IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARLETON UNIVERSITY

("University")

AND:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION

("Union")

IN THE MATTER OF:

CAUT'S REQUEST FOR INTERVENOR STATUS

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE UNIVERSITY:

Michael Kennedy - Counsel

APPEARANCES FOR THE UNION:

Peter Engelmann - Counsel

APPEARANCE FOR CAUT:

Peter Barnacle - Counsel

PRELIMINARY AWARD RE: STATUS

I have before me the grievance of Professor Root Gorelick, alleging that the University has violated his rights under the collective agreement pertaining to academic freedom and governance. The narrow issue to be decided as a preliminary matter is whether the Canadian Association of University Teachers (CAUT) should be accorded intervenor status with the right to call witnesses, cross-examine other parties' witnesses and to make submissions as to the relevant facts as well as the legal issues in dispute. Whereas the Carleton University Academic Staff Association (CUASA) supports the request of CAUT for intervenor status, the University is strongly opposed.

CAUT is a national federation of university and college faculty associations that was founded in 1951. It represents the interests of 70,000 teachers, librarians, researchers and other academic professionals through the membership of their local faculty associations. CAUT actively supports and promotes academic freedom, collegial governance of institutions, funding for research and access to post-secondary education. Its support for these causes/issues takes the form of lobbying government, producing research and publications in the area of tertiary education, collective bargaining support and legal support. CUASA is the faculty association and certified bargaining agent for all faculty, professional librarians and instructors at Carleton University. CUASA joined CAUT in 1953. The grievor is a tenured professor of

biology at Carleton University. He has been teaching at the University since 2006. As a professor at the University, he is a member of both CUASA and CAUT.

CAUT argues that it should be granted full intervenor status in this matter because it is not a stranger to the collective agreement, because it is uniquely positioned to provide information with respect to academic freedom and collegial governances that goes beyond that of the two parties to the collective agreement and because "the decision in this grievance arbitration will have a practical impact on the rights of CAUT's membership such that is has a 'substantial' interest." The following awards are cited in support:

- *CUPE v. Canadian Broadcasting Corp. [1990] OJ No. 772*
- *No Frills and UFCW, Local 1000A, 267 LAC (4th) 199*
- *Ontario Educational Communications Authority v. CEP, Local 72M, 199 LAC (4th) 211*
- *Westwind Regional School Division No. 9 v. ATA, 85 LAC (4th) 129*
- *UFCW Local 175 v. Pharma Plus Drug Marts Ltd. (2011) ONSL 4168, 2012 CLLC 220-017*

CAUT is recognized under the collective agreement. Article 18.7 gives CUASA a right to assistance from CAUT, which CAUT points out does not restrict the timing or manner of that assistance. Article 30.10(b) provides CAUT an oversight role in determining whether an individual grievance concerning academic freedom that CUASA decides not to process to arbitration can nevertheless be pursued.

Further, CAUT has both institutional knowledge and institutional interest in academic freedom and collegial governance that I am prepared to accept at this juncture, without finding, is both extensive and directly related to the instant grievance. Finally, it is clear that CAUT, given the nature of its membership, has a keen interest in the outcome of this case. The issue to be decided is whether on the basis of the foregoing CAUT is entitled to intervenor status.

The necessary starting point, as it was in the recently released *Laurentian University and LUFA* award (Dated May 26, 2017), where a CAUT request for intervenor status was rejected, is that grievance arbitration under a collective agreement is a two-party process as between the two parties to the collective agreement. The *Laurentian (supra)* award emphasized the private nature of grievance arbitration as follows:

> The necessary starting point is the recognition that grievance arbitration under a collective agreement is a private process between the two parties to the collective agreement under which the grievance has been filed. This is not to say that the rules of fairness and natural justice do not apply such that a third party may be given intervenor status in circumstances where the third party is effectively unrepresented and its legal rights stand to be adversely affected by the arbitral decision or where a failure to grant intervenor status would lead to a parallel hearing with a potentially contradictory result, i.e. a jurisdictional dispute.

The arbitrator rejected the CAUT request in the *Laurentian* case on the basis, firstly, that language such as that found in article 18.7 of the instant agreement (which was contained in the Laurentian University collective agreement) did not extend to allowing CAUT to claim intervenor status at arbitration; secondly, that its interest in

the outcome of the case, i.e. its precedential impact, was not sufficient; thirdly, that its knowledge of academic freedom, although extensive, was not knowledge that was otherwise unavailable to the arbitrator; and fourthly, that its interest was so aligned with LUFA, the union party, that the effect of granting it intervenor status would be to unfairly tilt the hearing in LUFA's favour. These factors would appear to have equal application here. The arbitrator concluded as follows in that case:

> It wishes to be given intervenor status so that it can participate and, thereby, influence the result so that it conforms to its understanding. This is neither a legal, commercial nor contractual interest and is not an interest grounded in any labour law principle that would override the privacy of grievance arbitration as between the two parties to a collective agreement. It is not, therefore, an interest that in and of itself warrants the admission of a third party into a private two-party process. Indeed, there is a myriad of umbrella organizations with a similar interest in the outcome of various arbitration cases (for example, on the management side in the health care, education and municipal sectors or on the union side umbrella organizations such as the OFL or the CLC), none of whom, to this arbitrator's knowledge, has ever been granted intervenor status on this basis in a grievance arbitration hearing between the actual parties to the collective agreement. This is so because not only is the interest insufficient but it is aligned with one of the parties to the arbitration such that the involvement of the umbrella organization not only invites duplication but is unfair because it tilts the hearing in favour of the party who is a member of its organization….
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> In order to gain intervenor status on this basis, the contribution of CAUT would have to be critical to the decision making and it would have to be otherwise unavailable. However, because CAUT and LUFA are directly aligned in interest, the position CAUT would seek to advance with respect to academic freedom is the same position LUFA would seek to advance. It is not as if CAUT would bring to bear a different perspective with regard to academic freedom. Further, to the extent that CAUT might have a greater depth of knowledge, that knowledge can be imparted to LUFA in joint preparation or through LUFA's use of CAUT as co-counsel (an arrangement that the University would not oppose) or through the use of a CAUT official as an expert

> witness. Accordingly, there is no basis upon which to accord CAUT third-party intervenor status in this two-party arbitration on the basis of it having special knowledge with respect to academic freedom that could not otherwise be made available to the arbitrator….
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> This clause, while it confirms the right of CAUT to provide "assistance" to LUFA upon request, to have access to Laurentian University premises and to "participate in discussions or negotiations with representatives of the Employer" cannot be read as extending a right to have intervenor status at arbitration, nor can it be read in conjunction with CAUT's knowledge and interest in academic freedom as providing an avenue to intervenor status that would not exist on the basis of CAUT's knowledge and interest alone. The right to provide "assistance," while it might extend to the co-counsel role referred to earlier, does not extend to intervenor status at grievance arbitration. These parties are presumed to understand that grievance arbitration is a private two-party process such that collective agreement language designed to allow for a three-party arbitration process would have to be clear and unequivocal. This is especially so where specific areas of CAUT involvement are identified as "participating in discussions and negotiations," neither of which would encompass intervenor status at arbitration.

CAUT argues that this case is distinguishable from ***Laurentian*** on the basis, firstly, that article 30.10(b) of the instant collective agreement, which does not appear in the Laurentian collective agreement, provides it with a supplementary carriage right in regard to the processing to arbitration of grievances involving academic freedom; and secondly, that the unique intersection of academic freedom and collegial governance in this case enhances CAUT's interest separate and apart from its carriage right to a degree not present in the ***Laurentian*** case. CAUT argues that its interest is in "protecting the interpretation of academic freedom in the collective agreement between CUASA and the University and at other institutions" and, in reply, that its "interest is more than a concern for the development of negative precedent in labour

law. It is a concern to be able to represent future grievances involving academic freedom under this collective agreement."

There are two fundamental underpinnings to CAUT's request for intervenor status. The first is that it need not have a "direct" or "legal" interest but only a "substantial" interest, which it asserts it does. The second fundamental underpinning is that its expertise with regard to academic freedom and collegial governance puts it in the best position to provide necessary information and evidence to allow for a fulsome adjudication. Further, contrary to the stipulation in *re: Laurentian (supra)* that the information and evidence that it would seek to advance as an intervenor be unique to it, CAUT argues that in order to attain intervenor status, it need not be the only available source of such information and evidence.

While it is to be conceded that this case is distinguishable from *Laurentian (supra)* on the basis of article 30.10(b) and, accepting without finding that this case involves a unique intersection of academic freedom and collegial governance, these factors, taken separately or together, do not support the granting of intervenor status to CAUT in this arbitration.

Dealing, firstly, with the collective agreement recognition of CAUT, as contained in articles 18.7 and 30.10(b). As already discussed, article 18.7 is essentially the same as article 20.4.7 of the Laurentian collective agreement. The finding there, as it must be here, is that a clause that allows CUASA to seek the "assistance" of CAUT and confirms CAUT's right of access to the University's

premises for the purpose of providing this assistance cannot be read, without more, as confirming the right of CAUT to participate as an intervenor in the two-party grievance arbitration process established under the collective agreement. Indeed, given the universal recognition that grievance arbitration under a collective agreement is a private two-party process, unequivocal language would be required to achieve this effect. There is no such unequivocal language in this collective agreement.

Article 30.10(b) is an interesting clause (not found in the Laurentian collective agreement) because it provides CAUT with an oversight role with respect to grievances concerning academic freedom that CUASA decides not to process to arbitration. Article 30.10(b) operates notwithstanding article 30.10(a) (the clause that confirms CUASA as the union party to the collective agreement with carriage of grievances to arbitration) to provide an individual grievor with the right to seek a "positive recommendation" from CAUT to proceed where CUASA has decided not to proceed to arbitration with a grievance involving academic freedom. Although article 30.10(b) implicitly recognizes the special expertise and interest of CAUT in this type of grievance, articles 30.10(a) and (b), read together, confirm the two-party nature of grievance arbitration except in the limited circumstance where CUASA decides not to pursue an academic freedom grievance to arbitration. In this exceptional circumstance it can reasonably be concluded that CAUT, having provided a positive recommendation, would represent the employee at arbitration. However, the article does not contemplate that CAUT would have intervenor status in an arbitration

involving academic freedom that CUASA, as the union party to the collective agreement, processes to arbitration as it has done in this case.

CAUT submits that an intervenor does not need to have a "direct" or "legal" interest in order to be given intervenor status but rather a "substantial" interest. It is the position of CAUT that it has a "substantial" interest such that it is entitled to intervenor status. CAUT relies upon the judgement of the Ontario Superior Court in *re: UFCW Local 175 v. Pharma Plus Drug Marts Ltd. (2011)(supra).* In that case, the former CAW (now UNIFOR) did not receive notice of a settlement between UFCW and certain employers in a related employer application that had the effect of limiting the CAW's future representation rights and "potentially undermin(ed) existing vested relationships." The Court found that the effect of the agreement was "to bump CAW from representing in the future Rexall employees at stores opened in the Ottawa region and to benefit UFCW by enabling it to expand in the Ottawa-Carleton region, which was previously exclusive CAW terrain." The OLRB did not provide CAW with notice because the CAW did not represent any of the subject employees at the time. The Court rejected this rationale and, relying on the principles of fairness and natural justice, which it held applied to an adjudicative proceeding, declared the agreement between the UFCW and the employer (as incorporated into a decision of the OLRB) to be of no force or effect.

The decision of the Court to, in effect, grant status on the basis of a "substantial" as distinct from a "direct" or "legal" right must be considered in this

context. The CAW did not represent any of the subject employees but given the impact of the settlement upon it, it had a "substantial" interest in the outcome, if not a direct legal interest, such that fairness and natural justice considerations dictated that it should have been given notice. The *Pharma Plus* judgement of the Court cannot be read as standing for the proposition that a "substantial" interest arises where the concern of the party seeking intervenor status is rooted in the precedential impact of the resulting award. Yet this is the interest advanced by CAUT in this case. In its own words, its interest is in "protecting the interpretation of academic freedom in the collective agreement between CUASA and the University and at other institutions." In refuting the notion that its concern is the development of negative precedent, it argues that its concern is "to be able to represent future grievances involving academic freedom under this collective agreement" – in other words, to avoid a negative precedent.

As described in the *Laurentian* award *(supra)*, CAUT is an umbrella organization to which faculty associations (bargaining agents) belong as members. As noted in *Laurentian (supra)*, there are various other such umbrella organizations with a labour relations focus who have a substantial interest in the outcome of arbitration cases, none of whom have ever sought or been given intervenor status. This is because a precedential interest is neither a direct interest, a legal interest nor a substantial interest as would support intervenor status in an arbitration hearing between the two parties to a collective agreement. The oversight role assigned to CAUT under article

30.10(b) and the implied acceptance of its keen interest in the outcome of academic freedom grievances that are processed to arbitration do not alter this result. This is because, in CAUT's own words, its interest is in the precedential impact of the award.

The question that remains is whether the arbitrator should exercise his discretion to allow intervenor status on the basis of the knowledge and understanding that would be brought to bear by CAUT if it was to be granted intervenor status. CAUT and CUASA are closely aligned in interest. CUASA is a member of CAUT with the collective agreement right to seek CAUT's assistance in understanding or pursuing any matter, including matters related to academic freedom and/or collegial governance. For the same reasons articulated in ***Laurentian*** *(supra)*, I have not been convinced that CAUT, if given intervenor status, would provide a different perspective or would provide information not available through CUASA. This is so notwithstanding the implicit recognition of CAUT's special expertise with respect to academic freedom in article 30.10(b).

CAUT takes the position that "it is not necessary that the third party be the only available source but that the third party should be in the best position to provide the information and evidence when compared to the two parties." In so far as the foregoing is advanced as a principle upon which discretion to grant intervenor status should be exercised, it must be rejected. Because grievance arbitration is a two-party process, an arbitrator must be circumspect in exercising his/her discretion to allow a third party to become an intervenor. Where the third party has information and

evidence necessary for a full and proper adjudication that would not be available through the parties themselves, the decision to grant intervenor status is an easy one. Where the third party is closely aligned with one of the parties to the collective agreement, where the two share a common point of view on the issue and where the collective agreement contemplates that the two may collaborate, the decision not to grant intervenor status is also an easy one. In the final analysis, it must be that, as here, where the information and evidence can be adduced through the party to the collective agreement, the privacy of the process must be protected.

The alliance between CUASA and CAUT, as recognized in the collective agreement and as formalized by CUASA's membership in CAUT, underscores the correctness of the decision to deny CAUT intervenor status. The effect of allowing CAUT to become a third party intervenor in the circumstances here would create an imbalance in favour of CUASA that would be unfair to the University without any offsetting enhancement to the process.

Having regard to all of the foregoing, CAUT's request for intervenor status in this proceeding is denied.

Dated this 27th day of June 2017 in the City of Toronto.

Kevin Burkett

KEVIN BURKETT