Thursday, October 8, 2015

(Motion hearing, Ontario Superior Court of Justice (Divisional Court))

(Begin at 10:10 am)

Justice Scott (J): Good morning. I read the materials. Proceed.

Harnden (H): Mr. Scott, we're here on behalf of U of O, we are moving party in today's proceedings. Motion to strike affidavit evidence filed by respondent APUO in support of its application for judicial review of a decision of an arbitrator in a labour arbitration proceeding involving certain disciplinary matters involving a professor, Prof. Rancourt.

Our contention in this motion is that the affidavit evidence does not follow the narrow circumstances of admissibility.. court of appeal (name of case) – it's at Tab 1 of our Book of Authorities (BoA). It's well settled in law – most recently in the Kingston decision (ref at para. 24 on Tab 4 of our BoA – principles that govern admissibility of evidence on judicial review of Arb's award say it can be done in 2 cases: 1) complete absence of evidence to support Arb's finding of fact; 2) where affidavit evidence is necessary to disclose breach of natural justice that cannot be disproved by reference to the record.

Addressing the first ground for introduction of affidavit evidence on application for judicial review. When one has regard for the grounds for review enumerated in the grounds for application for judicial review – contained at para. 6 of our factum – there is no ground which contends there is complete absence of evidence to support a finding of fact made by the Arb, whether essential to the decision or otherwise. In terms of the 2 possible purposes, the first, on our reading of the grounds for judicial review is not in contention today, because it's not a ground that was enumerated by the applicant in the app for judicial review. There's some suggestion in the applicant's factum that there's an absence of evidence on findings of fact of the Arb. I propose to wait for the respondent to advance that and I'll respond.

I'm going to focus on sole issue – whether the affidavit evidence is necessary to disclose a breach of natural justice. Applicant hasn't shown it's burden of this being the case. 2 principle submissions on this point: 1) Evidence which the applicant in the application for judicial review wishes to add to the record in form of affidavit, is in fact not directed to natural justice issues, but when examined, it represents an attempt to reframe or reweigh the evidence heard by the Arb to establish that his decision was unreasonable. I'm not suggesting that the Applicant cannot in the judicial review proceedings advance that position – that will be addressed by the court – but it can't fortify that argument by supplementing the record with portions of the evidence which it claims were heard by the Arb and were not referenced in his decision.

The second point I would make is even if the Applicant can address natural justice – it is an issue that can be argued without affidavit material. Doesn't need to be supplemented by affidavit evidence. I will draw primarily on contents of Arb's award, because I believe that it should assist the court in appreciating how the Arb dealt with the matters at issue today, and also will emphasize that the record need not be supplemented.

Before turning to my submissions on natural justice – want to recap nature of matter that was subject of judicial review. Set that stage: the arb award involved 3 grievances filed under CA between APUO and UofO – the 3 grievances were filed on behalf of Prof. DR. The hearing before the Arb, name Claude Foisy, lasted over 28 days – over 160 documents marked as exhibits – extensive evidence was called. Prof. R testified for 13 days. Dean Lalonde testified for 7 days. Arb Foisy disposed of the grievances in a comprehensive award of 32 pages – contained in motion record at Tab 2. Arb carefully articulated his reasons for concluding 1 of the grievances should be upheld, and remaining 2 grievances including warning to R and his dismissal, should be dismissed. We submit that it's abundantly clear from a review of Arb's award that he examined extensive evidence he heard, weighed it, and explained why he believed it supported conclusions he had reached. I think it, and this is my last comment on the ward – I think it notable that Arb preferred the credibility of 2 student witnesses over that of Prof R – noted at para 66 of the Award – and he further commented that R's credibility as a whole had been compromised – and cites at para. 68. I make that comment because the thrust of much of what the affidavit material is in support that Arb didn't give sufficient weight to evidence of 2 students and evidence of Dean Lalonde – I suggest that the findings of Arb have to be reviewed through prism of fact that he found other witnesses more credible than Prof R, which may have informed his ultimate conclusions.

Now with that backdrop – turn to affidavit of Ms. Udel – not properly added to record to establish breach of natural justice. First note that natural justice exception was not referenced by Court of Appeal in (name) decision because it was not part of that proceeding. Was noted in Kingston decision – Tab D of our BoA – "breach of natural justice that cannot be proven by mere..." (para 18 of Kingston decision).

J Tab?

H Tab D of Kingston decision.

J Para?

H 18. You see the court at para 18 discusses the standard with respect to judicial review– then summarizes: "affidavit evidence can show absence of evidence on essential point or" and these were the words I wanted to point the court to: "that cannot be proven by mere reference to the record"

J Who was the motions judge at that? It doesn't refer to them? Thought you might know offhand?

H No, sorry I don't know – doesn't seem to be apparent. Hmm, seems to be Justice (name).

J Thank you.

H Reference at para 44 – "where the court concludes no breach of natural justice that would admit affidavit evidence"

J Hold on – I only have as far as para 35 in my book.

H Perhaps it's in my friend's authorities?

J Just a minute. I have A,D,F...

H This is BoA of moving party? That's an unfortunate... Maybe the photocopying...

M Do you need an extra?

H We have an extra.

J There we go. I go to para 12 in KeepRite. Complicated stuff.

H I apologize. Para 44 there's a passage there that I thought useful: "after making a finding there's no breach of natural justice that would warrant admission of affidavit evidence, note that employer alleges breach of natural justice because Arb made... finding of fact... concept that protects rights to participate in proceeding.... Employer alleges... rather errors of law on the face of the record" – and we say those comments are what is occurred in this case – what the Applicant in application for judicial review may wish to have you characterize as breach of natural justice, when scrutinized, those submissions do not relate to breach of natural justice but are decisions Arb made on reasonable findings of fact – do not allow or provide support for introduction of affidavit evidence.

I'll now turn to the evidence itself in issue. 3 components to that evidence: The first is the Arb's reference to a document prepared by Ms. Maureen Robinson. The second relates to the Applicant's (responding party here) contention that the Arb gave insufficient weight to certain evidence of Dean Lalonde; and third, that the Arb gave insufficient weight to portions of the evidence of 2 students who had testified before the Arb.

I'll deal with each of those 3 elements in sequence.

Now, Ms. Maureen Robinson – and these facts are evident from the Arb's award -- was engaged by the University to assist it in relation to matters involving Prof. R. She did not testify in the proceeding. One of the actions she took while engaged by the university was to attend at Queen's University to listen to a presentation given by Prof R and to an interview he gave to certain media representatives. The document that she prepared purported to be a transcript of Prof R's comments on that occasion.

J Memoire?

H Had the appearance of a transcript, but it was her notes of what she claimed to have heard on that occasion. The thesis of APUO appears to be that the Arb improperly relied on that document for certain findings of fact in his award. That proposition might have some merit had he in fact done so. But when one reviews Arb Foisy's award, I submit to you it is quite evident that that is not what he did.

J But where is it in his...?

H First comment on Robinson document is pg. 54 of the motion record (para 58 of the Award). And so – first point from para 58 is that we concede that Arb did in fact refer to that document – he references it at para 58. Very important to see how he frames his reliance on it – first refers to R being keynote speaker, cites title of his address, says "a report on Prof R's address... prepared by.... monitoring the communication of Prof R..."

J This is where I'm confused about Ms. Robinson – she's the editor of a newspaper and she's sent in to tidy up his office?

H That's what Dean Lalonde testified he engaged her to do. He explained she also had another hat on as editor of student newspaper and took certain initiatives related to Prof R's activities.

J Any evidence how she was chosen, or just happened to be there? Seems a little unusual to me, that's the only thing I noticed.

H That she had this dual hat on? Not on the record how he chose her, but did take her on to organize this voluminous evidence and she took other steps.

J There's a reference somewhere in the materials to how she equated her role as a young woman trying to trap a pedophile?

H There was reference in Prof R's testimony of that allegation. She didn't testify so we don't have that. We

J Where did that reference come from then? She never said that? It's not part of the record?

H No it's only a statement by Prof R alleging that she had said that or it's said somewhere I'm not aware – she didn't testify. Will come to allegation of her bias in a moment. In terms of Arb's reliance on her report – para 58: "although grievor was very reluctant to acknowledge content of report.. finally.. following extensive.. agreed to some portion of its content." And we submit that this passage makes it clear that Arb carefully confined his reliance on the portions of the report that Prof R agreed were accurate. I'll take you to additional references on the third point. He then in para 58 goes on to say: "reported by the student.... course... impossible to fail... no grades.." That's quote from the Robinson report, but in para 58 the Arb is finding this is a portion of the content that Prof R agreed to.

J Sorry. (Reads from Arb award: "... agreed to some portion of its content...") How does that tie in those 2 sentences? There's no connection between the 2 there.

H It's implicit that "agreeing to portion of content" and then the Arb refers to portion of report – one can infer that from the sequence of references in that paragraph. The principal point with respect to portions of report that Prof R agrees to – meaning he agreed to making those statements – if Arb made a finding that Prof R made a statement at the Queen's U event based upon the fact that Prof R had conceded accuracy of Robinson report, there is no

natural justice issue – because that is evidence from Prof R himself – so whether Ms. Robinson testified is irrelevant.

I'll ask Court to proceed to para 60 where there is a similar quotation from Arb. Para 60: "Prof R reluctantly admitted it was possible he said that." And then he gives Prof R's explanation: "bravado.. frustration.. new ideas.. opposing it." The Arb refers to a portion of Ms. Robinson's report but points out Prof R admitted it was possible he said such.

J Hold on. I go to 59 and there's something about a radio station and reporter. Is that related to Ms. Robinson's report?

H Yes, her activity in Kingston included taking notes of the keynote address provided by Prof R and interviews with media subsequent to that address. Excerpt from radio was second prong of her activities in Kingston referenced in her report. It was about grading – and grading was the heart of the matter in the arb proceeding. That is why there was considerable significance as to what Prof R said in his address and to the reporter – because that was relevant to Arb's finding in respect to Prof R's practice in respect to grading. It would be a fair concern by APUO if Arb had simply taken sections of Robinson report and relied on them without explaining – but he very carefully made it clear that he's referencing what Prof R admitted to saying. That ends any concern about natural justice. But even the clearest indication of that is at para. 69 of the decision, at pg. 57 of our materials.

The first sentence in para 69 is right on point: "in relation to the Queen's report" – the document prepared by Ms. Robinson – "Prof R... someone who was spying on him... finally admitting to most of it in cross-examination." And so, we submit to the Court that the idea there is a natural justice issue is simply unsupported by this analysis of the Arb's award. The Arb scrutinized the contents of the report that were acknowledged to be an accurate record of Prof R's statements on that occasion, and that is an appropriate approach which does not engage any issue of natural justice.

I'll just make a brief comment on this point and may supplement it in reply. There's some reference in their factum to a finding of the Arb that Prof R engaged in improper conduct by delivering the Queen's U address. I'll simply say I've reviewed the Arb's award and he made no such finding – did not say Prof R did anything improper in going to Queen's U.

J Move back to 69 for a moment. Speaks for itself, but: "in relation to the Queen's report... spying on me... on behalf of university... cross-examination." Is there anywhere in his decision where we can differentiate between what he agreed to and what he didn't agree to.

H I understand the question, and no. Other than reader seeing how Arb articulated his reasons – he always tied references to Robinson report to admissions by Prof R – a reasonable reading of his report shows he was alive to only relying on portions of the report that Prof R agreed to be accurate. He did not, in his award, refer to which references. Has to be inferred from the care with which he linked the two subjects.

J In relation to Robinson report – how does he refer to that “aide memoire” – what are the words he uses to describe that particular document.

H Ah, you see at para. 69 in relation to the Queen’s report...

J Is that her report? Is the “Queen’s report” Robinsons aide?

H Yes

J Is that how he refers to it throughout his decision?

H In para 58, his initial reference..

J I say this – just so you’ll know – I think the respondents to this application motion would indicate that he somehow elevated that evidence throughout from being an aide memoire to being some kind of solid proof -- being more than just an *aide memoire* and I’m trying to determine if that’s a correct assumption.

H I understand – that’s also the contention of the applicant/respondent in these proceedings. Once again, para 58 he once again uses the term “report” and you’ll see as well he refers to – in para 58 – sixth line down – “a report on Prof R’s address... newspaper.. entered in evidence.” And the affidavit of Ms. Delorme, which is on the record, refers to how it is that the report was put into evidence, and she, on her record of what Arb said, he said: “I think it should be related to excerpts on which a witness was questioned... stuck with...” So Arb was saying: ‘Look I need that in front of me when I write my Award’. So that explains why the report was on the record notwithstanding fact that author did not testify. In Award he talks about how R frequently acknowledged making statements in the report. Arb refers to it being in evidence, but we know from Ms. Delorme’s affidavit (at para. 23) how it came about that it was on the record in the arb proceeding.

Now I want to touch as well – this is the last aspect of the Robinson report that I’ll make reference to – APUO makes the submission that the Arb overlooked evidence that Ms. Robinson was biased against Prof R, and the affidavit of Ms. Udel references evidence about that bias. But the question that needs to be asked is ‘does that raise an issue of natural justice that’s not apparent on the record?’ – I refer you once again to para. 69, and as you recall the comment by the Arb in relation to the Queen’s report – the Robinson report: “Prof. R initially disputed.. spying on him...” – what does that tell us? That the Arb was very much alive to the allegation that Ms. Robinson was biased against Prof R. So there’s no need to supplement the record to refer to that fact – he was alive to that fact. I can understand why APUO would like to enrich the record and show more evidence of bias – but that is not appropriate content to supplement record on judicial review. A party not entitled to plough through evidence and pick out bits that fortify it’s submissions. That’s exactly what’s happening here. I say that even if they convinced you there was an issue of natural justice somehow in play associated with this bias issue, they can make that submission based on the current record without the need to supplement it with affidavit material.

J The Arb draws no conclusion as to whether or not there's bias attached to that report. He merely says: 'Prof R suggests that there was spying'

H Yes – he was aware of those submissions.

J He was aware Prof R believed Robinson spying on him, despite Dean's statement that he just put her in there to organize his office.

H One should be more vigilant in only pointing to statements that Prof R admitted to making – admitted to portions of report being accurate – if Arb did not adopt that approach there might be a concern here.

J My concern is that it's not indicated what he relied upon. When it clearly says: "Finally admitted to most of it in cross examination." What I'm concerned is the difference between what didn't he agree to and what did he agree to. Not sure it's implied by what he refers to, as you say.

H I acknowledge it's not crystal clear from Arb's award that he took that care, but it would be extraordinary to conclude otherwise given his constant linkage to what R said and what was in the report.

J Maybe I'm at a loss because I don't have the report here.

H It's excerpted in the Award.

J It's cherry-picked.

H I understand.

J I have some issues with Ms. Robinson – you haven't totally explained this yet, but go ahead.

H I appreciate the Court's concern but my submission is: in an instant where there is a concern about need to supplement the record in application for judicial review, that Court should not be easily persuaded that it's necessary to go down the road of examining the full record before Arb on an issue of this nature. I haven't taken you through the details of the conflict between the 2 affidavits – the first being the Udel affidavit in support of the application for judicial review, the 2nd being the affidavit of Ms. Delorme filed in this matter, where Delorme first challenges the reliance on affidavit material. The hearing was in French, it's in English – affidavits are translations of material – Delorme points out context of what Arb brings onto the record – he simply says 'you're making reference to it, I need to refer to it' – that also tells us that it's unlikely he made an error on aspects of report that were not acknowledged to be accurate by Prof R. I'll make comments on the end on some of the policy reasons to support that Court should not readily identify an issue of natural justice in a proceeding of this nature unless it's abundantly clear.

Before that, want to comment on – applicant wants to supplement record with evidence of Dean Lalonde who testified for 7 days in the proceeding. Go back to the

ground cited in application for judicial review – ground is (para. 6 of our factum): “the Arb denied the applicant... erred in law by refusing.... Lalonde, confirming parameters of...” I’ll first make a comment that the fact that any decision maker, Arb or otherwise, didn’t summarize all aspects of a witnesses evidence does not demonstrate there was a failure to weight that evidence in making decision. Nothing in Arb’s award that suggests he didn’t fully appreciate perspective of R in his grading. Arb makes extensive reference to evidence of Prof R where he advanced his reasons for disagreeing with Lalonde. Arb refers to how Prof R characterized Dean Lalonde’s “conservative position.” So the matter in play of this whole ((?)) was Prof R’s approach to grading and his disagreement with Dean Lalonde’s approach to grading, which Prof R characterized as a “conservative position”.

Arb not citing portions of Dean Lalonde’s testimony does not suggest he didn’t give them appropriate weight. Clear that Arb’s decision – at para 78 of his Award – he refers here to Section 21(1)(2)(c) – section of CA between APUO and UofO – Arb says: “that provision... faculty members... responsibility... objectively.... to the course.” Then goes on to talk about “relevant academic standards.... short answer is no.” He heard days of evidence on the point and concluded that Prof R hadn’t evaluated students’ performances objectively. The Applicant APUO no doubt prefers that the Arb use other parameters in the reference to the Udel affidavit – more weight to comments and concessions given by Dean Lalonde in his cross-ex – but that position doesn’t somehow transform the issue into principles of natural justice. No principle of natural justice that can be cobbled together from fact that there were some helpful portions of evidence that would buttress our argument. That’s not allowed in our province regarding affidavit material. Not allowed for cogent policy reasons.

The third portion of the evidence that Applicant relies on relates to testimony of 2 students. As best as we can determine, that portion of evidence refers to this round of judicial review. Arb made determination that he awarded students A+ in absence of any evaluation. Give the court some context here – allegation by University that Prof R communicated to all students ‘you’re all getting an A+’ – Prof R testified at length saying ‘that’s not quite what I said, set other criteria’, so there was an extensive debate – that can be dealt with in application for judicial review, but doesn’t raise any principle of natural justice. Not even anything in ground that there’s an issue of natural justice, they said he made an improper finding of fact. Nevertheless, I’ll make brief comments on student evidence. The affidavit of Ms. Udel includes what she believes to be excerpts from evidence of 2 students in the proceeding. It includes some statements made by the students during their cross-examination where the APUO thinks they qualified their observations about what they observed on the first day of class. Aff then refers to fact that Prof R made it clear that students make a contribution in the class.

So APUO wishes to supplement the record by adding to the record reference to Prof R’s evidence about what occurred on first day of class. Take a look at Arb award – para 45 – we see that the Arb was very much alive to Prof R’s account of what occurred in that first day of class. He says: “according to Prof R’s own account... target grade... contract... obtain that grade.” It can’t be said that the Arb didn’t appreciate the perspective of Prof R in terms of what he claims to have communicated. So the proposition that the Applicant

in the application for judicial review needs to supplement the record to make sure Prof R's version of the event needs to be on the record is wrong – apart from fact that it doesn't raise an issue of natural justice, it's already there!

Those are my submission on 3 aspects of the evidence, of course we'll have a reply, but I want to touch on policy aspects that can be called the KeepRite approach. In the Kingston ruling, paras. 31-33, the court makes some points that I think are important to keep in mind in assessing the desirability of having this affidavit evidence. It notes that many proceedings to not transcribe their proceedings – desirability of having expeditious, inexpensive method to resolve disputes. That's the reality here – Arb made own respective notes, but there is no official transcript.

J Let me stop you. I'm confused – in your affidavit material it indicates the nature of the hearing – you started off by giving us the breakdown on that – "28 days, 160 documents.... R there 13 days..." – doesn't that fly in the face of the reason why arbitrations aren't recorded? They're recorded because they're short, to the point, get done in reasonable time – but when you have a really complicated one such as this one, it would be necessary for anyone to make sense of it later on to have it recorded. Do you see what you're faced with – or what I'm faced with – ultimately the Div Ct faced with – how do you review, just take a look at it? Assume?

H I suggest that the messaging from KeepRite, Kingston, is we'll take the frailties of that system rather than load onto these different kinds of proceedings the cost and effect on their expeditious handling of matters the costs of keeping an official transcript. One could debate that and suggest it would move more rapidly with an official transcript – that has not been the practice, and the court in Kingston says 'it's a good practice, and we should be careful to respect the social policy reasons that underlie that practice' – then they go on at para. 32: "If extensive affidavits can be filed... challenge.. seek judicial review because they could then try to.. .Arb."

J I agree 100%. My point was that technology is there that would allow for accurate recording. Might be helpful for someone sorting it out later. I also understand what this thing is built on.

H Fully understand the Court's point that the idea of expeditious and low cost rings a little hollow *(laughs)*. At para. 33 they go on: "might be difficulties.. conflicting views about what has been said.. unfortunate position of determining what the evidence was... unfair to administrative tribunal... undermines its role." And that's important – there is that assumption that the parties in this case have voluntarily chosen a decision maker with the appropriate expertise, and the assumption is that that gives protection to the parties in terms of the outcome before the arb'n or whatever the decision making tribunal may be.

And the Court's point is illustrated by the numerous disagreements between the version of the evidence recounted in Ms. Udel's affidavit and the version recounted in Ms. Delorme's affidavit. I have consciously not taken the court to those conflicts because – other than pointing to it as a reason why we should not go down that path – I do not suggest it's

necessary for this court to resolve those conflicts. They simply illustrate the need for extensive care in examining the affidavit material.

J Thank you. We'll take a 20 minute break.

(Break at 11:14 am)

(Resume at 11:39 am)

J Anything more?

H No my friend will clarify something on the record, but that's it.

McGee (M): What I'd like to do is start with one question raised by the Court with regard to catching a pedophile. In fact on the record before the Arb, there is an email in which Ms. Robinson says 'this is like trying to catch a pedophile' – so it's on the record – also want to clarify – that's not in the affidavit of Ms. Udel – we didn't think it was necessary since it's already on the record.

I propose to speak about the facts then ((?)). My friend is quite right to say the affidavit of Ms. Udel is divided into 3 main areas. First is the report transcript – whatever you want to call it; the second has to do with the admissions made by Dean Lalonde at the time; and the third has to do with the testimony of the students in question, that are named by alphabetically by an agreement between parties.

I start with this document – what happens is that there is a document that purports to be a complete record of what was said during this day at Queen's University.

J This is Ms. Robinson's report?

M Yes. The affidavit of Ms. Udel says that the Employer would regularly refer to this document as "the transcript". And that we objected, regularly, in response to that, that it can't be referred to in that way. What happens then is that there - -this is the Udel affidavit – there is a request by the Employer – the responding party on the motion – to put the document in. And after much discussion, there is a formal ruling – it's not on the record but it's in the Udel affidavit -- what the affidavit says is that there was a formal ruling that was 'I'm just going to accept it to deal with the elements where there was cross-examination' and we've heard that there is reference in the Delorme affidavit that there was an amplification that 'I need a reference to this' by the Arb. But the question is: what did the Arb do with that document? I'm happy to hear the UofO say that we're perfectly able to make that argument, that it was a reviewable error or a breach of some kind – so that's not an issue with respect to this point. What we're told though is that the affidavit evidence that the Applicant/Respondent wants to put in is not permissible. The difficulty that we have is that Arb Foisy starts out in para 58 of the decision – and you'll find that in the motion record at pg. 54 – para 58 – so what the Arb says halfway through the para: "although the grievor... reluctant.. cross-examination... agreed to some portion of the content". The next statement is: "as reported by the student... Prof R said the following:" The Arb doesn't say that Prof R agreed to that.

J That's where we were earlier, I had some confusion on that.

M The reference was in para 54, it was cited by my friend: "Prof R agreed to most of it's content" says the Arb. That's simply – it's not correct. The affidavit is necessary to make it clear that Prof R did no such thing. He did the opposite. So what does it say in the affidavit?

J Let me stop you there. Isn't that part of the issue – your affidavit says 'no, he didn't agree to this, it suggests it' and there affidavit is 'yes, he agrees to most of it.'

M I'm gonna stop there and deal with that question. It's important. What we're not here to do today is determine – 1) that each one of the points is an arguable point in the judicial review.

J Alright.

M Next thing we're not here to debate is whether or not there is an irreconcilable difference between the 2 affidavits and whether or not that can be resolved by cross-examination. Because if there's an affidavit remaining after your decision we go to cross-examination. So we don't know if there's such an irreconcilable difference that can't be resolved by cross-examination.

J Alright.

M And the third point: if there remains some element where there's a dispute, that's a matter that the Div Ct can very easily deal with. So I'll talk about what flows from that, but coming back to this – what the affidavit does it make it clear what basis this decision was made on. It was not to be the proof of any contents, or introduced to give any impression that Prof R agreed with it, unless he specifically said 'I agree, I said those things' the fact he might say 'I could have said something like that but it was in this context' does not lead to the conclusion that he agreed or adopted the statements in the report. The question is: is it a point that is going to be debated before the Div Ct, and my understanding is there's no dispute that it will be debated. On that basis – given fact that there was a ruling at the hearing that is not reproduced in the decision – we are entitled to place the material before the court that you see in paras 1-13.

J Of your affidavit?

M Yes, that's correct. The second is the question of the elements that were evidence before Arb Foisy, but are not dealt with or reproduced in the decision. One of the central issues was: did Prof R say 'I'm not grading anymore'? That's the Queen's issue. 'I'm not gonna assign any grades to anybody, nobody's gonna get anything other than whatever grade I decide'. What we know from the record is that that Queen's interview occurred before a course called 1722. I'll call it that, it's a physics course. There's the Queen's interview, and there's the course 1722. Arb Foisy does not deal with the statements attributed to Dean Lalonde in respect to PHY1722 that Prof R used a final exam, a mid-term exam, homework assignments, and other methods of grading. He doesn't deal with it – what he says is, 'well Prof R said he wasn't going

to use any methods at Queen's' and then Dean Lalonde says 'yeah, I agree he said he would use mid-terms and final exams, and other methods in 1722' – but then Arb Foisy doesn't deal with that at all.

Dean Pallone makes a startling admission in cross-examination. He says: "I don't know anybody who didn't deserve the grade they received". We have to remember that Prof R is fired for failing to grade people. Arb Foisy does not reproduce that in his decision.

J I say, so what? Maybe he doesn't have to say 'I took all this into consideration' – is that a necessary component of his decision?

M We would suggest, ultimately to the Div Ct – when you look at what Arb accepted, then look at how he doesn't deal with the fact – that everybody gets the same grade – that is a crucial factual admission that is not apparent on the face of the record. That there are no regulations about assigning a portion of grades in a certain way, and that a professor had the right to determine which of the various factors would be used in the evaluation of any student. It goes to 2 arguments in the judicial review: the first one is that Arb Foisy did not deal with this evidence in any way that is apparent on the face of record. But more importantly, it's a crucial and central series of facts when the Arb addresses to the extent that he does, the question of academic freedom. And once again, I want to be brief talking about the argument before the Div Ct ultimately, but the University terminates Prof R for the fact that he hasn't graded people. I'm really simplifying it – my friend will tell you that, but I want to be very brief. Dean Lalonde says 'there are all of these freedoms, where the determination, the discretion, belongs to the professor' – and then the Arb says, in essence 'well, Prof R disobeyed an order, so I uphold the termination.

J Do you need the affidavit to achieve that?

M Yes, because these facts – Arb Foisy doesn't deal with that. It may be that the Div Ct will say 'ah, that's implicit'. But our submission is that on a central point, a crucial element of evidence should be incorporated so that Div Ct has the benefit of being able to deal with that.

At paras 26 – of the affidavit – you see the references to the students' testimony. What Arb Foisy does with respect to the students' evidence – you can see at para 56 – so he speaks about the evidence as to what was said on the first day of class, and there are essentially 4 versions of this. He has Prof R, he has a Teacher Assistant Philippe Marchand who corroborates it, but Arb Foisy discounts this as somebody who – and I'm reading into this – somebody who supports Prof R. What we're doing is challenging the statement that students V and P had the same evidence. They didn't have the same evidence – in fact, their evidence was arguably different on both accounts than that reproduced by the Arb. But at the very least, what you see in the affidavit of Ms. Udel is that in cross-examination, student V couldn't remember exactly what was said -- that's para 28 again. The question was posed to him "could he have suggested that each student could excel and it was possible for everyone to have an A" – he responded he "couldn't recall but..." That's not saying that student V said 'Prof R walked into the course and said everyone would get an A'. More importantly, student P said nothing like what is

in the decision. He did in chief, but in cross-examination, student P accepted that it was possible that Prof R may have said that it was possible everyone in the course would get an A+, in the sense that it was his expectation. So Arb says that P and V said the same thing, they were rock solid in their evidence, and I prefer their evidence over evidence of R and PM. But they didn't say what was said in the Arb's decision. So we're debating if Ms. Udel's affidavit is accurate. If it was an admission in cross-examination it has to be before the court, because there is a finding of fact that in inconsistent with the evidence. You could say 'maybe the Arb considered that and found some way around that' – it will be an interesting argument – I know that if we're before the court and there's a decision maker who says 'witness A and B said the same thing, it's different than witness C and I'm preferring A and B.' and you go before an appellate tribunal and say 'witness A and B didn't say the same thing – and B says 'yeah it might have been what C said'' – a decision like that will be overturned. So if we're correct in that, then this decision can't stand. We're saying this information is so directly relevant to the judicial review application, and so critical, and if accepted, so likely to lead to a finding that the decision is unreasonable, that it at the very least deserves to be seen by the reviewing court.

So that's a segue into what I want to say about how the law has been set out and applied. We have 2 periods in time – the KeepRite decision, which is the law in Ontario to this day – it's the period pre-Dunsmuir. It's the period where we were speaking about patently unreasonable and jurisdiction, it's even before CUPE and New Brunswick Liquor. So we accept the principles that there is no reference to natural justice, but we bring it up to date. The question is: how is it applied today? And the most recent decision that we're aware of is at Tab 6 of our materials, and that's the NHL decision. So the court goes through the analysis and makes the analysis to KeepRite, but doesn't spend a lot of time on it – they go straight to the application. This is a decision of Justice Smitten, who's no stranger to labour relations in Ontario. They say 'we're going to look at whether this material is necessary.' There's an email that's requested put in the affidavit to demonstrate what was before the decision makers. If we look at para 17, what we find is that the motions judge was not satisfied that the interpretation of the email was an essential point in the case. So that's a point of departure. Elsewhere in her reasons she describes "the essential point to be why the applicants... application..." So the decision followed very much the line of reasoning the University is making now. And Justice Smitten said "in my view the motions judge erred in law in excluding this evidence... appears to equate an essential point with ultimate question... pivotal finding..." That's our point of departure. "Often... circumstantial evidence... argues that... properly understood.. in my view the motions judge erred in striking..." and it goes on. In evidence of Brian Murphy, evidence was struck as a result of fact that it was not part of a natural justice issue – in fact the court rules that 'it's not probative'. The balance deals with failure to give evidence. The point of departure is: is there a central point, a critical point, in the case that is dealt with on this material?

So I'd like to conclude by echoing some of the comments on the rationale. Because we do agree on a couple things. The first one is that, with all its warts, the Employer and Union side, as well as arbitrators in Ontario – because it's not universal in Canada -- have decided that they don't want to transcribe hearings. That fact can cause problems. Especially if you have a 28 or 29 day hearing, where one witness is on the stand for 13 days. It's hard to imagine how a decision maker can keep track of all of that, but my friend and I will probably

agree that most good arbitrators do exactly that. The problem, though, is that when we have agreed to the system with all of its flaws and potential impacts, I don't think either party has agreed to a system that says 'we waive the right to say 'you know, this was evidence in front of the arbitrator, and it's not dealt with in the decision'' – we have not waived that. So our point is a legitimate one. If the elements in the affidavit go directly to that point and are omitted in the arbitration decision – so they're relevant to an essential element of the decision. What we're being told is 'there's an underpinning to a relevant argument that you should be deprived of from putting to the Div Ct.' We would argue that we've heard about natural justice – any concept of a fair result from a judicial review would seem to suggest that those points should be in front of the Div Ct, who can do then what they will with them.

I also want to make it clear what we're not suggesting. It's consistent with KeepRite, Kingston, all the cases that we've cited. In labour relations, we don't want to revert to a situation where we're saying 'here's our take on the evidence' – affidavits in judicial review we're not meant to say 'somebody said it more like that, or I would have interpreted it this way' – judicial deference would mean that on those issues the Arb's assessment would go, unless it is unreasonable. So, as was the case in – perhaps it was Kingston – a party filing 400 pages of notes saying 'this is what it was like to us' is not what we're suggesting, and we would resist that strenuously if we were on the other side of that. A party putting forward an application for judicial review is under an obligation not to create a record for the hearing – a party has an obligation to ensure that the questions that are addressed by the affidavit are essential questions and that they are matters that are not reflected on the face of the record.

We would submit, to conclude, that each one of these elements of the affidavit goes to an error in the decision in that there are findings or conclusions that are unsupported on the evidence, or that represent errors going to a matter of natural justice. And on that basis, and of cases like the NHL case, this court has allowed portions of an affidavit such as those to go before the court, where an assessment will be made as to what the consequences are of those elements of the case.

Those are our submissions.

J Thank you – reply?

H 2 principal points in reply. The first comment relates to the Robinson report. To put in context my comments – go back to the reasons of the Court of Appeal in KeepRite. To quote from them: "the practice... very exceptional.. only to the extent... jurisdictional error.. complete absence of evidence... indeed be rare." So the task of the court in this proceeding is to determine if this is one of those rare situations where an exception should be made to allow affidavit evidence. My friend refers to paras 9-13 of Ms. Udel's affidavit, which recount – at pg. 32 of the motion record – what she does in the affidavit is recount the testimony of Prof R regarding the Queen's speech and the subsequent communications, and she goes into some detail talking about how he explained himself to the Arb. At para 10: "while he may have made statements... wording and tone... not accurately reflect... emphasized.. missing from the summary..." Let's just think about the significance – she's telling this Court that the decision maker heard all of those comments of Prof R. She's making it clear that the Arb heard those

concerns from Prof R, then the Applicant would have the court that the expert Arb disregarded those concerns, disregarded comments by APUO in closing submissions, and blundered. They're asking this court to draw the inference from the fact that the Arb didn't go out of his way to state 'look I'm referring to fact that Prof R conceded accuracy because that means I can rely on those portions of the documents'. Given how rare it should be that affidavit evidence is heard, it would not be appropriate to make that exception in a case where this court would have to find, in effect, that Mr. Foisy didn't exercise the expertise that should be held by any competent decision maker with respect to a document that has not been identified by a witness, and which has been identified with respect to its potential failure many times in the proceeding. We know Mr. Foisy heard Prof R's comments. The court should not be too quick to infer that he made the blunder that my friend suggests.

Last point: in reference to NHL decision. When you examine that decision – it has an interesting factual backdrop – but the point that's important for us begins at para. 15, where the court notes: "the board found that the email attached to a video clip.... the applicant states.. did not testify... no evidence that this statement related to an email clip." Take you over to para 16: "... this part of affidavit... absence of evidence... admissible..." The critical point there is that that submission and the affidavit material was in reference to a factual finding by the decision maker and the point of the evidence was to say there is no evidence that supports that factual finding. You did not hear today that sort of submission. You did not hear 'Mr. Foisy made this finding and it's not on the record.' That's what makes our case different from the NHL case, and you'll see that the portions retained were on that prong identified in KeepRite where there's no evidence to support that a finding of fact was not reflected on the record.

Then the natural justice argument – the only point that has any legs is the Robinson report – but it would be extraordinary to have this court conclude that Mr. Foisy made the blunder that they say he made.

M We can also advise the court on questions of costs. ((?)).

J Can't give you my decision right away, will require some thought. I thank you for your very good submissions.

I'm gonna give you back this book.

H That's ok.

J I think it fell apart after being bound, and somebody put it back together. May have happened down in central office.

H We noticed all the decisions are there, just not in the proper sequence.

J I underlined that summary – did I keep it or not? Let me keep that and take it upstairs – I'm going to keep your other copy that you gave me. Thank you.

(End at 12:29 pm)