

IN THE MATTER OF AN ARBITRATION

Date : January 27, 2014

BEFORE **Claude H. Foisy, Q.C., Arbitrator**

UNIVERSITY OF OTTAWA
Hereinafter called the « Employer »

And

ASSOCIATION OF PROFESSORS OF THE UNIVERSITY OF OTTAWA (APUO)
Hereinafter called (the “Union”)

Grievances : Letters of Reprimand and Dismissal
of Professor Denis Rancourt

For the Employer : Lynn H. Harnden and Celine Delorme
For the Union: Sean McGee
Dates of Hearing : Ottawa, May 2, October 11 and 31, November 1, 2011, January 12,
24, February 21, April 10, 11, 12, 13, May 14, 15, 16, 17, 2012,
May 13, 14, 15, 21, 22, 23, June 5, 6, 11, 12, 13, 25 and 26, 2013

AWARD

[1] This Award deals with three grievances filed by Denis Rancourt, a tenured professor in the University's Physics Department in the Faculty of Science. The first concerns a reprimand letter dated November 20, 2007, which essentially blames Professor Rancourt for not having taught the content of the approved course SCI 1101 / : Science in Society/La Science dans la société.

[2] The second grievance contests a letter of reprimand dated November 22, 2007 for violating Article 21.1.2(c), which requires professors to provide an objective evaluation of students' performance, in relation to course PHY 1722 (Principe de Physique II) that Professor Rancourt gave in the winter of 2007.

[3] The third grievance concerns Professor Rancourt's dismissal on March 31, 2009 by the Executive of the Board of Governors following a recommendation by the Dean of the Faculty of Science outlining the reasons for the dismissal dated December 10, 2008. Essentially the grievor was dismissed for not having graded his students objectively in the course PHY 4385 / 5100 where all his students were awarded an A+.

[4] Professor Rancourt started his employment with the University as a professor in 1986 and had been tenured for some twelve years at the time of his dismissal. André Lalonde, a former physics professor, was the Dean of the Faculty of Science since the last days of August 2006.

[5] As Dean he presides over the academic faculty counsel composed of forty to fifty members and includes professors from all departments, students and the chairs of all departments and programs. As Chief Executive Administrative Officer of the Faculty he is responsible for the budget and presides over the Faculty Teacher Personnel Committee (FTPC), a committee of peers on which sits one professor from each of the five departments in the faculty. The Dean is the only person that can deal with matters of discipline. At the time, there were 140 professors in the Faculty.

[6] The Dean and Professor Rancourt knew each other well, having worked together in the 1990s as collaborators.

Reprimand in relation to course SCI 1101 / 1501 : Science in Society/La Science dans la société

[7] Late in August Denis Rancourt was assigned a new course SCI 1101 / 1501: Science in Society/La Science dans la société to be taught in the Fall of 2006, in which course the inscription read as follows:

The course critically examines the role of science and scientists in society and the responsibility of citizens having to deal with the complex socio-economic, environmental, political, and ethical issues raised by advances in science and technology. The grading system is S/NS.

[8] On November 20, 2007 Professor Rancourt received a letter of discipline from Dean Lalonde for not having taught the above-quoted course description approved by the Senate, contrary to Article 21.1.2 b) of the Collective Agreement:

Every faculty member shall have the right and responsibility

(b) to organize course content and classroom or laboratory activities and employ methodology and didactic material, including textbooks, for the courses assigned to her, in a manner appropriate to the course and consistent with relevant academic standards and course descriptions approved by Senate, it being understood that in the case of multi-section courses the chair and the departmental assembly may jointly choose common didactic materials, including textbooks, where it can be shown that this choice is justified by valid academic reasons and does not impose ideological conformity on the members concerned.

[9] More particularly, Professor Rancourt is being disciplined for having taught Activism, a course not related to the role of science and scientists in society.

[10] The course description was spear-headed by Professor Rancourt starting in the fall of 2005 and was approved in the last days of August 2006. It required sixteen committee meetings spreading over eleven months. It is useful to briefly review the background leading to the Senate adoption of the course description.

[11] In the Fall of 2005 Professor Rancourt taught a course PHY 1703 : “Physique et l’environnement”, a French course that he had previously given in 1999 and 2001. The course description for PHY 1703 read as follows:

PHY 1703 PHYSIQUE ET ENVIRONNEMENT

(3 h.p.s.s. – 3 cr.) Cours conçu pour le programme d'études environnementales. Ce cours introduit les concepts physiques fondamentaux utiles pour l'étude de l'impact de l'activité humaine sur l'environnement : principes de conservation, notion d'énergie, sources d'énergie; limite physique sur le rendement des transformations énergétiques; transport des contaminants; pollution sonore; énergie nucléaire, effets de la radioactivité et du rayonnement. Ce cours ne peut être crédité aux étudiants inscrits aux facultés de Sciences et de Génie.

[12] Professor Rancourt used the technique of Academic squatting, which he defined as follows in his blog “Activist Teacher” dated April 13, 2007:

I decided that the course would itself be a realization of activism. I decided to squat the Physics and the Environment course that had been assigned to me that fall. This may have been the first example of overt academic squatting, where one openly takes an existing course and does with it something different.

[13] On December 19, 2005 Professor Rancourt received a written reprimand from his then Dean, Professor Christian Detellier, on the ground that he had publicized course PHY 1703 as a bilingual course with a different title than the one approved by the Senate and with a content radically different than the one which it was reasonable to expect based on the official description of the course. That reprimand was grieved and brought to arbitration before Arbitrator Picher.¹ By agreement of the parties Arbitrator Picher did not decide the issue of the course content. The following comments made by Arbitrator Picher in his award are nonetheless relevant to explain Professor Rancourt's motivation in redeveloping course PHY 1703.

The better way to promote the learning of science, he came to believe, is to draw students towards science by first presenting them with materials and speakers dealing with political, social and economic problems which will more naturally interest them, moving them to examine and absorb both the process and substance of science which has some relation to the issues that genuinely interest them. The central tenet of this pedagogical school of thought is that science learned in that way, by personal investment and problem-solving relevant to concerns which are meaningful to the student, is by far the better path to a true understanding of science.²

...

Apart from introducing the satisfactory/not-satisfactory grading system, he made several significant changes to the way in which the course material would be presented and handled by the students. Firstly, he considered the dynamics of the class makeup and the learning structure to be important. He therefore implemented a group discussion system, premised on the view that students cannot learn science in a vacuum, and that any meaningful learning must be society based. He also sought to broaden the array of

¹ University of Ottawa and Assn. of Professors of the University of Ottawa (Rancourt) (Re), 2008 CLB 4719 (Picher) June 25, 2008.

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*students in the course, attracting mature students and activists both from on campus and from the larger community. He wanted the presence of those people in his class as an influence on the environmental Studies students for whom the course was a requisite, as a way of promoting an understanding of the connection between the scientific material within the course and community issues.*³

...

*Professor Rancourt's objective was to prompt the students to become involved in activist issues presented through guest speakers, selected readings and his own influence so as to direct themselves to identifying and pursuing learning about the science most relevant to those issues.*⁴

[14] It is in the context of that background that course SCI 1101 was developed and approved after eleven months and sixteen committee meetings. Dean Lalonde testified that professors, involved in the process, feared that Professor Rancourt, with the new course, would teach something different.

[15] In March 2006 Professor Rancourt, in a communication to the then Dean Detellier and the Faculty Counsel members, outlined his course proposal for SCI 1984 "Science, Activism, and Society", approved, as SCI 1101 at the end of August by the Senate without the word "Activism". In relation to the use of activism Professor Rancourt stated:

"The course intends to use activism (involvement to improve things for all, civil struggle, etc.) as an example of one important interface between science and society (e.g., environmental activism) AND as a student motivational factor. (I would be happy to explain how that works.)"

[16] Dean Lalonde testified that his understanding of the discussions in relation to the development of course 1101 was that it was meant to discuss topics including safety of food supplies, genetically modified foods, the development of drugs by the pharmaceutical industry, etc. Dean Lalonde, however, conceded that the committee did not create a course description to go to that level of detail.

[17] On August 1, 2006 Professor Moon, writing on behalf of then Dean André Dabrowski, asked Professor Rancourt if he was the author of a document being circulated and distributed on the Internet in relation to the new course SCI 1101, which, at the time, was still under consideration for creation. Professor Moon was referring to Professor Rancourt's e-mail of July

³ Pages 6 and 7 of Decision

3, 2006 addressed to “undisclosed recipients” and which subject was “announcing a new activism course. The following excerpts from Professor Rancourt's E-Mail are informative:”

Possible themes of the course (to be decided by the students) include:

- *Radical (i.e., at the root) analysis of society and power structures*
- *Critical examinations of the university and science as institutions that serve power*
- *Activist perspectives, strategies, motivation, goals, etc.*
- *Civil society, resistance and defiance, activism in the workplace.*
- *Foreign policy, globalization, democracy, environment, social justice, minority rights, first nations rights, peace movement, anti-war movement, fair trade*
- *Personal and community benefits of activism, risk, change, involvement.*

Some characteristics of the new activism course:

.....

.....

- *outstanding weekly speakers; activists and researchers; and invited panels*
- *free-forming and free-changing parallel workgroups, defined by consensus*
- *students can move between work groups and choose their degree of involvement*
- *nothing imposed; striving for an anarchic freedom ideal*
- *ad hoc group reports and presentations as needs arise*
- *collectively trying to figure out how the world works and how to make it better for everyone*
- *continuous challenging of ideas, approaches, and perceptions; by whatever respectful means (e.g., to say what one thinks and feels is a high form of respect)*

[18] Professor Rancourt testified that academic squatting was not used in relation to course SCI 1101 because that course had been developed and applied according to his need and that of his students and that it was clear that his pedagogical approach of using activism would be an essential part of his course. Even though the final title of course SCI 1101 did not include “activism”, the course description itself was broad enough to include activism, more particularly in the context where his intent had been clearly discussed and explained at length before the different committees leading to the creation of SCI 1101, that course being assigned to him.

[19] At the first session the invited speaker was Malalai Ioyap, a member of the Government of Pakistan who was visiting Ottawa at the time. It was given in the 500-seat auditorium to a full audience. The following week Dean Lalonde met Professor Rancourt in the parking lot and commented to him that he must be proud of his course and congratulated him. Dean Lalonde testified that his comments were in relation to the large attendance, while Professor Rancourt’s interpretation was not limited to the attendance but included the content.

[20] As testified by Dean Lalonde, his knowledge of what was taught in SCI 1101 is based on documents emanating from Professor Rancourt and explanations or lack therefrom. There is no direct evidence except from the testimony of Professor Rancourt as to how the course was actually taught and how the linking between science and activism was actually made.

[21] On December 1, 2006 Dean Lalonde wrote to Professor Rancourt in reference to the topics discussed by the speakers in his seminars and the summary reports written by students in the class, concluding that:

“While I observe a clear emphasis on the theme of activism and social issues in these seminars and discussions, I also note a near total absence of any discussion on the role of science in our society and on the issues raised by developments in science and technology.”

[22] Professor Rancourt, in a reply dated December 5, 2006, gave a long explanation from which the following excerpts are relevant:

The 3-hour classes were roughly divided as: speaker or panel presentation, post-speaker discussion lead by me, and workgroups supervised by me.

There were approximately 12 or more workgroups at any given time. the more popular themes had several groups. Many of the workgroups had titles directly implying science-society interactions, such as: environmental sustainability, climate change, agriculture and GMOs, bioethics, etc. these were the most popular groups. Students moved between groups with different themes during the term. Other groups had titles involving societal effects on the science enterprise and science culture or technological effects on society, such as: war and conflicts, democracy and justice, gender and discrimination, academic governance, apathy and motivation, language issues, power structures, human rights, lifestyle choices, creativity, etc. my interactions with the groups further brought out the science-society interaction aspects.

...

Regarding my choice of invited speakers, as you know I am a scientist, arguably the most inter-disciplinary scientist in the Faculty. The speakers were chosen as top communicators and top experts in their fields, in areas that scientists and university students in specific programs are rarely exposed to. This allowed me to represent the societal context in some of its complexity rather than representing society as filtered through the eyes of a middle class white male research scientist. I interacted with each speaker and explained the goals of the course. After each speaker presentation, there was an extensive discussion period in which students and community members (many of them science majors and scientists) asked questions and made comments. In the latter discussion period I moderated the flow and gave my perspective as a scientist. I ensured that the topic of the day was integrated into the overall goals of the course and that interpretive relations were made with the other topics and areas.⁵

⁵ These excerpts are taken from Exhibit 25

[23] Professor Rancourt testified that the SCI 1101 course was known on campus as the activism course, which was the same common appellation his PHY 1703 course given in 2005 was known as. In that regard it is clear from Professor Rancourt's testimony that he largely publicized this course as an "activism" course and in that context it is not surprising that it was known on campus as the activism course. Professor Rancourt testified that he based great emphasis on the term "activism" in his communications in order to attract participants to his class from a large-life experience spectrum, but in no way did it deter him from linking the activism part and its relation to science, and thus respecting the course-approved description.

[24] Finally, Dean Lalonde testified that if Professor Rancourt did what he spelled out in his December 5, 2006 answer to his own inquiry, he would have respected the course description.

[25] There is no dispute between the parties that a Professor must organize his course content and employ a methodology and a didactic material in a manner appropriate to the course and consistent with relevant academic standards and course description approved by the Senate, as specified in Article 21.1.2.

[26] In the present case, although the notion of academic freedom was argued and case law was tendered, this case does not turn so much on the question of law, i.e. the scope of academic freedom, but the factual analysis of whether Professor Rancourt followed the course description when he mixed elements that went to science and to society, using "activism" as a vehicle.

[27] As mentioned earlier, Professor Rancourt was the object of discipline in relation to course PHY 1703 : "Physique et l'environnement". His grievance was adjudicated by Arbitrator Picher¹. The following excerpts taken from the Association's argument and found in Arbitrator Picher's decision are relevant:

[...] a component of academic freedom is the latitude of a professor to communicate with his or her students without undue interference from the University. In the advancement of their research and teaching professors may well resort to imaginative, innovative and even provocative statements and communications to their students. To the extent that such statements are not unlawful, or materially false and misleading, they should generally have the protection of academic freedom (59).

In approaching this aspect of the case the Arbitrator considers it important to appreciate that Professor Rancourt was involved in legitimate pedagogical innovation, in pursuance of his conviction that students achieve a better grasp of science by coming to it through social, economic and political issues that are of

immediate concern to them. While the Dean or another academic may have preferred not to pursue that method, and to describe the course differently, it is difficult for this Arbitrator to conclude that it was inappropriate or beyond the bounds of academic freedom for Professor Rancourt to have framed the description of the course in the terms he chose. By his own account, those terms were intended to attract persons who might otherwise be science averse (68).

[...]Many university courses are subject to the evolution of both their content and format over the years, without necessarily requiring an amendment of the original course name or description. While it is clear that academic freedom does not extend to allowing a professor to introduce changes which effectively contradict or radically depart from the fundamental concept of the course as originally established, there must be some latitude for flexibility both as to the teaching methods and specific content of a course (71).

“they fell legitimately within the scope of his academic freedom in pursuing a different pedagogical approach to draw students into the learning of science” (73).

[28] In the present case the SCI course description is more general in scope and less restrictive than the one applying to PHY 1703 : Physique et l’environnement” that applied in the case before Arbitrator Picher.

[29] I am satisfied from the evidence that the communications by Professor Rancourt to prospective attendees to his course, describing it as an “activism” course, was used to better promote said course and attract a larger attendance. It is obvious that the administration was not very keen, to say the least, in Professor Rancourt’s using “activism” as the vehicle for mixing societal issues to science.

[30] The only direct evidence as to what took place during the classes stems from Professor Rancourt’s testimony. That testimony corresponds to the written explanations given in his communication to Dean Lalonde on December 5, 2006, which I have reproduced earlier. I am also mindful of Dean Lalonde’s acknowledgement that if Professor Rancourt had linked the topics of his speakers with science, he would have respected the course description. Having considered the evidence, I come to the conclusion that the University has not, on a preponderance of evidence, established that Professor Rancourt violated the provisions of Article 21.1.2 b) in the Fall of 2006 in regards to course SCI 1101.

[31] The grievance is thus allowed and I order the University to strike any mention of a disciplinary letter dated November 20, 2007 from the grievor’s record.

[32] Professor Rancourt, in his grievance, sought other reparations, namely, an unqualified written apology, significant and fair monetary reparation and help in partially recovering lost time and lost research career advancement.

[33] There is no merit to these grounds of reparation as the grievor's own actions contributed to Dean Lalonde's issuance of a disciplinary reprimand. I have in mind the grievor's tone in his communications with the then administration, more particularly, his reply letter to Dr. Moon in the summer of 2006 and his communications with Dean Lalonde, and more particularly, the transcript from an informal meeting held on August 27, 2007 between Professor Rancourt, Dean Lalonde and their respective legal counsel. I am also mindful of the grievor's own written communication about his use of academic squatting, which at the time and in the context could have led Dean Lalonde to think that the technique was being applied to SCI 1101.

[34] In short, although I have come to the conclusion based on the evidence before me that the grievance should be allowed, I cannot conclude in any way that the letter of discipline signed by Dean Lalonde was arbitrary or motivated by bad faith.

Letter of Reprimand dated September 24, 2007 in relation to course PHY 1722 – and Dismissal of Professor Rancourt

[35] Although the facts in these two disciplinary measures differ somewhat, the issue is the same: Professor Rancourt was disciplined on the basis that he did not evaluate or grade his students in an objective manner, contrary to art 21.1.2(c):

21.1.2 Every faculty member shall have the right and responsibility:

(c) to evaluate course students' performance objectively in a manner appropriate to the course, consistent with relevant academic standards and marking scales approved by Senate, it being understood that any procedural rules adopted by a faculty council and approved by Senate must also be observed.

[36] Although warned by his dean not to grade his students according to the "student-centered evaluation" method, he continued to do so and his actions, according to the University, constitute insubordination and a form of academic fraud.

[37] The grievor's position is that his manner of grading based on a student-centered evaluation is indissociable from his pedagogical approach to learning physics. The manner in which he teaches and evaluates his students is protected by the concept of academic freedom and the protection stemming from being a tenured university professor.

[38] Professor Rancourt testified that through his experience as a physics professor and his research, more particularly his readings and exchanges with researchers participating in the "Physics education research (PER) group, he came to believe that the conventional pedagogy applied in the teaching of physics was not conducive to students acquiring a better understanding of the principles of physics. His belief is that the learning of physics must be anchored in the self-motivation of the student. The Professor must seek through communication with the students what is their field of interest. Once fields of interest are identified, the professor then builds his teaching around these fields and the students, now motivated, will better learn. A major tenet of this pedagogical approach is to have the students learn free of stress brought upon them by the traditional method of grading and ranking. According to Professor Rancourt, one of the reasons why the traditional approach is not conducive to learning is that the students are focused on obtaining a high note, rather than interacting with the matter being taught. Their focus is directed to satisfy the professor's requirements. In that context, grading in the traditional manner constitutes a barrier to learning.

[39] The following excerpts from a July 16, 2008 correspondence summarizes the grievor's approach to grading:

"I did not assign all A+s based only on student attendance or irrespective of academic performance.

I explained to students on the first day of class what my pedagogical method and its underlying assumptions were. I explained how the method was student-centered and based on their individual efforts and individual progress. I explained how true learning could not be force-fed but instead needed to be anchored in genuine self-motivation. I explained what researchers have discovered about the origins of self-motivation. I described pedagogical literature that presents these findings.

I explained that, therefore, it was necessary to remove the coercive and ranking aspects of grades, in order to create an optimized learning environment. I explained that, under these conditions, I fully expected that every student who commits to this method would experience exceptional results and that, therefore, I expected everyone to obtain A+.

My task, was to ensure that all students perform at an exceptional level, from the benchmark of their own individual difficulties, barriers, varied backgrounds, and varied technical abilities. I achieved this by an open door policy, by numerous occasions for the students to provide feedback and progress reports, by in-depth discussions, and by a dynamic class environment that presented rich and complex material.

....

I did intervene in some cases where I found a few students to be losing focus or losing interest in the learning experiment that they had all initially accepted. Except for one student (out of 24) who dropped the course, my interventions were successful.

This was the first time that I used critical pedagogy in the 4th-year solid state physics course and I hope to continue developing this approach in this and other courses.”

[40] In relation to the place of the final exam and assignments, Professor Rancourt, in the same document, wrote:

“As can be surmised from above, my evaluation was in practice based first on a binary and necessarily qualitative evaluation of whether or not the individual student was achieving in an “exceptional” manner. As long as I judged the student response to the challenge of the course to be exceptional in terms of effort, personal growth, skill discovery, and progress, I did not need to intervene beyond continuing to provide the course, resources, and contact.

.....

The assignments were open-ended and contained a large range of degrees of difficulty and depth of concepts. There were no set deadlines beyond the class material continuing to advance. Students could select among the many and varied suggested problems and could work at their pace and in association with anyone they choose. The non-grading completely eliminates all “cheating” or tendency to produce reports for the sake of producing reports. The student asks herself what is worth doing and has it been understood, etc., rather than how can this be handed-in on time.

.....

I see my job, therefore, as creating the conditions where these ideals can be realized and where education is optimized, without compromises related to external demands for ranking students in a particular way.

The final examination that you are so keen to analyse was not a key element in the grading. If the method did not work during the term then this could not be compensated for with a final exam demonstration of regurgitation. On the contrary, the final exam was another opportunity for the students to share their discoveries in any format they wished, with the possibility of obtaining my detailed feedback. The final examination was in addition, for most, a personal journal and communication about the student’s individual development, response to the challenges, criticisms of themselves and of the course and of me, etc.

It was oral, in pieces, written, in any form that the students desired, and needed to be received by April 30th. It was also as interactive (with me) as the students wanted. In several cases, I contacted the students about their examination reports to follow up or clarify or ask for more explanations.

The final examination was a confirmation of the term’s results, and a final occasion in the term to interact with the students. It was also optional, if a student wanted to discuss alternative ways of communicating

their progress with me and of providing the needed avenue of interaction, although all the students did complete a final examination, on one form or another, during the examination period.

The “percentage” value of the examination was variable from student to student, simply because I needed to interact more with some students than with others, in order to ensure or gauge their exceptional responses to the course’ many challenges.”

[41] The evaluation method by Professor Rancourt, where traditional grading and ranking is eliminated, was opposed by the administration at every step of the way. Dean Lalonde testified that the non-grading evaluation by the grievor would undermine the University’s reputation, as it would be recognized as a Mickey Mouse university. Competitive grading, which is the benchmark to awarding grants to students and opens up higher education, is a very serious matter for the University. Furthermore, the manner in which the students in the grievor’s class are graded is highly prejudicial to the other students who are ranked in the traditional manner by the 139 other teachers in the Faculty of Science. The following excerpts from Dean Lalonde’s communication dated April 21, 2008 addressed to the grievor summarizes the University’s position:

“I am deeply concerned about your response to a clear and unequivocal direction that you must not grant every student in these courses or any future courses you may teach, a grade of A+ regardless of their academic performance. I wish to reiterate that such an attribution is contrary to Faculty standards regarding grading scales and the attribution of marks to courses, and those approved by Senate and applied to other undergraduate and graduate courses in the Department of Physics. The utterance of such a promise if indeed made, regardless of whether it is ultimately implemented, is in the University’s view, highly prejudicial and undermines the well-established academic integrity of our university.”

[42] The evidence is also very clear that Professor Rancourt was well aware of the administration’s opposition to his evaluation method.

[43] Against this background, I will now refer to the specific facts concerning the Letter of Reprimand and Dismissal grievances.

[44] Professor Rancourt taught a course PHY 1722 "Principe de Physique II" in the winter of 2007. This was a first-year course given in French where 50 students were registered and 47 were given a grade at the end of the semester.

[45] According to Professor Rancourt's own account, on the first day of class he asked the students to each identify a target grade that they would like to reach and told them they had to enter into a contract as to what they had to accomplish in order to obtain that grade. Students during the semester had to write mid-term and final exams and do homework assignments which were taken into account by Professor Rancourt in determining a grade. That grade was given by Professor Rancourt according to the evaluation method described above, which took into account the involvement of the student and his respecting the terms of his contract.

[46] The average note for the class was 9. The grades were approved by the Chairman. In that regard, Dean Lalonde testified that there are approximately 4,000 students in the Faculty of Science who, on average, follow five courses that result in some 20,000 gradings. Dean Lalonde testified that the grading submitted by professors are routinely assessed by administrative staff and ultimately approved by the Chairman and, in that context, one cannot say that the approval by the Chairman legitimizes the objectivity of the evaluation.

[47] In early September 2007 Dean Lalonde became aware of the high marks given by the grievor to his students. Dean Lalonde had already warned the grievor that he considered the manner in which he graded his students to be contrary to the Collective Agreement. On November 27, 2006, in relation to course SCI 1101, Dean Lalonde wrote Professor Rancourt the following:

"I have taken notice of the evaluation mechanism that you are using for the course SCI 1101 that you have posted on the web site that you have been maintaining for this course (www.alternativevoices.ca). the web site in question clearly states that what is required of students in this course: "Nothing is required except your presence and your feedback about your own personal choices and progress". In view of this, I must advise you that all professors are obliged by the Collective Agreement to evaluate students' performance objectively in a manner appropriate to the course, consistent with relevant academic standards approved by Senate (article 21.1.2 (c))."

In fact, Dean Lalonde was putting Professor Rancourt on notice that student-centered evaluation was not, in his opinion, an objective evaluation.

[48] On September 24, 2007, Dean Lalonde wrote Professor Rancourt, calling him to an informal meeting on October 1, 2007, to discuss the evaluation of his students in the course PHY 1722. The following excerpt is relevant:

“In the context of article 39.4.2.1 of the collective agreement, I have reason to believe that you have committed an act that constitutes cause for discipline. In light of the provisions of 21.1.1(c) of the Collective Agreement, I note the results of your evaluation of 47 students in the course PHY1722 (Principes de physique II) in the winter 2007 semester. The average mark for this course, which you have given every year since 2003, except for 2004 when you were on sabbatical leave, has varied between 4.8 to 5.2. Last winter, for some yet unexplained reason, this average mark jumped to 9 (see attached graph). I am concerned that you have failed to evaluate students’ performance objectively in a manner appropriate for the course and consistent with relevant academic standards and marking scales approved by Senate.”

[49] Professor Rancourt declined to attend the meeting and so advised Dean Lalonde on September 28, 2007 in the following manner:

“Although your graph shows different grades for the new course PHY 1722, given for the first time in winter 2007, than for PHY 1702 given in previous years, I fail to see how this would lead you to conclude that I have “committed an act that constitutes cause for discipline” (your words). You have not provided or cited any evidence that I have been remiss in my duties and responsibilities.

I note that the grades given in PHY 1722 winter-2007 were approved and initialed by my chairman and approved by the Faculty and that you have not signaled any problem with these grades until now.

I therefore decline your offer to clear up any misinterpretations you may have regarding your graph because I don’t believe 39.4.2.1 is the proper vehicle for this.

I believe you are misusing 39.4, again. There is no need to use harsh and confrontational methods here. I would be happy to simply discuss my grading and pedagogical methods with you informally in a collegial atmosphere at some future and mutually convenient time.”

[50] Professor Rancourt explained that he declined to attend the meeting because everything that would be said in such a meeting could be used against him and he was convinced that Dean Lalonde had made up his mind about disciplining him. Professor Rancourt noted that the Dean’s letter was written in English and that fact indicated to him that it was not written by Dean Lalonde but by the University’s lawyer and that Dean Lalonde was a puppet being used by the administration against him. He was of the opinion that the Dean must be independent from the administration and it was clear here that he was acting on the order of the administration to trap him.

[51] On November 22, 2007, Dean Lalonde disciplined the grievor with a letter of reprimand. In that letter Dean Lalonde essentially referred to the grievor's grading in the manner set out in his convocation letter of September 24 quoted above and added the following paragraphs:

"I remind you that article 21.1.2(c) of the Collective Agreement requires professors to provide an objective evaluation of student's performance. Your failure to attend an informal meeting to discuss this matter leaves me with serious concerns on the evaluation that you conducted of the students in this course. Because of this, I have no choice but to provide you with this letter of reprimand that will be in your file, as per article 39.4.2.2 of the Collective Agreement. Furthermore, in the future, I request that you evaluate students registered in courses assigned to you as part of your official workload, in an objective manner according to article 21.1.2(c) of the Collective Agreement.

Any further incidents of this nature may lead to further discipline up to and including dismissal."

[52] At the same time that course PHY 1722 was given in French by Professor Rancourt, the same course was given in English in PHY 1302/1322 by Professor Czajkowski. The grading by Professor Czajkowski for the years 2003 to 2007 varied between 4.4 to 6.

[53] Dean Lalonde testified that the marks given to students are used for allocation of scholarships and course PHY 1722 is a pre-requisite for the subsequent year. Students must maintain good marks to maintain their scholarship. Dean Lalonde said that students that apply for graduate studies, like most universities in the world, would have to provide an official transcript of under-graduate studies. For some schools the grading is an automatic cut-off and they will not look at your application if you don't meet minimum standards. He said that a student with a scholarship is an asset for a professor and constitutes a green card for the student. Having this in mind and taking into consideration the difference of grading between the grievor's students and those following the same course in English, he considered the high notes given by Professor Rancourt a form of academic fraud.

[54] Dean Lalonde disputed the objectivity of the grievor's evaluation. He could not believe that in 2007 the course given by Professor Rancourt was composed of 1st year students twice as bright as those in all of his previous classes. Dean Lalonde disputed Professor Rancourt's claim that he had developed a pedagogical method that allowed him to succeed to this point, that is, his students doing exceptionally well in their first year of Physics.

[55] Professor Rancourt testified that he knew that the University did not want to discuss his method and was opposed to it. It was, in Professor Rancourt's own words, like driving into a brick wall. He testified that he knew at all relevant times concerning course PHY 1722 of the closed attitude of the University as regards his teaching method.

[56] Professor Rancourt minimized the importance of grading required for admission to graduate and post-graduate studies. He said that some schools prefer to administer their own tests to evaluate the students.

[57] Except for the testimony of Professor Rancourt, there is no evidence as to what actually occurred in the classroom and whether the method described by Professor Rancourt was actually applied. This aspect has some relevance because, contemporaneously, Professor Rancourt was championing his method of teaching physics, in various communications means, including blogs, conferences, interviews with newspapers and radio stations reporters.

[58] On October 18, 2007, Professor Rancourt was a keynote speaker at Queen's University, where the title of his address was "*On the responsibility of university professors to create anarchism; liberation through anti-hierarchy activism*". A report on Professor Rancourt's address prepared by a University of Ottawa student and editor to the students newspaper (attending the talk with the purpose of monitoring the communication by Professor Rancourt), was entered into evidence. Although the grievor was very reluctant to acknowledge the content of the report, he finally, through cross-examination and following extensive explanation on the context in which he was speaking, agreed to some portion of its content. As reported by the student, Professor Rancourt, in relation to his course given in September 2005, said "*I proposed to the students that it would be impossible to fail, and that there would be no grades and no institutional evaluation.*"

[59] After his address, Professor Rancourt was interviewed by a radio station reporter. Here is the question and the answer by Professor Rancourt on grading:

"You mentioned how you weren't grading. Are you still not grading given the fact that there has been some type of regulation passed at the university to require grades?"

Yeah, I still don't grade. I refuse to grade. So what I've done recently is I've simply given everyone the top grade, automatically without any possibility of getting a lower grade than that. That's the first rule of the classroom, the first thing that's announced on the first day is we will not talk about grades beyond this point. I'll explain what it's going to be about and you're all going to get an A+ at the end of it. I explain why and how it is and how I want them to have the freedom to criticize the course, to say what they think, to follow their interests, to research what they feel they need to, and so on. And so yeah, I still do that. And I will defend that to the end. They're going to have to take me to court to take that away."

[60] Professor Rancourt reluctantly admitted that it was possible that he said that, but that it was bravado, a result of frustration in his efforts to put forward his new ideas against those who were opposing it. It is in that context that his comments came out that way. He also acknowledged as possible, the following answer given to the reporter:

"For example, I removed my power by saying "I will not grade you. You have passed the course. You can walk out of here and you still get an A+. you have total freedom to interact with me, to tell me to be quiet, to ask me to leave the room while you discuss things. You have that freedom, I'm giving it to you. And I won't take back that power."

[61] Professor Rancourt testified that what he said was exaggerated and meant to provoke, although he recognized that it was true that the students knew that they would be evaluated in relation to their capacity to learn and their individual work efforts.

[62] On February 6, 2009 Professor Rancourt gave an interview to commentator Benoit Dutrizac on a Montreal radio station. Here are some excerpts from the English translation of the interview, which was conducted in French:

"DR: Ah, I said that, they are there to learn. That it's not in our interest to rank students for employers, or to try using motivation methods that are extrinsic, so I said we're going to eliminate that, and we're going to try to get interested in the subject. We're going to do it democratically, to eliminate any oppression and everything that comes with marks, that entire power relationship that exists between professor and student, and we're going to eliminate the entire concept of marks.

.....

DR: How do I view teaching? Well, first, I basically believe that it's impossible to teach. In other words, you can't make something be learned. The only way to truly learn is through oneself, through one's being and so I have created an environment in the classroom where the student will be equipped to follow his/her natural instinct to learn. I myself do not believe in pedagogy. OK? I think it's necessary to get away from pedagogy. You must get away from that idea, and then just try to create an environment where the student is able, because ultimately what I believe is that the only way to enable an independent mind to be born is to give it freedom. You can't tap him/her on the head and insist that he/she regurgitate a particular matter in two days, etc. that whole control technique that removes a lot of the responsibilities for interaction that the professor would normally have with his class; it removes all that and it puts all the responsibility, if you

will, or stress on the student, rather than creating a type of give-and-take relationship between student and professor. I wanted to eliminate that because all the educational researchers say it: that power relationship doesn't work. Marks is not a good system. A distinction needs to be made between certifying someone and education.....

BD: I know, but what to you do to evaluate them?

DR: For many years I've had experience with those techniques; in my view, it's a technique that works much better than the traditional technique. Moreover, all the studies show that the traditional technique for teaching science, or university level, does not work at all. All the studies show it. It's unambiguous. If we take new graduates and question them about whether they learned anything, whether they understood the concepts, the answer is absolutely not and the degree to which they understood, if they understood anything, is completely independent of the marks they received, the professors they had, if we use traditional methods, and all the studies show that."

[63] Professor Rancourt testified that he did not refute the commentator's comments in relation to his giving A+ because it was a popular show and not a legal text. His objective was to identify the conflict with the University following the Dean's recommendation to dismiss him dated December 10, 2008, and to rapidly expose his ideals in relation to teaching. Professor Rancourt acknowledged that he wanted to eliminate the concept of ranking, but his actions in that regard were an integral part of his pedagogical method.

[64] Professor Rancourt testified further that he did not agree that his method of grading would result in the University community at large considering his course as a Mickey Mouse one. He said that one must recognize that certain courses in the physics program, namely his, were different because the evaluation was made under the method "student-centered" and that the exploration of that pedagogical technique would give a very good reputation to the University because those universities who had started to use these methods were considered to be progressive universities. Professor Rancourt made reference to UBC, who had hired a Nobel prize winner in pedagogy that wanted to explore this method of teaching and evaluating. He also referred to one of his former students who told him that the traditional methods of teaching physics did not work. In short, Professor Rancourt testified that he did not agree with the conservative position of Dean Lalonde, which was inconsistent with the position developed by research that has shown that a traditional method fails completely. Professor Rancourt also testified that the error made by Dean Lalonde in this case was to refuse to discuss with him and to close the door to the possibility that his method could be very advantageous.

[65] In the winter of 2008 Professor Rancourt gave two courses, PHY 4385/5100 – Solid State Physics, and PHY 4770 – Mecanique quantique. The class 4385/5100 originally had 18 4th year physics students and 6 master students. All students, except for one who dropped out, received a grade of A+. PHY 4770 had 21 4th year students and all who completed the courses received an A+.

[66] Evidence was adduced as to what was said by the grievor in class PHY 4385/5100 in relation to grading. I have heard four witnesses in that regard, namely Professor Rancourt, Teacher Assistant (TA) Philippe Marchand, and students V and P. Having heard the witnesses, I give more credibility to the two students. I am satisfied that what is hereinafter stated by student V to the Chairman of the Department of Physics on February 16, 2008, represents what was said by Professor Rancourt in class.

“In the first class Dr. Rancourt told us directly that everyone in the class would be receiving an A+. he went on to describe his teaching method and that his theory, or rather the teaching method he uses, that by removing the grades there will be less stress on us to learn. He said he does not believe in grades. He said that in no way can we be harmed by this system of giving everyone an A+ as this was a contract between the students and the teacher, and that he was guaranteeing us this mark, and there was nothing that the university could do to take it away.”

[67] The students' testimonies are in line with what Professor Rancourt was saying publicly in his Queen's address in October 2007 and his radio interview in February 2009 in relation to his teaching.

[68] Furthermore, Professor Rancourt's credibility as a whole has been compromised by his explanations and contradictions in relation to 3 subject matters: what he said at the Queen's University seminar, what he said in class in relation to whether he had read, or not, Dean Lalonde's warning about not assessing A+s to all his students, and his knowledge regarding a munitions cache in a forest by one Claude Harridge.

[69] In relation to the Queen's report, Professor Rancourt initially disputed some of its content based on the fact that it was made by someone who was spying on him on behalf of the University, but finally admitting to most of it in cross-examination. Furthermore, Professor Rancourt initially denied having read Dean Lalonde's letter to his students in class 4385/5100

and finally admitting that he had read part of it, after being confronted with a written report to the contrary by student P. In the Claude Harridge matter, Professor Rancourt first stated his first knowledge of Harridge burying ammunition in a forest came the week preceding his testimony which was contradicted by one Harridge's e-mail of sept 20/11 to him.

[70] Teacher Assistant Marchand, who was a student of Professor Rancourt for his master's degree, I found was a very defensive witness who was trying to cover for Professor Rancourt by giving his opinion as to what Professor Rancourt meant to say or do. In the end, after cross-examination, he corroborated most of what the two students had testified in relation to what Professor Rancourt had said in class on grading.

[71] Student V, who had the highest grading average in the physics department, dropped out of the course in mid-February 2008. He made a complaint in relation to Professor Rancourt's grading and pedagogy to the Chairman of the Physics Department, Dr. Béla Joos, who transferred it to Dean Lalonde, with the following comments:

"Voici le rapport de [V] sur l'enseignement dans le cours PHY4385/PHY5100 dans lequel il était inscrit jusqu'à vendredi matin le 15 février. J'envoie une copie de ce message à Gary Slater, comme doyen des études supérieures parce que je trouve inacceptable que les étudiants recevront tous un A+ sans avoir prouvé leur compétence dans la matière. Ce qui se passe dans ce cours soulevé aussi des questions sérieuses sur la qualité de l'enseignement dans ce cours. "

[72] At about the same time, Gary W. Slater, Dean of the Faculty of Graduate and Postdoctoral Studies, who had received a copy of student V's report, wrote back to Chairman Joos. Part of Dean Slater's comments read as follows:

"Si nous pouvons utiliser la lettre, je vais consulter mon Comité Exécutif sur la valeur des A+ ainsi reçus. Il n'est pas question que nous donnions des bourses à des étudiants qui ne les mériteraient qu'à cause de ce A+. Nous allons devoir en avertir les étudiants dès que possible. "

[73] Confronted with this information, Dean Lalonde met with the students who had voiced their complaints, and on March 25, 2008, he wrote Professor Rancourt a confidential letter, which read, in part, as follows:

“I have been advised that in both courses you have promised a grade of A+ to all students provided only that they attend class. The Faculty of Science grading scale provides that the letter grade of A+ is defined as “exceptional” and a mark of A+ based on class attendance alone is totally inconsistent with the Faculty grading scale. The promise of an A+ based only on attendance is also incompatible with the academic standards of the Faculty of Science and puts into question the integrity and validity of students’ grades. As you know students’ grades are included on University of Ottawa official academic records and transcripts and relied on by the University and other universities in respect of issues such as the granting of degrees, access to and awards for scholarships and bursaries, and admission to graduate programs. Your inappropriate and unacceptable approach to grading these courses would negatively impact the reputation of the Department of Physics, the Faculty of Science, and the University as a whole. It is also unfair to students who are entitled to expect that they will be graded on the basis of their academic performance rather than mere attendance. Nor in the University’s view does academic freedom mean that you can adopt grading practices for these courses that are fundamentally inconsistent with the grading practices put in place by the Faculty of Science and approved by the Senate and applied to other undergraduate and graduate students in the Department of Physics.

You are expected to evaluate students’ performance objectively in a manner appropriate to the course and consistent with the Faculty of Science grading policy. This letter will serve as a clear and unequivocal direction to you that you must not grant every student in these courses or any future courses you teach, a grade of A+ based only on their attendance at class. If you do so despite this direction you will have committed the serious disciplinary offences of insubordination and misconduct in connection with your employment obligations and you will be subject to discipline, up to and including dismissal.

I urge you to re-consider your proposed grading of a grade of A+ to all students provided only that they attend class rather than put your continued employment with the University in jeopardy.

[74] At about the same time the DTPC discussed the evaluation of students by Professor Rancourt. The following excerpts from the minutes of the DTPC meeting of February 19, 2008, are relevant:

4. Concerns regarding Denis Rancourt’s failure to appropriately evaluate students’ performance and potential serious impact on the reputation of the department.

The committee discussed at length evaluations of students’ performance by Prof. Denis Rancourt for the current Winter 2008 semester. The committee was appalled to learn that Prof. Rancourt promised all attending students of PHY 4770 (Mécanique quantique) and PHY 5100/4385 (Solid State Physics) grades of A+, irrespective of performance in these classes.The DTPC felt that such an a priori grade assignment, if allowed to stand, is in violation of Article 21.1.2 (c) of the Collective Agreement and had the potential to seriously undermine the reputation of the department and the university as a whole. It was strongly felt that the Deans of the Faculties of Science and Graduate and Postdoctoral Studies should be immediately advised of this serious issue, and that appropriate measures should be taken to correct this situation as soon as possible. In light of these serious concerns, the committee questions whether Prof. Rancourt should continue to teach PHY 4770 and PHY 5100/4385 and whether he can appropriately teach Physics courses in the future. This leaves us in a quandary regarding recommendations for appropriate workload for this faculty member in the Fall of 2008 and beyond.”

[75] The evidence is that all students who did not drop out in the two courses Professor Rancourt gave in the Winter of 2008 received an A+. The same applied for PHY 1722 given in the Winter of 2007(except for 2 who received C+) and PHY 5130 (5 students) in the Fall of 2007, all of whom received A+.

[76] Professor Rancourt's position in regards to his grading method and its legality can be summarized in the following excerpt of his correspondence to Dean Lalonde dated July 13, 2008:

“Grades can be based on a number of factors, including student participation, answers on tests or homework, oral reports, practical experiments, multi-media projects, etc. Grades can also be student-centered by measuring individual student progress from individual student starting points, and the progress can be evaluated using qualitative criteria. Self-evaluation is also an accepted concept.

As long as the same grading method is applied to all students and is stated on the first day of class and as long as A+ means “exceptional”, following the stated criteria, then the basic requirements of the Collective Agreement are satisfied. The rest is of the domain of academic freedom. The choice and design of the pedagogical and grading method is the responsibility of the professor.”

[77] Having considered the evidence in its entirety, I come to the conclusion that grading, whether in a conventional manner or not, was considered by Professor Rancourt an impediment to learning physics. A student who remained or was prompted to remain motivated by his interventions for the whole semester was an "exceptional student" and thus should be granted the highest mark in the University grading system. Convinced of the value of his pedagogical approach to teaching Physics he decided to apply it in his classes although he knew the University' administration was against it and that in their opinion it constituted a violation of the collective agreement and a form of academic fraud.

[78] Section 21.1.2(c) imposes on the Faculty members the responsibility to evaluate students “*performance objectively in a manner appropriate to the course*” consistent with relevant academic standards in marking scales approved by the Senate. The question raised by the grievances is whether Professor Rancourt has satisfied his obligation. The short answer is no.

[79] According to Professor Rancourt, his grading or evaluation is objective because all students are evaluated according to the same criteria outlined in the first course, i.e. to remain

motivated and committed to his teaching method. If the student works hard and remains motivated and progresses, he should be considered an exceptional student because he would have learned to the best of his capabilities and, thus, merits the exceptional mark of A+. Professor Rancourt further testified that there is nothing in the text of Article 21.1.2(c) which prohibits or specifies the evaluation method or what is meant by evaluating the student's performance objectively. In that context, the onus is on the University to prove that his standard of evaluation, based on self-centered motivation, is not objective.

[80] The Association and Professor Rancourt have asked me to view this case in the particular setting of a university environment, very distinct from the industrial one. I agree with that statement.

[81] However the setting, the professors are bound by the collective agreement that governs them. I must interpret the collective agreement entered into between the University and the Association and give it a meaning which reflects the wording and the intention of the parties at the time it was agreed to.

[82] Here the evidence is that the evaluation of students' performance in the Physics department is made using a conventional grading system to evaluate the students' knowledge and what they have learned during the course. This conventional evaluation system is external-based, as opposed to student centered, and is objective in the sense that all students are tested by grading one against the other. It is objective also because no one knows in advance what their grade will be at the end of the semester. The marks obtained by this method differentiates the students and sets them apart one from the other and permits them to obtain bursaries, grants and in many cases, admission to post-graduate studies.

[83] Dean Lalonde has testified that the Grievor's self-centered evaluation giving all his students high notes is not objective. This view, as reported above is shared by the DTTC, the Chairman of the Physics Department and the Dean of the Faculty of Graduate and Postdoctoral Studies. The Association has not brought one professor as a witness to testify that what Article

21.1.2(c) encompassed at the time it was agreed to, was self-centered evaluation with each student receiving the exceptional grade of A+.

[84] It stems from common sense that not all students, or any person for that matter, are born equal, with the same learning capabilities, and that all perform to the level of "exceptional". To interpret Article 21.1.2(c) as proposed by Professor Rancourt would make a mockery of the expression "evaluate students' performance objectively ... consistent with the relevant academic standards and marking scales approved by the Senate". Why apply a marking scale at all if everyone is to get A+, a grade awarded on the first class in the absence of any evaluation. Concluding that the Grievor's evaluation method is objective and protected by Article 21.1.2c) would result in the absurdity that all professors would soon apply this method. They would testify that they have done an exceptional job in motivating and directing their students in their respective classes and therefore, in that context, all their students, having performed exceptionally well to the maximum of their respective abilities, should get A+s. The University of Ottawa would overnight be blessed with exceptional professors and students. Grading of students would become meaningless.

[85] It is true that when a professor grades his students he or she may take into consideration not only the results of the objective exams, but also the involvement of the students and his dedication to learning and his interaction in the class. But these "other factors" are of minor importance in the total objective evaluation. A student who in his homework, mid-term and final exams, obtains very high grades because of his superior intelligence or ability to better assimilate the subject matter of the course may be downgraded to A from A+ because, in the professor's opinion, he has not performed to the maximum of his capability and/or has not interacted in class. The reverse, however, is not true. Grading a student "exceptional" entirely on his participation in class and his learning to the maximum of his capabilities, while performing "average" in competitive testing, is a perversion of the objective evaluation obligation set out in Article 21.1.2c).

[86] In short, in my opinion Article 21.1.2(c) does not support the Grievor's proposition that a self-centered student evaluation is an objective evaluation of the student's performance consistent

with relevant academic standards and markings approved by the Senate. I therefore conclude that the Grievor's self-centered evaluation is not objective and violates his obligation set out in Article 21.1.2c).

[87] The Association and Professor Rancourt argued that his teaching method, based on self-motivation and its necessary corollary the absence of grading, is protected by the concepts of academic freedom and freedom of expression and his tenure status. A great number of cases were filed by both parties and the Association in particular on Academic Freedom.⁶ None of these cases discussed the concept of academic freedom in the context of a professor not objectively grading his students. To illustrate the concept I have selected two excerpts from the

⁶ *Order PO-3084 « University of Ottawa (Re)»*, 2012 CanLII 31568 – decision by the Information and Privacy Commissioner of Ontario

FINAL ORDER PO-3009-F «University of Ottawa (Re)», 2011 CanLII 74312 – decision of the Information and Privacy Commissioner of Ontario

University of Calgary and AUPE (Re), 2008 CLB 16779 – decision of the Alberta Labour Relations Board

Langara College and Langara Faculty Assn. (Mirza) (Re), 2000 CLB 14599 – decision by the British Columbia Collective Agreement Arbitration Bureau

University of Manitoba and University of Manitoba Faculty Assn. (Re), 1991 CLB 12537 [Schulman]

York University and York University Faculty Assn. (Noble) (Re), 167 L.A.C. (4th) 39 (Arbitrator R. Goodfellow)

Vancouver City College and Faculty Assn. of Vancouver City College (Langara) (Re), 1974 CLB 1847 – Labour Relations Board of British Columbia; Paul C. Weiler, Graham Leslie, Angus Macdonald

University of Calgary and University of Calgary Faculty Assn. (Re), 1999 CLB 13889 (Sims)

University of Ottawa and Assn. of Professors of the University of Ottawa (Rancourt) (Re), 2008 CLB 4719 (Picher)

Laurentian University and L.U.F.A. (Robidoux) (Re), 2011 CLB 19727 (Surdykowski)

Memorial University of Newfoundland and Memorial University of Newfoundland Faculty Assn. (Snook) (Re), 2007 CLB 12396

University of Ottawa and Assn. of Professors of the University of Ottawa (Rancourt) (Re), 2008 CLB 4719 (Picher)

First Nations University of Canada v. University of Regina Faculty Association [Court of Appeal Decision], 2008 SKCA 162 (B. Pelton, Q.C., E. Neufeld, and J.C. Hill)

Pridgen v. University of Calgary, 2012 ABCA 139

First Nations University of Canada and University of Regina Faculty Assn. (Re) [Arbitral Award], 2009 CLB 17755

First Nations University of Canada v. University of Regina Faculty Association [Court of Appeal Decision], 2008 SKCA 162

York University and York University Faculty Assn. (Noble) (Re), 167 L.A.C. (4th) 39

Strofolino v. Helmstadter, 2001 CLB 10658

McKenzie v. Isla, 2012 HRTO 1908

Langara College and Langara Faculty Assn. (Mirza) (Re), 2000 CLB 14599 (British Columbia Collective Agreement Arbitration Bureau)

Mount Allison University and M.A.F.A. (Re), 1993 CLB 12772

University of Manitoba and University of Manitoba Faculty Assn. (Re), 1993 CLB 13781 [Freedman]

University of Manitoba and University of Manitoba Faculty Assn. (Re), 1991 CLB 12537 [Schulman]

Laurentian University and L.U.F.A. (Robidoux) (Re), 2011 CLB 19727 (Surdykowski)

Dickason v. University of Alberta, [1992] 2 SCR 1103

Mckinney v. University of Guelph, [1990] 3 SCR 229

University of Windsor and Faculty Assn. of the University of Windsor (Taboun) (Re), 112 L.A.C. (4th) 1 (B. Adell)

submitted jurisprudence. The first one is taken from the McKinney decision by the Supreme Court:

[...professors] must have a great measure of security of employment if they are to have the freedom necessary to the maintenance of academic excellence which is or should be the hallmark of a university. Tenure provides the necessary academic freedom to allow free and fearless search for knowledge and the propagation of ideas. [...] apart from [assessments in relation to merit increases, promotion and the life], and excepting cases of flagrant misconduct, incompetence or lack of performance, strict performance appraisals are non-existent and, indeed, in many areas assessment is extremely difficult. In a tenured system, then, there is always the possibility of dismissal for cause but the level of interference with or evaluation of faculty members' performance is quite low. The desire to avoid such evaluation does not, as I see it, relate solely or even principally to administrative convenience. Rather, the desire is to maximize academic freedom by minimizing interference and evaluation (p. 282).

[...] Academic freedom and excellence is essential to our continuance as a lively democracy. [...] mandatory retirement [...] ensures that faculty members have a large measure of academic freedom with a minimum of supervision and performance review throughout their period at university. They need not be unduly concerned with a "bad year" or a few bad years, or that their productive capacity may decline with the passing years. Security of employment is well protected for a substantial number of years and they are spared demeaning tests that would otherwise have to be employed (p. 286-7).

"While I believe that the principle of academic freedom serves an absolutely vital role in the life of the university, I think its focus is quite narrow. It protects only against the censorship of ideas...." (p. 376)

[88] In that case the Supreme Court was dealing with the issue of retirement of university professors.

[89] The following excerpt from the University of Calgary case is also informative:

[...] It is almost impossible to overstate the importance of academic freedom to the nature of a modern university. One of the core beliefs in western liberal democracies is that society is best served by the existence of a free "marketplace" of ideas, where enquiry and expression can take place generally unconstrained by state power. Universities have evolved into perhaps the purest institutional embodiment of free enquiry and expression. Universities recruit and select their own academic staff on the basis of merit. Academic staff members receive compensation from the institution itself, freeing them from dependence on private enterprise and other patrons. Academics advance in rank, compensation and perquisites by their scholarly activity, widely defined, which activity is evaluated by peers inside and outside their particular university....

[...] By long tradition, close institutional control over scholarly activities is anathema to universities and their scholars alike. Contractual and statutory provisions like tenure support academic freedom. As we noted earlier, the whole concept of a university is that of a community of scholars, supported by the state or the institution or both, who in return for a general commitment to apply themselves to advance the state of human knowledge receive an extraordinary freedom to define for themselves how to go about doing that.... Instead, control by the university exists only at the level of enforcing the basic bargain of the academic appointment: that the appointee will remain productive in scholarly activity, that he or she will co-operate in meeting the institution's needs for teaching and service, and ... (280).

[90] The parties, however, have given themselves a contractual definition at Article 9(a):

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

[91] This definition is a fair summary of the case law on academic freedom. The definition clearly states that the academic freedom concept is not so wide as to shield a professor from actions or behavior that cannot be construed as a reasonable exercise of his responsibilities in an academic setting, nor does it protect him when exercising said academic freedom in contravention of the provisions of the Collective Agreement in general and in this case, those of Article 21.1.2(c).

[92] The University is not disciplining Professor Rancourt for his ideas or beliefs in regards to his teaching method based on self-centered motivation and evaluation. Dean Lalonde made it very clear that Professor Rancourt could openly promote his convictions as to teaching in his classroom, on campus and elsewhere. The research aspect and the promotion of ideas is one thing, the implementation is quite another.

[93] As I have found earlier, I am of the opinion that Professor Rancourt violated the provisions of Article 21.1.2(c) when he did not objectively evaluate and grade his students. That is particularly true in regards to course 4385/5100. This, in my opinion, is a very serious breach of his obligations as a university professor. In an American case⁷, the dismissal of a university professor who had 28 years of tenure was upheld by the Appeal Court for not following the university's grading rules.

⁷ *Louis Wozniak, Plaintiff-Appellant, v. Thomas F. Conry, et al., Defendants-Appellees Court of Appeal for the 7th circuit 236F.3d 888; 2001 U.S. App.LEXIS 274;*

*“No teacher has a fundamental right to hand in random or skewed grades, or to pretend that 95% of his students are better (or worse) than average. No person has a fundamental right to teach undergraduate engineering classes without following the university’s grading rules. Quite the contrary, both a university and its students have powerful interests in the comparability of grades across sections, for grades are a university’s stock in trade and class rank may be vital to a student’s future. By insisting on a right to grade as he pleases, Wozniak devalues his students’ right to grades that accurately reflect their achievements.”
.....(p4)*

“Finally, Wozniak’s contention that he is the victim of “retaliation” for taking his stand against the University’s grading policy adds nothing. [HN5] A violation of an employer’s lawful rules does not become an improper basis for decision just because the employee makes his position known to the public. Wozniak does not contend that other professors have defied the University’s grading rules, kept their silence, and escaped any response. Without proof of that kind, the University’s decision must be understood as a reaction to Wozniak’s behavior, not as a penalty for his speech about that behavior.”(p6)

[94] The reasoning of the U.S. Court of Appeal for the 7th Circuit in relation to grading is no different in Canada.

[95] The facts relevant to Professor Rancourt’s grievance contesting his letter of reprimand for his grading average of 9 for the first year course PHY 1722, in which some 50 students were initially registered, are simple. Professor Rancourt, in accordance with his student-centered motivation evaluation, awarded marks averaging 9, where he had previously awarded grades for the same course that varied between 4.8 and 5.2. The fact that one student received a mark of C+ does not make Professor Rancourt’s evaluation an objective one. As he testified, he gave a C+ to a student because that student did not live to his commitment to obtain an A.

[96] It is to be noted that Professor Rancourt had been notified previously by Dean Lalonde in relation to the evaluation of students in the course SCI 1101 not to evaluate on a student-centered standard.

[97] For the reasons stated above, I find that Professor Rancourt did not objectively evaluate his first year students in course PHY 1722 by giving those who had not dropped out an average of 9, in violation of Article 21.1.2(c).

[98] I therefore find that the grievance fails and that the Letter of Discipline is to remain in Professor Rancourt’s file.

[99] Even though Professor Rancourt was well aware of the University's opposition to his evaluating of students on a self-centered standard, he continued on his course of action. Although he had grieved the Letter of Suspension, he did not wait to find out whether he had infringed Article 21.1.2(c). He continued to defy the administration. He was warned on March 28, 2008 by Dean Lalonde that his actions violated the Collective Agreement and that if he continued he was placing himself in a position to be dismissed. Given the evidence, I find that Professor Rancourt did not objectively evaluate his students in his course 4385/5100, in breach of Article 21.1.2(c). Is the dismissal the appropriate remedy in the circumstances? The short answer is yes.

[100] Professor Rancourt, even though he was well aware of Dean Lalonde's opposition in the context where he had through his writings explained extensively his teaching method and approach, and to use his words, "there was nothing he could do to convince Dean Lalonde, it was like hitting a brick wall", continued on his course of action. Immediately following his Queen's address, he had stated he would defend his method to the end and the University would have to bring him to court to take that right away from him. He even told Dean Lalonde on July 16, 2008 that he would continue to apply his teaching methods in the future. Dean Lalonde, who was aware that Professor Rancourt in his last four courses had given his students an A+, had no reason not to take Professor Rancourt's assertion seriously that he would continue in not grading his students objectively. In fact, up to the time of his dismissal, the Professor's whole demeanor made it crystal clear that he would not change his ways. Professor Rancourt had decided to take on the University over his method of teaching.

[101] In the last days of his testimony, which spanned over 12 days, Professor Rancourt said that if he was returned to his position he would follow the University's directive in relation to the grading of his students. This affirmation during the last days of the hearing is belied by the substance of his testimony in which he never recognized he had done anything wrong, that in fact it was Dean Lalonde's stubbornness of refusing to recognize the soundness of his approach to teaching Physics that caused the problem. Professor Rancourt was disciplined on November 22, 2007 for not grading his students objectively in Course PHY 1722. Yet he continued to act as if owned the University by not evaluating objectively in the two last courses he taught in the

Winter of 2008(PHY 4385/5100 and PHY 4770). In short, I give no credibility to Professor Rancourt's testimony that he would conform to Article 21.1.2c) if reinstated. Not recognizing one's misconduct is an important factor that weighs in the decision to substitute a penalty lesser than discharge⁸.

[102] Given the extreme seriousness of Professor Rancourt's breach of his duties to objectively evaluate his students, which I agree with Dean Lalonde is a form of academic fraud, and his insubordination in not following Dean Lalonde's repeated warnings, I find there is no reason for me to intervene in the University's decision to dismiss Professor Rancourt.

[103] The grievor claimed that Dean Lalonde and the University's administrators acted in bad faith in their dealings with him. Five grounds were mentioned: Hiring a student to spy on him, refusal by Dean Lalonde to informally discuss his teaching method, reliance on behavior that was known to the employer before the dismissal and not acted upon, when the students expressed concern on the grievor's course content they were told their marks would be frozen, and failure by the Board of Governors to revise all the facts before they made the decision to dismiss him, namely not considering the fact he had produced the final exams of class PHY 4385/5100 three days before. In regard to this last allegation, it is noteworthy to mention that Dean Lalonde had requested these exams on numerous occasions since June 2008 and the grievor had steadfastly opposed handing them in, for various reasons.

[104] These allegations of bad faith are totally irrelevant to the present issue of whether the grievor evaluated his students objectively. He knew all along that Dean Lalonde opposed his method of teaching and why, and the consequences for him if he continued his actions. At all times he was in control of his conduct. He cannot claim that his violation of Article 21.1.2c) is a result of the Administration's bad faith towards him.

[105] Finally I want to note that I am in no way passing judgment on the value of Professor Rancourt's teaching method, which calls for removing a student's stress by not grading. It may very well be that such a method of teaching results in improved learning for the Physics students.

⁸ Pope&Talbot Ltd and IWA Canada, Local 1-423 2002 CLB 12504 (Chertkow) at paragraphs 63&64

A number of researchers have written books on this teaching approach applied by Professor Rancourt. The University, however, has the right to decide and manage its institution in a manner in which students are objectively evaluated and graded comparatively one against the other. It has the right to determine that the grading method applied by its professors must conform to the general practice of universities which is the benchmark for determining the students' progression in their studies and for the attribution of bursaries and grants.

[106] For all these reasons, the grievance is dismissed.

Claude H. Foisy, Q.C., Arbitrator