APUO v. University of Ottawa
U of O's appeal of decision of Scott J.
ONSC Divisional Court, Ottawa Courthouse, Room 37
April 29, 2016

M = Sean McGee, Counsel for APUO
H = Lynn Harnden, Counsel for University of Ottawa
J1 = Justice Caroline Horkins
J2 = Justice Michael Dambrot
J3 = Justice Harrison Arrell
R = Professor Denis Rancourt

(Begin at 10:04am)

J2 Good morning. APUO and U of O, Lynn Harnden and Celine Delorme for the University, and Sean McGee and Alison McEwan? Thank you. Perhaps before starting, deal with extension of time issue. Is it on consent?

M We're not taking a position.

J2 No position – is that almost consent?

M You might be able to infer that.

J2 Obviously no prejudice, very short time frame, so we can proceed with the appeal. Could I ask for a sense for the timing counsel anticipate?

H 45 minutes.

M And somewhat less than that.

J2 OK.

H Good morning, come before you to address important issue re: parameters of record in app for judicial review (JR). No record taken of hearing. Many other tribunals have adopted practice of keeping record – digital record, etc. – but labour arbitration has stayed with its approach of hearing in a room, arbitrator takes his own record, each party takes their own record, so, in effect there are 3 records, but no official record to go up on app for JR. Overarching rule is that there should not be placed on the record in app for JR any material purporting to summarize the evidence. This is because if one side files aff material about record, other side files own aff, there will be cross-examination…

J2 And cross-examination of counsel that filed the records…

H That's right. Then up to review court to sort that out. Also very cogent policy reasons that this court articulated in Tab D in our book of authorities, in para 17 of our factum. I rarely read to the court an excerpt from a prior decision, but in this case I ask the court's indulgence. [Utilities v. Kingston] case: "if extensive aff can be filed… in order to permit parties… significant incentive for parties to seek

JR… reframe the arguments that were before the arbitrator… more prolonged and more costly". The court then went on to say "… real difficulties to recreate the evidence… dispute… unfortunate position of trying to determine what the evidence was before the tribunal". A key comment: "…unfair to the tribunal."

J1 What para number in the case?

H Paras 31 and 32.

J2 Justice Swinton?

H Yes. And that's the backdrop to this important subject. Those policy reasons. There's no doubt that because of these considerations, the Court of Appeal – refer to it as Keepright decision. Terminology they use when they say there should be exceptions: "should be very exceptional", "rare", then they develop "an exacting jurisdictional test."

It's incumbent on the party opposite, where it observes there's aff material filed, to bring a motion to have the Keepright principles applied to that material. It's not appropriate to let that material reign on the record. Message clear to the bar it's our responsibility to bring a motion.

J2 And it's been done lots of times.

H Keepright set out an important exception: "aff needed to show a complete lack of evidence on an essential point." Subsequent courts have developed one additional exception "where the aff shows breach of natural justice that cannot be proven by mere reference to the record".

I'll begin with a brief review of the factual matrix.

J2 I'm not trying to stop you from doing that, but can assure you we're all familiar with the material.

H Dismissal of Prof Rancourt 2009. Key allegations that he awarded A+ to all the students in two classes. First day of class he made comments to the effect they could be assured to receive an A+ at the end of class. Hotly debated point. Respondent APUO filed grievance re: dismissal. Went before Arb Foisy. Two other grievances included relating to two letters of reprimand. Hearing lasted 28 days. 160 documents marked as exhibits that will be part of the record of the reviewing court. Prof R testified for 13 days. His Dean, Andre Lalonde, testified for seven days. His evidence will come up in my comments. Arb Foisy issued comprehensive award of 32 pages. He upheld one of the grievances related to one of the warnings, dismissed the second grievance and the dismissal grievance. He preferred the credibility of two student witnesses over that of Prof R. That is para 66 of his award, pg 43 of motion record. He also commented at para 68 that Prof R's credibility as a whole had been compromised, and cited specific reasons for that.

Respondent APUO filed app for JR and grounds for that app are notable. They're listed in para 8 of applicant's factum. Summarize them: allegation that Arb Foisy denied Prof R natural justice and procedural fairness, which is important in the context of today's hearing in two ways: relying on report of Maureen Robinson, and failing to rely on testimony by Dean Lalonde. Other allegations: unreasonable finding of fact re: awarding A+; and unreasonable conclusion re: result in termination of

employment. Notable by its absence is the lack of any reference to the first principle identified in Keepright – complete lack of evidence on an essential point.

In support of application, APUO filed aff of N. Udel. It's 30 paras in length, and purports to supplement record by adding evidence heard by Arb Foisy. U of O filed motion to strike Udel aff, and in support of that motion, there was filed an aff by my co-counsel Ms. Delorme, 75 paras in duration, and not for purpose of supplementing record, but of pointing out alleged inaccuracies in Udel aff. Based on our record, our transcript, there were inaccuracies. Shows complexity of drawing from different records. That motion was heard by Justice Scott on October 15 and was dismissed. Scott J purported to apply the Keepright principles, and concluded this case represented one of the rarer cases where aff should be added. He said "reviewing court would ultimately be tasked with determining if aff material should be accepted". With respect, it's not the task of this court. Our assertion is that Scott J did not apply the principles of Keepright.

As I've noted on the first principle of Keepright, nowhere in the Udel aff is there mention of evidence to support that. I'll wait for counsel's response then reply.

Turn to whether necessary for APUO to submit aff material to show breach of natural justice in proceeding. Five components in Udel aff: 1) component dealing with M. Robinson. She was a student at University, editor of student newspaper, but critical point is that she was not called as a witness in the proceeding. The evidence was she attended Queen's U, when R gave talk. She prepared a document which purported to record what Prof R said on that occasion. There was also evidence that she was actuated by bad faith. Prof R was being cross-examined regarding his testimony, the document that had been prepared by Ms. Robinson was put before him and put to him "this document says you said such and such on this occasion". APUO objected to admission of this document as exhibit. Arb Foisy made ruling with respect to it and he said "I'll take it on the record, but only by reason of fact there are questions regarding its content – need it to understand those questions before me" – so for that very limited purpose. That ruling referenced in aff of Delorme, Tab 6 of our motion record, pg 78. Keeping in mind frailties of these notes taken – words recorded were Arb Foisy said "think it should be entered in relation to questions witness has answered…". So entered on that restricted basis. But in fairness, that's an unusual situation when the document was not identified by the witness. Apparent on face of the award delivered by Arb Foisey that he was extremely careful in terms of how he used that document. Refer you to paras 27-30 of our factum. Won't go through all of it but we put in bold the words used by Arb Foisy when he drew upon that document, and they are important in terms of satisfying the Court that he was alive to the concern around the document. These were his words "although the grievor… very reluctant… finally through cross-examination agreed to some portion of its content" so what does that tell us? Through the process of cross-x, Prof R admitted some portion of this document. That puts that portion of the document on the record. No breach of nat jus there. Much of Prof R's explanation was put on the record. But let's stay with use of Arb Foisy of document. Pg. 12, similar thing, Prof R admitted it was "possible" that he said that. That part dealt with heart of allegation around A+ issue – pivotal part. Arb Foisy says why R said that "bravado, frustration" – so Foisy is showing he's aware that the comments at Queen's need to be put into context – but important part is that R acknowledged it was possible he said those very words. Further down there's another reference by Foisy to the document. Final reference at pg 13 of our factum, para 69, similar theme, he says "in relation to the Queen's report, R initially disputed some of its content, based on fact... spying on him" so there's the reference to bad faith, so it shows he's alive to that concern, "but finally admitting to most of it in cross-

x". So our submission on this key point for today's proceeding: there couldn't be stronger indications of care with which decision-maker took in that unusual circumstance of that document to only rely on components of which witness said were reliable.

J2 Even if he didn't do it right, still apparent on face of it – doesn't require aff to show how he treated him.

H That's right.

Now, my friend may point out that Arb overlooked allegation that Robinson biased against him, but he was alive to that.

Now I'll turn to Dean Lalonde's evidence. He testified for seven days. Motion judge determined that all aff material should be struck since it was difficult to separate from Robinson material. They are separate and discrete elements. Paras 14-23 of Udel aff address Dean Lalonde

J1 14-23?

H Yes. So it's a significant portion of the aff. To summarize: portions make reference to Lalonde's evidence that were not particularized in Foisy's award. Overall theme of that ev relates to propriety of R's awarding all students an A+ in two classes. Foisy made reference to Lalonde's ev, Udel aff supplements that with additional material. Important that Foisy made reference to Lalonde's testimony regarding R's let's say special approach to pedagogy. Even more important, he made extensive reference to R's explanations of that pedagogy. He was generous in extreme about excerpting portions of R's articulation of his pedagogy, and refer you to paras 37-40 of Foisy Award, and para 63-64 of the award – all that material in the award gives R his voice in terms of how he explained his approach to teaching. That's important in this context because it shows the decision-maker alive to the competing issues around R's conduct. It is open to APUO to argue before review court that Foisy's conclusions were unreasonable, wrong, that would be a fair argument to put – there's absolutely no need to supplement the record by picking out additional elements of the ev that of course APUO would prefer Foisy had chosen to include, but that is not the proper exercise, to selectively pick it. Of course we feel there are other elements of the record we would like to see. It's a troubling direction to take unless it's compelled by the rules in Keepright and other cases.

There's no issue of nat jus here, and that's basically the end of the argument. Mr. Foisy ultimately concluded there was a violation of particular cause of collective agreement (CA), and anchors his decision in that.

Understand the respondent may have preferred Foisy make his decision differently, but that does not justify inclusion of material in Udel aff.

If I could just refer to this court's decision in [Utilities v. Kingston] for a moment. Case is at Tab D, read from para 39: in the latter portion of that para, these comments could be applied to this case: "it is evident that employer taking issue with respect to weight given to some evidence and not other evidence… inviting court to re-weigh the evidence.. not role of court on judicial review". We submit that's directly on point – Udel aff is invitation to court to re-weigh the evidence.

Third component of the aff is headed "Prof R's methodology" – two paras. Same comments – similar concerns for this portion of the aff. To give example, it's mentioned in aff that R intervened

with students on occasion when they were struggling. Having in mind context of him assigning all students A+, he pointed out in evidence "look, if students were struggling, I would intervene". But when you turn to Foisy's Award, pgs 34-35, there's an excerpt from a letter or an email sent by R, in para 39 of the Foisy Award, "and included in R's comments is this statement… 'I did intervene... losing focus… learning experiment'" – so the very theme in the Udel aff is right in the Award – no need for supplementary material. Any argument that can be derived from that can be determined by the review court from the current record.

Fourth component of aff relates to testimony of two students identified by their initials – they testified about first day of class, and what they understood R was saying. R took issue with how they characterized it, and it was a significant issue in the proceeding, in terms of what actually was said, understood in that first day. Udel aff purports to supplement the record in terms of ev of two students, and one of the points made was during cross-x, one of the students acknowledged he couldn't remember exactly what was said. Objective of that component of Udel aff is to strengthen argument that Foisy got it wrong in terms of his conclusion – that he shouldn't have accepted ev of students over R. Focused on defining credibility. Record shows Arb examined R's evidence – discusses it at para 66, and in that para makes important finding that he gives more credibility to 2 students on the points at issue. Comments further at para 68 that R's credibility as a whole compromised. Not appropriate to file aff ev to supplement record to challenge credibility. That is in domain of decision-maker, not for review court to re-visit that finding.

Final component of Udel aff relates to policy or procedural rules. In aff, states that University had not relied on procedural rule passed by Senate to support its decision. That's common ground. But unfortunately, for today's proceeding, that does not raise an issue of nat jus. No need for APUO to advance any argument around absence of policy. As mentioned earlier, Foisy referred to CA, but that's an argument for review court.

J2 Motions judge made no reference to this aspect of the argument, did he?

H That may have more to do with my advocacy. I didn't take him through level of detail we have today. I didn't highlight nature of this additional evidence, in retrospect I should have.

In summary, we say this case does not fall within what Court of Appeal characterizes as "rare instances" in which aff ev is properly tendered.

Close by reference to one additional reference – no, I'll leave it at that. Our overall submission is that there will be an ample record for review court comprised of Arb's Award, 160 exhibits, that is going to enable APUO to advance arguments in its Notification of App for JR – not impeded by absence of aff ev, therefore submit aff should be struck as a whole.

J2 Thank you very much, Mr. McGee?

M Start with something that appears not to be an issue. My recollection is final paras of Udel aff were not argued. Now understand position of Uni is that there is common ground with respect to para 29.

J2 So you're not going to talk about that, thank you.

M Start from proposition that this was a case that determined if there was inappropriate conduct in three courses. Foisy agreed with one grievance and upheld it. Second course was a first-level course, refer to it as 1722, and a third course called "solid state physics course". What Foisy did was make decisions about the latter two courses, in large measure, I would say and will say before Div Crt almost exclusively on credibility findings. Credibility was central. See that in para that my friend referred to, para 68 of Award – central to that cred finding is Queen's report. I tend to begin there – I'm going to talk about caselaw in a moment.

Look at decision at para 58 – Foisy tells us what the APUO says actually happened in the decision. That R, through extensive cross-x, agreed to some portion of this report prepared by Ms. Robinson. I won't take you through in detail the facts in the decision of first-instance and in Udel aff, but this is Ms. Robinson who saw her role akin to posing as a young female to catch a sexual predator and express what I'll loosely characterize as her revulsion to Prof R. Facts that don't appear in the record. When we're looking at cred issues that arise and that are axis about which Foisy's decision rotates, the fact he would not comment on those astonishing elements in this case and they would not form part of record in terms of decision, are quite puzzling. But what is more puzzling is what is reproduced in para 58 and then what is reproduced in para 69. Foisy says "R admitted most of what was in the Queen's report" – it sets up an issue in the decision that begs the question about what the ev was that was before him. Unfortunately, Foisy does not provide a record that allows us to explore those deficiencies. So what does aff of Udel say? It says 'this report was not to form any factual basis other than a specific admission R might make during proceedings' – outside of that, it had no evidentiary support. What Udel says in her aff is that he did not make broad admissions…

J2 He did in his radio interviews.

M But the radio interviews are a separate issue – the timing. The difficulty is that he teaches a course, he grades – not everybody gets an A+ -- he has these radio interviews, these discussions, then the Queen's interview, then the solid state physics course. But we have the 1722 course in which he has graded people. What R said during that Queen's interview is something that Foisy interprets as being a broad acceptance of all the propositions of the Queen's interview – it is something that in the absence of the Udel aff, the Div Crt would have to accept. But the Udel aff says 'that's just not so'. If we face a situation where the aff was filed in support of the app for JR is tossed out – my friend is right, it doesn't mean we have no case, but on that point – elements that are central to that issue are never brought before the court. There is a contradiction between these two paras. Udel aff says the para 58 reference is absolutely accurate – he agreed to a portion of what was in that report.

J3 Aren't we forgetting para 60, 61? Where the Arb goes on further to outline the professor's comments in cross-x? As well as para 63-64?

M We're now into an exercise where we have to differentiate what will happen in the app for JR when it is heard, and whether or not it is appropriate to have reference to affidavits when we make those arguments. My friend will say 'in the end, even with the Udel aff, and considering that this particular individual may have had a motive to misrepresent, there remains some factual basis to support this decision' – but that goes to deciding the merits.

J2 It's not exactly that easy – the test is that you have to show an absence of ev on an essential point – what is the essential point?

M The essential point is that – in this situation, the ev that was given by R was not represented in the decision. He denied both that he had said exactly those things, and he said that without the context – he said 'light have said something like that, but you can't understand unless someone faithfully reproduced it'

J2 Both those things are in the Award.

M But not fact that R said 'I'm not accepting that document'.

J2 Well he says a lot of things, but where's the essential point? The Court of Appeal is talking about an essential point to the outcome. This is a quibble about how much he accepted. You've pointed out the Award might be contradictory – that's on the face of the Award – but to descend into counsel's interpretation – it's about down and dirty into the evidence. So the Div Crt will end up with one version, and we'll have another version – how does that relate to what the test is about?

M Essential point is that Foisy tells us in his decision that R essentially confessed. But what Udel says is 'he did no such thing, he rejected the notion' – if the decision says 'the accused confessed' and it's not true, it's an essential point.

J2 He didn't quite say 'the accused confessed' in this case, did he?

M Para 69 – 'he initially disputed, but in the end he admitted most of it' – that's what Foisy says and Udel aff says that's just not true.

J2 He says a lot more than that and leaves you aware that R admitted some of it, sort of, but it was out of context. He doesn't say 'confession' in the sense we would mean by a confession. He says he made some degree of confession.

M In labour arbitration context, if Arb says 'this was put to the witness' and 'this' includes admission, and Arb says 'witness agreed that's true', then in labour arb context that's a confession.

J1 Strikes me that that kind of complaint could arise routinely in lab arb, but you don't see wealth of authorities re: challenging how tribunal has assessed credibility and finding of fact. Must happen all the time because you don't have transcripts. It invites new evidence on the JR, when a cred issue has arisen.

M You're taking me to what we say is the ratio of what should be taken from Keepright…

J1 I'm troubled by that – opening a floodgate toward involving the panel in a credibility assessment.

M The answer is that all parties in lab relations context are of same view – lab relations was meant to keep out lawyers – they weren't successful – and it was meant to avoid judicial processes following arbitration. Start from that principle, and my friend and I are on same page. It's correct that there are parties that don't feel as though a particular assessment of cred was appropriate. So that's number 1. Second point is that parties may feel that there are certain elements for and against that deserve more emphasis, that's number 2. Number 3 is a characterization – if an Arb says 'this person came across as completely dishonest'. None of those things we are proposing in the aff would have the effect of opening a floodgate.

J1 Why not? This process comes from challenging your client's evidence. If you were right, and this decision upheld, why wouldn't that happen frequently?

M In this particular case, Arb Foisy makes a statement about what a witness gave in evidence, and… says that was not accepted…

J2 You're really explaining the problem of an affidavit. Witnesses are cross-x'd on prior statements in a courtroom. They don't say "that's correct", they edge, they sort of admit it. The trier of fact takes into account the differences in the way they explained their admission. Very hard for a lawyer or other person to say "he's wrong and didn't admit it". The trier of fact looks at it all and makes a conclusion. Can't open door to saying "oh that's not what he admitted". Hopeless exercise. Div Crt can never resolve differences in your views about what was or wasn't accepted. Arb is trier of fact, he says "he admitted essence of it". How can we go around that?

M We put in aff that said 'he admitted 47% of it' – if we put an aff of that kind in.

J1 What happens after that? Udel gets cross-x'd. Then three appellate judges who weren't at hearing. Not satisfactory.

M We put in aff that says 'the percentage was lower than what was said' – you will tell me to sit down. But if we say 'this is what was stated in the arbitration' – that's different. Now we're saying 'the ev in front of th Arb was X' – not an opinion, not a weighing, a statement of what was said.

J2 But cross-examination was lengthy – assessment of cred of witness, of what he means when he does or doesn't admit has so much nuance to it. If we're to review that, we need a transcript of whole cross-examination, not someone's little excerpted part. Either you have entire transcript, or this is a hopeless exercise.

M Again, I'm trying to differentiate between hearing on merits and question of the aff. On merits, Div Crt – first of all, don't know we ultimately will have a conflict about this. Haven't sorted out if there is an Employer aff filed on the merits.

J1 You've gone through all this effort without exploring if there is an agreement. Why not a discussion about whether you can strike an agreement? That's really surprising. Well I'm sure there's a good excuse…

M We filed an aff that says 'during the hearing, R said A and didn't say B'. If that's not resolved, I want to be sure – we've discussed the policy reasons for what we're doing. If an individual gives ev before an arbitration and Arb says 'I find A, B, C, D' and individual says 'B was just not said' – that ev was not given. The Keepright decision, we would argue, says that the moving party has a right to put an aff in to say 'there was a conclusion about B that B was said, and it just wasn't said' – because otherwise, there's no way to bring the matter before the court. So Keepright starts from that proposition—regardless of a floodgates argument – if party alleges B was said, and it was not said, then that aff ev is permitted. So we suggest to you there was no error in determining what the law was by judge of first instance. Then becomes question of application of what law was. Now, Arb says B was said, party says "B was not said" – then judge of first instance can say "I determine this can go forward". There is absolutely no question that in decision it is made clear that this is a matter of an exceptional

circumstance and only exceptional circumstances should go forward. All of Keepright is interpreted in way that law is described and tests that must be made.

In this particular case, allegation in aff that "B was not said" is at a sufficient level to allow it to go in by way of aff. In first-instance, the judicial determination is that it was. The general test on the motion before this panel is 'was there an error of law' – if not, was there an overriding error in application of that law. Determining in this case that aff was sufficient to meet that "B wasn't said"-type test, was there. It was within range of discretion of judge of first instance.

J2 Let me just ask – do both sides agree the issue is "palpable and overriding error", or is "error of law" there as well in decision of motions judge?

H Yes.

J1 That he states correctly, but does not apply it correctly, isn't that it?

H Yes, thank you.

M We submit that it must be within range of matters on which judge of first-instance has that discretion.

Turn to second matter, cross-x of Lalonde. With respect to 1722 course, allegation is that R did not objectively evaluate students in that course. Know from decisions that not everybody got same result in that course – there was a ranking of students. Yet, Mr. Foisy says 'well I find that there was no objective evaluation'. So there is an absence, up to this point, of any basis for that conclusion, other than what we have just talked about – the statements we've already made. We're back to the cred problem – Foisy jumps from cred problem to conclusion there's no objective evaluation. That's why judge in first-instance says with respect to position of University, 'these are linked to each other, but there's specific evidence before Arb Foisy about whether or not there was objective evaluations'. There were critical evaluations made, one of which was that the Dean said he could not point to a single individual in that course who was not objectively evaluated. And 2) that he could not point to a single individual in that course who got a grade he or she did not deserve. So a conclusion there's no objective evaluation, and specific evidence before Foisy – he doesn't deal with at all.

J2 Do you say that's an essential point?

M Yes

J2 Then everything's an essential point! We need transcripts, because you can always find 25 or 30 bits of a witness's evidence that support your point. So we need a transcript all the time if this can be supplemented.

M The issue in front of Foisy – not a corollary issue, not talking about cred – the issue was that the Employer has the burden of proof of demonstrating it had grounds for dismissal. The sole grounds for discipline is R did not objectively evaluate. There was an admission by Employer that it could not point to any person who was not objectively evaluated.

J2 Any individual. Surely you don't have to point to an individual – that's not an essential point. That's not the end of the case, that's like everybody threw up their hands and said 'let's go home'.

J1 You're saying the Employer did not fulfil its burden.

M I would go further –

J1 Where's proof that Employer – oh right, cross-x.

M No evidence that any single individual not objectively evaluated.

J2 But surely could have evidence that people were not objectively evaluated as a whole. If R said 'I didn't objectively evaluate my students' and you cross-x'd the Dean who said 'I can't point to a single individual' – that wouldn't defeat the case.

M But the issue here is: is there evidence of an absence of evidence? This is clearly an admission by the Employer that there was a complete and total absence of evidence – it's not reproduced in the case.

In the Keepright example, this falls squarely within it – but at very least, we're back to palpable error issue, and at very least, the judge at first-instance would say 'this seems to be within Keepright', I'm going to allow it. So there's no error of law in expression of test, therefore it remains as well.

With respect to paras 24 and 25, I'm back to first point I made – we may have consensus with Employer – that Employer accepts that methodology stated applied to the two courses. Foisy talks about this with respect to the 1722 course – if Employer accepting that then we don't have a dispute, and we're content to have those paras disappear.

Final point is testimony of individual students. Foisy says 'I accept testimony of these two students'. Foisy does not reproduce fact that Student P accepted that this statement about getting As might have been more of an expectation – the University's position in this case has been that R walked in and said 'it doesn't matter what you do, you get an A'. That's what this case was about. Basis for initial complaint was that Student P said that's what was said to the class. But during cross-x Student P – it was put to Student P – 'this is what R will say' – and Student P said 'that's possible' and that it 'may have been an expectation' – is it possible to sway Court on merits with that? We're not at that point. If there is factual underpinning – a "promise" as Foisy found – that they would get an A+ regardless of their work, then this is an essential element.

To summarize, the Keepright decision is one that was decided in an era before [Dunsmuir] and [Webber] and we have to interpret it in that light. In an era when we spoke about errors of law going to jurisdiction, and so we need to make a determination of what that means in the modern world. But it is still the law in Ontario. What Keepright allows is that in circumstances where there are factual elements that go to a central issue in the JR, and do not appear on the face of the record, and that reasonably could be seen to have an influence on decision itself, that those factual elements are permitted in an aff. And there will of necessity be a range of those elements, from elements that are absolutely critical – I put in an exculpatory document that says 'I wasn't there when the theft happened' and the Arb doesn't include it... The decision at first-instance was an exercise of that discretion, and that exercise was in the bounds of the Keepright decision. As a result, there is no reason to interfere with that decision.

J2 Thank you very much, reply?

H Three points in reply.

First, reference that Foisy did not include Robinsons comments about “sexual predator” – wasn’t even in Udel’s aff. The ref to “sexual predator” is in an email that is in one of the exhibits. He can point to that.

On Ms. Robinson’s document, it’s useful to turn to the Udel aff at Tab 5, in particular para 10, which is quite notable in context of discussion. Udel states “R also testified… similar statements... wording and tone did not accurately reflect..” My friend said it’s like he confessed, well right in the aff that they want to place before the court, there’s the confession, essentially. Then they turn to nuances – all of that already in the Award. As you read paras 10-12, for example, para 11: “R… arouse interest in teaching methods...” – that’s right in the Award, that explanation. No need for this material to anchor any submission on App for JR.

On cred point, refer Court to one passage of decisions before you involving Keepright. The […Schoolboard] decision, Tab D of our Book of Authorities, para 4, and it’s significant because discussion about role of review court in relation to credibility. This statement by Justice Brown is germane: “my view… credibility… patent unreasonableness… deference…” I know that’s not novel, but interesting that it’s discussed in context of application of Keepright principles.

One comment on Lalonde’s evidence and critical admissions not on record. Of course, there’s another view of record – refer you to Ms. Delorme’s aff, at Tab 6 of our Motion Record, where she addresses that specific point in para 45. She says “Lalonde admitted… did not deserve… not evaluated objectively…. Admitted it would be statistical accident that they all got A+” – just an illustration of the nuances we would get into if this aff evidence was maintained. Unless there’s very compelling evidence, we submit it should be struck.

J2 Any discussion about costs?

H Yes, $5,000.

J1 All in?

H Yes.

J2 The usual labour number. Thank you counsel for your very helpful submissions. We will reserve the judgment.

(End at 11:35am)