

IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARLETON UNIVERSITY

("the University")

AND:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION

("the Association")

IN THE MATTER OF:

GRIEVANCE OF ROOT GORELICK

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE UNIVERSITY:

Michael Kennedy - Counsel
Steve Levitt - General Counsel

APPEARANCES FOR THE ASSOCIATION:

Peter Engelmann - Counsel
Christal Côté - Member Services Officer

PRELIMINARY AWARD

A hearing was convened on November 7, 2017 to deal with production issues. Counsel for the Association filed an extensive request for production by letter dated May 4, 2017. This was responded to by counsel for the University by letters dated July 13, 2017 and July 18, 2017. The specific May 4, 2017 requests that became the subject of the November 7, 2017 hearing are:

4. Copies of any and all documents and communications including, but not limited to, notes, emails, memoranda, and correspondence regarding the student tuition protest that occurred at the Board of Governors on March 30, 2015;
5. Copies of any and all documents and communications including, but not limited to, notes, emails, memoranda and correspondence regarding comments by Michael Wernick comparing the tactics of student protesters to "tactics of brownshirts and Maoists";
6. Copies of any and all documents and communications including, but not limited to, notes, emails, memoranda and correspondence regarding access to Board of Governors meetings by members of the public and any changes to procedures or protocol in that regard, and/or the reason for any changes;

The University's response to these specific requests is set out in its July 13, 2017 letter as follows:

4. The University fails to understand how documents related to the student protest at the Board meeting are related to the subject matter of the grievance.

5. Any documents that are related to comments by Michael Wernick comparing the tactics of student protesters to "tactics of brownshirts and Maoists" are in the two binders subject to any claim of privilege.

6. Documents related to access to Board of Governors meetings by members of the public are not relevant to the grievance.

The University's July 18, 2017 letter identifies 153 items, i.e. letters or emails, that are categorized as either covered by solicitor-client privilege or not. The vast majority are marked as privileged. Counsel for the University has undertaken to review the privileged designation and to report back within 10 days.

There were three areas of contention dealt with at the November 7, 2017 hearing. These are:

1. The University's objections based on relevance.
2. The Union's concerns about incomplete disclosure.
3. The Union's concern over the extent of the University's reliance upon solicitor-client privilege.

Dealing with these in order. The test of relevancy for purposes of production is "arguably relevant." The question to be answered is not whether the documents in question would be relevant at hearing but rather whether, on the basis of the grievance as liberally construed, the documents requested might be relevant.

The claim asserted in the July 8, 2016 grievance is as follows:

Dr. Gorelick grieves that the University and its Board of Governors acted contrary to the provisions of the collective agreement and past practice when it refused to let him stand as a candidate to serve as an Academic Staff Governor on the Carleton University Board of

Governors for the 2016-2019 term of office, thereby denying him the right to participate in the governance of the University and perform his service to the University.

Consistent with the foregoing, the remedy sought is as follows:

- a declaration that the University and its Board of Governors have violated the provisions of the collective agreement by denying Dr. Gorelick the right to participate as a candidate in the elections for the vacant Academic Staff Governor position on the Carleton University Board of Governors;
- an order directing the University and its Board of Governors to allow Dr. Gorelick to stand as a candidate to serve as an Academic Staff Governor on the Carleton University Board of Governors for the 2016-2019 term of office in accordance with past practices and the collective agreement;
- an order directing the University and its Board of Governors to re-hold the election of candidates serving as Academic Staff Governors on the Carleton University Board of Governors for the 2016-2019 term of office; and
- any further and other relief that might be necessary to correct the wrongdoing done by the Employer.

The arbitrator described the grievance in the August 23, 2017 preliminary award dealing with bifurcation as follows:

The Association grieves in this matter that the University and its Board of Governors acted contrary to the collective agreement and past practice when it refused to let Professor Root Gorelick, a tenured member of faculty, stand as a candidate to serve as an Academic Staff Governor on the Carleton University Board of Governors for the 2016-2019 term of office. It is asserted that in acting as it did, the University impaired Professor Gorelick's right to academic freedom. It is also asserted that Professor Gorelick's right to participate in the governance of the University as a member of the Board of Governors and to perform his service to the University was thereby improperly denied.

and in refusing to bifurcate reasoned, as follows:

When I read article 4 – Academic Freedom, article 5 – No Discrimination, article 6.1 – University Governance, article 13 – Academic Workload and article 15.6 – Rights and Responsibilities of Self-Governance, I am unable, without evidence, to determine whether or not these clauses provide the necessary "hook" into the collective agreement. In order to make a determination with respect to jurisdiction, I would require evidence going to the meaning of academic freedom at this university, to the meaning of self-governance at this university, to the relevance and application of academic freedom to service at this university and, in particular, evidence as to whether one's tenure on the Board of Governors constitutes service under this collective agreement and, if so, whether academic freedom applies. I would require this evidence in order to understand the intended meaning of these clauses and whether they have application if the facts as asserted by the Association are taken at this point as proven.

This grievance, therefore, pertains to the University's decision to amend the Code of Conduct as it did, and to make prior acceptance of the Code of Conduct as amended, a precondition to eligibility for election to the Board of Governors. The issue to be decided is whether or not this constituted an improper impairment of Professor Gorelick's right to academic freedom and his ability to participate in the governance of the University as a member of the Board of Governors and thereby to perform his service to the University.

In assessing relevance in this case, it is important to understand that as a member of the Board of Governors during the 2013-16 term, Professor Gorelick blogged about the content of Board meetings (meetings that the Association maintains were open to the public) and further that Professor Gorelick's blogging was controversial within the Board. The Association position is that the University initiatives identified in the grievance were designed to disqualify Professor Gorelick

because of his blogging and that these initiatives thereby improperly interfered with the collective agreement rights that it now relies upon.

If Professor Gorelick, in his capacity as a member of the Board of Governors, blogged about either the student protest of March 30, 2015 or if he blogged concerning decisions regarding access to Board of Governors meetings by members of the public during the 2013-16 term and if there are documents and/or communications, including notes, emails, memoranda and correspondence, that refer to or otherwise speak to the blogging of Professor Gorelick in regard to these matters, those documents and/or communications are arguably relevant and must be produced. Documents and communications in regard to these matters that do not refer to or otherwise speak to the blogging of Professor Gorelick are not arguably relevant and, therefore, are not required to be produced.

The second area of Association concern about the University's disclosure is that it is "incomplete." The Association questioned whether the University had canvassed all members of the Board in regard to its specific requests. Counsel for the University responded that "we have produced all the documents in our control with respect to changes to the Code of Conduct and anything else with Root Gorelick's name on it." He made clear that "we have solicited everyone who is an employee of Carleton – but not private citizens." The arbitrator accepts counsel's assertions in this regard.

While as a general matter the emails, etc. of private citizens are not within the control of the University, the emails of private citizens who serve on the University's

Board of Governors and who, in their capacity as members of the Board communicate with other members of the Board concerning Board matters, may be in the control of the University. To the extent that there is any such documentation within the control of the University, this documentation, in so far as it pertains to the blogging of Professor Gorelick while a member of the Board and/or to the change in the Code of Conduct and the process for eligibility to stand for election to the Board of Governors, is arguably relevant. Accordingly, if it has not already been solicited and produced, it is to be solicited and produced.

The third area of concern raised by the Association is the extent of the University's reliance upon solicitor-client privilege. As noted, counsel for the Association has undertaken to review the various documents that have been identified as privileged and to report to opposing counsel and the arbitrator within one week. It is presumed that "documents that are related to comments by Michael Wernick comparing the tactics of student protestors to 'tactics of brownshirts and Maoists'," which the University has identified in the two binders as subject to a claim of privilege, will be included in this review by counsel for the University.

The arbitrator remains seized.

Dated this 16th day of November 2017 in the City of Toronto.

Kevin Burkett

KEVIN BURKETT

