Date: 20170113

File: 566-02-9648

Citation: 2017 PSLREB 6

Public Service Labour Relations and Employment Board Act and *Public Service Labour Relations Act*

Before a panel of the Public Service Labour Relations and Employment Board

BETWEEN

STEVEN LUKITS

Grievor

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Lukits v. Treasury Board (Department of National Defence)

In the matter of an individual grievance referred to adjudication

Before: John G. Jaworski, a panel of the Public Service Labour Relations and Employment Board

For the Grievor: Bernard A. Hanson, counsel

For the Employer: Sean F. Kelly, counsel

Heard at Kingston, Ontario,
September 10, 2015.

I. Individual grievance referred to adjudication

[1] Dr. Steven Lukits ("the grievor") is employed as a full-time associate professor of English at the Royal Military College of Canada ("the College"), located in Kingston, Ontario. He is a member of the University Teaching bargaining unit that is represented by the Canadian Military Colleges Faculty Association ("CMCFA") and that is bound by the collective agreement between the Treasury Board and the CMCFA that was executed on March 11, 2011, and that expired on June 30, 2014 ("the collective agreement").

[2] On March 22, 2013, an access to information request ("the ATI request") was received by the access to information coordinator ("the ATI coordinator") at the Canadian Defence Academy (CDA) relating to course ENE 453 (War Literature II) taught at the College by the grievor. The ATI request asked for the production of the course materials, lecture slides, handouts, and course packages and the grievor's handwritten notes prepared for the course ("the course notes").

[3] On April 5, 2013, on behalf of the grievor, the CMCFA wrote to Principal Joel Sokolsky of the College, advising that the documents in the ATI request did not constitute a ". . . record under the control of [the] institution" as specified in s. 4(1) of the *Access to Information Act* (R.S.C., 1985, c. A-1; "the *AIA*"). The CMCFA stated that by custom and law, such documents were in the grievor's custody and control. It requested that the College cease its efforts to compel the production of the documents referred to in the ATI request, failing which the CMCFA would take steps to protect the rights of its members.

[4] A briefing note prepared for the Commander of the CDA by Support Services and dated October 2, 2013, stated that the grievor agreed to provide the documents set out in the ATI request, with the exception of the course notes.

[5] On November 5, 2013, the grievor received a letter dated October 29, 2013, from the Chief of Military Personnel stating that he had to comply with the complete requirements of the ATI request, which included producing the course notes.

[6] On November 28, 2013, the grievor filed a grievance with respect to the order to produce his course notes and requested the following:

a. a declaration that the Treasury Board (Department of National

Defence) breached the provisions of the collective agreement and the *AIA*;

b. an order requiring the employer to cease and desist from such breaches in the future; and

c. such further and other relief as the CMCFA may request and that the adjudicator considers appropriate in all the circumstances.

[7] On January 14, 2014, the grievor complied with the order and produced his course notes, under threat of discipline.

[8] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board ("the Board") to replace the former Public Service Labour Relations Board ("the PSLRB") as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in sections 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to section 393 of the *Economic Action Plan 2013 Act, No. 2*, a proceeding commenced under the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2; "the *Act*") before November 1, 2014, is to be taken up and continue under and in conformity with the *Act* as it is amended by sections 365 to 470 of the *Economic Action Plan 2013 Act, No. 2*.

[9] The matter was scheduled to be heard on September 10 and 11, 2015, in Kingston, Ontario. On August 27, 2015, counsel for the employer objected to the jurisdiction of an adjudicator to hear the matter and requested that the parties use the scheduled hearing days to address the employer's objection. Counsel for the grievor concurred. The matter was referred to me, and I granted that request. This decision deals solely with the employer's objection.

II. Summary of the evidence

[10] No witnesses were called.

[11] The grievor provided an exhibit book containing nine tabs; however, sometimes a tab contained more than one document. The exhibit book was entered on consent. Relevant facts were also set out in his counsel's written submissions.

[12] On March 22, 2013, the ATI coordinator for the chief of military personnel forwarded the ATI request to the CDA. The email stated as follows:

. . .

> *SUBJECT/OBJECT: Copy of course materials, lecture slides, hand-outs, course packages and hand written notes prepared for and/or by Dr. Steven J. Lukits Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013.*
>
> *1. The enclosed electronic ATI request is fwd for your action. Please provide your submission to CMP ATI Coord at the latest on the target date indicated above. OPI(s) are to advise CMP ATI Coord immediately upon receipt of tasking if following conditions apply:*
>
> *a. the tasking should be re-directed to another Directorate;*
>
> *b. supplementary information may be avail from another Directorate;*
>
> *c. the time required for the "search" is expected to be more than five(5) hours; and/or*
>
> *d. additional consultations are necessary.*
>
> *2. If your Directorate does not have any documentation to provide, a nil return is required (email will be accepted).*
>
> *3. All relevant documentation must be submitted. If you consider that some details of a document should not be released, follow the procedure outlined in the enclosed Access to Information Act (AIA) OPI Guidance Checklist sheet.*
>
> *4. It is your Directorate's responsibility to identify all relevant exemptions and the related sections of the AIA. You must use a YELLOW HIGHLIGHTER to identify the exemptions and also note the related AIA sections in the right margin on the page being reviewed. Only those exemptions identified in the AIA section(s) will be contemplated. The final decision for disclosure rests with DAIP.*
>
> *5. DND must reply to ATI requests within the prescribed time limits or face liability. In some cases, where a valid reason can be justified, the CMP ATI Coord will try to obtain an extension from DAIP on behalf of the OPI(s). your cooperation is appreciated. Thank you.*
>
> *END OF ENGLISH TEXT-LA VERSION FRANÇAISE SUIT*

. . .

[*Sic* throughout]

[13] On April 5, 2013, on the grievor's behalf, the CMCFA wrote to Mr. Sokolsky with respect to the ATI request, stating as follows:

> *We are writing in regard to the Access to Information (ATI) Request A-2012-01998 seeking copies of course materials, lecture slides, hand-outs, course packages and hand written notes prepared for and/or by Dr. Steven J. Lukits Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013.*
>
> *It is the position of the Canadian Military Colleges Faculty Association that these documents do not constitute "a record under the control of the institution" pursuant to section 4(1) of the Access to Information Act. Rather, by custom and law, such documents are in the custody and control of Professor Lukits, not the Royal Military College, and therefore are not amenable to the request.*
>
> *In this regard we refer you to:*
>
> University of British Columbia v. University of British Columbia Faculty Association, *Before J.E. Dorsey (Arbitrator), 125 L,A,C, (4th) 1,[2004] B.C.C.A.A.A. No. 39, confirmed, BCLRB No. B56/2006, 2006 CanLII 6155 (BCLRB)*
>
> The Association of Professors of the University of Ottawa v. University of Ottawa, *Before: P. Chodos (Arbitrator): Award, Supplementary Award No. 1, Supplementary Award No. 2*
>
> Order PO-3009-F; University of Ottawa (Re), *2011 CanLII 74312 (ON IPC)*
>
> Order PO-3084; University of Ottawa (Re), *2012 CanLII 31568 (ON IPC)*
>
> *In these circumstances we respectfully request that the College cease efforts to compel the production of Professor Lukits' course material. Barring withdrawal of the request, the Canadian Military Colleges Faculty Association will take the necessary legal steps to ensure the rights of our members, and of the College as an academic institution, are upheld.*
>
> . . .
>
> [*Sic* throughout]

[Emphasis added]

[14] A briefing note for the Chief of Military Personnel, dated April 9, 2013, and prepared by the principal's office, details that the Principal supports the grievor's position with respect to the course notes. It states as follows:

> ***BRIEFING NOTE FOR CMP***
>
> ***ACCESS TO INFORMATION REQUEST a-2012-01998***
>
> *References: A. Access to Information Request (ATI) A-2012-01998*
>
> *B. Letter from the Canadian Military Colleges Faculty Association dated 5 April 2013*
>
> ***PURPOSE***
>
> *1. The purpose of this Briefing Note is to seek CMP's support regarding the release of Dr. Lukits personal course notes as requested in reference A.*
>
> ***BACKGROUND***
>
> *2. Dr. S.J. Lukits, a full time professor at RMCC, received an ATI request at reference A, seeking copies of his course materials, lecture slides, hand-outs, course packages and hand written notes prepared for his course, ENE 453 "War Literature II" taught at RMCC between September 2012 and 18 March 2013.*
>
> *3. Dr. Lukits has agreed to provide his course outline and copies of material handed out or presented in class. He has, however declined to provide his course notes.*
>
> ***DISCUSSION***
>
> *4. This ATI request for course material would appear to be the first time such a request has been received at RMCC. Although Dr. Lukits is a full time employee he does consider his course notes as his personal notes and it is normal practise of the College that course notes are treated as personal property of the individual and are not held under the control of the College. Concern was expressed by Dr. Lukits that release of this material could infringe upon his right to academic freedom as provided in the collective bargaining agreement.*
>
> *5. The RMCC Principal sought the opinion of our local JAG officer, Major John Peck. As indicated by the attached, Major Peck has advised that as Dr. Lukits is an employee of*

> *RMCC, a government institution, he is obliged to provide his notes, but that he may apply for some of the material to be exempted; a decision that would, not, however be made by him.*
>
> *6. Dr. Lukits also sought the assistance of the Canadian Military Colleges Faculty Association (CMCFA). As indicated by the CMCFA at reference B, they have advised the Principal, citing several previous cases, that Dr. Lukits is not obligated to provide course material on the grounds that these documents do not constitute "a record under the control of the institutions" pursuant to section 4(1) of the Access to Information Act. The CMCFA representative indicated that it is prepared to take additional legal action to block the release of these course notes should DND continue to request them.*
>
> *7. The Principal concurs with Dr. Lukits' decision to decline to hand over his course notes. Apart from the legal issues, he is concerned about the origins and vagueness of this request and believed that to accede to it would set a troubling precedent which would undermine the individual efforts of professor and call into question the academic freedom at RMCC. It should be noted that under provincial access to information legislation, universities are exempt from having to provide course material due to this very issue.*
>
> ***RECOMMENDATION***
>
> *8. It is strongly recommended that CMP support this request that Dr. Lukits' course notes be exempted from this ATI request and that DAIP be requested to exempt this material.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis added]

[15] On April 22, 2013, the Office of the Commander of the CDA wrote to the Chief of Military Personnel with respect to this matter and attached the briefing note (dated April 9, 2013) from the Principal of the College, as well as the ATI request and the CMCFA's letter dated April 5, 2013. The letter stated in part as follows:

> . . .
>
> *2. Dr. Lukits agreed to provide the course outline and other materials which were package and sent to CMP ATI Coordinator on 04 April 2013. However, Dr. Lukits has*

> *refused to provide his own personnel course notes on the principal of "academic freedom" (Refs A&B). In accordance with the Federal Access to Information Act, there are no provisions to exempt (severance) the personal notes of a University Professor. Under the Ontario Provincial Freedom of Information and Privacy Protection Act (FIPPA) such a provision exists.*
>
> *3. The AJAG in Kingston has been consulted and his advice was that Dr. Lukits works for DND and as such must provide the requested material. As the sole federally owned University in Canada, the ATI Act may have failed to recognize such unusual requests for University Professors working for the Federal government to submit personal course material.*
>
> *4. I fully support the position taken by Dr. Lukits in view of the protection offered to non-Federal University Professors by Provincial ATI Acts. I would like to see the Act amended to reflect the unique situation of University Professors in not having to provide personal course material which is unique among each and every professor.*
>
> . . .
>
> [*Sic* throughout]

[16] By letter dated October 29, 2013, which the grievor received on November 5, 2013, the Commander of the CDA ordered that he was required to comply with the complete requirements of the ATI request.

[17] On November 28, 2013, the grievor filed a grievance against the Commander of the CDA's order that stated in part as follows:

> . . .
>
> ***DETAILS OF THE GRIEVANCE***
>
> *3. An Access to Information Request (A-2012-01998) was forwarded by the Chief of Military Personnel, ATI Coordinator to the Canadian Defence Academy, (hereinafter, "the CDA"), on or about March 22, 2013, requesting the following documents in connection with a course taught by Dr. Lukits, ENE 453, (War Literature II) between September 2012 and March 18, 2013. The request for documents included:*
>
> *a. Course materials*
>
> *b. Lecture Slides*

c. Hand-outs

d. Course Packages

e. Hand written notes prepared for or by Dr. Lukits

4. By letter dated April 5, 2013, the CMCFA advised then Principal Sokolsky of the RMCC that in its view the documents requested did not constitute "a record under the control of the institution" pursuant to section 4(1) of the ***Access to Information Act,*** *R.S.C. 1985, c. A-1 and therefore were not subject to the access provisions of the* ***Act.***

5. Notwithstanding that, because all of the documents except his course notes already have been available to students in the course, Dr. Lukits provided all of the documents requested with the exception of his course notes.

. . .

8. In a Briefing Note prepared for the Commander CDA dated October 2, 2013, it was noted that CMP had directed CDS to "close the loop on this ATI by having Dr. Lukits provide his personal notes . . . immediately".

9. By letter dated October 29, 2013, the Commander CDA advised the Principal and Commandant of the RMCC in part, "[t]his matter was clearly sensitive to Dr. Lukits and accordingly was given very careful consideration. Please inform Dr. Lukits that he must comply with the complete requirement of this ATI request."

10. Dr. Lukits was so advised on or about November 5, 2013.

11. Article 5 of the collective agreement acknowledges that University Teachers have a right to academic freedom including the freedom to teach, the freedom to research, the freedom to publish and freedom of expression. It should be noted that while article 5.06 recognizes the special mission of the College it expressly provides that such special mission does not diminish the academic freedom of University Teachers. Article 5.06 of the collective agreement provides in that regard:

The special mission of the College does not diminish the academic freedom of the UT. Nonetheless, the special mission makes the College vulnerable to harm from misunderstandings that may arise from public discussion or publication in areas that speak directly to that special mission. This places on the UT, embarking upon such public discussion or publication, a somewhat greater responsibility for clarity than might attend similar actions

> ***in areas not closely associated with the mission.***
>
> *12. Arbitral and judicial case law has recognized that unlike in most other workplaces, records and documents created and received by academic staff in the course of their employment by custom and practice are within the custody and control of academic staff and not their employer. The underlying rationale for that custom and practice is the protection of academic freedom.*
>
> . . .
>
> *13. Based on the foregoing, by custom and practice, at all relevant times, Dr. Lukits' course notes were within his control.*
>
> *14. Section 4(1) of the Access to Information Act, R.S.C. 1985, c. A-1 provides:*
>
> ***4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is***
>
> ***(a) a Canadian Citizen, or***
>
> ***(b) a permanent resident within the meaning of subsection***
>
> ***has a right to and shall, on request, be given access to any record under the control of a government institution.***
>
> *15. Under section 4(1), the right of access to "records" is expressly limited to a "record under the* ***control*** *of a institution" (emphasis added). For the reasons set out in paragraphs 11-13 above, Dr. Lukits' notes were not "under the control of" the Employer.*
>
> *16. That being the case, the Employer has no authority to compel him to produce his course notes and such an order contravenes articles 5, 6.01 and 8.01 of the collective agreement.*
>
> . . .
>
> [*Sic* throughout]
>
> [Emphasis added]

[18] On November 28, 2013, the CMCFA's president wrote to the CDA and stated as follows:

> *It is the position of the CMCFA that Dr. Lukits' [sic] complied with the legislation when he originally provided the requested course materials on March 26, 2013. Dr. Lukits*

> *has formally filed a grievance with respect to this matter, and the CMCFA will be representing him on all issue [sic] relating to this request.*

[19] On January 21, 2014, the CMCFA's president wrote to the Principal of the College and stated as follows:

> . . .
>
> *The handwritten notes prepared by Dr. Steven J. Lukits have been subject to an access-to-information (ATI) request, and it is the position of the CMCFA and Dr. Lukits that these notes are not within the custody and control of the institution.*
>
> *These documents do not constitute "a record under the control of the institution" pursuant to section 4(1) of the Access to Information Act. Rather, by custom and law, such documents are in the custody and control of Professor Lukits, not the Royal Military College, and therefore are not amenable to the request.*
>
> *A grievance has been filed on November 28, 2013, alleging that [sic] being the case, the Employer has no authority to compel him to produce his course notes and such an order contravenes articles 5, 6.01, and 8.01 of the collective agreement.*
>
> *On Tuesday January 14, 2014, the University has indicated verbally that the requested records must be submitted before Wednesday January 22, 2014, failing which Dr. Lukits will be subject to Administrative actions (discipline).*
>
> *In order to avoid sanctions, Dr. Lukits is providing his "handwritten notes prepared for and/or by Dr. Steven J. Lukits, Associate Professor, Department of English, for course number ENE 453 (War Literature II) taught at Royal Military College in Kingston, between September 2012 and March 18, 2013", under reserve of all his rights and of all the Association's rights. Without limiting the foregoing, this is to advise you that the submission of such notes by Dr. Lukits expressly is without prejudice to the grievance dated November 28, 2013.*
>
> . . .

[20] Article 2 of the collective agreement is entitled "Interpretation and Definitions", and clause 2.01(j) defines "employee" as a person so defined by the *Act* and who is a member of the bargaining unit.

[21] Clause 2.01(s) defines "UT" as an employee defined in clause 2.01(j).

[22] The *Act*, at the relevant time defined "employee" as follows:

> ***employee**, except in Part 2, means a person employed in the public service, other than*
>
> ***(a)** a person appointed by the Governor in Council under an Act of Parliament to a statutory position described in that Act;*
>
> ***(b)** a person locally engaged outside Canada;*
>
> ***(c)** a person not ordinarily required to work more than one third of the normal period for persons doing similar work;*
>
> ***(d)** a person who is a member or special constable of the Royal Canadian Mounted Police or is employed by that force under terms and conditions substantially the same as those of one of its members;* [however, see *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1]
>
> ***(e)** a person employed in the Canadian Security Intelligence Service who does not perform duties of a clerical or secretarial nature;*
>
> ***(f)** a person employed on a casual basis;*
>
> ***(g)** a person employed on a term basis, unless the term of employment is for a period of three months or more or the person has been so employed for a period of three months or more;*
>
> ***(h)** a person employed by the Board;*
>
> ***(i)** a person who occupies a managerial or confidential position; or*
>
> ***(j)** a person who is employed under a program designated by the employer as a student employment program.*

[23] Article 4 of the collective agreement is entitled "Precedence of Legislation". Clause 4.01 states as follows:

> ***4.01** In the event that any law passed by Parliament, applying to the public service employees covered by this Agreement, renders null and void any provision of this Agreement, the remaining provisions of the Agreement shall remain in effect for the term of the Agreement.*

[24] Article 5 of the collective agreement is entitled "Academic Freedom and Academic Responsibility" and states as follows:

> ***General Definition***
>
> ***5.01*** *UTs have a right to academic freedom. Academic freedom does not confer legal immunity, nor does it diminish the responsibility of UTs to fulfil their academic obligations. It is defined as the freedom, individually or collectively, to pursue, to develop and to transmit knowledge through research, study, discussion, documentation, production, creation, teaching, lecturing and writing, regardless of prescribed or official doctrine and without constriction by institutional censorship. It includes:*
>
> ***The Freedom to Teach, and Its Responsibilities***
>
> ***5.02*** *UTs teaching courses have the right to the free expression of their views on the subject area, and may use and refer to materials and their treatment thereof without reference or adherence to prescribed doctrine.*
>
> *In such circumstances, the UT is expected to cover topics according to the calendar description, to remain up to date in the knowledge of the discipline, treat students fairly and ethically, and teach effectively; which includes using fair, reasoned and fact-based arguments and showing a willingness to accommodate the expression of differing points of view.*
>
> ***The Freedom to Research, and Its Responsibilities***
>
> ***5.03*** *UTs have the freedom to carry out scholarly research within areas of their expertise without reference or adherence to prescribed doctrine. This should not be interpreted to preclude or inhibit the ability of UTs to develop new areas of expertise.*
>
> *UTs are expected to meet established ethical guidelines for work with animal or human subjects, to deal fairly with colleagues and students, to carry out their research in the spirit of an honest search for knowledge, and to base findings upon a critical appraisal of available evidence and a reasoned analysis of its interpretation.*
>
> ***The Freedom to Publish, and Its Responsibilities***
>
> ***5.04*** *UTs have the right to publish the results of their research, without interference or censorship by the institution, its agents, or others. This should not be interpreted as prohibiting the UT from accepting restrictions upon publication as a condition of receiving support for the*

> *UT's research from a sponsor.*
>
> *Researchers have a responsibility to report findings honestly and accurately, and to recognize appropriately the contributions of others to the work they report.*
>
> ***Freedom of Expression, and Its Responsibilities***
>
> ***5.05*** *UTs have the right to freedom of expression.*
>
> *UTs who are commenting in their areas of disciplinary expertise are bound by the same obligation to honest and accurate scholarship which attends the right to publish research.*
>
> *In the exercise of this right, UTs shall not create ambiguities as to whether they are speaking in a professional capacity or as private citizens, nor shall they claim to speak on behalf of the College unless so authorized.*
>
> ***Academic Freedom and the Specific Mission of the CMC***
>
> ***5.06*** *The special mission of the College does not diminish the academic freedom of the UT. Nonetheless, the special mission makes the College vulnerable to harm from misunderstandings that may arise from public discussion or publication in areas that speak directly to that special mission. This places on the UT, embarking upon such public discussion or publication, a somewhat greater responsibility for clarity than might attend similar actions in areas not closely associated with the mission.*
>
> *The College will be better placed to correct any public misunderstandings and assure the UT's academic freedom, if the College and the UT are in a position to anticipate the impact of the UT's discourse. To this end, UTs are encouraged to advise the Principal before any anticipated public discussion or publication which, in the opinion of the UT, relates closely to the special mission of the College.*
>
> [Emphasis in the original]

[25] Article 6 of the collective agreement is entitled "Management Rights", and clause 6.01 states as follows:

> ***6.01*** *All the functions, rights, powers and authority that the Employer has not specifically abridged, delegated or modified by this Agreement are recognized by the Association as being retained by the Employer.*

[26] Article 8 of the collective agreement is entitled "Past Practices", and clause

8.01 states as follows:

> ***8.01*** *Where this Agreement is silent on working conditions, the conditions existing immediately before the date of this Agreement shall continue to apply provided that:*
>
> *(a) they are not inconsistent with the Agreement;*
>
> *(b) they are reasonable, certain and known;*
>
> *(c) they may be included in this Agreement in accordance with the* Public Service Labour Relations Act*;*
>
> *(d) they are carried out in a fair and equitable manner.*

[27] Clause 8.02 states as follows:

> ***8.02*** *The onus of establishing an existing practice within the meaning of 8.01 shall rest on the party who alleges the existence of same.*

[28] On May 27, 2014, the grievor was provided with the final-level grievance response, which stated as follows:

. . .

> *This is the final level response to your grievance where you allege that the act of compelling the production of your course notes in response to an Access to Information request has contravened articles 5, 6.01 and 8.01 of your collective agreement. I have carefully reviewed the circumstances of your grievance, including the representations made on your behalf by Helen Luu, your representative from CMCFA.*
>
> *I note that you are a professor at the Royal Military College of Canada (RMCC) which is the only federally regulated university in Canada and, therefore, subject to the Access to Information Act (ATIA). In accordance with this legislation, I have determined that your teaching material does fall under the control of the RMCC and there are no exemptions contained within the ATIA regarding teaching materials. Additionally, your collective agreement states, at article 5, that "academic freedom does not confer legal immunity". Therefore, the order to comply with the ATI request was not a contravention of articles 5, 6.01 nor 8.01 of your collective agreement.*

. . .

III. Summary of the arguments

A. For the employer

[29] The employer objected to the jurisdiction of an adjudicator to consider this grievance on the following basis:

> (a) The essence of this grievance is a matter of interpreting the *AIA*, not a matter of collective agreement administration or application.
>
> (b) Section 30 of the *AIA* is another administrative procedure for redress within the meaning of s. 208(2) of the *Act*.
>
> (c) The disclosure of documents under the *AIA* is not a matter incorporated into the collective agreement either expressly or through the operation of s. 226(2)(a)) of the *Act*.

[30] An adjudicator does not have inherent jurisdiction, must adhere to the confines of the statutory authority under the *Act*, and cannot trespass in areas where the legislature has not assigned express authority. Subsection 208(2) of the *Act* precludes filing a grievance when another administrative procedure for redress is provided under another Act of Parliament (other than the *Canadian Human Rights Act* (R.S.C, 1985, c. H-6; *CHRA*)). In support, the employer referred me to *Wray v. Treasury Board (Department of Transport)*, 2012 PSLRB 64, and *Chamberlain v. Canada (Attorney General)*, 2015 FC 50.

[31] The employer submitted that when assessing jurisdictional issues, the grievor bore the onus of establishing that the grievance meets the thresholds as prescribed by the *Act*. In this respect, I was referred to *Mutart v. Treasury Board (Department of Public Works and Government Services)*, 2013 PSLRB 90.

[32] According to the employer, although the language may refer to articles of the collective agreement, it must be established that the essence of the grievance or its pith and substance is related to a matter covered by the collective agreement. A grievor cannot use innocuous collective agreement provisions to bootstrap jurisdiction. To assess the essence of a grievance, an adjudicator should review its wording, together with any contextual factors. The fact that a provision of the collective agreement is referenced in the body of the grievance is not determinative.

[33] The pith and substance of the grievance is whether the grievor's course notes are a ". . . record under the control of a government institution" under s. 4(1) of the *AIA*. In this respect, the employer stated that the grievance cites a letter in which an individual states his or her belief that the *AIA* should be amended to read in a manner similar to its Ontario legislative counterpart, cites an order of the Office of the Information and Privacy Commissioner of Ontario, cites s. 4(1), emphasizes the allegations that the course notes are ". . . not under the control of the employer for the purposes of subsection 4(1) of the *AIA*", and requests a declaration that the employer has breached the provisions of the *AIA*.

[34] The employer submitted that the grievance was triggered by an ATI request as opposed to an independent action on its part.

[35] As the essential character of the dispute is one of access to information and not labour law, it requires an adjudicator to interpret and apply the *AIA*. One gets to the collective agreement dispute only if the course notes are deemed ". . . records under the control of a government institution" within the meaning of the *AIA*. The statutory interpretation is the primary issue, and contractual compliance flows from the determination only as a secondary matter. Since the essential character of the dispute is interpreting the *AIA* and not the collective agreement, an adjudicator would lack jurisdiction.

[36] Subsection 208(2) of the *Act* precludes filing an individual grievance when another administrative procedure for redress is provided under another Act of Parliament (except the *CHRA*). If another administrative procedure is available, then it must be used. The employer referred me to *Brown v. Canada (Attorney General)*, 2011 FC 1205, *Miller v. Treasury Board (Correctional Service of Canada)*, 2013 PSLRB 164, *Public Service Alliance of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2012 PSLRB 84, and *Canada (Attorney General) v. Boutilier*, [2000] 3 F.C. 27 (C.A.).

[37] The employer submitted that s. 30(1)(f) of the *AIA* provides an administrative process for redress that was available to the grievor. Under that provision, the information commissioner is able to investigate a complaint and provide findings and recommendations, which according to the employer, is a meaningful remedy akin to the grievor's request for a declaration. This being the case, a grievance could not have

been filed. In this respect, the employer referred to me a document from the website of the Office of the Information Commissioner of Canada entitled, "My diary is my business".

[38] The employer submitted that the adjudication process under s. 209(1) of the *Act* is an inadequate process as it does not allow the unknown individual requesting the disclosure any opportunity to make submissions before an adjudicator about the necessity of his or her request.

[39] The disclosure of documents under the *AIA* is not a matter incorporated into the collective agreement either expressly or through the operation of s. 226(1)(g) of the *Act.*

[40] Any breach of the *AIA* is beyond an adjudicator's jurisdiction. In this respect, the employer referred me to *Hajjage v. Canada Revenue Agency*, 2011 PSLRB 5, and *Scharf v. Canada Revenue Agency*, 2013 PSLRB 121.

[41] An adjudicator is without jurisdiction under s. 209(1)(a) of the *Act* to consider an individual grievance that raises a stand-alone issue relating to an ". . . Act of Parliament relating to employment matters . . ." under s. 226(1)(g). The power to interpret an Act of Parliament relating to employment matters under s. 226(1)(g) comes into play only once a grievance has properly been referred to adjudication. In this respect, the employer referred me to paragraphs 39 through 44 of *Chamberlain*, 2015 FC 50, which state as follows:

> ***39*** *The legislative scheme adopted by Parliament in relation to the grievance processes applicable to public service employees is very specific, and it is different from those generally seen in the private sector. Parliament chose to provide a "right to grieve" on several matters related to employment conditions to all public servants, including those not represented by a bargaining agent and not covered by a collective agreement. . . .*
>
> . . .
>
> ***40*** *However, Parliament also chose to limit the types of grievances that employees could refer to adjudication. Section 209 of the PSLRA circumscribes and limits the types of grievances that can be referred to adjudication . . . .*
>
> . . .

41 *Section 209 does not encompass individual grievances filed by employees who are not covered by a collective agreement and which raise stand-alone CHRA violation issues. In my view, section 209 is the only provision of the PSLRA that attributes jurisdiction to a grievance adjudicator. Section 226 does not create another category of grievances that can be referred to adjudication. Subsection 226(1) (now subsection 226(2) of the PSLRA and sections 20-23 of the PSLREBA) provides the power vested in the adjudicator regarding any matter referred to an adjudicator. The powers enumerated in subsection 226(1), among which is the power to interpret and apply the CHRA, come into play once a grievance has properly been referred to adjudication. In other words, once the adjudicator is validly seized of a grievance that has been referred to adjudication, he or she can interpret and apply the CHRA if the issues raised in the grievance involve provisions of the CHRA. Therefore, in my view, the adjudicator did not err when he concluded that he did not have jurisdiction over Ms. Chamberlain's human rights allegations, because he did not have jurisdiction over her grievance in the first place.*

42 *I can only add that I agree with the distinctions that the adjudicator made with the case law referenced in* Chamberlain FC. *Moreover, in my view, the following excerpts from the adjudicator's decision offer an excellent summary of the correct interpretation of sections 209 and 226 of the PSLRA:*

> *87 In other words, the condition precedent for an adjudicator to consider a remedy under subsection 226(1) of the* PSLRA *requires him or her to first conclude the matter was referred to adjudication under subsection 209(1) of the* PSLRA.
>
> *88 In this case, the grievor referred the grievance to adjudication under paragraph 209(1)(*b*)* of the PSLRA, *which, under the circumstances of this case, was the only applicable provision of that subsection. In my preliminary decision, I determined the grievor had not established a* prima facie *case that disciplinary action had been taken by the employer against her, a finding determined to be reasonable by the Federal Court in* Chamberlain FC.
>
> *89 In paragraph 76 of* Chamberlain FC, *the Federal Court refers to* Parry Sound. *This is a case in the private sector in which the Supreme Court of Canada concluded an arbitrator was correct to assume jurisdiction to consider a grievance alleging termination of a probationary employee on the basis of claims of human rights violations. The private-*

> *sector scheme was not at all the same as the adjudication scheme contemplated by the* PSLRA. *The latter clearly defines and limits the matters that can be referred to adjudication.*
>
> *[…]*
>
> *93 I am of the view subsection 226(1) of the* PSLRA *must be interpreted contextually, having regard to the particular facts of each case. An interpretation of subsection 226(1) of the* PSLRA *that would grant adjudicators the power to interpret and apply provisions of the* CHRA, *even if there is no grievance referable pursuant to subsection 209(1) of the* PSLRA, *would have the effect of barring federal employees from resorting to recourses under the* CHRA *(with the exception of pay equity issues).*
>
> *94 More directly, such an interpretation would have the effect of "reading in" a basis for a referral to adjudication that is not present in subsection 209(1) of the* PSLRA.
>
> *95 In my view, both results could not have been intended by Parliament without clear language.*
>
> ***43** The only route open to Ms. Chamberlain is relation to her stand-alone alleged CHRA violations was to file a complaint before the CHRC.*
>
> ***44** The type of situation in which Ms. Chamberlain found herself has since been revisited by Parliament when it adopted the* Economic Action Plan Act, No 2, *SC 2013, c. 40 [Bill C-4] which received Royal Assent on December 12, 2013. Bill C-4 amended subsection 209(1) of the PSLRA by adding paragraph* c.1(c)(i) *which provides that an individual grievance related to a discriminatory practice set out in the CHRA will be referable to adjudication. Therefore, individual grievance raising human rights issues will be referable to adjudication, and the CHRC will no longer have jurisdiction over employment-related discrimination complaints. Unfortunately, these changes cannot affect Ms. Chamberlain's situation because the new provisions are not yet in force and cannot broaden the adjudicator's jurisdiction over her human rights allegations.*

[42] The employer submitted that the essential character of the dispute that arises from the grievance does not fall within the ambit of the collective agreement but under the *AIA*. Nothing in the collective agreement incorporates the *AIA*; nor does it prohibit the disclosure of documents under the *AIA*.

[43] While article 5 of the collective agreement discusses academic freedom, it is silent with respect to the disclosure of course notes. Had the parties intended to incorporate the obligations imposed by the *AIA* into the collective agreement or to somehow limit the disclosure of course notes, they would have done so; they did not.

[44] The *AIA* is not an "Act of Parliament" relating to employment matters within the meaning of s. 226(1)(g) of the *Act*. And adjudicator cannot interpret this in the context of this grievance. The term "employment matters" refers to Acts that have as their main purpose fundamentally regulating the employment relationship (as opposed to isolated portions of statutes that are not employment related). The *AIA* is intended to regulate access to information in records in control of a government institution. It is not intended to regulate any employment relationship. In support, the employer referred me to *Ontario Nurses' Association v. Chatham-Kent (Municipality)*, [2006] O.L.A.A. No. 734 (QL), and *Universal Workers Union, Labourers' International Union of North America, Local 183 v. King-Con Construction Ont. Ltd.,* [2004] O.L.R.D. No. 773 (QL "*King-Con*"). The employer also referred me to *Charette v. Parks Canada Agency*, 2015 PSLREB 43, and *Boivin v. Treasury Board (Canada Border Services Agency)*, 2009 PSLRB 98.

B. <u>For the grievor</u>

[45] The grievor submitted that the following two primary legal issues are to be determined:

a. Whether the determination that the grievor's course notes are or were within the employer's control is a matter that relates to ". . . the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . .", per s. 209(1)(a) of the *Act*.

b. Even if the issue of the control of the grievor's course notes is a matter within s. 209(1)(a) of the *Act*, whether, in any event, the grievor was precluded from presenting a grievance in respect of that matter because s. 30 of the *AIA* provided an administrative procedure for redress.

[46] The grievor's argument was set out in separate and sometimes

interrelated submissions.

1. The employer's authority to provide documents in response to requests under the *AIA* is limited to records under its control

[47] It is clear in the *AIA* that the disclosure of information is limited to records under the control of government institutions. Subsection 2(1) defines the purpose of that Act and states as follows:

> ***2 (1)*** *The purpose of this Act is to extend the present laws of Canada to provide a right to access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.*

[48] Subsection 4(1) of the *AIA*, which provides the right to request and be granted access, expressly limits that right to ". . . any record under the control of a government institution." Subsection 4(2.1) states that the obligations imposed on heads of government institutions are limited to requests ". . . for access to a record under the control of the institution . . .". Paragraph 5(1)(b) imposes a broad obligation on the government to publish descriptions of classes of records, limited to those records ". . . under the control of each government institution . . .".

[49] Before any substantive obligations under the *AIA* arise, it must be determined that the record in question is under the control of the government institution in question.

2. Substantive rights and obligations of employment-related statutes are implicit in each collective agreement

[50] The grievor submitted that *Parry Sound (District) Social Services Administration Board v. O.P.S.E.U., Local 324*, 2003 SCC 42 ("*Parry Sound*") made the following determinations:

> *a. The courts will not enforce contracts that are illegal or against public policy;*
>
> *b. Even if a collective agreement extends to an employer a broad right to manage the enterprise as it sees fit, that*

> *right is circumscribed by the employee's statutory rights;*
>
> *c. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of the right does not constitute a violation of the collective agreement;*
>
> *d. Substantive rights and obligations of employment related statutes are implicit and incorporated into each collective agreement over which an arbitrator has jurisdiction irrespective of the mutual intention of the contracting parties.*
>
> *e. Because substantive rights and obligations of employment related statutes are implicit in and incorporated into each collective agreement over which an arbitrator has jurisdiction, it follows that an alleged breach of those substantive rights and obligations constitutes an alleged violation of the collective agreement.*

[51] Clause 48(12)(j) of the Ontario *Labour Relations Act*, *1995*, S.O. 1995, c. 1 ("the *OLRA*"), states as follows:

> *(12) An arbitrator or the chair of an arbitration board, as the case may be, has power,*
>
> > *(j) to interpret and apply human rights and other employment-related statutes, despite any conflict between those statutes and the terms of the collective agreement . . . .*

[52] Subsection 226(2) of the *Act* states as follows:

> ***(2)** An adjudicator or the Board may, in relation to any matter referred to adjudication,*
>
> > ***(a)** interpret and apply the* Canadian Human Rights Act *and any other Act of Parliament relating to employment matters, other than the provisions of the* Canadian Human Rights Act *that are related to the right to equal pay for work of equal value, whether or not there is a conflict between the Act being interpreted and applied and the collective agreement, if any . . . .*

[53] Paragraph 48(12)(j) of the *OLRA* was the relevant portion of the Ontario legislation the Supreme Court interpreted in *Parry Sound.* As such, the principles in *Parry Sound* that the Supreme Court interpreted and applied with respect to s. 48(12)(j) of the *OLRA* would apply to s. 226(2) of the *Act*. In this respect, the grievor also referred me to *Association of Justice Counsel v. Attorney General of Canada*, 2013 FC

806, *Chamberlain v. Treasury Board (Department of Human Resources and Skills Development)*, 2013 PSLRB 115, *Chamberlain v. Attorney General of Canada*, 2012 FC 1027, and *Dodd v. Canada Revenue Agency*, 2015 PSLRB 8.

[54] This case involves a collective agreement, and the principles set out in *Parry Sound* apply. Therefore, if the *AIA* is an Act of Parliament relating to employment matters, pursuant to *Parry Sound*, then the following applies:

a. The substantive rights and obligations relating to employment under the *AIA* are implicit and are incorporated into the collective agreement.

b. An alleged breach of those substantive rights and obligations constitutes an alleged violation of that collective agreement.

c. Pursuant to s. 209(1)(a) of the *Act*, the grievance relates to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award and was properly referred to adjudication.

3. The *AIA* relates to employment matters

[55] The Ontario Labour Relations Board and arbitrators have held that the term "employment-related statute" must be given a broad enough meaning to achieve the valuable social objective of promoting labour relations harmony through the prompt, inexpensive, and final resolution of workplace disputes by a tribunal with labour relations expertise. In this respect, the grievor referred me to *Ontario Agency for Health Protection and Promotion c.o.b. Public Health Ontario v. Ontario Public Service Employees Union, Local 545*, [2013] O.L.A.A. No. 438 (QL; "*Nagra*"), and *King-Con*.

[56] For a statute to fall within the scope of the term "employment-related statute", it need not be exclusively about employment or terms of employment or, in the words of s. 226(2)(a) of the *Act*, be "relating to employment matters". An employment-related statute shows a meaningful connection or nexus between its provisions and the subject matter covered in the collective agreement. In order to establish such a connection it is sufficient if that the employer exercises its right to run its operations in a manner that collides with an employment-related statute and that some employee covered by the collective agreement is adversely affected by the employers actions. In this respect, the grievor referred me to *Nagra*, *Canadian Union of Public Employees,*

Local 133 v. Niagara Falls (City), [2005] O.L.A.A. No. 228 (QL; ("*Iaonnoni*"), and *Kawartha Pine Ridge District School Board v. Elementary Teachers Federation of Ontario*, unreported, released February 28, 2008.

[57] Arbitrators in Ontario and Alberta have concluded that provincial legislation governing privacy and access to information constitutes employment-related statutes. The grievor referred me to *Nagra*, *Iaonnoni*, *Kawartha Pine Ridge District School Board*, *Ontario Public Service Employees' Union v. The Crown in Right of Ontario*, 2015 CanLII 19325, and *Government of the Province of Alberta v. The Alberta Union of Provincial Employees*, 2012 CanLII 47215.

[58] Applying the principles set out in the aforementioned jurisprudence discloses that there is no question that the employer's determination that it had control of the grievor's notes within the scope of ss. 2(1) and 4(1) of the *AIA* adversely affected him. Under the threat of discipline, he was compelled to provide a copy of his course notes, which he considered his personal notes, and that according to the normal practice of the College, had been treated as the personal property of individuals and had not been held under the College's control.

4. <u>The same result applies pursuant to clause 4.01 of the collective agreement</u>

[59] Clause 4.01 of the collective agreement provides as follows:

> ***4.01*** *In the event that any law passed by Parliament, applying to public service employees covered by this Agreement, renders null and void any provision of this Agreement, the remaining provisions of this Agreement shall remain in effect for the term of the Agreement.*

[60] Clause 6.01 of the collective agreement is the management rights clause. In it, the parties reserved to management the functions, rights, powers, and authority not specifically abridged, delegated, or modified by the collective agreement.

[61] When clauses 4.01 and 6.01 of the collective agreement are read together, it is clear that the intent of the parties was to expressly recognize contractually the fundamental rule that the courts will not enforce contracts that are illegal or against public policy. In *Parry Sound*, the Supreme Court held that that rule, as a practical matter, means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator or

adjudicator has jurisdiction. As such, clause 4.01 of the collective agreement expressly accomplishes what, in any event, was implicit.

5. <u>The determination of control within the meaning of the *AIA*</u>

[62] It is clear from the scheme of the *AIA* that the disclosure of government information is to be limited to information under the control of government institutions and that before any substantive obligations under the *AIA* arise, it must be determined that the record in question is under the control of the government institution in question.

[63] The term "control" is not defined in the *AIA*; however, *Canada (Information Commissioner) v. Canada (Minister of National Defence)*, 2011 SCC 25, adopted the following definition of "control":

. . .

> *The Federal Court of Appeal agreed with this test, holding that, in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request? . . . .*

. . .

[64] To assess whether a government institution could reasonably be expected to obtain copies of documents upon request, the applicable contractual provisions must be considered. In *The Association of Professors of the University of Ottawa v. The University of Ottawa*, unreported, dated September 29, 2008, the article of the collective agreement dealing with academic freedom, which is relevant to the question of whether the grievor's notes were under the employer's control, was addressed at paragraph 230 as follows:

> *This however, begs the question as to what, if any, documents that may be in the possession of academic staff are subject to the Act. This remains a question, if for no other reason than the academic staff are indeed employees of the University. Nevertheless, in light of the collective agreement and the age-old customs and practices of academic institutions, including the University of Ottawa, it can hardly be argued that university professors are typical*

> *employees who are subject to the close scrutiny of management. In general, the evidence demonstrates that in the context of the various governing structures of the University, which are described in detail above, the academic staff have a considerable degree of independence in the exercise of their academic functions, i.e. teaching, research and community activities. Indeed, it is hard to conceive how they could fulfill those functions without such latitude and independence.*

[65] Clause 8.01 of the collective agreement is relevant to the issue of determining whether the grievor's notes were under the employer's control. Subject to certain conditions, this clause contractually preserves the working conditions in existence immediately before the effective date of the collective agreement that otherwise were not expressly addressed in the collective agreement.

[66] The briefing note prepared by the principal's office and dated April 9, 2013, is a concession by the employer that while the grievor is a full-time employee, he considers his course notes his personal notes, and it is the College's normal practice that course notes are treated as the personal property of the individual and are not held under the College's control.

6. <u>The pith and substance test</u>

[67] The employer suggested that the pith and substance of the issue raised in the grievance is the request for documents under the *AIA* and not a matter under the collective agreement.

[68] The pith and substance test is relied upon when determining whether a matter comes under an exclusion specified in the *Act* within one of the exclusions of the *Act*, typically s. 113. That issue is of no relevance to this case. The simple legal issue in this case is whether the determination that the grievor was required to produce his course notes relates to the ". . . interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award . . .", per s. 209(1)(a). The pith and substance test has no relevance to that issue.

[69] In the alternative, the pith and substance of this matter is clearly related to a matter under the collective agreement and not the *AIA*.

[70] While the initiating process was a request under the *AIA*, the result of the request was an order the employer issued to the grievor to comply with the request for

his course notes or face discipline. He complied, but did so without prejudice to his right to pursue a grievance alleging that the employer's exercise of its management rights was unlawful. In substance, this matter is about whether the employer's order to the grievor to produce his course notes was lawful. If a grievance about whether an order from an employer to an employee is lawful is not, in pith and substance, a matter under a collective agreement, it would be difficult to conceive what would satisfy that requirement.

7. Whether another administrative procedure is provided

[71] Subsection 208(2) of the *Act* bars the presentation of an individual grievance in respect of which an administrative procedure for redress is provided for under any Act of Parliament other than the *CHRA*. No issue was raised with respect to the presentation of the grievance pursuant to this provision until September 2015.

[72] *Johal v. Canada Revenue Agency*, 2009 FCA 276, provides that the French pronoun "lui" makes it clear that a specific administrative recourse bars an employee from presenting a grievance under s. 208(1) of the *Act* only if that recourse is available to the employee presenting the grievance. Under the *AIA*, for two reasons, no administrative procedure for redress was available to the grievor.

[73] First, the right to complain to the information commissioner is limited to instances in which a request has been denied. *Canada (Information Commissioner)* held that notice of a right to complain under s. 10 of the *AIA* arises only in instances in which the request for information is denied and is required to be given only to the requester.

[74] Second, the information commissioner's authority in circumstances in which she or he concludes that a complaint is well founded is limited to sending a report to the head of the government institution that contains the findings of the investigation and any recommendations that the commissioner considers appropriate.

[75] The head of the government institution need not comply with the information commissioner's report. In that event, judicial review is appropriate under s. 41 of the *AIA*; however, on its face, s. 41 is limited to someone who has been refused access to information.

C. Employer's reply

[76] The employer submitted that this case is about the *AIA* and how the employer responded to the request. It felt that the notes were required, and it ordered the grievor to produce them.

[77] The parties cannot contract out of legislation. The documents at issue here are under the government institution's control.

[78] The academic freedom argument is very generic. In Ontario, the legislation and argument are based on the premise of the breach of academic freedom. The *University of Ottawa* case is not helpful.

[79] The language of the grievance, which uses the term "breach of the *AIA*", must be considered.

[80] The *AIA* is not an employment-related statute.

[81] The grievor should have filed a complaint with the information commissioner.

[82] There is nothing in the collective agreement to connect the course notes to academic freedom.

[83] The grievor suggested that because provincial arbitrators are incorporating provincial privacy acts into collective agreements, so should the Board. The provincial Acts deal with privacy issues, which make them employment related.

[84] The *Association of Justice Counsel* case does not go further than *Parry Sound*. The parties in that case negotiated a clause that incorporated the *Canadian Charter of Rights and Freedoms* and the Constitution of Canada. In this case, nothing in the collective agreement incorporates the *AIA*.

IV. Reasons

[85] Section 2 of the *AIA* states that its purpose is to extend the laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific, and that decisions on the disclosure of government information

should be reviewed independently of government.

[86] "Government institution" is defined in the *AIA* as any department or ministry of state of the Government of Canada or any body or office listed in Schedule I, or any Crown corporation and any wholly owned subsidiary of such a corporation within the meaning of s. 83 of the *Financial Administration Act* (R.S.C., 1985, c. F-11). It defines "record" as any documentary material, regardless of medium or form.

[87] Section 4 of the *AIA* provides that subject to the *AIA* but despite any other Act of Parliament, every person who is a Canadian Citizen or a permanent resident within the meaning of s. 2(1) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) has the right to and shall, on request, be given access to any record under the control of a government institution.

[88] Simply put, the *AIA* provides that information held by the government can be accessed by Canadians and permanent residents.

[89] On or about March 22, 2013, an ATI request was forwarded to the Chief of Military Personnel, the Chief Coordinator, at the CDA for certain documents in connection with a course taught by the grievor. The request for documents included the following:

- course materials;
- lecture slides;
- handouts;
- course packages; and
- handwritten notes prepared for or by the grievor.

[90] On April 5, 2013, CMCFA advised the Principal of the College that in its view, the documents asked for in the ATI request did not constitute a record under the control of the institution pursuant to s. 4(1) of the *AIA*. Despite its position, the grievor provided all the documents requested except his course notes, as all the other documents had all been available to students in the course.

[91] The grievor provided his course notes under protest and filed this grievance on

November 28, 2013. The grievance is quite lengthy and at points sets out both facts and jurisprudence. However, its essence is found at paragraph 13, where he states that his course notes were within his control and not the employer's and as such are not subject to the provisions of the *AIA*.

[92] The employer's position is that the Board has no jurisdiction under the *Act*, as this matter falls under the *AIA*; however, there is almost no factual material before me to allow me to make that determination.

[93] The problem with the employer's position is that it is based on the premise that the grievor's notes were under its control, which the grievor disagreed with.

[94] The key question in this grievance is whether the documents in question were under the control of a government institution or the grievor. If they were not under the employer's control (the employer being a government institution), then the *AIA* has no application as it does not apply to information that is not within the government's control. This is the very essence of the issue before me.

[95] While the ATI request was the genesis for the employer's order to the grievor to produce the materials requested, he questioned the employer's authority to order him to produce them. That is fundamentally an employment issue; it is a workplace issue between the employer and an employee that would ordinarily come within s. 208 of the *Act* since the grievor felt aggrieved by the interpretation or application in respect of him of a direction made or issued by the employer that fell within either s. 208(1)(a)(i) or (ii) or (1)(b), as the employer required him to produce the materials set out in the ATI request. At the very least, it was a direction that dealt with the terms and conditions of his employment or was an occurrence or matter that affected his terms and conditions of employment. Again, at the very least, the evidence before me on the preliminary issue of my jurisdiction suggests that the grievance falls within the limitations of s. 208.

[96] Subsections 208(2) through (6) of the *Act* provide certain specific limitations with respect to an employee filing a grievance under the *Act*. Subsection 208(3) prohibits filing grievances with respect to the right to equal pay for work of equal value. Subsection 208(4) prohibits filing grievances about a provision of a collective agreement or arbitral award unless the employee has the approval of and is represented by his or her bargaining agent. Subsection 208(5) prohibits an employee

from filing a grievance if there is an employer complaint process with an express provision that if employees avail themselves of the complaint process, they are precluded from filing a grievance under the *Act*. Subsection 208(6) prohibits an employee from filing a grievance in relation to any action taken under any instruction, direction, or regulation given or made by or on behalf of the Government of Canada in the interest of the safety or security of Canada or any state allied or associated with Canada.

[97] None of the limitations in ss. 208(3), (4), (5), or (6) of the *Act* are applicable with respect to this grievance and do not prohibit filing this grievance under s. 208(1). This leaves only the limitation set out in s. 208(2) of the *Act*, which is a prohibition against filing a grievance when there is an administrative procedure for redress provided under any Act of Parliament other than the *CHRA*.

[98] The employer argued that the limitation in s. 208(2) of the *Act* is applicable because there is an administrative procedure for redress set out in the *AIA* of which the grievor could have availed himself. I disagree.

[99] The employer submitted that s. 30(1)(f) of the *AIA* is an "administrative procedure for redress" under another Act of Parliament as set out in s. 208(2) of the *Act* and as such falls within the prohibition against filing a grievance.

[100] Paragraph 30(1)(f) of the *AIA* falls under the part titled "Complaints" and states as follows:

> ***30 (1)*** *Subject to this Act, the Information Commissioner shall receive and investigate complaints*
>
> . . .
>
> ***(f)*** *in respect of any other matter relating to requesting or obtaining access to records under this Act.*

[101] In *Canada (Information Commissioner)*, at paras. 17 through 20, the Supreme Court reviewed the access to information process and congruent complaint process set out in the *AIA* and stated as follows:

> *[17] The right to "be given access to any record under the control of a government institution" is provided under s. 4(1). . . .*

> *[18] The process for accessing government information begins when a member of the public makes a request in writing for a record to a government institution (s. 6). The head of the government institution who receives a request must give written notice to the person who has requested the records as to whether or not access will be given in whole or in part within a reasonable time limit (ss. 7 to 9). Where the government institution refuses to give access to the records requested, it is required to provide notice to the requester that the records do not exist, or to expressly state the exemption it is relying upon in refusing to provide access to the records (ss. 10(1) to (3)). Further, the government institution must inform the requester of his or her "right to make a complaint to the Information Commissioner about the refusal" (s. 10(1)).*
>
> *[19] If the requester elects to exercise this right and makes a compliant, the Commissioner is entitled to commence an investigation if she is "satisfied that there are reasonable grounds to investigate a matter relating to requesting or obtaining access to records under this Act" (s. 30(3)). . . If the Commissioner concludes that the complaint is well founded, a report is sent to the head of the government institution containing the findings of the investigation and any recommendations the Commissioner considers appropriate; the report may also include a request to be notified of any action taken to implement the recommendations or reasons why no such action has been or is proposed to be taken (s. 37(1)).*
>
> *[20] If the government institution elects not to comply with the Commissioner's recommendations, the individual requesting the record may apply for judicial review pursuant to s. 41 of the* Access to Information Act. . . .

[102] The difficulty with the employer's position is that s. 30(1) of the *AIA* presupposes that the documents in question are records as defined by the *AIA*. For s. 30(1) to apply, the records must be ". . . under the control of a government institution" per s. 4(1); if they are not, s. 30(1) has no application. The grievor's position was that his course notes are not a record ". . . under the control of a government institution". If the course notes are not a record as defined by the *AIA*, then the administrative procedure for redress, as set out in s. 208(2) of the *Act*, does not exist and therefore is not a limitation on filing a grievance.

[103] The entire purpose and structure of the *AIA* is to facilitate access to government-held information. The complaint and investigation processes are clearly set out for the purpose of securing records that for some reason or other the

government institution will not produce.

[104] In *Jalal*, the Federal Court of Appeal set out the meaning of s. 208(2) of the *Act*. Paragraphs 33 through 35 state as follows:

> ***(ii) Interpreting* PSLRA*, subsection 208(2)***
>
> *[33] The English version of the statutory text is ambiguous and could have one of two meanings: either that the procedure for redress referred to in subsection 208(2) must be available to the employee who has presented a grievance under subsection 208(1), or that it must deal with the substance of the grievance, regardless of whether the particular employee grieving under subsection 208(1) has access to it.*
>
> *[34] The French text, however, resolves the ambiguity by providing:*
>
> > *Le fonctionnaire ne peut présenter de grief individuel si un recours administratif de réparation* ***lui*** *a ouvert sous le régime d'une autre loi fédérale …*
>
> *The pronoun "lui" makes it clear that a specific administrative recourse only bars an employee from presenting a grievance under subsection 208(1) if it is available to the employee presenting the grievance. However, the appellants have no recourse under the Staffing Program with respect to Ms. Mao's appointment because Directive 'S' provides that, on the facts of the present case, only employees with preferred status may seek recourse when a person with preferred status is appointed.*
>
> *[35] Accordingly, the appellants are not barred by the text of subsection 208(2) from presenting their grievance under subsection 208(1). As Justice Strayer stated in* Byers *(at para. 39), for a remedy provided under another statute to exclude a person from presenting a grievance under subsection 208(1) "the procedure must be capable of producing some real redress which could be <u>of personal benefit to the complainant"</u> (emphasis added).*
>
> [Emphasis in the original]

[105] Therefore, I find that no other administrative process, as defined in s. 208(2) of the *Act*, was available to the grievor.

[106] The employer also submitted that if I engaged the "pith and substance" test, the pith and substance of the grievance is whether the grievor's course notes are a

". . . record under the control of a government institution" under s. 4(1) of the *AIA*, which is primarily an issue of statutory interpretation under the *AIA*. I disagree. Nowhere in the *AIA* does it state what comprises a ". . . record under the control of a government institution." That is the primary question at issue.

[107] The next question is, where can the grievance go if the employer denies it during the grievance process? For the answer to that, s. 209 of the *Act* must be consulted, which sets limits to the jurisdiction over those grievances that may proceed to adjudication under the *Act*.

[108] The grievor submitted his grievance under s. 209(1)(a) of the *Act*, which provides for the referral to adjudication of an individual grievance that has been presented up to and including the final level of the grievance process and that has not been dealt with to the employee's satisfaction if the grievance is related to the interpretation or application in respect of the employee of a provision of a collective agreement or an arbitral award. The only qualification on that section of the *Act* is that grievances referred to adjudication must have the approval of the employee's bargaining agent to represent him or her in the adjudication proceedings. In this case, that is not in issue, as the grievor's bargaining agent was present and representing him.

[109] The grievor submitted that his employer's order to produce his course notes breached the collective agreement, specifically article 8, "Past Practices", and article 5, "Academic Freedom and Academic Responsibility".

A. <u>Article 8 of the collective agreement</u>

[110] Article 8 is set out earlier in this decision and simply provides that when the collective agreement is silent with respect to working conditions, with certain limitations, then the working conditions shall be those that existed immediately before the date of the collective agreement and that they shall continue to apply.

[111] Also, as set out earlier, no witnesses were called. The evidence provided to me was limited to a brief of documents admitted on consent, which contained a copy of a briefing note from the Principal of the College to the Chief of Military Personnel dated April 9, 2013, which states, among other things, as follows:

> *4. This ATI request for course material would appear to*

> *be the first time such a request has been received at RMCC. Although Dr. Lukits is a full time employee* ***he does consider his course notes as his personal notes and it is normal practise of the College that course notes are treated as personal property of the individual and are not held under the control of the College.***
>
> . . .
>
> [Emphasis added]
>
> [*Sic* throughout]

[112] It would appear that in his briefing note, the Principal of the College understood that it was the College's normal practice that course notes be treated as the personal property of the individual concerned and not held under its control.

[113] The grievor's evidence about his refusal to produce his course notes, and the correspondence written on his behalf by the CMCFA with respect to the "delivery of his course notes", is clear that the course notes are not in the College's control.

[114] If the College's normal practice, as set out by Mr. Sokolsky, has been that course notes are treated as the personal property of the individual concerned and not held under the College's control, and there is nothing in the collective agreement about the ownership of course notes, then this appears to be a working condition that existed before the collective agreement was signed. The fact that the employer took the position that the course notes were not the grievor's property would be an issue in dispute under article 8 of the collective agreement between the grievor and his bargaining agent on the one hand and the employer on the other.

[115] Based on the evidence before me, I am satisfied that I have jurisdiction under ss. 208 and 209 of the *Act* with respect to an alleged breach of article 8 of the collective agreement, and as such, the employer's objection to jurisdiction must fail.

B. <u>Article 5 of the collective agreement</u>

[116] Article 5 of the collective agreement (which is set out in its entirety earlier in this decision) is two pages long, contains six subsections, and addresses in some detail the area of academic freedom and academic responsibility.

[117] The employer submitted that while article 5 of the collective agreement does

address academic freedom, it is silent with respect to the disclosure of course notes. This is not sufficient in and of itself on a jurisdictional objection to satisfy me that course notes are not covered by article 5.

[118] The grievor submitted *The University of Ottawa*, which discussed the concept of academic freedom as it relates to age-old customs and practices of academic institutions. In this vein, he pointed to the arbitrator's comments about the character of university professors' employment relationship.

[119] Given the very limited evidence before me, I am not convinced that I am without jurisdiction under article 5 of the collective agreement, as it is certainly arguable on the evidence and case law as submitted that the ownership of and use of course notes is an issue that could fall within the scope of article 5.

C. <u>The article entitled, "My diary is my business"</u>

[120] The employer submitted as the last tab of its book of authorities an excerpt entitled, "My diary is my business". It appears to be from the Office of the Information Commissioner of Canada.

[121] The document appears to be a summary of a fact situation involving an employee who had made some notes on his home computer about thoughts he had with respect to a meeting that had taken place at work. According to this summary, an ATI request had been made once the existence of these notes had come to light. The employee refused to produce these notes pursuant to the request. The ATI coordinator involved sought the advice of the Information Commissioner, who, on his own account, initiated a complaint and an investigation. The summary has a section entitled "Legal issues", which states as follows:

> *This case raised two issues. First, whether the commissioner has the power to compel a person to produce records which the person considers to be his personal property and not a government record. Second, it raised the issue of the interpretation of the phrase "under the control of a government institution". Only records which are under the control of a government institution are, by virtue of section 4 of the Act, subject to the right of access.*
>
> *As to the first issue, two provisions of the ATIA are relevant. Paragraph 36(1)(a) gives to the commissioner the power:*

"to summon and enforce the appearance of persons before the Information Commissioner and compel them to give oral or written evidence on oath and to produce such documents and things as the commissioner [sic] deems requisite to the full investigation and consideration of the complaint, in the same manner and to the same extent as a superior court of records [sic]." . . . .

Subsection 36(2) also deals with the commissioner's powers. It reads:

"Notwithstanding any other Act of Parliament or any privilege under the law of evidence, the Information Commissioner may, during the investigation of any complaint under this Act, examine any record to which this Act applies that is under the control of a government institution, and no such record may be withheld from the commissioner on any grounds." . . . .

The commissioner took the view that paragraph 36(1)(a) expands upon the powers given by subsection 36(2) and provides the necessary power to compel the employee to produce his home computer records. The commissioner felt that he must see the records in order to properly determine whether there was a sufficient connection between the records and the workplace to trigger the Access to Information Act. *The employee, with the support of his union, resisted on the basis of subsection 36(2). In his view, if the record wasn't "under the control of" the IRB, then even the commissioner had no right to see it.*

In the end the employee relented and produced the records. No summons needed to be issued.

As to the second issue, the commissioner determined that the records were personal to the employee and were not under the control of the IRB for the purposes of the Access to Information Act. *In coming to that conclusion, the commissioner found that the location of a record (i.e. whether it is located on the premises of a government institution) is not the sole determining factor in the control issue. One must examine the content of the record, the circumstances under which it was created or compiled and the reasons it is located either on or off government premises.*

. . .

Lessons learned

In determining whether records are accessible under the Access to Information Act, *there is nothing magical about*

> *the physical location of the record. Public officials cannot protect a government record from disclosure simply by keeping it at home, or storing it with a third party not subject to the* Access to Information Act.
>
> *Moreover, when "control" is an issue, the commissioner must view the disputed records. For this purpose, the* Access to Information Act *gives him the authority to view any records he considers relevant to the matter whether or not they eventually are determined to be under the control of a government institution.*
>
> [Emphasis in the original]

[122] This document is not helpful. Its source and author are unknown, and it is certainly not legislation or jurisprudence. It states the obvious, which is that the location of documents may not be the determinative factor in whether a record is under government control. As it states under the "Lessons learned" portion, "[p]ublic officials cannot protect a government record from disclosure simply by keeping it at home, or storing it with a third party . . .". The opposite is also true; the fact that an employee may have something in his or her possession while at work does not make that something a ". . . record under the control of a government institution" and hence subject to the *AIA*.

D. The *AIA* is an employment-related statute

[123] As I have found that the employer's objection to the Board's jurisdiction fails for the reasons set out earlier in this decision, I do not have to address the arguments of whether the *AIA* is an employment-related statute.

[124] The employer also submitted that the grievance was triggered by the ATI request as opposed to an independent action on its part. I fail to see how this has any bearing as to the jurisdiction to hear the grievance. What precipitated the employer's action that led to the filing of the grievance is inconsequential to my jurisdiction under the *Act* if the grievance is otherwise within the jurisdiction as set out in the *Act*.

[125] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

V. Order

[126] The objection to jurisdiction is dismissed.

January 13, 2017.

John G. Jaworski,
a panel of the Public Service Labour Relations and Employment Board