requesting a finding that documents in the possession of academic staff are not under the custody and control of the University, except those held by members in an administrative role, such as chairs of departments, etc., which are related to those administrative functions. These documents are in fact already in the University's possession. With respect to students' exams, she stated that the original of an exam written by a student is in the joint custody of the academic staff and the student. After it is corrected, the results are forwarded to Administration. She described an exam as a kind of a “grey zone” if the University's view is accepted.

[218] Finally, Ms. Pilon emphasized that notwithstanding the University's request for guidelines and its current reservations about Exhibit U-2, the Association is still left with Exhibit U-2, which continues to maintain the right to access a whole host of documents in the possession of academic staff. Accordingly, the Association continues to seek a declaration that the University does not have the right to obtain access to documents in the possession of academic staff, subject to exceptions for administrative work. She noted that the Association is not seeking damages in this case.

Reasons for Decision

[219] As noted above, this grievance was precipitated by an access request under the FIPPA, which, since June 2006, applies to university institutions, subject to the exemptions under section 65.(1)(8.1). More specifically, the subject grievance was generated in response to Exhibit U-2, a letter issued by the University's Secretary, Pamela Harrod, which in very broad terms sought from academic staff documents in their possession relating to the access request received by the University, so that the University could fully respond to that request.

[220] At the outset I would state that in my view the University has throughout acted in good faith. As counsel for the University pointed out, the access request was filed almost immediately following the June 2006 amendment. The University Administration was wrestling with its obligations to comply with the Act, with which it had very little familiarity. I do not doubt that in so doing the University never intended to violate the provisions of the collective agreement with the Association. However, I do agree with both counsel that the collective agreement does have relevance with respect to the determination of this matter —

in particular the question as to whether documents and communications in the possession of academic staff can be considered within the custody and control of the University.

[221] An analysis of the parties' respective rights and obligations in this context should begin with the FIPPA. Section 1 of the Act reads as follows:

The purposes of this Act are,

(a) to provide a right of access to information under the control of institutions in accordance with the principles that,

(i) information should be available to the public;

(ii) necessary exemptions from the right of access should be limited and specific, and

(iii) decisions on the disclosure of government information should be reviewed independently of government; and

(b) to protect the privacy of individuals with respect to personal information about themselves held by institutions and to provide individuals with a right of access to that information.

[222] Section 10.(1) is at the very heart of this dispute and it provides as follows:

Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,

(a) the record or the part of the record falls within one of the exemptions under sections 12 to 22; or

(b) the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[223] Section 18.(1) provides that "A head may refuse to disclose a record that contains. . . (b) Information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication."

[224] Section 65.(1)(8.1) has particular application in the context of this dispute. It reads as follows:

This Act does not apply,

(a) to a record respecting or associated with research conducted or proposed by an employee of an educational institution or by a person associated with an educational institution; or

(b) to a record of teaching materials collected, prepared or maintained by an employee of an educational institution or by a person associated with an educational institution for use at the educational institution.

[225] As noted above, it is common ground between the parties that the collective agreement informs and provides context to the application of the Act. The collective agreement provides a very comprehensive code (of over 300 pages in bilingual format) covering, among many other matters, the various committees and other governing structures of the University. I do not propose to reproduce here all of the provisions that may touch on this dispute. However, I have reproduced some of the more pertinent provisions, beginning with article 9 (“Academic Freedom”):

(a) The parties agree neither to infringe nor abridge the academic freedom of the members. Academic freedom is the right of reasonable exercise of civil liberties and responsibilities in an academic setting. As such it protects each member’s freedom to disseminate both inside and outside the classroom, to practice her profession as teacher and scholar, librarian, or counsellor, to carry out such scholarly and teaching activities as she believes will contribute to and disseminate knowledge, and to express and disseminate the results of her scholarly activities in a reasonable manner, to select, acquire, disseminate and use documents in the exercise of her professional responsibilities, without interference from the employer, its agents, or any outside bodies. All the above-mentioned activities are to be conducted with due and proper regard for the academic freedom of others and without contravening the provisions of this agreement. Academic freedom does not require neutrality on the part of the member, but rather makes commitment possible. However, academic freedom does not confer legal immunity, nor does it diminish the obligation of members to meet their duties and responsibilities.

(b) The parties agree that no censorship based on moral, religious, or political values shall be exercised or allowed against any material which a member desires to be placed in the library collections of the University of Ottawa.

[226] Sections 5.3.3 and 5.3.4 provide as follows:

Section 5.3

Management rights

...

5.3.3 The employer agrees that the management rights which are subject to this agreement shall only be exercised in accordance

with the provisions of this agreement and pursuant to reasonable interpretation of these provisions.

5.3.4 The employer further agrees that in exercising those management rights which are not subject to this agreement, it shall neither attempt to circumvent the provisions of this agreement nor act in a manner inconsistent with the terms and conditions of employment set out therein.

[227] Section 5.4.1 sets out in very clear language the importance which the parties attribute to the collegial process:

Collegial process The parties recognize that the collegial process is a fundamental element of university life. The parties undertake to respect that principle and thus recognize the right and responsibility of members to participate individually, each in accordance with her own responsibilities, in the formulation of policies and procedures for the functioning of the University of Ottawa and take part in the work of appropriate committees, councils and assemblies.

[228] Sections 20.1 to 20.4 provide a detailed description of the various functions of academic staff:

**Section 20.1
General provisions**

The functions of a member of the academic staff include, in varying proportions:

- (a) teaching activities;
- (b) scholarly activities revealed by research, artistic or literary creation or professional work;
- (c) academic service activities.

Specific activities corresponding to those 3 functions are listed in the next 3 sections, it being understood that these lists are not exhaustive and are not in order of priority.

**Section 20.2
Teaching**

Teaching includes the following activities:

- (a) giving courses, conducting seminars, guiding tutorials and laboratories, and supervising individual study projects;
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- (b) preparing and correcting assignments, tests and examinations;
- (c) guiding the work of teaching assistants, markers and laboratory instructors;
- (d) supervising, guiding and evaluating students' individual work, such as theses and papers;
- (e) granting individual consultations outside of class or laboratory time;
- (f) participating in the development of teaching methods, programs or course content;
- (g) preparing instructional material, laboratory exercise and course notes for the member's own students;
- (h) writing textbooks; and
- (i) serving as a thesis examiner at the University of Ottawa.

All other activities in which the member engages for the purpose of preparing courses and seminars, including those undertaken to ensure that her teaching is in keeping with the current state of the subject taught, are considered teaching activities.

20.3.1 General provisions

20.3.1.1 Scholarly activities are those which contribute:

- (a) through research, to the advance of knowledge in a discipline;
- (b) through artistic or literary creation, to the advancement of the arts and the letters;
- (c) through various professional activities, to the advancement of a profession.

20.3.2.2 Scholarly activities referred to in this agreement are those whose form makes peer evaluation possible and those which aim at being communicated in a form permitting peer evaluation.

20.3.2.3 It is understood that the existence of a scientific, artistic or literary works, or professional activities is not – in and of itself – proof of competence or satisfactory performance in scholarly activities.

20.3.3 Research

20.3.2.1 Research includes the following activities:

- (a) conceiving, developing and carrying out research projects, individually or with others;
-

- (b) conceiving, developing and carrying out critical analyses of existing knowledge;
- (c) presenting the results of research or critical studies at, or actively participating in, scholarly meetings, colloquia, or research groups;
- (d) preparing reports, articles, chapters or books presenting results so the member's research or critical studies, including works published in collaboration with others;
- (e) guiding master's and doctoral theses, provided such guidance contributes to the advancement of knowledge;
- (f) preparing innovative textbooks, and developing innovative teaching materials or methods, which may be used by others;
- (g) work done under contract, provided it contributes to the advancement of knowledge, and the results are accessible in a form permitting peer evaluation;
- (h) editing of a scholarly publication, where there is evidence that the member's work extends beyond customary editorial duties and includes a significant contribution to the advancement of knowledge.

20.3.2.2 Any work related to the immediate and normal preparation of courses is not considered part of research activities, in the sense of this collective agreement.

20.3.3 Artistic or literary creation Artistic or literary creation includes the following activities:

- (a) producing original works or forms of expression;
- (b) conceiving, developing and carrying out for publication artistic projects or literary criticism.

20.3.4 Professional activities Professional activities include:

- (a) making contributions to the practice of a profession beyond those normally required of a practitioner who is not a university professor;
- (b) making valuable contributions to the advancement of the profession itself.

Section 20.4 Academic service

Academic service activities include specific activities such as the following:

- (a) administrative activities such as chairing a department, or coordinating undergraduate studies within a department;
- (b) participating in the work of committees of a department, a faculty, or the university, or otherwise contributing to the effective operation of the University of Ottawa or one of its constituent parts;
- (c) contributing to the effective operation of the Association by serving as an officer of the Association or on its Board of Directors, or participating in the work of one of its committees or constituent parts;
- (d) contributing to the effective operation of AUCC, CAUT or OCUFA by serving on their governing bodies or participating in the work of their committees;
- (e) counselling or advising students;
- (f) serving as chair of a thesis committee at the University of Ottawa or thesis examiner or supervisor elsewhere;
- (g) referring submissions for scholarly publications;
- (h) editing scholarly publications;
- (i) contributing to the effective operation of learned or professional societies by serving on their governing bodies or participating in the work of their committees;
- (j) contributing to the effective operation of granting agencies or evaluation organizations, such as MRC, SSHR, NSERC or OCGS, as examiner or committee member;
- (k) contributing to community projects which are related to the role of the university.

[229] In the course of this hearing the differences between the parties have narrowed considerably. The University has at least implicitly recognized that there may well be documents originated by and in the possession of professors that are not in the custody and control of the University, as that term is used in the FIPPA. Both parties have also agreed that the collective agreement informs and provides context to the notion of “custody and control,” as do the practices and customs at the University vis-à-vis the three major academic endeavours: (1) teaching, (2) research, and (3) community activities. I entirely agree with them in this respect. The University, through its counsel, has at least implicitly acknowledged that Exhibit U-2 (the letter from Ms. Harrod) is too broad, in that it fails to take into account either the exemptions under the Act or the provisions of the collective agreement that may impinge on the University’s right to seek the documents identified in

Ms. Harrods' letter. I agree with that conclusion and accordingly I find that Exhibit U-2 is contrary to the collective agreement and should be withdrawn.

[230] This, however, begs the question as to what, if any, documents that may be in the possession of academic staff are subject to the Act. This remains a relevant question, if for no other reason than the academic staff are indeed employees of the University. Nevertheless, in light of the collective agreement and the age-old customs and practices of academic institutions, including the University of Ottawa, it can hardly be argued that university professors are typical employees who are subject to the close scrutiny of management. In general, the evidence demonstrates that in the context of the various governing structures of the University, which are described in detail above, the academic staff have a considerable degree of independence in the exercise of their academic functions ,i.e. teaching, research and community activities. Indeed, it is hard to conceive how they could fulfill those functions without such latitude and independence.

[231] None of the above observations would be contested by either party. Nevertheless, there still remain some differences between them as to the application of a request under the FIPPA. The Association maintains, generally speaking, that except for administrative matters exercised by certain of the academic staff (such as chairs of departments and vice-deans), the Act has no application to its members in light of the collective agreement. While recognizing the importance of the collective agreement in this context, the University would not go this far. Rather, it is seeking some guidelines in this award as to what documents, in whatever form, may be within its custody and control, subject to the exemptions in section 65. Counsel has stated that it would be impossible to provide a comprehensive statement on this issue. I also agree with her in on this point. However, In the interest of assisting the parties, I will make some observations with respect to this issue.

[232] I would first note that in my view the sweeping, broad brush approach advocated by the Association, while tempting because of its relative simplicity, is not in accord with the jurisprudence, which has consistently found that the Act should be given a liberal and purposive interpretation (see for example the Ontario Energy Board decision, *supra*). As employees of the University it is conceivable that academic staff may be in possession of documents which are neither subsumed by the exemptions under the Act, nor can be characterized as being strictly related to University administrative matters. For example, in some circumstances student evaluations may fall into this gray zone. In fact, academic staff can be required in the course of the exercise of their responsibilities to provide information to the administration for certain limited and specific purposes. One example is the

requirement to submit information concerning research to the Ethics Committee when human subjects are involved. In a number of contexts (e.g. applications for tenure, sabbaticals, internal funding of research) professors are expected (and have complied with this requirement) to submitted fairly detailed information concerning their activities, mostly regarding research projects. It is at least arguable that these requirements are not entirely subsumed under the rubric of “administrative matters”.

[233] However, I do agree with the Association that in particular the provisions of the collective agreement such as section 20 that describe in detail the scope of teaching and research activities should be used to put flesh on the bare bones of the exemption provisions of section 65.(1)(8.1). This approach is consistent with the Commission’s decisions (e.g. Township of King, *supra*) which speaks of “the customary practice” of institutions and the parties they contract with.

[234] Counsel for the University has readily acknowledged that there are a number of types of documents, including emails, research papers, etc. in the possession of academic staff that are not in the custody and control of the University. The documents following into this category are summarized in detail above under the heading of Arguments for the Employer. One obvious example are communications between the Association and its members. Other examples are exchanges between professors and persons outside the University sphere relating to their private work, such as Professor Leclerc’s psychology practice. I would also include here, e.g. Professor Morin’s work with the North American Benthological Society. This is merely illustrative of some of the types of documents in this category, and is not intended to be in way comprehensive. I would indicate however that I endorse Ms. Flaherty’s view that the various types of documents she refers to in this context are beyond the purview of the Act.

[235] The Association acknowledges that documents related to the administrative functions of certain academic staff, such as chairs of departments; vice-deans, etc., can be considered within the custody and control of the University. I would agree with this assertion. As to what may specifically constitute documents of this nature, I would suggest that it includes correspondence with the Administration between these individuals concerning these functions including minutes of meetings and documentation of conclusions reached, subject always to the protection of “personal information” as that term is used in the Act.

[236] In conclusion, I find that Exhibit U-2 is contrary to the collective agreement and should be withdrawn. I appreciate that some of the observations made above with respect to

documents that may be in the custody and control of the University are far from comprehensive or definitive. Accordingly, I shall remain seized of this matter in the event that the parties need to seek further guidance with respect to the application of the access request to specific types of documentation.

[237] To the extent noted above, this grievance is upheld.

[238] DATED AT OTTAWA, ONTARIO, September 29, 2008.

Philip Chodos,
Arbitrator
