IN THE MATTER OF AN ARBITRATION

BETWEEN:

CARLETON UNIVERSITY

("the University")

AND:

CARLETON UNIVERSITY ACADEMIC STAFF ASSOCIATION

("the Association")

IN THE MATTER OF:

GRIEVANCE OF ROOT GORELICK

SOLE ARBITRATOR:

Kevin M. Burkett

APPEARANCES FOR THE UNIVERSITY:

Michael Kennedy	- Counsel
Steve Levitt	- General Counsel

APPEARANCES FOR THE ASSOCIATION:

Peter Engelmann	- Counsel
Christal Côté	- Member Services Officer

The Association grieves in this matter that the University and its Board of Governors acted contrary to the collective agreement and past practice when it refused to let Professor Root Gorelick, a tenured member of faculty, stand as a candidate to serve as an Academic Staff Governor on the Carleton University Board of Governors for the 2016-2019 term of office. It is asserted that in acting as it did, the University impaired Professor Gorelick's right to academic freedom. It is also asserted that Professor Gorelick's right to participate in the governance of the University as a member of the Board of Governors and to perform his service to the University was thereby improperly denied. The University challenges my jurisdiction to hear this grievance on the basis that there is nothing in the collective agreement that provides Professor Gorelick with the right to stand as a candidate to serve on the Board of Governors nor is there anything in the collective agreement that in any way restricts the Board of Governors in establishing the eligibility requirements for election to the Board of Governors. It is the position of the University that absent any tie-in or "hook" to the collective agreement, this is not a matter in respect of which an arbitrator appointed under the collective agreement has authority to decide.

The University seeks to have the hearing bifurcated with a decision rendered with respect to jurisdiction at the outset, in advance of any evidence being led with respect to the merits. The Association, on the other hand, asserts that because I will not be in a position to decide the jurisdictional issue without the hearing of evidence and because the evidence going to jurisdiction is intertwined with the evidence going

to the merits, I should not bifurcate but rather hear all the evidence and then make a ruling with respect to jurisdiction.

The background is as follows. Professor Gorelick served as one of two Association members on the Board of Governors from 2012 to 2015. During his tenure, he blogged the contents of Board meetings. Prior to the election for the 2016-2019 term, the Board amended its code of conduct to prohibit such blogging and required anyone seeking election to the Board to sign off on the amended code of conduct in advance. Professor Gorelick refused to sign off with the result that he became ineligible to stand for election.

It is acknowledged by counsel that the hearing on the merits in this matter will be protracted. Accordingly, because the jurisdictional ruling may be dispositive, the arbitrator, after hearing opening statements, directed counsel to make argument with respect to the jurisdictional issue, including whether or not to bifurcate.

The provisions of the collective agreement that have been relied upon in support of the grievance are set out below.

Article 4: Academic Freedom

4.1 The common good of society depends upon the search for truth and its free exposition. Universities with academic freedom are essential to these purposes both in teaching and scholarship/research. Employees are entitled, therefore, to:

(a) freedom in carrying out research and in publishing the results thereof,

(b) freedom in carrying out teaching and in discussing their subject and,

(c) freedom from institutional censorship.

Academic freedom carries with it the duty to use that freedom in a manner consistent with the scholarly obligation to base research and teaching on an honest search for truth.

6.1 University Governance

Except as expressly provided for in the Certification Order and this Collective Agreement, the parties agree:

(a) to acknowledge and support the traditional role of Senate as established by statute, bylaw and practice;

(b) to acknowledge and support the traditional role of the Board of Governors and the persons authorized to act on its behalf;

(c) that nothing in this Collective Agreement shall be construed to deny or diminish any existing rights, privileges and responsibilities of employees, individually and collectively, to participate directly in the formation and recommendation of policy within Carleton University and its component parts, as these rights, privileges and responsibilities are provided for under existing Senate/Board documents and/or established practices.

(d) Except as modified in this article or changed by subsequent agreement of the parties, the Senate/Board policies referred to in Articles 14, 15, 16, 17 and 26, as they were on the date of signing this agreement, shall remain in force for the term of this Collective Agreement unless specifically amended by agreement of the parties. Should the Senate change or alter any of these policies during the term of this agreement, Articles 14, 15, 16, 17 and 26 shall remain in force for the term of this Collective Agreement, unless specifically amended by agreement of the parties.

10.2 University Criteria for Tenure and Promotion

The work of an academic member of a modern university falls into a number of categories - teaching, scholarly studies or research, professional activities, the corporate work of the department, faculty and university, and activities related to the community. It is generally accepted that contributions to teaching and scholarly studies should receive paramount consideration in any tenure or promotion decision but that recognition must also be given for valuable contributions to the university, for professional achievement, and for contributions to the community.

(a) **University Criteria for Tenure**

(i) Consideration for the awarding of tenure shall be based on the following criteria:

(4) Service to the University – an appropriate record of service to Carleton University (and other institutions where appropriate), such as administrative and committee duties and other professional activities which contribute to the operations of the University. It is expected that assigned service, pre-tenure shall be below the average service levels of faculty members in the same unit.

(b) **University Criteria for Promotion to Associate Professor**

(i) Consideration for the awarding of promotion to Associate Professor shall be based on the following criteria assessed over the candidate's career achievements to date:

(4) Service to the University – an appropriate record of service to Carleton University (and other institutions where appropriate), such as administrative and committee duties and other professional activities which contribute to the

operations of the University. It is expected that assigned service, pre-tenure shall be below the average service levels of faculty members in the same unit.

(c) **University Criteria for Promotion to Full Professor**

(ii) The criteria for assessing promotion to the rank of Full Professor are:

(3) Service to the University, the Profession and Society – a significant record of service to Carleton University (and other institutions where appropriate), such as administrative and committee duties and other professional activities which contribute to the operations of the University;

Article 13: Academic Workload

13.1 Workload of Faculty Employees

The normal workload of faculty employees shall include teaching, research/scholarly/creative activities, and service to the University in proportions of approximately 50%, 35% and 15% respectively of each employee's time, as governed by and varied in accordance with past practice. For each faculty a normal workload shall be defined by past practice.

Article 15: Rights and Responsibilities

15.1 General

It is the understanding of the parties that the statements in this Article are not inconsistent with the principles enunciated in the Report of the Committee on Rights and Responsibilities of Academic Staff endorsed by Senate on October 26, 1976.

(a) The rights and responsibilities of employees of the academic staff ensue from the nature of a university, the requirements of teaching assignments, the position of a

member of the academic staff, the rightful expectations of the institution, the requirements of the students and the legitimate claims of the community. In addition to their civil rights and civic responsibilities, the primary rights and responsibilities of employees are as specified in Article 15.1(b) and 15.1(c).

(b) The primary responsibilities of faculty employees are teaching and research/scholarship. In addition, they have the right and the responsibility to participate in the governance of the University through active membership in department, school, institute, and/or faculty bodies and, when called upon, to participate to a reasonable extent in other University bodies and the Association. It is understood, however, that the performance of the latter function shall be at the level consistent with their primary teaching and research or scholarly responsibilities.

15.6 Rights and Responsibilities of Self-Governance

(a) In the context of collegial decision-making and the processes of academic peer judgement, members of the academic staff shall participate in the governance of Carleton University through active membership in department, school, institute, and/or faculty councils and, when called upon, to participate to a reasonable extent in other University bodies, according to this Collective Agreement, past practice and the principles embodied in the New University Government document. [Note that the Senate Academic Governance document replaces the New University Government document.]

(b) In the course of the collegial and peer judgement decision-making process, members of the academic staff shall deal fairly and ethically with their colleagues, shall objectively assess the performance of their colleagues when this is required, shall avoid discrimination and shall not infringe on their colleagues' academic freedom. In addition, they shall observe the principles of confidentiality in a manner consistent with the performance of their collegial responsibilities.

Article 30: Complaints, Grievances and Arbitrations

30.1 The parties agree that they will use their best efforts to encourage informal, amicable and prompt settlement of complaints and grievances arising from the interpretation, application, administration or alleged violation(s) of this Agreement. However, the parties recognize that one of the corner-stones of collective bargaining is a viable grievance procedure allowing for a prompt and fair hearing of matters arising from the interpretation, application, administration or alleged violation(s) of The Agreement.

Except as otherwise provided in this Agreement, the procedures outlined below shall be the sole method for the resolution of complaints or grievances arising from the interpretation, application, administration or alleged violation(s) of this Agreement. There shall be no discrimination, harassment or coercion of any kind by either party or their agents against any person who elects to avail or not to avail oneself of these procedures.

Appendix C: A Description of the Carleton University Academic Staff Association Bargaining Unit, from the Ontario Labour Relations Board Decision Dated April 4, 1975

"All full-time academic staff and professional librarians employed by the Respondent in the City of Ottawa in the Regional Municipality of Ottawa-Carleton save and except President, members of the Board of Governors elected by the Senate, Assistant to the President, Vice-President (Academic), Assistant to the Vice-President (Academic), Deans, Assistant Deans, Director of Schools, University Librarian, Assistant to the University Librarian and Sections Heads for Bibliographic Processing, Central Library Services and Systems."

The position of the University is that because there is no collective agreement right to stand for election to the Board of Governors and because there is no collective agreement restriction upon the authority of the Board of Governors to establish its

own criteria for eligibility to stand for election to the Board of Governors, there is no arbitrable grievance. To the extent that it is argued that the right of self-governance (article 15.6) has been compromised, the University points out that under article 15.6 the right of self-governance is "in the context of collegial decision-making." It is submitted that "collegial decision-making" is a term that was defined in the 1975 decision of the Ontario Labour Relations Board granting certification as residing within the universities' "basic organizational unit, the department." *University of Windsor Faculty Association and University of Windsor (1977) OLRB Rep May 1977* and *Algoma University Faculty Association and Algoma University (2015) 260 LAC (4th) 53 (Etherington)* at para. 53 are cited in support of this position and in support of its position that the hearing in this matter should be bifurcated. The argument is that article 15.6, Rights and Responsibilities of Self-Governance, does not apply to the activities of a faculty member in connection with his/her tenure on the Board of Governors. Similarly, it is argued that article 4, Academic Freedom, does not apply. The clause, it is argued, applies to "teaching and scholarship/research," not to service on the Board of Governors. It is further argued that the entitlement to "freedom from institutional censorship" does not apply in circumstances where the grievor chose not to sign the code of conduct as presented to him. The University cites the following awards in support of the assertion that a grievance, in order to be arbitrable, must allege a breach of the collective agreement – which it is asserted this grievance does not:

- *RWDS Union and Ont. Representatives Association 28 LAC (2d) 164 (MacDowell)*
- *York Region Roman Catholic Separate School Board v. OECTA (52 LAC (4th) 285 (Kaplan)*
- *Ontario Provincial Police and OPPA 224 LAC (4th) 259 (Johnston)*
- *Long Manufacturing Ltd. V. CAW, Local 1285 48 LAC (4th) 208 (Brown)*
- *OPSEU v. Ontario (Ministry of Agriculture, Food and Rural Affairs) (2009) CarswellOnt 4669 (Briggs)*
- *William Osler Health System and ONA 239 LAC (4th) 372 (Albertyn)*

In the absence of an allegation that if proven would constitute a breach of the collective agreement, I am asked to declare that I am without jurisdiction to proceed.

The Association asserts that I have jurisdiction in that the allegation is that Professor Gorelick has been improperly denied the opportunity to provide "service" in the form of tenure as a member of the Board of Governors. It is the position of the Association that academic freedom applies to all the required activities of a faculty member, i.e. teaching, research and service, and that the University acted improperly to deny Professor Gorelick's right to serve by forcing him to choose between academic freedom and service on the Board of Governors when it amended the code of conduct as it did. Articles 13.1, 10.6, 6.1 and 5.1 are relied upon.

It is the further position of the Association that I should not bifurcate the hearing in order to decide the jurisdictional issue before addressing the merits. The

Association argues that the evidence that would be required to decide the jurisdictional issue is interwoven with the evidence going to the merits and, further, that it would be unfair to attempt to rule on the jurisdictional issue without a clear understanding of academic freedom in the university context and the interrelationship between self-governance and academic freedom generally and within the specific context here. The Association asserts that I would have to hear evidence to determine if academic freedom was curtailed and to understand how the Board of Governors knew that the grievor would not likely sign the amended code of conduct and, thereby, be disqualified from standing for re-election to the Board of Governors. Reference is made to the following awards in support of the proposition that this case does not satisfy the preconditions necessary for a bifurcation of hearing:

- *Board of Governors of Lakehead University and Lakehead University Faculty Association (John M. Scurfield, July 16, 2002) (unpublished)*
- *Canadian Broadcasting Corp. v. CUPE (Broadcast Council) 1991 CarswellNat 944, 22 LAC (4th) 9,23 CLAS 471*
- *Hiram Walker & Sons Ltd. and Distillery Workers, Local 61 [1973] OLAA No. 71 (Adams)*
- *Hunt v. Carey Canada Inc. [1990] 2 SCR 959*
- *Lakehead University and LUFA (Shutdown) 2010 CarswellOnt 11552, 104 CLAS 304*

- *Nova Scotia Police Assn. v. Amherst (Town) 2011 CarswellNS 360, 207 LAC (4th) 89*
- *Ontario (Ministry of Government and Consumer Services) and OPSEU 2016 CarswellOnt 15944, 128 CLAS 317, 269 LAC (4th) 111, 29, CCPB (2nd) 79*
- *Toronto Police Association v. Toronto Police Services Board 2013 CanLII 92144 (ON LA)*
- *University of Lethbridge Faculty Association and The Board of Governors of the University of Lethbridge (F.A. Laux, March 11, 1992) (unpublished)*
- *University of Windsor and CUPE, Local 1393 (Pension Confidentiality) 2017 CarswellOnt 1958, 130 CLAS 146*

Emphasis is placed on the second precondition to bifurcation identified by arbitrator Adams in *re: Hiram Walker (supra)*; that is, that "the merits appear to be severable from the issue of arbitrability." The submission is that in this case the merits are not severable from the issue of arbitrability such that bifurcation is not appropriate.

The University reiterates in reply that my jurisdiction is dependent upon an allegation that if proven would constitute a violation of the collective agreement. It is asserted that the allegation here does not meet this threshold. It is pointed out that in contrast to this matter, there is a "hook" into the collective agreement that could be enforced in each of the cases cited by the Association. Accordingly, the University maintains that this is not an arbitrable grievance and asks me to so find.

DECISION

The best summary of the law and the rationale for and against the bifurcation of a hearing where there is a challenge to the jurisdiction of the arbitrator at the outset is found in *re: Town of Amherst (2011) 207 LAC (4th) 89 (Richardson)* and as reproduced in *re: Toronto Police Association v. Toronto Police Services Board (supra)*, as follows:

> I do not intend to extensively review the case law. An excellent summary and discussion of the cases and the competing interests and principles is provided in Town of Amherst, supra, at paragraphs 26-37:
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> [26] The Board starts with the observation that the question of whether to bifurcate a hearing or not is one that is solely within its discretion. It is not a right of the parties – it is a decision of the Board based on its power to control its own procedure.
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> [27] That being the case the Board is of the view that the availability of bifurcation must always be considered within what ought to be a fundamental goal in the case of arbitrations: that the integrity of the arbitration process be maintained, as a means of providing "speedy relief' to the parties. The Board agrees with the statement of Arbitrator Peck in Re Health Labour Relations Assn. and Hospital Employees' Union, Loc . 180 (1984) 17 L.A.C. (3d) 443 (Peck) at pp. 447-8 that "arbitration proceedings must fulfill the important labour relations goal of speedy, informal dispute resolution, geared to the real substance of the matters at hand, and the involvement of laymen, rather than to procedural technicalities:" quoted in Re Canadian Broadcasting Corp, supra at p. 13.
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> [28] Bifurcation, if not carefully used, threatens that goal. It is, first of all, a tool more likely to be used and understood by lawyers than by laymen. Second, a decision to bifurcate followed by a subsequent decision to allow a preliminary objection risks fostering a sense of injustice on the part of a grievor who has come to the hearing seeking a chance to be heard on the merits: Re Hiram Walker & Sons Ltd and

Distillery Workers, Local 61 [1973] OLAA No. 71, 3 L.A.C. (2d) 203 (Adams) at para. 5. While such a grievor may not be happy with a ruling on a preliminary objection as to jurisdiction, he or she will at least have had the comfort – and it is a real one in the Board's view – of having been heard. The value of such comfort is not to be minimized, given the important role that grievances and their resolution after a full airing of the issues involved play in fostering and maintaining harmonious labour relations.

[29] It has been suggested that letting the grievor be heard on the merits, even if there is a preliminary objection to jurisdiction, risks prejudice to the other side. Arbitrators are, it is said, only human and they may be swayed by evidence on the merits to rule against an otherwise valid preliminary objection to jurisdiction: Re Hiram Walker, supra at para. 6. However, this particular objection is not overly persuasive. Arbitrators no less than judges are forced to grapple with such issues all the time. They are expected to and do put aside prejudices and rule on the merits of an issue, whether it goes to procedure or to the merits.

[30] Third, bifurcation risks adding delay and expense to a process that was and still is intended to be expeditious and relatively inexpensive. The issue of delay and expense may not have been as important a concern in the 1970s when, by anecdotal account, most arbitrations were quickly arranged and quickly heard. The risk is much higher now, when arbitrations take longer and are generally more difficult to schedule, with delays of several months if not more being now the norm.

[31] The principle of "speedy relief" does, however, support bifurcation in an appropriate case. Where a ruling on a preliminary objection would, if successful, avoid days if not weeks of evidence or where the issues on the preliminary objection are separate and distinct from those that would have to be argued and considered on the merits —there is much to be said for bifurcation: see. for e.g., Cherubini Metal Works Ltd and USWA, Local 4122 (2008) 72 L.A.C. (4th) 1 (Christie) at pp. 28-29; Canadian Broadcasting Corp and CUPE (Broadcast Council) (1991) 22 L.A.C. (4th) 9 (Thorne) at p. 18.

[32] It may be said then that while there is a "general reluctance on the part of arbitrators to bifurcate hearings:" B.C.T., Local 446, supra at para. 35, the ultimate decision is dependent "upon fairness to the parties, and the practicality and economy of time:" Toronto (City) and CUPE,

Loc. 79 (2004) 128 L.A.C. (4th) 217 (Kirkwood) at p. 220; Canadian Broadcasting Corp, supra at p. 18; School District No. 27 (Cariboo-Chilcotin) and Cariboo-Chilcotin Teachers' Assn (1994) 46 L.A.C. (4th) 385 (Kinzie) at pp. 386-87.

[33] What then is the "best course of action" for an arbitrator when considering a motion to bifurcate a hearing? It is suggested by the authors in Gorsky, Evidence and Procedure in Canadian Labour Arbitration, Part III, section 7.2, pp. 7-4 to7-6 that while the "early practice" of arbitrators was to hear both the preliminary objection and the merits in the same hearing, the "more orthodox position" – one that was they say in place by 1970 and is now "the best course of action" – is for these matters to be bifurcated: see too Nova Scotia and NSGEU (Coates) (1999) 83 L.A.C. (4th) 218 (North) at pp. 220-21. In support of this proposition the text cites Re Hiram Walker & Sons Ltd and Distillery Workers, Local 61 [1973] OLAA No. 71, 3 L.A.C. (2d) 203 (Adams), where Arbitrator Adams suggested at para 6 that requests for bifurcation should not be granted unless:

a. the party requesting the adjournment made this fact known to the other party before the hearing date to enable the other party the opportunity to refrain from having his witnesses in attendance;

b. the merits appear to be severable from the issue of arbitrability;

c. the delay will not seriously affect the availability of witnesses; and

d. no other serious prejudicial effect, uncompensable by money, will be experienced.

[34] The most problematic of these four conditions is the second: that the merits appear to be severable from the issue of arbitrability. The difficulty is that an arbitrator hearing a motion to bifurcate does not know what the evidence and issues on either the preliminary objection or the merits will be. Indeed, it often has little idea of the exact nature of the issues – or of the facts that are or will be material to those issues. Hence it can only rely on the submissions of counsel seeking bifurcation, but counsel with the best of good intentions may nevertheless be mistaken as to (a) what evidence will be necessary to establish their preliminary objection and (b) whether that evidence will overlap evidence that is material to the merits.

> [35] The risk then is that bifurcation may be granted on the assumption that the evidence and issues on the preliminary objection are separate and distinct from the merits, only to discover either that (a) they are not severable, or (b) evidence from the merits side is in fact necessary to resolve the issues on the preliminary objection side. So, for example, and perhaps ironically, Arbitrator Adams in the Re Hiram Walker case granted the employer's request for bifurcation based on counsel's submissions that the four conditions had been established – only to discover upon hearing the evidence relevant to the preliminary objection that "with hindsight, the second criteria enumerated has not been met:" para. 7. In the result he found that the issues of arbitrability and the merits were intertwined, and a new hearing would have to be convened: see para. 23.

To repeat, this is a case where a ruling on the jurisdictional issue in advance of a hearing on the merits would, if in the University's favour, avoid a lengthy and costly hearing. Accordingly, it is a case where consideration should be given to bifurcation and the principles enunciated in *re: Town of Amherst (supra)* and adopted in *Toronto Police Association (supra)* carefully applied.

An arbitrator's jurisdiction is to be found within the four corners of the collective agreement such that a grievance, in order to be arbitrable, must allege a breach of the collective agreement. There is nothing in this collective agreement that on its face entitles a faculty member to stand for election to the Board of Governors. Nor is there anything in this collective agreement that on its face restricts the authority of the Board of Governors to establish whatever eligibility requirements for election to the Board of Governors that it sees fit. However, the allegation is that Professor Gorelick was forced to make an improper choice as between academic freedom and

the performance of his service on the Board of Governors when he was forced to sign the amended code of conduct as a precondition to standing for election to the Board of Governors. The allegation is that Professor Gorelick's right to academic freedom under article 4 and his right to participate in the governance of Carleton University under article 15.6 have been breached. In addition, it will be argued that the longstanding past practice is that two members of CUASA hold positions on the Board of Governors, thereby creating a member right to stand for election. Further, it will be disputed that "collegial decision-making" as referenced in article 15.6(c) is restricted to self-governance at the departmental level but rather it will be contended that collegial decision-making extends to the Board level.

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

whether they have application if the facts as asserted by the Association are taken at this point as proven.

This evidence is inextricably interwoven with the evidence going to the merits. Accordingly, the merits are not severable from the jurisdictional issue (see *Hiram Walker (supra)* and *Toronto Police (supra)*) as they must be if a hearing is to be bifurcated. To repeat, much of the evidence necessary to make an informed ruling on the jurisdictional issue overlaps the evidence that would be called in regard to the merits.

Having regard to all of the foregoing, this hearing will not be bifurcated. The arbitrator will decide at the conclusion of the case, after hearing all the evidence, whether or not this grievance has a "hook" into the collective agreement (as it must if I am to have jurisdiction) and, if so, whether there has been a breach that must be remedied.

This matter is to be put on for hearing. Any disclosure issues that remain outstanding are to be dealt with in the interim by way of teleconference with counsel.

Dated this 23rd day of August 2017 in the City of Toronto.

KEVIN BURKETT