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File: 566-02-9648

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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

STEVEN LUKITS

Grievor

And

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Lukits v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Bernard A. Hanson, counsel

For the Employer: Christine Langill, counsel

Heard at Kingston, Ontario,
February 2 and 3, 2017.

I. Individual grievance referred to adjudication

[1] Dr. Steven Lukits ("the grievor") is employed as a full-time associate professor of English at the Royal Military College of Canada ("the College") in Kingston, Ontario. He is a member of the University Teaching (UT) bargaining unit that is represented by the Canadian Military Colleges Faculty Association ("CMCFA") and bound by the collective agreement between the Treasury Board and CMCFA that was signed on March 11, 2011, and that expired on June 30, 2014 ("the collective agreement").

[2] On March 22, 2013, the Access-to-information ("ATI") Coordinator at the Canadian Defence Academy ("CDA") received an ATI request about a course, English ENE 453 (War Literature II), which the grievor taught at the College ("the ATI request"). It asked for the production of the course materials, lecture slides, handouts, course packages, and the grievor's handwritten notes that he had prepared for the course ("the course notes").

[3] On November 5, 2013, the grievor received a letter dated October 29, 2013, from the Chief of Military Personnel stating that had to comply with the complete requirement of the ATI request, which included producing the course notes.

[4] On November 28, 2013, the grievor filed a grievance with respect to the order to produce the course notes and requested the following:

> 1) a declaration that the employer had breached the provisions of the collective agreement and the *Access to Information Act* (R.S.C., 1985, c. A-1; *AIA*);
>
> 2) an order requiring the employer to cease and desist from such breaches in the future; and
>
> 3) such further and other relief as the CMCFA may request and as the adjudicator considers appropriate in all the circumstances.

[5] The grievor complied with the order and produced the course notes, under threat of discipline.

[6] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365; *PSLREBA*) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board (PSLREB) to replace

the former Public Service Labour Relations Board (PSLRB) as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; *PSLRA*) before November 1, 2014, is to be taken up and continue under and in conformity with the *PSLRA* as it is amended by s. 365 to 470 of the *Economic Action Plan 2013 Act, No. 2.*

[7] On August 27, 2015, counsel for the employer objected to the jurisdiction of an adjudicator to hear the matter and requested that the parties use the scheduled hearing days to address the employer's objection to jurisdiction before dealing with the merits. Counsel for the grievor concurred. I issued a decision on January 13, 2017, dismissing the employer's objection (2017 PSLREB 6).

[8] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent, changing the name of the PSLREB and the titles of the *PSLREBA* and the *PSLRA* to, respectively, the Federal Public Sector Labour Relations and Employment Board ("the Board"), the *Federal Public Sector Labour Relations and Employment Board Act*, and the *Federal Public Sector Labour Relations Act* ("the *Act*").

II. Summary of the evidence

[9] The grievor testified and called three witnesses. The employer called one witness.

[10] The College was founded in 1874 for the purpose of establishing a complete education in all branches of military tactics, fortification, and engineering and in general scientific knowledge in subjects connected with and necessary for thorough knowledge of the military profession. In 1959, the *Royal Military College of Canada Degrees Act, 1959* was passed by the Ontario Legislature. It empowered the College to confer degrees in arts, science, and engineering.

[11] At the time the grievance was filed and as of the hearing, the grievor was employed by the Treasury Board as a full-time associate professor at the College. As of

the hearing and since July of 2015, he was the chair of the College's Writing Centre. He has a bachelor of arts from Trent University (awarded in 1972) and both a master's degree (awarded in 1977) and a PhD (awarded in 1984) from Queen's University, all in English literature.

[12] Before his employment at the College, the grievor was both a lecturer and an assistant professor at Queen's University and an assistant professor at the University of Manitoba. Between 1989 and 2002, he also worked as an editor with the Kingston Whig Standard newspaper. His first employment at the College ran from September of 1988 to April of 1989 as a sessional associate professor. He returned to the College in August of 2002, and from then until the present, he has held a number of positions, which included (between July of 2005 and June of 2012) being the head of the English Department.

[13] The grievor confirmed that as a federal public servant, he is bound by the *Values and Ethics Code for the Public Sector* ("the V&E Code"), a copy of which was entered into evidence.

[14] On March 22, 2013, the ATI Coordinator forwarded the ATI request to the CDA for the Chief of Military Personnel. The email stated as follows:

. . .

> *SUBJECT/OBJET: Copy of course materials, lecture slides, hand-outs, course packages and hand written notes prepared for and/or by Dr. Steven J. Lukits Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013."*
>
> *1. The enclosed electronic ATI request is fwd for your action. Please provide your submission to CMP ATI Coord at the latest on the target date indicated above. OPI(s) are to advise CMP ATI Coord immediately upon receipt of tasking if following conditions apply:*
>
> *a. the tasking should be re-directed to another Directorate;*
>
> *b. supplementary information amy be avail from another Directorate;*
>
> *c. the time required for the "search" is expected to be more than five(5) hours; and/or*

> *d. additional consultations are necessary.*
>
> *2. If your Directorate does not have any documentation to provide, a nil return is required (email will be accepted).*
>
> *3. All relevant documentation must be submitted. If you consider that some details of a document should not be released, follow the procedure outlined in the enclosed Access to Information Act (AIA) OPI Guidance Checklist sheet.*
>
> *4. It is your Directorate's responsibility to identify all relevant exemptions and the related sections of the AIA. You must use a YELLOW HIGHLIGHTER to identify the exemptions and also note the related AIA sections in the right margin on the page being reviewed. Only those exemptions identified in the AIA section(s) will be contemplated. The final decision for disclosure rests with DAIP.*
>
> *5. DND must reply to ATI requests within the prescribed time limits or face liability. In some cases, where a valid reason can be justified, the CMP ATI Coord will try to obtain an extension from DAIP on behalf of the OPI(s). Your cooperation is appreciated. Thank you.*
>
> . . .
>
> [*Sic* throughout]

[15] Section 4 of the *AIA* provides that subject to that Act but despite any other Act of Parliament, every person who is a Canadian citizen or a permanent resident within the meaning of s. 2(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) has the right to and shall, on request, be given access to any record under the control of a government institution.

[16] The *AIA* defines "government institution" as any department or ministry of state of the Government of Canada, any body or office listed in Schedule I to the *AIA*, or any Crown corporation and any wholly owned subsidiary of one within the meaning of s. 83 of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*). It defines "record" as any documentary material, regardless of medium or form.

[17] The Department of National Defence is listed in Schedule I to the *AIA*.

[18] The grievor testified that the course notes specified as part of the ATI request were with respect to the English ENE 453 (War Literature II) undergraduate course, which he taught in the 2012 to 2013 school year. He confirmed that he received the March 22, 2013, email notification and the ATI request and that he then met and spoke

with Dr. Joel Sokolsky, the principal of the College.

[19] The position of principal is a Governor-in-Council appointment. It reports to the College's commandant but is independent of the military and so is not part of its chain of command.

[20] The grievor stated that with respect to all the material specified in the ATI request except for the course notes, he and Dr. Sokolsky agreed that since it was already available to the students, it would be handed over, and was, within days of that discussion. The grievor also stated that at that time, Dr. Sokolsky told him not to turn over the course notes.

[21] The evidence disclosed that the principal's office asked for and received a legal opinion from the local judge advocate general ("JAG") office.

[22] The grievor testified that after his initial discussion with Dr. Sokolsky, and after he had turned over the other material, they had a further discussion. He said that by then, he had learned that under provincial law, course notes were not subject to ATI requests. The second discussion centred on the issue of academic freedom at the College and how producing the course notes could be a blow to it. Dr. Sokolsky was concerned from the College's perspective and at both a personal and professional level.

[23] On April 4, 2013, the grievor received an email from Lt.-Col. Paziuk, who worked in the principal's office. It stated as follows:

> *Steve,*
>
> *Sorry I missed your call, I was stuck in a meeting and just missed you. The Principal has heard back from the JAG, and according to the legal opinion from him, because your course notes were created while you employed by the Crown to teach, they are considered co-owned by the Crown and therefore are subject to compliance with an ATI request. In other words, the JAG believes you need to hand over the notes. However, the JAG has promised a written response which Dr Sokolsky will then share with you so that you can decide what to do next. I will also ask MWO Merrick to determine what are the ramification if you refuse the request. We'll talk tomorrow.*
>
> . . .

[*Sic* throughout]

[24] On that same day, the grievor and Dr. Sokolsky had a meeting at which they discussed the JAG's opinion that the grievor had to hand over the course notes. The grievor said that at the meeting, Dr. Sokolsky told him that he would not compel him to turn over the course notes and reiterated that he felt that doing so would be a blow to academic freedom.

[25] On April 5, 2013, the CMCFA, on the grievor's behalf, wrote to Dr. Sokolsky, stating as follows:

. . .

> *We are writing in regard to the Access to Information (ATI) Request A-2012-01998 seeking copies of course materials, lecture slides, hand-outs, course packages and hand written notes prepared for and/or by Dr. Steven J. Lukits, Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013.*
>
> *It is the position of the Canadian Military Colleges Faculty Association that these documents do not constitute "a record under the control of the institution" pursuant to section 4 (1) of the* Access to Information Act. *Rather, by custom and law, such documents are in the custody and control of Professor Lukits, not the Royal Military College, and therefore are not amenable to the request.*
>
> *In this regard we refer you to:*
>
> > University of British Columbia v. University of British Columbia Faculty Association, *Before: J.E. Dorsey (Arbitrator), 125 L.A.C. (4th) 1, [2004] B.C.C.A.A.A. No. 39, confirmed , BCLRB No. B56/2006, 2006 CanLII 6155 (BC LRB)*
> >
> > The Association of Professors of the University of Ottawa v. University of Ottawa, *Before: P. Chodos (Arbitrator): Award, Supplementary Award No. 1, Supplementary Award No. 2*
> >
> > Order PO-3009-F; University of Ottawa (Re), *2011 CanLII 74312 (ON IPC)*
> >
> > Order PO-3084; University of Ottawa (Re), *2012 CanLII 31568 (ON IPC)*

> *In these circumstances we respectfully request that the College cease efforts to compel the production of Professor Lukits' course material. Barring withdrawal of the request, the Canadian Military Colleges Faculty Association will take the necessary legal steps to ensure the rights of our members, and of the College as an academic institution, are upheld.*
>
> . . .

[26] On April 8, 2013, Dr. Sokolsky wrote to Brig.-Gen. Eric Tremblay, the College's commandant, stating as follows:

> . . .
>
> *Dr. Lukits has agreed to provide his course outline and copies of material handed out or presented in class. He has, however, declined to provide his course notes.*
>
> *I sought out the opinion of our local JAG officer, Major J Peck. As indicated by the attached, Major Peck has advised that as Dr. Lukits is an employee of RMCC, a government institution he is obliged to provide his notes, but that he may apply for some of the material to be exempted; a decision that would, not, however be made by him.*
>
> *Dr. Lukits has also sought the assistance of the Canadian Military Colleges Faculty Association (CMCFA). As indicated by the CMCFA has advised me, citing several previous cases, that Dr. Lukits is not obligated to provide course material on the grounds that these documents do not constitute "a record under the control of the institutions" pursuant to section (4)1 of the* Access to Information Act.
>
> *In view of the differing legal advice thus far received, I concur with Dr. Lukit's decision to decline to hand over his course notes.*
>
> *Apart from the legal issues, I am very concerned about the origins and vagueness of this request and believe that to accede to it would set a troubling precedent which would call into question academic freedom at RMCC.*
>
> *I therefore strongly recommend that you seek support from CMP to exempt Dr. Lukit's class note from this ATI request. Should you also concur with this request, LCol Paziuk will prepare a BN and the necessary documentation as required.*
>
> . . .
>
> [*Sic* throughout]

[27] In a briefing note dated April 9, 2013, for the Chief of Military Personnel, Dr. Sokolsky supported the grievor's position with respect to the course notes, stating as follows:

> ***BRIEFING NOTE FOR CMP***
>
> ***ACCESS TO INFORMATION REQUEST A-2012-01998***
>
> *References: A. Access to Information Request (ATI) A-2012-01998*
>
> *B. Letter from Canadian Military Colleges Faculty Association dated 5 April 2013*
>
> ***PURPOSE***
>
> *1. The purpose of this Briefing Note is to seek CMP's support regarding the release of Dr Lukits personal course notes as requested in Ref A.*
>
> ***BACKGROUND***
>
> *2. Dr S.J. Lukits, a full time professor at RMCC, received an ATI request at Ref A seeking copies of his course materials, lecture slides, hand-outs, course packages and hand written notes prepared for his course, ENE 453, "War Literature II" taught at RMCC between September 2012 and 18 March, 2013.*
>
> *3. Dr. Lukits has agreed to provide his course outline and copies of material handed out or presented in class. He has, however, declined to provide his course notes.*
>
> ***DISCUSSION***
>
> *4. This ATI request for course material would appear to be the first time such a request has been received at RMCC. Although Dr. Lukits is a full time employee he does consider his course notes as his personal notes and it is normal practise of the College that course notes are treated as personal property of the individual and are not held under the control of the College. Concern was expressed by Dr. Lukits that release of this material could infringe upon his right to academic freedom as provided in the collective bargaining agreement.*
>
> *5. The RMCC Principal sought out the opinion of our local JAG officer, Major J Peck. As indicated by the attached, Major Peck has advised that as Dr. Lukits is an employee of RMCC, a government institution, he is obliged to provide his notes, but that he may apply for some of the material to be*

> *exempted; a decision that would, not, however be made by him.*
>
> *6. Dr. Lukits also sought the assistance of the Canadian Military Colleges Faculty Association (CMCFA). As indicated by the CMCFA at Ref B, they have advised the Principal, citing several previous cases, that Dr. Lukits is not obligated to provide course material on the grounds that these documents do not constitute "a record under the control of the institutions" pursuant to section 4(1) of the* Access to Information Act. *The CMCFA representative indicated that it is prepared to take additional legal action to block the release of these course notes should DND continue to request them.*
>
> *7. The Principal concurs with Dr. Lukits' decision to decline to hand over his course notes. Apart from the legal issues, he is concerned about the origins and vagueness of this request and believed that to accede to it would set a troubling precedent which would undermine the individual efforts of professor and call into question the academic freedom at RMCC. It should be noted that under provincial access to information legislation, universities are exempt from having to provide course material due to this very issue.*
>
> ***RECOMMENDATION***
>
> *8. It is strongly recommended that CMP support this request that Dr. Lukits' course notes be exempted from this ATI request and that DAIP be requested to exempt this material.*
>
> . . .
>
> [Emphasis added]
>
> [*Sic* throughout]

[28] On April 22, 2013, the Office of the Commander of the CDA wrote to the Chief of Military Personnel. The grievor confirmed he received a copy. It attached the briefing note (dated April 9, 2013), the ATI request, and the April 5, 2013, letter from the CMCFA. The Office's letter stated in part as follows:

> . . .
>
> *2. Dr. Lukits agreed to provide the course outline and other materials which were package and sent to CMP ATI Coordinator on 04 April 2013. However, Dr. Lukits has refused to provide his own personnel course notes on the principal of "academic freedom" (Refs A & B). In accordance with the Federal Access to Information Act, there are no provisions to exempt (severance) the personal notes of a University Professor. Under the Ontario*

> *Provincial Freedom of Information and Privacy Protection Act (FIPPA) such a provision exists.*
>
> 3. *The AJAG in Kingston has been consulted and his advice was that Dr. Lukits works for DND and as such must provide the requested material. As the sole federally owned University in Canada, the ATI Act may have failed to recognized such unusual requests for University Professors working for the Federal government to submit personal course material.*
>
> 4. *I fully support the position taken by Dr. Lukits in view of the protection offered to non-Federal University Professors by Provincial ATI Acts. I would like to see the Act amended to reflect the unique situation of University Professors in not having to provide personal course material which is unique among each and every professor.*
>
> . . .
>
> [*Sic* throughout]

[29] By letter dated October 29, 2013, which the grievor received on November 5, 2013, the Commander of the CDA ordered that the grievor had to comply with the complete requirement of the ATI request.

[30] In the summer of 2013, Harry Cole replaced Dr. Sokolsky as the College's principal. The grievor stated that Principal Cole showed him the October 29, 2013, letter and ordered him to turn over the course notes. He explained to Principal Cole why he had objected to turning them over; however, Principal Cole's response was that there was an order that the College had received and that the grievor had to obey it and hand over the course notes.

[31] On November 26, 2013, Lt.-Col. Paziuk and Major Peck, the local JAG officer, exchanged the following emails, which were forwarded to the grievor:

> [From Major Peck to Lt.-Col. Paziuk, at 10:02 a.m.:]
>
> ***Sir,***
>
> ***1. Have Mr. Lukitis call my assistant and she will book an appt this week. I did a quick check of the Access to Information Act and I bring to your attention s. 67.1(1) & (2). In addition I suspect sanctions from the collective bargaining agrt may also apply***
>
> . . .

> [From Lt.-Col. Paziuk to the grievor, at 10:35 a.m.:]
>
> *Steve,*
>
> *I was directed by the Principal to contact Maj Peck from the JAG office on Base to see if he could offer you some assistance or advice regarding your ATI case. Maj Peck provided some notes below but has also offered to meet with you this week should you wish to book an appointment with him.*
>
> . . .
>
> [Emphasis in the original]
>
> [*Sic* throughout]

[32] The grievor testified that shortly after that email exchange, Major Peck came to his office and reiterated to him that he had to turn over the course notes. He made his arguments to Major Peck, who told him that according to the military, the College is not considered a university but a military unit, and that he had to comply with the order to hand over the course notes.

[33] On November 28, 2013, the grievor filed a grievance against the order to hand over the course notes. Also on that day, the president of the CMCFA wrote to the CDA, the relevant portion of which is as follows:

> . . .
>
> *It is the position of the CMCFA that Dr. Lukits complied with the legislation when he originally provided the requested course materials on March 26, 2013. Dr. Lukits has formally filed a grievance with respect to this matter, and the CMCFA will be representing him on all issues relating to this request.*
>
> . . .

[34] On January 21, 2014, the president of the CMCFA wrote to the Principal of the College and stated as follows:

> . . .
>
> *The handwritten notes prepared by Dr. Steven J. Lukits have been subject to an access-to-information (ATI) request, and it is the position of the CMCFA and Dr. Lukits that these notes are not within the custody and control of the institution.*

> *These documents do not constitute "a record under the control of the institution" pursuant to section 4(1) of the* Access to Information Act. *Rather, by custom and law, such documents are in the custody and control of Professor Lukits, not the Royal Military College, and therefore are not amenable to the request.*
>
> *A grievance has been filed on November 28, 2013, alleging that being the case, the Employer has no authority to compel him to produce his course notes and such an order contravenes articles 5, 6.01 and 8.01 of the collective agreement.*
>
> *On Tuesday January 14, 2014, the University has indicated verbally that the requested records must be submitted before Wednesday January 22, 2014, failing which Dr. Lukits will be subject to Administrative actions (discipline).*
>
> *In order to avoid sanctions, Dr. Lukits is providing his "handwritten notes prepared for and/or by Dr. Steven J. Lukits, Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013", under reserve of all his rights and of all the Association's rights. Without limiting the foregoing, this is to advise you that the submission of such notes by Dr. Lukits expressly is without prejudice to the grievance dated November 28, 2013.*
>
> . . .

[35] The grievor testified that he did hand over the course notes.

[36] The parties advised me that the employer was holding on to the course notes. It had not released them and was awaiting a decision in the grievance and adjudication processes. A copy of the course notes was produced at the hearing in the employer's brief of documents. It appeared that there was no agreement to enter them into evidence, on consent. Each page of the course notes was stamped. "Copyright Steve Lukits 2013".

[37] The grievor identified the course notes and said that he stamped them as they are original to him in their arrangement and composition for classes and potentially for his research; they are personal and private.

III. The collective agreement

[38] The terms and conditions of the grievor's employment are governed in part by

the collective agreement. Article 2 is entitled "Interpretation and Definitions", and clause 2.01(j) defines "employee" as a person so defined by the *Act* who is a member of the bargaining unit. Clause 2.01(s) defines "UT" as an employee as defined in clause 2.01(j).

[39] Section 2 of the *Act*, at the time the grievance was filed, defines "employee" as follows:

> ***employee,*** *except in Part 2, means a person employed in the public service, other than*
>
> *(a) a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;*
>
> *(b) a person locally engaged outside Canada;*
>
> *(c) a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> *(d) a person who is a member or special constable of the Royal Canadian Mounted Police or who is employed by that force under terms and conditions substantially the same as those of one of its members;* [see however *Mounted Police Association of Ontario v. Canada (Attorney General)* 2015 SCC 1]
>
> *(e) a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;*
>
> *(f) a person employed on a casual basis;*
>
> *(g) a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;*
>
> *(h) a person employed by the Board;*
>
> *(i) a person who occupies a managerial or confidential position; or*
>
> *(j) a person who is employed under a program designated by the employer as a student employment program.* (fonctionnaire)

[40] Article 5 of the collective agreement is entitled "Academic Freedom and Academic Responsibility", and it states as follows:

General Definition

5.01 *UTs have a right to academic freedom. Academic freedom does not confer legal immunity, nor does it diminish the responsibility of UTs to fulfil their academic obligations. It is defined as the freedom, individually or collectively, to pursue, to develop and to transmit knowledge through research, study, discussion, documentation, production, creation, teaching, lecturing and writing, regardless of prescribed or official doctrine and without constriction by institutional censorship. It includes:*

The Freedom to Teach, and Its Responsibilities

5.02 *UTs teaching courses have the right to the free expression of their views on the subject area, and may use and refer to materials and their treatment thereof without reference or adherence to prescribed doctrine.*

In such circumstances, the UT is expected to cover topics according to the calendar description, to remain up to date in the knowledge of the discipline, treat students fairly and ethically, and teach effectively; which includes using fair, reasoned and fact-based arguments and showing a willingness to accommodate the expression of differing points of view.

The Freedom to Research, and Its Responsibilities

5.03 *UTs have the freedom to carry out scholarly research within areas of their expertise without reference or adherence to prescribed doctrine. This should not be interpreted to preclude or inhibit the ability of UTs to develop new areas of expertise.*

UTs are expected to meet established ethical guidelines for work with animal or human subjects, to deal fairly with colleagues and students, to carry out their research in the spirit of an honest search for knowledge, and to base findings upon a critical appraisal of available evidence and a reasoned analysis of its interpretation.

The Freedom to Publish, and Its Responsibilities

5.04 *UTs have the right to publish the results of their research, without interference or censorship by the institution, its agents, or others. This should not be interpreted as prohibiting the UT from accepting restrictions upon publication as a condition of receiving support for the UT's research from a sponsor.*

Researchers have a responsibility to report findings honestly and accurately, and to recognize appropriately the

contributions of others to the work they report.

Freedom of Expression, and Its Responsibilities

5.05 *UTs have the right to freedom of expression.*

UTs who are commenting in their areas of disciplinary expertise are bound by the same obligation to honest and accurate scholarship which attends the right to publish research.

In the exercise of this right, UTs shall not create ambiguities as to whether they are speaking in a professional capacity or as private citizens, nor shall they claim to speak on behalf of the College unless so authorized.

Academic Freedom and the Specific Mission of the CMC

5.06 *The special mission of the College does not diminish the academic freedom of the UT. Nonetheless, the special mission makes the College vulnerable to harm from misunderstandings that may arise from public discussion or publication in areas that speak directly to that special mission. This places on the UT, embarking upon such public discussion or publication, a somewhat greater responsibility for clarity than might attend similar actions in areas not closely associated with the mission.*

The College will be better placed to correct any public misunderstandings and assure the UT's academic freedom, if the College and the UT are in a position to anticipate the impact of the UT's discourse. To this end, UTs are encouraged to advise the Principal before any anticipated public discussion or publication which, in the opinion of the UT, relates closely to the special mission of the College.

[41] Article 6 is entitled "Management Rights". Clause 6.01 states as follows:

6.01 *All the functions, rights, powers and authority that the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.*

[42] Article 8 is entitled "Past Practices" and states as follows:

8.01 *Where this Agreement is silent on working conditions, the conditions existing immediately before the date of this Agreement shall continue to apply provided that:*

(a) they are not inconsistent with the Agreement;

(b) they are reasonable, certain and known;

> *(c) they may be included in this Agreement in accordance with the* Public Service Labour Relations Act*;*
>
> *and*
>
> *(d) they are carried out in a fair and equitable manner.*
>
> ***8.02*** *The onus of establishing an existing practice within the meaning of 8.01 shall rest on the party who alleges the existence of same.*

IV. <u>The grievor's work description</u>

[43] The grievor's work description was entered into evidence, the relevant portions of which are as follows:

> . . .
>
> *Key Activities*
>
> - *Creates undergraduate and graduate academic courses for all levels in all areas of a discipline and Creates undergraduate and graduate academic courses for all levels in all areas of a discipline and supervises the academic work of students involved in graduate degrees and examines their theses.*
> - *Develops curricula, academic programs, developmental activities and assists in the formulation of academic policy.*
>
> . . .
>
> - *Creates, publishes and defends, in private and public fora, new knowledge in one or more subdisciplines within a discipline and adds to an established body of his/her own work.*
> - *Monitors/mentors the work of associates and colleagues by acting as a peer reviewer for their research project manuscripts, papers and reports.*
> - *Leads multi-disciplinary research teams composed of members of the academic community and the private and public sector.*
>
> . . .

Work Characteristics

Responsibility

(1) Information for the Use of Others

Develops undergraduate and graduate academic courses at all levels in all areas of a discipline, designs and organizes course material into a series of lectures, seminars or laboratory classes and delivers lectures to teach officer cadets, officers and other students in a variety of settings that include classrooms, offices, laboratories, the field and other interactive settings; provides advice and supervises the academic work of students involved in graduate degrees and examines their theses. This information is used by students to expand their knowledge, and to develop their scholarly, technical and experimental skills for application in various military, public, or private environments.

Develops curricula, academic programs, and provides input into the development of academic policies of a Department (i.e., RMC). This information is used by senior management to make policy decisions, and by faculty members to develop courses, course material, and allow them work within the policy parameters of the Department (i.e., RMC).

With complete latitude to select research topics within a chosen discipline, and complete latitude to make decisions on how research will be conducted and disseminated, designs and conducts original research and disseminates the findings through publication in international, peer reviewed books, journals and presentations at national and international scientific or scholarly conferences, extension courses and departmental briefings; adds to intellectual property developed independently or in collaborative research projects with industry or other interest groups in a focus of knowledge within a discipline. This information contributes to the world body of scientific or scholarly knowledge and can influence new directions in research and policy. It is also used for licencing to external clients and to collect royalty revenues for RMC and the government.

Writes scientific or scholarly works, such as manuscripts, papers and reports, for the development, exploitation and dissemination of new scientific and scholarly knowledge, results and discoveries, which are made available to research sponsors, professional peers, and the public. This information is used by internal and external clients to enhance their own research and by the public to keep abreast of new developments within the academic community.

. . .

Reviews and referees research manuscripts, proposals, and reports by peers and colleagues and reports on them to academic publishers, journal editors, conference chairs and funding agencies. This information is used by national and international scholars and researchers to keep up with new developments in their field and to advance their own work, and by funding agencies to make decisions developments in their field and to advance their own work, and by funding agencies to make decisions related to research grants.

. . .

*(2) **Well-Being of Individuals***

Provides academic and personal counselling to assist individual cadets (all of whom are residents) to solve personal or study related problems or issues or to develop individualized learning programs for military members who have demonstrated exceptional potential in the field. Establishes a collaborative relationship with the student to understand his/her situation. Assesses and determines the real nature of the student's problem, whether academic or personal, and develops a plan of action, including follow-up. Refers the student to an internal or external specialist if required. [Note: Professors in this environment operate under the principle of 'duty of care' and have professional ownership and responsibility for these students 24 hours a day.]

Counsels graduate students on similar issues, including the development of the Masters or Ph.D. theses.

. . .

*(6) **Ensuring Compliance***

Reviews articles, reports and manuscripts for possible publication in books, learned journals and peer reviewed fora, to ensure compliance with standards accepted by the international scientific and scholarly community. Has authority to make recommendations to the originator for amendments and corrections.

Monitors student compliance with College rules, including those published in the College calendar and Cadet Wing Instructions, regarding such matters as attendance, punctuality, classroom behaviour, plagiarism and harassment as well as meeting the academic or professional standards of the academic discipline. There is a latitude to monitor behaviour and recommend dismissal to either senior academic or military staff.

[*Sic* throughout]

[44] On May 27, 2014, the grievor was provided with the final-level grievance response, which stated as follows:

. . .

> *This is the final level response to your grievance where you allege that the act of compelling the production of your course notes in response to an* Access to Information *request has contravened articles 5, 6.01 and 8.01 of your collective agreement. I have carefully reviewed the circumstances of your grievance, including the representations made on your behalf by Helen Luu, your representative from CMCFA.*
>
> *I note that you are a professor at the Royal Military College of Canada (RMCC) which is the only federally regulated university in Canada and, therefore, subject to the* Access to Information Act (ATIA). *In accordance with this legislation, I have determined that your teaching material does fall under the control of the RMCC and there are no exemptions contained within the* ATIA *regarding teaching materials. Additionally, your collective agreement states, at article 5, that "*academic freedom does not confer legal immunity*". Therefore, the order to comply with the* ATI *request was not a contravention of articles 5, 6.01 nor 8.01 of your collective agreement.*

. . .

V. Evidence on how course notes are prepared and used

A. The grievor

[45] The grievor testified that as a professor of English Literature, he teaches many texts and that depending on the year, the syllabus for a course could change. He keeps a list of the texts that he teaches and maintains a file folder for each one in which he keeps notes he has made for and about it. He keeps notes over the years for each text and uses them as aide-memoires. He uses them to select what to talk about. The notes do not remain static; they can and do change over the years, and additions and deletions are made as time passes. He also uses the file folders and notes for research ideas and to follow up on publications and conference presentations.

[46] As an example, he described using his notes with respect to two texts written by George Whalley, who was a young naval officer during World War II. Mr. Whalley witnessed the sinking of the German battleship Bismark. Mr. Whalley wrote about it after returning to port, and published in 1961. The grievor testified that as far as he is aware, he is the only person teaching from these texts. He presented a paper about

Mr. Whalley's writing in 2016, which he later used as a basis for an article he wrote that was published in the *Queen's Quarterly* journal published by Queen's University. He said course notes have a wide range of use that go beyond teaching and they are original to him and come from no one else. He would have maintained such notes in his folder on Mr. Whalley's texts.

[47] The grievor testified that he often finds texts or portions of them that he copies and places in his work files. He may not use them to teach a specific course, but they may have something to do with or may in some way, in his view, be related to materials he has maintained over the years. He makes notes about those materials and places them in folders.

[48] The grievor said that he often makes notes in the context of personal study and research and as an academic and a university professor, which is a scholarly activity. He stated that in this day and age, some do it on their phones. Course notes are personal, tentative, and unfinished. They are not meant for a stranger to review.

[49] The grievor stated that no one at the College ever told him that he was required to prepare or keep course notes; nor was he aware of any standards he was required to maintain if he did prepare and keep them, including their content or the form in which they are to be made, kept, or stored. As far as he was aware, his course notes have never found their way into the employer's records. Nor did the employer place any reliance upon them (or on those of any other person teaching at the College) for the purpose of College administration.

[50] The grievor said that except for the ATI request, the employer has never required him or any other person teaching at the College, as far as he was aware, to provide their course notes or to make them accessible to anyone.

B. Professor Delaney

[51] As of the hearing, Douglas Delaney was a professor at the College, teaching history and war. He started there as a commissioned officer in the Canadian Armed Forces ("CAF") after receiving his PhD in 2001. He left the CAF in 2009 but remained at the College as a bargaining unit member in the UT classification. He said that two types of personnel are appointed to the teaching level at the College, which are civilians who are members of the bargaining unit and commissioned officers in the

CAF who may be assigned to teach.

[52] Dr. Delaney testified that between 2007 and 2012, he was the chair of the War Studies department. He said that his duties included chairing the war studies committee, which set the academic standards for the program.

[53] Dr. Delaney was shown a copy of the College's "Institutional Quality Assurance Process Manual" dated November 14, 2013, and was asked about governance and quality control of programs. He said that as part of the quality assurance process, external evaluations are carried out, following a framework set out by the Ontario Universities Council on Quality Assurance ("the OUCQA"), which is the governing body in Ontario that oversees and approves the quality of all academic programs across the province. He confirmed the statement in that manual that the College has developed a protocol for reviewing its academic programs that meets both the OUCQA's requirements and its internal standards for academic accountability. In general terms, he set out the process for establishing a course at the College.

[54] Dr. Delaney said that as part of the programs he taught, he was required to set out both a calendar and a syllabus. With respect to delivering course materials, he prepared notes, and depending on when they were made, they could have different formats. They tended to be bullet points of questions to himself, to remind him to talk about certain things. He would often type his notes and store them so that he could both review and revise them, depending on the circumstances. When he was asked how he used his notes, Dr. Delaney said that they guided him as to what to talk about and that they kept him on point.

[55] Dr. Delaney stated that he understood that his notes were just that, his notes; they were only for his use, and they would go nowhere. When he taught, he would speak and provide information via other means, such as PowerPoint slides. When he was asked if the College required him to prepare class notes, he stated that it did not and that doing so was up to the individual professor. When he was asked if he was aware of any standards with respect to the content or form of notes or storing and maintaining them, he again said that he did not. When he was asked if the College prescribed standards or requirements for distributing or dispersing class notes, he said, "Not at all."

[56] Dr. Delaney said that as far as he knew, no class notes that he or anyone else that he was aware of had prepared had been integrated into the employer's records in any way. As far as he knew, the employer did none of the following:

- rely on his notes with respect to his employment;
- rely on his notes with respect to the College's administration; and
- require him or anyone, to his knowledge, to let it have access to course notes.

[57] He stated that he kept his notes in a cabinet on the College's premises.

[58] In cross-examination, Dr. Delaney was brought to the College's mission statement. He agreed that its mission is to produce officers with the mental, physical, and linguistic capabilities and the ethical foundation required to lead in the CAF. He also said that while the College is still largely a university that provides officer training to the CAF and whose cadet student population has its tuition paid through the Defence Academy, civilian students also attend. When he was the chair of the War Studies program, 65% of students were civilian. He stated that overall, only about 9 or 10% of undergraduate students are civilian, while the percentage in graduate programs is higher.

C. Professor Boulden

[59] As of the hearing and since January of 2004, Jane Boulden was a professor at the College, and between 2006 and 2012, she was the associate chair of the War Studies program. She has four degrees from Queen's University, which are a bachelor of arts (honours) in political science, a master's degree in political science, a master's degree in law, and a PhD in political science.

[60] Dr. Boulden was asked about her practice with respect to using her course notes. She said that they are mostly handwritten and could be as little as a few lines or as much as one or two pages. She makes them solely for her own use, with no intent on them ever being released to anyone.

[61] She said that while she was at the College, she was never required to make course notes, and that to the best of her knowledge, neither was anyone else. She was not aware that the employer had imposed any standards with respect to the making,

form, storage, distribution, or disposal of course notes. To her knowledge, no course notes that she or any other person teaching at the College had prepared had been integrated into or formed part of the employer's record. She was not aware that the employer placed any reliance on course notes for any purpose. As far as she was aware, the employer did not require her or any other employee who taught at the College to provide their course notes to anyone. When she was asked what she did with her course notes at the end of teaching a course, she said that sometimes she kept them and that sometimes they were put out for recycling.

D. Professor Errington

[62] As of the hearing, Elizabeth Jane Errington was retired from the College. She has a bachelor of education degree from the University of Toronto, a bachelor of arts (honours) from Trent University, a master of arts degree in history, and a PhD in history from Queen's University. Between 1984 and September of 2011, she held several positions at the College, including as an assistant professor of history, an associate professor of history, a professor of history, the chair of the History Department, and the Dean of Arts. From 1999 to the present, she has held a one-third position as a professor of history at Queen's University.

[63] Dr. Errington explained the accreditation process in Ontario that permits universities to grant degrees. She said that the Council of Ontario Universities ("COU") accredits universities, that the College is a university accredited in Ontario to grant degrees, and that it is a member of the COU. She testified that she has been involved with the COU with respect to both preparing and reviewing accreditation submissions. While she was on the College faculty, she oversaw the preparation of documents to submit to accredit courses for other departments at the College. She has reviewed accreditation submissions from the University of Western Ontario, Nipissing University, McMaster University, and Laurentian University.

[64] She said that the College is a member of the Association of Universities and Colleges of Canada ("AUCC"), which has been renamed Universities Canada. Membership in the AUCC allows university degrees conferred in one province to be recognized in other provinces.

[65] Entered into evidence was a copy of the *Report of the Commission on Governance of the Royal Military College of Canada* ("the Governance Report") dated

April of 2013, which identifies and discusses 12 issues related to the College's governance structure. At page 12, paragraph 23, under the heading "Issue 6: Decisions on academic matters", the second bullet point states as follows:

> *Academic degrees at RMCC are awarded by virtue of an Act of the Ontario Legislature. Like other universities in Ontario, RMCC is a member of the COU, albeit an Associate member because it is financed by the federal government. Continued membership in COU — the main quality control and accountability body for Ontario Universities — is contingent on meeting eligibility criteria, including adherence to principles of academic freedom and responsibility. RMCC is also a member of AUCC; to maintain membership universities must satisfy a set of criteria that are virtually identical to the eligibility criteria for COU. Institutions must reaffirm their adherence to these criteria every five years, and it is the Board of Governors that does so.*

[66] Dr. Errington confirmed that at both the College and Queen's University, she taught graduate and undergraduate courses. She stated that she made course notes by hand, in point form, which she described as a road map for her to follow. She made them for her own use and not for anyone else, including students, colleagues, or her employer. While she taught at the College, she was never required to make course notes. To the best of her knowledge, no one else was required to make them. She was not aware that the employer imposed any standards with respect to the making, form, storage, distribution, or disposal of course notes. To her knowledge, at the College, no course notes that she or any other person teaching there had prepared had been integrated into or had formed part of the employer's record. She was not aware that the employer placed any reliance on course notes for any purpose. As far as she was aware, the employer did not require her or any other employee who taught at the College to provide their course notes to anyone.

[67] When Dr. Errington was asked what she did with her notes at the end of a course, she stated that if she taught the same course the following year, she might have held on to them, but that typically, she destroyed them. When she was asked if her practice at Queen's University differed in any way from her practice at the College, she replied that it did not.

E. Other evidence

[68] As of the hearing and since 2009, John O'Connell was the deputy director of the

DND's Access to Information and Privacy ("ATIP") Office. He has been with the ATIP directorate since 1996, starting as an analyst, then moving on to become a team leader and finally the deputy director. Before 1996, he was in the military reserve.

[69] Mr. O'Connell described the ATIP process at the DND and set out how it determined what constituted a record under the control of an institution. According to him, the course notes are the employer's records because the College is part of DND; therefore, they are covered. When he was asked how course notes related to the College's business, he stated that he did not understand the question.

[70] None of Lt.-Col. Paziuk, Major Peck, Maj.-Gen. Tremblay, Dr. Sokolsky, or Mr. Cole testified.

VI. Summary of the arguments

A. For the grievor

[71] The grievor referred me to *Canada (Information Commissioner) v. Canada (National Defence)*, 2008 FC 766 ("*Canada v. DND (FC)*"; upheld in 2011 SCC 25 ("*Canada v. DND (SCC)*")); *Canada Post Corporation v. Canada (Minister of Public Works*, [1995] 2 FCR 110 (C.A.); *Canada (Privacy Commissioner) v. Canada (Labour Relations Board)*, 1996 CanLII 4084 (FC) ("*Privacy Commissioner v. CLRB (FC)*"; upheld in 2000 CanLII 15487 (FCA) ("*Privacy Commissioner v. CLRB (FCA)*")); *Re: University of Ottawa*, [2011] O.I.P.C. No. 152 (QL; "*U of O*"); *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229; and *York University v. York University Faculty Association*, [2007] O.L.A.A. No. 550 (QL).

[72] The primary issue is determining what constitutes a record under s. 4(1) of the *AIA*. The test is set out and reviewed in detail in *Canada v. DND (FC)*. Just because a document is in a minister's office and relates to a departmental matter does not necessarily mean it is under the control of the government institution. That is an important point because in cross-examination, it was the only question put to the grievor's witnesses about their practices. It was put to them that they made course notes as part of their duties and that doing so was related to their employment, which is insufficient to find control.

[73] Paragraphs 144 and 145 of *Canada v. DND (FC)* address notes taken by exempt staff. They state that no one at the DND had ever asked for the notes or to be provided

with a copy of them. It was clear to the Court that the notes were barely legible, coherent only to the author, and not intended for any other person.

[74] *Canada v. DND (SCC)* basically states the same principles as *Canada v. DND (FC)*, which are that physical possession is not determinative. At paragraphs 55 and 56, steps are set out to determine whether something is under a government department's control. The first question is whether it relates to a departmental matter. If so, the enquiry does not end; it is merely not stopped. Once it is determined that the record relates to a government department, the SCC stated that all relevant factors must be considered to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the record's substantive content, the circumstances in which it was created, and the legal relationship between the government institution and the record holder.

[75] *Privacy Commissioner v. CLRB (FC)* discusses notes taken by members of a quasi-judicial tribunal at a hearing. While the CLRB was able to produce the notes for review, that was not the test for establishing control over them. There was no requirement in either the legislation or CLRB policy for board members to make or keep notes; they were free to make them or not make them. The notes were only for their eyes, and their authors viewed them as their own. They were responsible for the care and safekeeping of the notes and were free to destroy them at any time. The notes were not part of the CLRB's official record and were not contained in any other record-keeping system over which the CLRB had administrative control. The fact that notes are kept on a government institution's premises does not bring them within the institution's control.

[76] Nothing in the jurisprudence suggests that the factors to consider when determining control must be balanced against the broader purpose of transparency. It does not state that premise; nor should it be a consideration.

1. <u>Academic freedom</u>

[77] *U of O* was rendered under provincial legislation. A request was made for documents that individual professors possessed, not the university. In that case, the professor's bargaining agent filed a grievance alleging that the production order contravened the recognized practice of academic freedom. At paragraph 123, the decision states as follows:

> *123 . . . it is clear that **academic freedom** is an important right, and one with a vital role to play in a democracy such as Canada. These authorities also support the view that **academic freedom** does not arise solely from the collective agreement; rather, it is a pre-existing and independent right that informs the university's ability to access, use and regulate information and records in the possession of its faculty members.*
>
> [Emphasis in the original]

[78] *U of O* drew a distinction between administrative records and documents that deal with teaching and research. Administrative records are in a university's control, but that presumption could be rebutted. Documents that deal with teaching and research are protected by academic freedom, and it is outside the university's custody to inspect them. That is not overridden by the fact that an employee created one.

[79] The grievor referred me to *McKinney*, at 375, where it states as follows:

> *The claim of the university teacher is that he and his fellows, whatever their legal position as employees, are in fact members of a professional community and should be considered to enjoy the rights of a learned profession. That is, they collectively should determine what shall be taught, how it shall be taught, who shall be qualified to do the teaching, and who shall be qualified to receive the teaching. In a word, they should be self-governing as are the members of other learned professions. Academic freedom is the collective freedom of a profession and the individual freedom of the members of that profession.*

[80] The grievor submits that I should adopt that concept of academic freedom with respect to his situation and grievance.

[81] *York University* dealt with material distributed on campus that made certain pronouncements that the university administration saw as anti-Semitic. The author was a university professor. The university acknowledged that the Professor was engaged in an academic exercise, albeit if only, as it acknowledged, broadly defined. That said, the Arbitrator found that the distribution of the material was protected by academic freedom, which the collective agreement covered.

[82] The grievor submitted that the evidence strongly supports the conclusion that course notes were not under the employer's control, as a matter of either fact or law. The evidence of the other witnesses called on his behalf supports that position,

as does the evidence from the employer's own documents, the letter from Dr. Sokolsky.

[83] The evidence disclosed that article 8 of the collective agreement applies. The consistent practice about working conditions before the collective agreement was entered into was that course notes were treated as personal property not under the College's control.

[84] The grievor produced the course notes as part of his teaching responsibilities. They are covered by article 5 of the collective agreement, which protects academic freedom.

[85] There was some suggestion that because members of the College's teaching staff were federal public servants employed by the DND, the principles of academic freedom do not apply in the same manner to them as to those in the provincial sector. In this respect, the grievor referred me to the Governance Report. Additionally, article 5 states that academic freedom is not diminished by virtue of the College's special mission.

B. <u>For the employer</u>

[86] The issue is whether the course notes listed in the ATI request constitute a record under the control of a government institution, as set out in s. 4(1) of the *AIA*. To grant the grievance, the Board must find that documents prepared by an employee in the performance of his or her duties do not fall under a department's control and therefore are not subject to the *AIA*. Such a finding would be contrary to the governing legislation and the jurisprudence.

[87] The grievor had the burden of proof.

[88] The College was created under s. 47(1) of the *National Defence Act* (R.S.C., 1985, c. N-5), and its mission is to train officers for the CAF.

[89] The grievor is a DND employee and is subject to the V&E Code. Part of it covers democratic values, which require all public servants to help ministers under law serve the public interest.

[90] Under the heading, "Responsibility (1) Information for the Use of Others", the grievor's work description sets out that he is to develop courses, design and

organize course materials into a series of lectures, and deliver lectures to teach officer cadets, officers, and other students. He designs course material and lectures, which are records. He does so in line with a course calendar. The ATI request was made relative to a course. A course listed in the calendar links to its syllabus.

[91] Course notes are linked to preparing material for the courses the grievor teaches; that is his job.

[92] Control is different in each case and depends on the circumstances. "Control" is not a defined term. In *Canada v. DND (SCC)*, the Court set out that "control" is not a defined term in the *AIA*. It should be given a broad and liberal interpretation.

[93] Physical control is not determinative. The Federal Court has set out a two-step process. The first step is determining whether the record relates to a departmental matter; if not, the matter ends. If it does, then the second step must be considered, which is that all relevant factors must be considered, meaning the substantive content of the record, the circumstances in which it was created, and the legal relationship between the government institution and the record holder.

[94] The grievor designs his lectures. According to the work description, he is paid to do that. The substantive content is delivering the lecture or course. The *National Defence Act* vests control in the DND. The reasonable expectation test is objective. Someone should be able to obtain a copy of the record. The test and the record have been made out.

[95] If a student has a medical note, the employer has certain obligations. Part of an accommodation may be to provide lecture notes to a student, which can be obtained and provided under s. 45 of the *National Defence Act*. Boards of inquiry may obtain any record.

[96] Section 4(b) of the *National Defence Act* provides that research with respect to the defence of Canada vests in Her Majesty.

[97] The notion of the grievor's ideas being covered by copyright is dealt with in the *Copyright Act* (R.S.C., 1985, c. C-42), s. 12 of which states as follows:

> *Without prejudice to any rights or privileges of the Crown, where any work is, or has been, prepared or published by or under the direction or control of Her Majesty or any*

> *government department, the copyright in the work shall, subject to any agreement with the author, belong to Her Majesty and in that case shall continue for the remainder of the calendar year of the first publication of the work and for a period of fifty years following the end of that calendar year.*

[98] Section 32.1(1) of that Act provides that it is not an infringement of it to disclose material pursuant to the *AIA*.

[99] The *Public Service Inventions Act* (R.S.C., 1985, c. P-32) provides that inventions vest in Her Majesty.

[100] The employer submitted that not only could the course notes be reasonably provided but also that Brig.-Gen. Tremblay confirmed that they had to be provided. The authority lay with Brig.-Gen. Tremblay, who exercised it and issued the direction to comply with the request to produce the course notes.

[101] The College's principal reports to its commandant. In this environment of a chain of command, a direction was issued, and the notes were to be provided.

[102] Clause 5.02 of the collective agreement is not a catch-all academic freedom clause; it has limits. Article 6 sets out that unless certain rights and responsibilities are negotiated away, the employer manages the workplace.

[103] The employer also referred me to *Canada v. DND (FC)*; *Canada v. DND (SCC)*; *Canadian Association of Professional Employees v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 100; *Professional Institute of the Public Service of Canada v. National Research Council of Canada*, 2013 PSLRB 88; Brown and Beatty, *Canadian Labour Arbitration* (4th Ed.), Chapter 4, "The Collective Agreement", section 4:2100, "The Object of Construction: Intention of the Parties"; *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254; *Canadian Broadcasting Corporation v. National Capital Commission*, [1998] F.C.J. No. 676 (QL); *Canadian Imperial Bank of Commerce v. Canada (Human Rights Commission)*, 2007 FCA 272; *Canada (Information Commissioner) v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 270; *Canada Post Corporation v. Canada (Minister of Public Works)*, [1993] 3 F.C. 320; *Investigation I93-083P*, [1994] O.I.P.C. No. 437 (QL); *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; *Burchill v. Attorney General of*

Canada, [1981] 1 F.C. 109 (C.A.); *Shneidman v. Attorney General of Canada*, 2007 FCA 192; Ruth Sullivan, *Sullivan on the Construction of Statutes* (6th Ed.); *Re: Wilfred Laurier University*, [2009] O.I.P.C. No. 174 (QL); *Neilson v. British Columbia (Information and Privacy Commissioner)*, [1998] B.C.J. No. 1640 (QL); *Re: Ontario (Ministry of Children and Youth Services)*, [2014] O.I.P.C. No. 211 (QL); and *Ontario (Criminal Code Review Board) v. Doe* (1999), 47 O.R. (3d) 201.

[104] In addition to the *Act* and the *AIA*, the employer also referred me to the *Copyright Act*, the *FAA*, the *Interpretation Act* (R.S.C., 1985, c. I-21), the *National Defence Act*, the *Privacy Act* (R.S.C., 1985, c. P-21), the *Public Servants Invention Act*, the Ontario *Freedom of Information and Protection of Privacy Act* (R.S.O. 1990, c. F.31), and the British Columbia *Freedom of Information and Protection of Privacy Act* (R.S.B.C. 1996, c. 165).

VII. Reasons

[105] In 2017 PSLREB 6, I addressed the employer's objection to my jurisdiction on the alleged basis that the matter fell within the ambit of another Act, the *AIA*. The objection was based only on a portion of the documentary evidence and on no oral evidence. Based on the material available at that time, I dismissed the objection.

[106] I have to answer two questions. Are the course notes subject to the *AIA*? If not, do I have jurisdiction to address the grievance as it relates to the employer's order that the grievor turn over the course notes, as part of the ATIP request?

[107] Section 2 of the *AIA* states that its purpose is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution. That is done in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on disclosing government information should be reviewed independently of government.

[108] The *AIA* defines "government institution" as any department or ministry of state of the Government of Canada, any body or office listed in Schedule I to the *AIA*, or any Crown corporation and any wholly owned subsidiary of such a corporation within the meaning of s. 83 of the *FAA*. It defines "record" as any documentary material, regardless of medium or form.

[109] Section 4 of the *AIA* provides that subject to that Act but despite any other Act of Parliament, every person who is a Canadian Citizen or a permanent resident within the meaning of s. 2(1) of *the Immigration and Refugee Protection Act* has the right to and shall, on request, be given access to any record under the control of a government institution.

[110] Simply put, the *AIA* provides that Canadians and permanent residents may access information held by the government.

[111] On or about March 22, 2013, the ATI Coordinator at the CDA received the ATI request, which was for certain documents in connection with a course taught by the grievor. The request included the handwritten notes prepared for or by the grievor.

[112] On April 5, 2013, the CMCFA advised the College's principal that in its view, the documents asked for in the ATI request did not constitute a record under the control of the institution under s. 4(1) of the *AIA*. Despite its position, the grievor provided all the documents requested except the course notes, as all the other ones had been available to students.

[113] The grievor provided the course notes under protest and filed this grievance on November 28, 2013. The grievance is quite lengthy and sets out both facts and jurisprudence. However, its essence is found at paragraph 13, where he states that the course notes were within his control and not the employer's, and as such, they were not subject to the provisions of the *AIA*.

A. Ownership of the course notes

[114] In simple terms, the grievor's position is that the course notes belong to him, and as such, the employer, under the *AIA*, has no control over them. The employer's position is that he made the course notes as an employee during his employment with the DND as an associate professor of English at the College. As such, under the *AIA*, they are not his but are under the employer's control. Therefore, I have no jurisdiction.

[115] Paragraph 32 of *Canada v. DND (FC)* sets out the three legal questions to be asked when deciding if the material requested is subject to disclosure under the *AIA*, which for the purpose of this grievance can be narrowed to the first two questions, as follows:

1. Is the College a "government institution" under s. 4(1) of the *AIA*?

2. What constitutes a record "... under the control of a government institution", as stated at s. 4(1) of the *AIA*?

[116] The third question has no bearing because it relates to exemptions to those documents that are found to be records under the control of a government institution under s. 4(1) of the *AIA*. That determination is outside my jurisdiction.

[117] Answering the first question is simple. The evidence has disclosed that, and it does not appear to be in dispute, the College, as established under s. 47(1) of the *National Defence Act*, meets the definition of "government institution" in s. 2 of the *AIA* as any department or ministry of state of the Government of Canada, any body or office listed in Schedule I to the *AIA*, or any Crown corporation and any wholly owned subsidiary of such a corporation within the meaning of s. 83 of the *FAA*.

[118] The second question is fraught with more difficulty. The evidence brought forward and the arguments made centred upon "[w]hat constitutes a record 'under the control of a government institution' as stated in subsection 4(1) of the [*AIA*] ..."?

[119] In s. 3, the *AIA* defines "record" as any documentary material, regardless of medium or form. The course notes, as defined by the grievor and as disclosed in the evidence, are documentary material. Simply put, are they in the control of the government institution (DND through the College) or the grievor?

[120] As set out in *Canada v. DND (SCC)*, the word "control" is an undefined term. However, its meaning has been judicially considered in a number of cases. The Court summarized as follows, at paragraphs 48, 50, and 54 to 56, the principles gleaned by Justice Kelen in the lower Federal Court decision:

> ***48*** *As "control" is not a defined term in the Act, it should be given its ordinary and popular meaning. Further, in order to create a meaningful right of access to government information, it should be given a broad and liberal interpretation. Had Parliament intended to restrict the notion of control to the power to dispose or to get rid of the documents in question, it could have done so. It has not. In reaching a finding of whether records are "under the control of a government institution", courts have considered "ultimate" control as well as "immediate" control, "partial" as well as "full" control, "transient" as well as "lasting" control,*

and "de jure" *as well as* "de facto" *control. While "control" is to be given its broadest possible meaning, it cannot be stretched beyond reason. Courts can determine the meaning of a word such as "control" with the aid of dictionaries. The* Canadian Oxford Dictionary *defines "control" as "the power of directing, command (under the control of)" (2001, at p. 307). In this case, "control" means that a senior official with the government institution (other than the Minister) has some power of direction or command over a document, even if it is only on a "partial" basis, a "transient' basis, or a* "de facto" *basis. The contents of the records and the circumstances in which they came into being are relevant to determine whether they are under the control of a government institution for the purposes of disclosure under the Act (paras. 91-95).*

. . .

50 *The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? (Decision 1, at paras. 8-9).*

. . .

54 *. . . As Kelen J. made clear, the notion of control must be given a broad and liberal meaning in order to create a meaningful right of access to government information. While physical control over a document will obviously play a leading role in any case, it is not determinative of the issue of control. Thus, if the record requested is located in a Minister's office, this does not end the inquiry. The Minister's office does not become a "black hole" as contended. Rather, this is the point at which the two-step inquiry commences. Where the documents requested are not in the physical possession of the government institution, the inquiry proceeds as follows.*

55 *Step one of the test acts as a useful screening device. It asks whether the record relates to a departmental matter. If it does not, that indeed ends the inquiry . . . If the record requested relates to a departmental matter, the inquiry into control continues.*

56 *Under step two,* all *relevant factors must be considered in order to determine whether the government institution could reasonably expect to obtain a copy upon request. These factors include the substantive content of the record,*

> *the circumstances in which it was created, and the legal relationship between the government institution and the record holder. The Commissioner is correct in saying that any expectation to obtain a copy of the record cannot be based on "past practices and prevalent expectations" that bear no relationship on the nature and contents of the record, on the actual legal relationship between the government institution and the record holder, or on practices intended to avoid the application of the* Access to Information Act *(A.F., at para. 169). The reasonable expectation test is objective. If a senior official of the government institution, based on all relevant factors, reasonably should be able to obtain a copy of the record, the test is made out and the record must be disclosed, unless it is subject to any specific statutory exemption. In applying the test, the word "could" is to be understood accordingly.*

[121] At paragraphs 144 and 145 of *Canada v. DND (FC)*, Justice Kelen stated as follows when addressing the issue of handwritten notes taken in the context of a meeting:

> ***[144]*** *The notes were the personal notes of the exempt staff. No person in the DND or the Minister ever asked to see the notes or be provided with a copy of them. The evidence is that the notes would not have been produced to departmental officials. If some information in the notes had ever been requested, which was not the case, the Court reasonably assumes that the exempt staff who took the notes would prepare a typewritten record of the discussion.*
>
> ***[145]*** *It is clear that the government institution did not have* de facto, *transient, or partial access to the notes of the meetings. When the Court reviewed the notes, it is evident that they were not intended for any third person. The writing is barely legible and the substance is not coherent to anyone other than the author. Accordingly, the notes in their original form would not be produced to a senior official of the DND upon request, and they are not under the control of the DND.*

[122] The grievor also referred me to pages 59 and 60 of *Privacy Commissioner v. CLRB (FC)*, which dealt with the disclosure of board members' notes at a hearing. The Court stated as follows when reviewing the situation relating to these notes:

> *I now turn to the record before me in so far as it pertains to the notes in issue and the control that was exercised over them. It is clear that there is no requirement either in the* Canada Labour Code, *or in the CLRB policy or procedure touching upon the notes. The notes are viewed by their authors as their own. The CLRB members are free to take*

> *notes as and when they see fit, and indeed may simply choose not to do so. The notes are intended for the eyes of the author only. No other person is allowed to see, read or use the notes, and there is a clear expectation on the part of the author that no other person will see the notes. The members maintain responsibility for the care and safe keeping of the notes and can destroy them at any time. Finally, the notes are not part of the official records of the CLRB and are not contained in any other record keeping system over which the CLRB has administrative control.*
>
> *In my view, it is apparent from the foregoing that however broadly one construes the word control, the notes in issue were not "under the control" of the CLRB within any of the meanings that can be attributed to that term. Not only are the notes outside the control or custody of the CLRB but they are also considered by the CLRB to fall outside the ambit of its functions.*
>
> *Nevertheless, the record does suggest that the notes in question were kept by the members either at the office or at home, but most likely at the office. A question therefore arises as to whether the mere fact that the notes may have been kept by the members on the premises of the CLRB could result in the Board having "control" over them as that word is used in paragraph 12(1)(b) of the Act.*
>
> *I do not believe so. Admittedly, the fact that records are left or kept on the government institution's premises allows for a* de facto *intrusion into these records by the institution. But that does not bring the records within the "control" of the institution as these words are used in paragraph 12(1)(b) of the Act. What is contemplated is control in any form so long as it is exercised in a lawful fashion. It is inconceivable that the* Privacy Act *could compel a government institution to intrude into the records of a third party in breach of that person's right to privacy in order to satisfy the privacy rights of others.*

[123] Including the grievor, I heard from four professors who as of the hearing either were teaching at or had taught at the College. Of them, two were department heads, and one had been the Dean of the Faculty of Arts. With respect to their course notes, they all gave the same evidence, which is as follows:

- they all believed that notes they had made with respect to their lectures were their personal property;
- the College did not require them to prepare course notes for their courses or lectures;

- the notes were in some point-form format to be used as a type of aide-memoire;
- the College did not require them to produce their course notes to anyone;
- the College did not impose any standards on them with respect to making or storing course notes;
- they were not aware that the College used their course notes in any way or that the notes were in any way integrated into its record;
- they were not aware that the College placed any reliance on their course notes for any purpose;
- they stored their course notes on College premises; and
- some kept course notes at the end of an academic year, and some destroyed them.

[124] The grievor also testified that his course notes could be in a state of flux. He taught English and maintained folders for each text that he might use during a course. Each folder contained notes. He made notes of the texts for his benefit. They could have been made to remind him to talk about a particular subject or as possible research topics.

[125] In addition, Dr. Sokolsky's briefing note of April 9, 2013, states that the College always viewed course notes as "... personal notes and it is normal practise [*sic*] of the College that course notes are treated as personal property of the individual and are not held under the control of the College."

[126] No evidence submitted suggested the opposite of the evidence put forward by the grievor and Drs. Delaney, Boulden, and Errington with respect to course notes.

[127] Based on the tests set out in the jurisprudence, it is clear to me that the professors, and not the College (government institution), maintained control over course notes.

B. The Board's jurisdiction

[128] As set out in 2017 PSLREB 6, while the ATI request was the genesis for the employer's order to the grievor to produce the materials requested, he questioned its authority to issue that order. That fundamentally is an employment issue; it is a workplace issue between the employer and an employee that would ordinarily come within s. 208 of the *Act* because the employer required him to produce the materials set out in the ATI request. At the very least, it was a direction that dealt with the terms and conditions of his employment or was an occurrence or matter that affected those terms and conditions. Again, at the very least, based on the evidence before me on the preliminary issue of my jurisdiction, it appeared that the grievance might fall within the limitations of s. 208.

[129] Also as set out in 2017 PSLREB 6, ss. 208(2) through (6) of the *Act* provide certain specific limitations with respect to an employee filing a grievance under the *Act*. Based on the evidence at the time of that preliminary objection, none of the limitations in ss. 208(3) through (6) of the *Act* apply with respect to this grievance, and they do not prohibit filing it under s. 208(1). The only limitation that could apply is set out in s. 208(2), which is a prohibition against filing a grievance when an administrative procedure for redress is provided under any Act of Parliament other than the *Canadian Human Rights Act* (R.S.C., 1985, c. H-6). My finding that the course notes were not under the control of a government institution eliminates that prohibition.

[130] I have not heard or seen any evidence that would suggest that I was incorrect in my finding in 2017 PSLREB 6.

[131] However, that does not determine the issue of my jurisdiction. While the grievor might certainly have been able to file a grievance about the employer ordering that he produce the course notes, the fact that he could grieve does not necessarily give me jurisdiction. Jurisdiction flows from s. 209 of the *Act*.

[132] The grievor referred his grievance to adjudication under s. 209(1)(a) of the *Act*, which states that an employee, who is not a member as defined in s. 2(1) of the *Royal Canadian Mounted Police Act* (R.S.C., 1985, c. R-10), may refer to adjudication a grievance that has been presented up to and including the final level in the grievance process and that has not been dealt with to the employee's satisfaction if the grievance

is related to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award.

[133] As there is no arbitral award at issue, for me to have jurisdiction, the employer's action must somehow have been related to the interpretation of the grievor's collective agreement. I was referred to two possible sections of the collective agreement that the action breached, which were article 5, entitled "Academic Freedom and Academic Responsibility", and article 8, entitled "Past Practices".

[134] For the reasons that follow, I find that I have jurisdiction under article 8, which states as follows:

> ***8.01*** *Where this Agreement is silent on working conditions, the conditions existing immediately before the date of this Agreement shall continue to apply provided that:*
>
> *(a) they are not inconsistent with the Agreement;*
>
> *(b) they are reasonable, certain and known;*
>
> *(c) they may be included in this Agreement in accordance with the* Public Service Labour Relations Act*;*
>
> *and*
>
> *(d) they are carried out in a fair and equitable manner.*
>
> ***8.02*** *The onus of establishing an existing practice within the meaning of 8.01 shall rest on the party who alleges the existence of same.*

[135] Although the grievor referred me to article 5, which details the principles of academic freedom, it does not specifically reference who controls course materials; specifically, course notes that professors create. I was not pointed to any other section of the collective agreement that would cover that area.

[136] However, article 8 states that when the collective agreement is silent on working conditions, those conditions that existed before the collective agreement came into being shall continue to apply, subject to certain exceptions.

[137] The collective agreement was signed March 11, 2011.

[138] As the principal of the College, Dr. Sokolsky wrote a briefing note early in the

process, on April 9, 2013, which states in part as follows:

. . .

> *. . . Although Dr. Lukits is a full time employee he does consider his course notes as his personal notes and it is normal practise [sic] of the College that course notes are treated as personal property of the individual and are not held under the control of the College. . . .*

. . .

[139] The grievor and Drs. Delaney, Boulden, and Errington all testified as to their understanding of course notes at the College, which was in essence that they were the property of the individual professors. The grievor started teaching at the College in the late 1980s and after an absence returned in 2002. Dr. Delaney began his career there in 2001, Dr. Boulden in 2004, and Dr. Errington in 1984. Their evidence indicates that clearly, that practice was in place before 2011, when the collective agreement was signed, and is in line with Dr. Sokolsky's comment in his briefing note of April 9, 2013.

[140] There is no evidence that the practice of course notes being the personal property of the individual professors is in any way inconsistent with the terms of the collective agreement or that it was unknown. Certainly, the College's principal was aware, and his comment was to the effect that the College always treated them that way. There is no evidence as to why the ownership of course notes could not be negotiated into a collective agreement in accordance with the *Act*, and I was not pointed to any legislative or regulatory reason that that could not be done. And based on the evidence of the grievor, Drs. Delaney, Boulden, and Errington, and Principal Sokolsky, that practice was carried out fairly and equitably as all parties treated course notes the same way.

[141] Clause 8.02 states that the onus of establishing an existing practice within the meaning of clause 8.01 rests on the party that alleges the existence of the past practice. For the reasons already outlined, I am satisfied that on a balance of probabilities, the grievor established that the past practice existed with respect to the course notes.

[142] As I am satisfied that the ownership of the course notes was a past practice established and accepted under clause 8.01 of the collective agreement, the employer ordering the grievor to produce them under the ATI request falls under s. 209(1)(a) of

the *Act*, and therefore, I have jurisdiction.

[143] Article 5 of the collective agreement sets out in very broad language the common law principles ascribed to the concept of academic freedom. I agree and accept that the relationship between a university and its academic staff is different in some respects from the standard employer-employee relationship because of the concept of academic freedom, recognizing that academic freedom is not an umbrella and catch-all for everything and anything done by a university's teaching staff.

[144] Broadly speaking, the difference is marked by those documents and materials that are largely administrative. Documents that would be covered by academic freedom, as set out in the jurisprudence, have been identified as documents and records created by teaching staff related to their teaching and research.

[145] Given my finding that the course notes are in the grievor's control and not the College, if the College attempted to force the production of them, it would be a breach of article 5 of the collective agreement, as it would be an attempt by the employer to force the production of material created for and in the course of teaching and research that is otherwise protected by the principle of academic freedom.

[146] The employer suggested that the College differs from other universities by virtue that it is a federally established institution that falls under the *National Defence Act*. While it is somewhat unique, like every other university in the province, as set out in the Governance Report, it is permitted to award academic degrees by virtue of an Act of the Ontario legislature. It is also a member of the COU and AUCC. To maintain membership in the AUCC, the College must satisfy a set of criteria that are virtually identical to the eligibility criteria for the COU.

[147] The suggestion that the College is somehow exempt from the common law principle of academic freedom is further diminished by the wording of clause 5.06, which is entitled "Academic Freedom and the Specific Mission of the CMC". It states as follows:

> ***5.06*** *The special mission of the College does not diminish the academic freedom of the UT. Nonetheless, the special mission makes the College vulnerable to harm from misunderstandings that may arise from public discussion or publication in areas that speak directly to that special mission. This places on the UT, embarking upon such public*

> *discussion or publication, a somewhat greater responsibility for clarity than might attend similar actions in areas not closely associated with the mission.*
>
> . . .

C. Conclusion

[148] For the reasons already set out, by ordering the grievor to produce the course notes, the employer breached a term and condition of his employment, as established by clause 8.01 and article 5 of the collective agreement.

D. Sealing documents

[149] *Basic v. Canadian Association of Professional Employees*, 2012 PSLRB 120 at paras. 9 to 11, states as follows:

> *[9] The sealing of documents and records filed in judicial and quasi-judicial hearings is inconsistent with the fundamental principle enshrined in our system of justice that hearings are public and accessible. The Supreme Court of Canada has ruled that public access to exhibits and other documents filed in legal proceedings is a constitutionally protected right under the "freedom of expression" provisions of the* Canadian Charter of Rights and Freedoms*; for example, see* Canadian Broadcasting Corp. v. New Brunswick (Attorney General), *[1996] 3 S.C.R. 480;* Dagenais v. Canadian Broadcasting Corp., *[1994] 3 S.C.R. 835;* R. v. Mentuck, *2001 SCC 76,* Sierra Club of Canada v. Canada (Minister of Finance), *2002 SCC 41 (CanLII).*
>
> *[10] However, occasions arise where freedom of expression and the principle of open and public access to judicial and quasi-judicial hearings must be balanced against other important rights, including the right to a fair hearing. While courts and administrative tribunals have the discretion to grant requests for confidentiality orders, publication bans and the sealing of exhibits, it is circumscribed by the requirement to balance these competing rights and interests. The Supreme Court of Canada articulated the sum of the considerations that should come into play when considering requests to limit accessibility to judicial proceedings or to the documents filed in such proceedings, in decisions such as* Dagenais *and* Mentuck. *These decisions gave rise to what is now known as the* Dagenais/Mentuck *test.*
>
> *[11] The* Dagenais/Mentuck *test was developed in the context of requests for publication bans in criminal proceedings. In* Sierra Club of Canada, *the Supreme Court of Canada refined the test in response to a request for a confidentiality*

> *order in the context of a civil proceeding. As adapted, the test is as follows:*
>
> . . .
>
> 1. *such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and*
>
> 2. *the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.*
>
> . . .

[150] The course notes were entered into evidence. The whole purpose of the grievance and the issue before me was whether they constitute a record under the control of a government institution. The purpose of the grievance was to state that they are in the grievor's control and so not subject to the *AIA*. Not sealing them would in essence defeat the purpose of the grievance process by putting them in the public domain, where they would be accessible to anyone.

[151] Sealing the course notes protects an important interest, which outweighs the deleterious effect of sealing them.

[152] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VIII. Order

[153] The grievance is allowed.

[154] The employer breached the collective agreement.

[155] The employer is ordered to return to the grievor all copies of the course notes.

[156] The course notes as entered into evidence are ordered sealed.

March 13, 2019.

John G. Jaworski,
a panel of the Federal Public Sector
Labour Relations and Employment Board