6-10-1999

NSTU v Nova Scotia (Minister of Education & Culture)

Innis Christie

IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE NOVA SCOTIA TEACHERS UNION

(The Union, Grievor)

and

THE MINISTER OF EDUCATION AND CULTURE

(The Minister)

RE: Salary Increments; impact of the *Public Sector Compensation (1994-97) Act*

BEFORE: Innis Christie, Arbitrator

HEARING DATE: April 12, 1999

AT: Halifax N.S.

FOR THE UNION: Lorraine P. Lafferty, counsel
Harold Doucette, NSTU Executive Staff Officer

FOR THE MINISTER: Eric Durnford, counsel
Bernadine MacAulay, counsel
Robert A. Cunningham, Manager Labour Relations, Halifax Regional School Board
Carol Ayer, Payroll Supervisor, Halifax Regional School Board

DATE OF AWARD: June 10, 1999

Union grievance dated April 23, 1998, alleging breach Article 43.01 and Schedules D1, D2, D3 and D4 of the Collective Agreement between the Minister and the Union made February 3, 1998 for the term November 1, 1997-October 31, 1999 in that all school boards in Nova Scotia have refused to pay at the salary levels set out in the Schedules following the end of the effect of the *Public Sector Compensation (1994-97) Act* on October 31, 1997. The parties have agreed that the Halifax Regional School Board will be used as an example in this arbitration and that this award will determine the obligations of all school boards in Nova Scotia. The Grievor Union requests an order that the Halifax Regional School Board pay all teachers the salary increments to which it alleges they are entitled, retroactive to November 1, 1997. At the hearing before me the Union requested that any order to pay retroactive to November 1, 1997, specify that interest be paid.

At the outset of the hearing in this matter the parties agreed that I am properly seized of it, that I should remain seized after the issue of this award to deal with any matters arising from its application, including the quantification of any payments ordered, and that all time limits, either pre- or post-hearing, are waived. Counsel agreed that the question of whether interest could or should be ordered be part of this retained jurisdiction.

AWARD

The issue in this arbitration is whether teachers' experience-based salary increments provided for by Article 43.01 of the Collective Agreement between the Minister of Education and the Nova Scotia Teachers' Union made February 3, 1998 and effective

November 1, 1997 ("the Collective Agreement"), and its predecessor Collective Agreement, and denied them for the school year 1994-95 by section 10 of the *Public Sector Compensation (1994-97) Act* are lost not only as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined. This is a matter of the interpretation of the Collective Agreement and of that *Act.* How does, or did, the *Act* affect the Collective Agreement, and did the *Act* cease to have any relevant effect after October 31, 1997?

The current Collective Agreement between the Minister of Education and the Nova Scotia Teachers Union made February 3, 1998 and effective November 1, 1997, provides in Article 3 that it is binding not only on the Union, teachers and the Minister but also on any School Board or other authority employing teachers in the Province. It provides in Article 4 that it prevails over any agreement between the Union and a School Board. Its predecessor, made November 2, 1994 and effective June 5, 1994 - October 31, 1997, contains identical Articles 3 and 4. In very general terms the Collective Agreement with the Minister sets teachers' salaries and other matters are left to agreement between the Union and school boards in Nova Scotia.

Article 43 of the current Collective Agreement provides:

ARTICLE 43 SALARY

43.01 For the periods August 1, 1997 - November 30, 1997, December 1, 1997 - July 31, 1998, August 1, 1998 - March 31, 1999 and April 1, 1999 - October 31, 1999, salaries for all teachers shall be in accordance with the

salary schedules set forth in Schedules D1, D2, D3 and D4 hereto, which schedules shall be deemed to be part of this Agreement.

(i) To calculate the annual salary for the academic school year beginning on August 1, 1997, the appropriate salary from Schedule D1 shall be divided by 195 and multiplied by the number of school days taught and claimed from August 1, 1997 to November 30, 1997 both dates inclusive, and adding that number to the number calculated by taking the appropriate salary from Schedule D2 and dividing that salary by 195 and multiplying by the number of school days taught and claimed from December 1, 1997 to July 31, 1998, both dates inclusive.

Subparagraphs (ii) and (iii) provide similarly for the calculation of the annual salary of the academic school years beginning on August 1, 1998 and 1999, by reference, for 1998, to Schedules D3 and D4 and, for 1999, to Schedule D4 and "the annual salary to be determined effective on November 1, 1999 and divided by 195".

Schedules D1, D2, D3 and D4 are simply tables, each relating to one of the four periods referred to in Article 43.01. The first vertical axis of each sets out "Position[s] on Scale" from 1 to 8, with a dollar amount, for those on VTPA (Vocational Teachers Permit). The second vertical axis (the 3rd column) of each sets out "Year of Teaching" from 1 to 11, and the various levels of teachers certificates, from TCM, TC1 and TC2 to TC8 on the horizontal axis, as follows, using Schedule D1 as an example:

SCHEDULE D1

AUGUST 1, 1997 – NOVEMBER 30, 1997

Position on scale	VTPA	Year of Teaching	TCM TC1 TC2	C3	VTC1 TC4	VTC11 TC5	VTC11 1 TC6	VTCIV TC 7	TC8
1	26,325	1	29,566	29,566	26,325	29,112	32,583	35,802	38,856

2	27,693	2		29,566	27,693	30,851	34,513	37,732	40,786
3	29,061	3		29,566	29,061	32,590	36,443	39,662	42,716
4	30,429	4		29,566	30.429	34,329	38,373	41,592	44,646
5	31,797	5		29,566	31,797	36,068	40,303	43,522	46,576
6	33,165	6		29,566	33,165	37,807	42,233	45,452	48,506
7	34,533	7		29,566	34,533	39,546	44,163	47,382	50,436
8	35,901	8		32,136	35,901	41,285	46,093	49,312	52,366
		9			37,269	43,024	48,023	51,242	54,296
		10				44,763	49,953	53,172	56,226
		11				46,502	51,883	55,102	58,156

The wording of Schedules D2, D3 and D4 is precisely the same, with only the numbers changed.

Article 43 of the predecessor Collective Agreement between the Minister of Education and the Nova Scotia Teachers Union made November 2, 1994, and effective on its face from June 5, 1994 - October 31, 1997, is similar, with a minor paragraphing difference, and slight wording changes irrelevant here. Article 43 of the 1994-97 Collective Agreement provides:

ARTICLE 43 SALARY

43.01 For the periods August 1, 1994 - October 31, 1994, November 1, 1994 - July 31, 1995, and the 1995-96, 1996-7 school years and the period August 1, 1997 – October 31, 1997 salaries for all teachers shall be in accordance with the salary schedules set forth in Schedules D1 and D2 hereto, which schedules shall be deemed to be part of this Agreement. To calculate the annual salary for the academic school year beginning on August 1, 1994, the appropriate salary from Schedule D1 shall be divided by 195 and multiplied by the number of school days from August 1, 1994 to October 31, 1994, both dates inclusive, and adding that number to the number calculated by taking the appropriate salary from Schedule D2 and dividing that salary by

195 and multiplying by the number of school days from November 1, 1994 to July 31, 1995, both dates inclusive.

Schedules D1 and D2 of the 1994-97 Collective Agreement are constructed and worded exactly the same as Schedules D1, D2, D3 and D4 of the 1997-99 Collective Agreement, except that the last number in the "Year of Teaching" column is "11+" rather than simply "11", a difference which is also irrelevant here.

As to what constitutes a "Year of Teaching" both Collective Agreements provide, in identical terms, in Article 18 as follows:

ARTICLE 18 TEACHING EXPERIENCE

18.01 To determine a teacher's experience for salary increments for a school year, the teacher's total service shall be determined as of the first (1st) day of August of the academic school year in which the teacher applied for the recognition of service and submitted all required documentation.

18.02 Should a teacher with partial years service complete the requirements as set forth in 18.03, 18.04 or 18.05 [which specify the number of days, basically 175, that make up a school year for increment purposes] before January 1 of any school year, the teacher shall be entitled to an automatic revision of the increment effective January 1 of that school year.

As Robert Cunningham, Manager of Labour Relations for the Halifax Regional School Board and in July of 1994 Supervisor of Human Resources for the Halifax County – Bedford District School Board, testified, the 1994-97 Collective Agreement was negotiated in the shadow of the *Public Sector Compensation (1994-97) Act*, S.N.S. 1994, c.11. That *Act* was enacted by the Legislature on June 30, 1994, effective, by virtue of s. 28, on and after April 29th, 1994. As I have already noted, on its face that

Collective Agreement states that it was made November 2, 1994, and that its term is June 5, 1994 - October 31, 1997.

S. 6 of the *Act* imposed a pay freeze:

> 6(1) Every compensation plan in effect immediately before April 29, 1994, is continued until November 1, 1997, except as provided by this Act.

It is undisputed that s. 6 applied to the 1994-97 Collective Agreement, as did s. 9, which imposed a 3% roll-back. The relevant sub-sections of s. 9 provided:

> 9. (1) Effective November 1, 1994, the pay rate for each position covered by a compensation plan shall be reduced by three percent except as provided by this Section.
>
> (2) For greater certainty, the reduced rates shall be the basis for any pay-related calculations.

As Mr. Cunningham testified, this 3% roll-back is reflected in Schedules D1 and D2 of the 1994-97 Collective Agreement. Schedule D1 applied retroactively to the period August 1- October 31. Schedule D2, which applied for November 1, 1994 to October 31, 1997, the period of the freeze in s. 6 of the *Act*, specifies salaries reduced through out the grid by the 3% required by s. 9.

In the current 1997 Collective Agreement, as reflected in schedules D2, D3 and D4, the parties provided for a 3% increase effective December 1, 1997, a 1.9% increase effective August 1, 1998, and a 1.9% increase effective April 1, 1999. There is nothing

in the Collective Agreement or the evidence before me to say whether the December 1 3% increase was treated by the parties as the return of the 3% rollback effected by s. 9 of the *Public Sector Compensation (1994-97) Act*, or simply a negotiated increase.

It is also undisputed that s. 10 of the *Public Sector Compensation (1994-97) Act* applied to the 1994-97 Collective Agreement. The interpretation on Section 10 is at the heart of the issues here. It provided:

> 10. (1) An increase in pay rates may be paid to or received by an employee for or in recognition of
>
> (a) the successful completion of a course of professional of technical education;
>
> (b) subject to subsection (2),
>
> (i) meritorious or satisfactory work performance,
>
> (ii) the completion of a specified work experience,
>
> (iii) length of time in employment,
>
> if any such provisions have been expressly contained in the compensation plan.
>
> (2) Any increase in pay as described in clause 1(b) that would, but for this subsection, have been awarded to an employee at any time between May 1, 1994, and April 30, 1995, inclusive, is cancelled.
>
> (3) An employee referred to in subsection (2) is not entitled to
>
> (a) any other increase as described in clause (1)(b) until one year after the time referred to in subsection (2); or
>
> (b) any greater increase or adjustment at another time as a result of subsection (2).

> (4) Nothing in subsection (1) prevents increases in pay or pay rates as a result of a *bona fide* promotion of an employee to a different or more responsible position.

There is no doubt that the immediate effect of subsection (3) of section 10 of the *Public Sector Compensation (1994-97) Act* was that the increments to which teachers would otherwise have been entitled between May 1, 1994, and April 30, 1995, were cancelled, in the sense that not until the following year did teachers receive the increments they would otherwise have received for that year. For the purposes of this award it does not matter under which sub-paragraph of section 10(1)(b) teachers' increments are categorized. There is no dispute that it applied to them.

The fact that the *Act*, in accordance with and to the extent of its own terms, would over-ride the Collective Agreement was never open to doubt, but Article 4 of the Collective Agreement also provides:

> 4.01 Where any provision of this Agreement conflicts with the provisions of any law passed by the Legislature of the Province of Nova Scotia, the latter shall prevail ...
>
> 4.02 (i) In the event that any law passed by the Legislature of the Province and applying to teachers covered by this Agreement renders null and void any provision contained herein, the remaining provisions shall remain in effect for the term of the Agreement and the parties agree to negotiate a mutually acceptable alternative for the provision which has been rendered null and void.
>
> (ii) Notwithstanding Article 4.02(i), during the period April 1, 1994 through July 31, 1998, both dates inclusive, Article 4.02(i) shall be of no effect with respect to any legislation enacted during the 2nd Session of the 56th General Assembly of the Province of Nova Scotia which ended on June 30, 1994. Article 4.02(i) is of no effect with respect to the Public Sector Compensation (1994-97) Act (Bill 52).

It is undisputed that since November 1, 1997, school boards in Nova Scotia have been paying on the basis of actual years of teaching experience minus one; on the basis, that is, that according to the school boards the effect of s. 10 of the *Act* was that, for the purpose of determining increments, their teachers permanently lost one year of experience.

On April 8, 1998, in *Nova Scotia Government Employee's Union v. QE II Health Sciences Centre* (1988) 166 N.S.R. (2d) 194, the Nova Scotia Court of Appeal (Freeman and Pugsley JJ.A., Jones J.A. dissenting) allowed the appeal of the Nova Scotia Government Employee's Union from the judgment of Goodfellow J. (Jan. 8, 1998, unreported) quashing the December award of Arbitrator Eric Slone with respect to the effect of the *Public Sector Compensation (1994-97) Act*. The arbitrator had held that s. 9 (the 3% roll-back) of the *Act* was limited in its effect to the period from November 1, 1994, to October 31, 1997, although the *Act* does not explicitly say so. The Court of Appeal concluded that Arbitrator Slone was correct in this conclusion. There is also reasoned *dicta* in Freeman J.A.'s majority judgment to the effect that the entire *Act* was spent on October 31, 1997.

On the basis of the Court of Appeal's judgment in *QE II* the Union filed the Grievance before me here. The relevant parts of the letter of grievance from Harold Doucette, the Union's Executive Staff Officer, to Mike Sweeney, Department of Regional Educational Services, Department of Education and Culture, dated April 23, 1998, are as follows:

Re: Grievance – Salary Increments Based on Teaching Experience

...

The alleged grievance arises out of the recent decision of the Nova Scotia Court of Appeal rendered on April 8, 1998 between the NSCEU and the QEII Health Sciences Centre which held that the ***Public Sector Compensation Act (1994-97)*** has no force and effect on public sector incomes after October 31, 1997.

You will be aware that as a consequence of the operation of the ***Public Sector Compensation Act (1994-97)*** any salary increase based on a year of teaching experience to which a teacher was entitled during the period May 1, 1994 and April 30, 1995, was cancelled. As a result, a teacher who as of August 1, 1994 had, for example, five (5) years of teaching experience, was paid during the 1994-5 school year at the salary rate of a teacher with only four (4) years of teaching experience. On August 1, 1995, that same teacher was paid during the 1995-96 school year at the salary rate of a teacher with five (5) years of teaching experience though the teacher had six (6) years of actual teaching experience. Similarly on August 1, 1996 and on August 1, 1997, that same teacher was paid at a salary rate equivalent to one year less than the teacher's actual years of teaching experience.

The NSTU maintains that in light of the decision of the Nova Scotia Court of Appeal, as of November 1, 1997, all salary increments based on experience cancelled by the legislation should be restored to teachers. In other words on November 1, 1997, teachers should have been paid, and should now be paid by the Halifax Regional School Board, and all other school boards on the basis of actual years of teaching experience to a maximum of eleven (11) years as provided in the Teachers Provincial Agreement. ...

Thus the Union's claim in its Grievance is that upon the expiry of the of The *Public Sector Compensation (1994-97) Act* teachers became entitled, from then forward, to be paid their increments in accordance with the Schedules to the Collective Agreement, based on actual years of teaching experience. The response by counsel for the Minister is that s. 10, unlike s. 6 (the freeze) and s. 9 (the 3% roll-back), is not time limited in its effect.

The Union makes no back-pay claim for increments lost during the period of the *Act*. Nor is there any claim on behalf of teachers who started teaching after May 1994, and were therefore not affected by s. 10(2), teachers who already had more than 11 years experience in the first school year in which the loss of the one year of experience affected their salaries or teachers to whom the *Act* did not apply because their annual salaries were less than $25,000 in all relevant years.

With respect to the effect of the *Public Sector Compensation (1994-97) Act,* Counsel for the Minister submitted, first, that the clear words and effect of s. 10(2) were that teachers' increments for the school year 1994-95, that is the increments that would otherwise have been paid on August 1 and November 1, 1994, were "cancelled". The legislative choice of the word "cancelled", he submitted, relying on Black's Law Dictionary (6th ed.), means "obliterated" or "struck out", "abandoned" or "terminated". It conveys a concept of permanence, which is to be contrasted with the meaning of "postponed" or "deferred". In *The King v. Chapelle* (1902), 32 S.C.R. 627, in an entirely different context, Sedgewick J. commented that with respect to statutes the word "cancelled" is even stronger than "repealed". "The effect" his Lordship stated, at p. 628, "is to obliterate it as completely as if it had never been passed". It is significant, counsel for the Minister submitted, that subsection (2) of s. 10 is the only place in the *Public Service Compensation (1994-97) Act* where the word "cancelled" is used.

Counsel for the Minister also submitted that, by subsection (3)(a) of s. 10, teachers were not entitled to an increment "until one year after" August 1, 1994, and, most

importantly, by subsection (3)(b) they were not entitled to "any greater increase or adjustment **at another time** as a result of subsection (2)". [emphasis added]

Counsel for the Minister stressed that subsection 3(b) of s. 10, uses the words "at another time", with no reference to the period April 29, 1994 to November 1, 1997, such as is found in s. 6, which imposes the freeze on pay. Therefore, he submitted, subsection 3(b) has continuing and indefinite effect, such that, for example, teachers holding TC5 and higher licenses who are affected by the *Act* will not reach their top, or "year of teaching - 11", pay rate until their 12th year of teaching.

With respect to the words of the Collective Agreement, Robert Cunningham, called by counsel for the Minister as the only witness in this matter, testified that in the current Collective Agreement the parties "did not address the increment issue". Those are the words he used in a document he prepared and put into evidence to demonstrate the increases received, and to be received, by a sample teacher from August 1, 1994 to August 1, 2002. He testified, however, that at that time "there was an appreciation in the Department of Education and on the part of the school boards of the increment issue", that they understood that the 1994-95 increment was "cancelled forever" and that "it was not possible to recover it at any future time after August, 1994". He identified, and stated to be consistent with his understanding, a letter dated September 8, 1994, from E.G. Cramm, Chair of the Public Sector Restraint Board, to Lloyd Gillis, at the time Superintendent of Schools for the Halifax County – Bedford District School Board, about the tabling of the *Public Sector Compensation (1994-97) Act*, which included the following:

Key Provisions of the Act

The following provisions of the Act should be particularly noted:

....

- **Pay increments based on merit, experience, or time in employment with an effective date between May 1, 1994 and April 30, 1995, inclusive, are cancelled, except in the case of employees earning $25,000 or less per year.**

Mr. Cunningham also identified two other Government documents on the matter. A December 16, 1994, Memorandum on Department of Education letterhead from Richard Morris to "Chief Financial Officers" states in part:

> This memo is to update you on several on-going issues as well as follow-up items from the Chief Financial Officers meeting on 24 November 1994.
>
> 1. **Three Percent Wage Roll Back**
>
> (a) I have received confirmation regarding years of service increments under the Public Service Compensation (1994-97) Act. Teachers who were eligible to receive a service increment on August 1, 1994, will not receive that increment until August 1, 1995. They will not receive this increment on May 1, 1995, which is when the increment freeze period expires. In effect the August 1, 1994 increment is not postponed, it is cancelled. In addition, the service increment awarded in 1995 would not be a double increment. It would simply be the increment they were entitled to receive in 1994 that was otherwise frozen.
>
> I have previously notified you that employees earning under $25,000 annually are eligible to receive service increments in 1994-95 provided the increment does not increase their salary beyond $25,000. Partial increments cannot be awarded. If a teacher is eligible to receive an increment on August 1, 1995, the increment would be based on the new salary scales effective November 1, 1994.

An August 1, 1995 Memorandum to "All Superintendents of Schools and Chief Financial Officers District School Boards" from "George L. Fox, Administrator and

Chief Executive Officer" re "TEACHER SALARIES/INCREMENTS", which was also entered into evidence through Mr. Cunningham, states in part:

> A number of School Boards have enquired about the effects of the Public Service Compensation (1994-97) Act on salary increments available to teachers. Through this correspondence I will attempt to clarify this matter so that all teachers affected by the legislation a being dealt with in a consistent manner.
>
> The Public Service Compensation (1994-97) Act cancels the increment which otherwise would have been available to a teacher, with annual pay above $25,000, during the May 1, 1994 to April 30, 1995. The Act does not cancel service. The effect of the provisions of S 10(3)(a) and (b) is that a teacher cannot have a compensation increase pursuant to S 10(1)(b) of the Act, for a one year period following the cancelled increment, and the salary adjustment cannot be greater at another time because of the cancellation of the increase in the May 1994-April 1995 period.
>
> The effect of the Act on teachers who had an increment cancelled in 1994-1995 carries over and they optimally and ultimately achieve their maximum salary, one year after the time they would have achieved it, but for the Act.

I note in passing that ss. 20-22 of the *Public Sector Compensation (1994-97) Act* provided for the appointment of Mr. Fox as Administrator and of a Board to determine certain questions for the purposes of the *Act,* including, in s. 22(1)(c), "whether a compensation plan has be established, amended or administered contrary to this plan". S. 22(2) entitles a bargaining agent to "request that the Administrator refer [any such] question to the Board". In the absence of any indication that Mr. Fox's memorandum was sent to the Union I assume that it was merely advice, not intended to be a ruling binding upon both parties. That being so, it is unnecessary for me deal with the question of whether a ruling by Mr. Fox's ever would have been, or is now, binding on me. However, I note that in *Nova Scotia Government Employee's Union v. QE II*

Health Sciences Centre (*supra*), at p. 202, Freeman J.A. stated in his judgment for the majority;

> During the period prior to November 1, 1997, it was for the Board [or, I assume his Lordship intended, the Administrator, under s. 22(1)] to determine whether the **Act** applied to a compensation plan, and how it must be complied with. This does not oust the jurisdiction of an abitrator under the **Trade Union Act** to deal with grievances arising as to whether, for example, employers are actually paying employees wages in compliance with the **Act.**

Obviously, this would apply equally to the *Teachers' Collective Bargaining Act*, R.S.N.S 1989, c. 460, under which I am proceeding here. On p. 203 his Lordship went on to say, in terms clearly applicable here:

> In my view then the Board [or the Administrator] is without jurisdiction to order compliance with the **Act** after October 31, 1997, while the arbitrator's jurisdiction to consider grievances is clear. If the Board had such jurisdiction it was not exercised while that of the arbitrator was exercised. There were no relevant orders of the Board to be considered, so the arbitrator was not fettered by the Board in interpreting the statute.

Finally with respect to Mr. Cunningham's testimony, I note that his understanding, like Mr. Fox's, was that a teacher's actual years of teaching experience, or "service", to use the term used by Mr. Fox, would continue to count for all purposes other than increments.

Sub-article (ii), of Article 4.02 set out above, which appears in both the 1997 Collective Agreement and its predecessor, was new to the 1994 Collective Agreement and demonstrates with the utmost clarity that the parties had the *Public Sector Compensation (1994-97) Act* in mind when they signed that Collective Agreement in

November of 1994. The legal effect, it seems to me, can only be what is stated in sub-article (ii); "Article 4.02(i) is of no effect with respect to the Public Sector Compensation (1994-97) Act", so the effect of that *Act* must be ascertained without taking sub-article (i) into account. I have not taken sub-article (i) into account here. I also recognize the force of the submission by counsel for the Minister that sub-article (ii) does suggest that the parties did not understand, when either collective agreement was negotiated, that the effect of the *Act* would be, or was, spent after October 31, 1997. I deal with this submission below.

The Issues: (1) I will consider, first, the issue of whether, as a matter of the interpretation of the Collective Agreement, in context, including the *Public Sector Compensation (1994-97) Act*, teachers' experience-based salary increments provided for by Article 43.01 of the Collective Agreement and denied them for the school year 1994-95 by section 10 of the *Act*, are lost not only as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined.

(2) I will then consider the issue of whether, quite apart from the words of the Collective Agreement, section 10 of the *Public Sector Compensation (1994-97) Act* is to be interpreted as not only having denied teachers the increments otherwise due them for the school year 1994-95 as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined. Another way of stating this issue is to ask whether section 10 of the *Public Sector Compensation (1994-97) Act* continued to have any force and effect in this respect after October 31, 1997.

Decision. (1) I agree with the submission by counsel for the Union that on the face of the 1997 Collective Agreement increments are to be paid based on actual "Year of Teaching", without regard to the legislated cancellation of increments for 1994-95. That is the plain meaning of Articles 18 and 43 and Schedules D1, D2, D3 and D4. Even read in the context of all other parts of the Collective Agreement, there is no patent ambiguity. Thus, the only way the Collective Agreement itself (leaving the direct effect of the *Act* aside for the moment) can be interpreted as the Minister has interpreted it is by finding that, read in the context of the history of its negotiation in the shadow of the *Act* and any other evidence of the parties' shared intent in this respect, the Collective Agreement contains a latent ambiguity which that same negotiation history or practice resolves in favour of the Minister's interpretation.

A careful reading of the Schedules in the Collective Agreement together with those in its predecessor makes it clear that the parties negotiated both collective agreements with the shared intent of taking account of at least some of the effects of the *Public Sector Compensation (1994-97) Act*. For example in the 1994 Collective Agreement the salary for a teacher with a TC8 license in his or her first year of teaching is $40,056. for August 1- October 31, 1994. For the remainder of the 1994 Collective Agreement, that is to October 1, 1997, that salary is $38, 856, which quite obviously takes account of the 3% roll-back. That salary is held constant by the 1997 Collective Agreement in Schedule D1 for the period August 1, 1997, to November 30, 1997, with the first increases being made under Schedule D2, for the period December 1, 1997, to July 31, 1998. Counsel for the Minister suggested on this basis that the parties did not proceed on the understanding that the *Act* was spent on October 31, 1997.

Does it follow from this that the parties negotiated the Collective Agreement with the shared intent of treating teachers' experience-based salary increments provided for by Article 43.01 of the Collective Agreement and denied them for the school year 1994-95 by section 10 of the *Act* as lost not only as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined? I do not think so.

Sections 6 and 8 of the *Public Sector Compensation (1994-97)Act* are explicit in providing that the freeze ends on October 31, 1998. This is so clear that the fact that the parties chose to extend the Schedule D1 of the Collective Agreement to November 30, 1997, cannot be taken as some indication that they shared the view that the freeze, and therefore all provisions of the Act, extended beyond October 31.

The fact that the parties effectively provided for the recovery of the 3% rollback on December 1, 1997, the effective date of Schedule D2, may well suggest that until the ruling of the Nova Scotia Court of Appeal in *Nova Scotia Government Employee's Union v. QE II Health Sciences Centre* (*supra*) the parties shared the view that the 3% roll-back in s. 9 of the *Act* was not time limited, contrary to the view of the arbitrator and the Court of Appeal in *QE II*. That does not, however, make it clear that the Union shared the Minister's view that s. 10 continued indefinitely, such that the Union can be taken to have intended the clear words of Articles 18 and 43 and Schedules D2, D3 and D4 to mean other than what they say.

As mentioned above, I also recognize the force of the submission by counsel for the Minister that the mention of the date July 31, 1998, in sub-article (ii) of Article 4.02 does suggest that the parties did not understand, when either collective agreement was negotiated, that the effect of the *Act* would be, or was, spent after October 31, 1997. However, in what respect they mutually understood that the *Act* would not be spent until July 31, 1998, is quite unclear. Certainly, in light of the clear words of ss. 6 and 8 they could not have thought that the freeze continued until then.

The Collective Agreement and what little evidence is before me of the negotiations between the parties reveal nothing special about July 31, 1998, except that the D2 salary schedule came to an end, replaced the following day, August 1, by the D3 salary schedule. It is also clear from Mr. Cunningham's evidence that the Minister and the school boards did not treat July 31, 1998, as the date upon which the effect of s. 10 of the *Act* was spent. They treated the effect of section 10 as indefinite and apparently plan to do so until the last teacher otherwise entitled to an increment between May1, 1994 and April 30, 1995, has reached his or her 12th year of teaching. Again, the inclusion in both Collective Agreements of sub-article (ii) of Article 4.02 does not make it clear that the Union shared the Minister's view that s. 10 continued indefinitely, such that the Union can be taken to have intended the clear words of Articles 18 and 43 and Schedules D2, D3 and D4 to mean other than what they say.

The only evidence of the wider context of the negotiation of the current Collective Agreement was provided through the testimony of Robert Cunningham. Mr. Cunningham's evidence, both in his testimony and in the document he prepared and put into evidence to demonstrate the increases received, was that in the current Collective

Agreement the parties "did not address the increment issue". If the "increment issue" was not addressed, how can the Minister rely on the context of the Collective Agreement as a whole to demonstrate a latent ambiguity in the clear words Articles 18 and 43 and Schedules D2, D3 and D4?

I do accept Mr. Cunningham's evidence that at the time the current Collective Agreement was negotiated "there was an appreciation in the Department of Education and on the part of the school boards of the increment issue", that according to their understanding the 1994-95 increment was "cancelled forever" and "it was not possible to recover it at any future time after August, 1994". The Cramm letter dated September 8, 1994, the December 16, 1994, Department of Education Memorandum from Richard Morris and particularly the August 1, 1995, Memorandum from "George L. Fox, Administrator and Chief Executive Officer" set out above, make it clear that this was the Departmental or Minister's view, and undoubtedly the view of the regional school boards, but there is no evidence that this view was communicated to the Union.

Even if I were to assume that such widely circulated documents would have come to the Union's attention, that is a far cry from saying that the Union was officially informed of the Department's "appreciation" of the situation, and even further from saying that the Union shared this interpretation of words in the 1997 Collective Agreement which clearly say otherwise.

Finally, as a matter of interpretation of the current 1997 Collective Agreement, there is the fact that although, from August 1, 1995, on the advice of Mr. Fox and the Minister, the Halifax School Regional School Board and all other regional school boards in the

Province had not paid salaries as set out in Articles 18 and 43 and Schedule D2 to the 1994 Collective Agreement and in Articles 18 and 43 and Schedules D1 and D2 of the 1997 Collective Agreement, the Union did not grieve until April 23, 1998, after it became aware of the ruling of the Court of Appeal in the *QEII* case. Does this constitute a past practice acquiesced in by the Union which calls for an interpretation of the Collective Agreement in accordance with the submission by counsel for the Minister and contrary to the clear words of the Collective Agreement?

Counsel for the Minister argued that, on Union's "plain meaning" argument teachers eligible for an increment would have been entitled to the amounts set out in Schedule D2 of the 1994 Collective Agreement on and after August 1, 1995, 1996 and 1997, just as much as they would have been to the amounts set out in Schedules D1 and D2 of the 1997 Collective Agreement on and after November 1 and December 1, 1997, because nothing else in the *Act* precludes that except s. 10(3)(b). Yet, he said, the Union did not grieve, so did they not acquiesce in the Minister's interpretation of the Collective Agreement?

The answer to this argument, I have concluded, is that it is not evident that the Union acquiesced in the Minister's interpretation of the Collective Agreements. Rather, the Union appears to have acquiesced, to some degree at least, in the Minister's, and the school boards', interpretation of s. 10(3)(b) of the *Public Sector Compensation (1994-97) Act*. Probably they did not grieve before November 1, 1997, because they understood the *Act* precluded them from doing so up to then, and quite possibly, until the ruling of the Court of Appeal in the *QEII* case, they too thought that s.10(3)(b) continued in effect indefinitely, or until July 31, 1998, or some other date. Of course,

acquiescence in the interpretation of a statute is quite different legally from acquiescence in the interpretation of a collective agreement, which may help resolve an ambiguity, and possibly even demonstrate the existence of a patent ambiguity. Acquiescence in the interpretation of a statute does not in any way determine its correct interpretation.

In support of this I note that although, in the shadow of the Goodfellow J.'s judgement quashing the Slone arbitration award, the Union negotiated, intentionally or otherwise, for the apparent return of the 3% roll-back effective December 1, 1997, no such concessionary treatment was accorded the notion that the s. 10(3)(b) of the *Public Sector Compensation (1994-97) Act* had effect indefinitely. That is, the parties did not rewrite the Collective Agreement to reflect the Minister's understanding with respect to increments; that, for example, after 1994-5, for his or her fourth year of teaching a teacher would get his or her third year increment, and so on until he or she got his or her eleventh increment for his or her twelfth year of teaching. Contrary to what they did with respect to the roll-back, they continued to match year of teaching with increment, subject to the effect of the legislation, whatever that might be.

Interpreting the Collective Agreement in context, I have concluded on the evidence before me that there is no basis for concluding that it provides, or for accepting that the Union is to be taken as having agreed, that teachers' experience-based salary increments denied them for the school year 1994-95 by section 10 of the *Public Sector Compensation (1994-97) Act* are lost not only as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined. I now turn to the issue of whether, quite apart

from the words of the Collective Agreement, that is the effect of the s.10(3)(b) of the *Public Sector Compensation (1994-97) Act.*

(2) Did s.10 of the *Public Sector Compensation (1994-97) Act* deny teachers the increments otherwise due them for the school year 1994-95 not only as increases to their salaries during the period the *Act* was in force but also as steps on the basis of which their salaries after October 31, 1997 are to be determined? Did s. 10 continued to have any force and effect in this respect after October 31, 1997? The critical provisions are subsections (2) and (3) of s. 10, which, for convenience, I repeat here:

> 2) Any increase in pay as described in clause 1(b) that would, but for this subsection, have been awarded to an employee at any time between May 1, 1994, and April 30, 1995, inclusive, is cancelled.
>
> (3) An employee referred to in subsection (2) is not entitled to
>
> (a) any other increase as described in clause (1)(b) until one year after the time referred to in subsection (2); or
>
> (b) any greater increase or adjustment at another time as a result of subsection (2).

I accept the submission by counsel for the Minister that the effect of subsection (2) is that the increment was cancelled, not postponed. Indeed, the Union appears to have accepted this in the sense that it has not sought to recover any payment lost in the periods affected by the proscribed increment. There is also no apparent dispute about the application of subsection (3)(a) in that nothing was granted by the school boards or

claimed by the Union by way of an increment until "one year after" "the time between May 1, 1994, and April 30, 1995".

I also agree with the Minister's position that, on its face, s. 10(3)(b) precludes the parties from negotiating increments to, in effect, make up "at another time" for the lost August 1, 1994, increment. If Schedule D2 to the 1994 Collective Agreement had been applied literally on August 1, 1995, 1996 or 1997, or if Schedule D1 to the 1997 Collective Agreement had been applied literally on August 1, 1997, that would have been the effect. But that did not happen, and the Union's Grievance here does not claim it should have. Rather the Union claims that, as a matter of statutory interpretation, s. 10(3)(b) ceased to apply after October 31, 1997, and at that point teachers became entitled to the pay the Collective Agreement plainly provided for.

The time for which s. 10(3)(b) of the *Public Sector Compensation (1994-97) Act* applies is not explicitly limited, and the Minister's position is that it therefore continues indefinitely. However, in *Nova Scotia Government Employee's Union v. QE II Health Sciences Centre* (*supra*) the Nova Scotia Court of Appeal stated, in the words of Freeman J.A. for the majority, at pp. 212-13;

> In my view the **1994-1997 Act** was straightforward and effective legislation intended to impose the harsh measure of a three per cent wage rollback on the public sector workers of Nova Scotia from 1994 to October 31, 1997 to combat the evil of a runaway deficit. It was not intended to have any effect beyond that time. There is not a provision in the Act that suggests otherwise. The collective agreements were restored to the forms in which they had been found, and the legislature took hands off. ... The statutory structure that supported the rollback, the time limitations express and implied in the ancillary provisions that ran out all together on October 31, 1997, the language of the rollback provision itself, all support this conclusion. ...The **Act**

> governed the public sector incomes from 1994 until October 31, 1997. By November 1, 1997, when public sector collective agreements expired it was spent.

Counsel for the Minister argued strongly that the *QEII* judgement addressed only the implied time limit on the life of s. 9, the rollback section, of the *Public Sector Compensation (1994-97) Act* and said nothing at all about s. 10(3)(b). I agree that only s. 9 was in issue before the Court and that the strict *ratio decedendi* of the case probably does concern only s. 9, but there is no doubt that the Court's language, just quoted, extends to the *Act* in general. The language in which Freeman J.A. here refers to the 3% rollback, upon which there was no explicit time limit, could with equal force be applied to the denial of an increment. Clearly the Court's broad language encompasses s. 10(b)(3) and its rationales apply to it.

"The statutory structure that supported the rollback,... that ran out all together on October 31, 1997" (*QEII* at p. 214) was also a necessary part of the administration of s.10(3)(b) with respect to the denial of increments. As mentioned above, the Administrator and the Board created under the Act were given primary jurisdiction by s. 22 to determine whether a compensation plan had been administered contrary to the Act, and also to determine whether an increase in pay fell within the purview of s. 10 at all. (see s. 22(1)(h)) The Court states specifically on p.203, "In my view then the Board is without jurisdiction to order compliance with the **Act** after October 31, 1997". How then could s. 10(3)(b) have been intended to continue in operation indefinitely? Of it too the Court of Appeal would undoubtedly ask as it did of s. 9, "can that twig survive as an anomaly cut off from its statutory trunk?" (see *QEII* at pp. 199-200).

The position of counsel for the Minister is that the Court was only addressing s. 9 of the *Act*, and that s. 10(3) is worded differently from s. 9, and indeed uniquely, and is not therefore governed by the Court's conclusion. In fact, however, while it nowhere mentions s. 10, the Court was very explicitly and deliberately "considering the **Act** as a whole" (at p. 213). If, as counsel submitted, s. 10 falls outside the Court's reasoning, when Freeman J.A. said at p. 197, "In my view every other provision of the **Act** terminated as of October 31, 1997, either by its express terms or by necessary implication, and the **Act** is spent ..." His Lordship overlooked s. 10(b)(3), and did so again when he said at p. 199 "In my view it is not in issue that all of the **Act's** effects save for the one in question have been extinguished by the passage of time".

I understand the position taken by counsel for the Minister, but I am not prepared to base my interpretation the *Public Sector Compensation (1994-97) Act*, or of any other public statute governing the outcome of an arbitration, on a position so apparently at odds with a reasoned and reasonable view of the Court of Appeal, be it *dicta* or not.

Counsel for the Minister relied on s. 23 of the *Interpretation Act*, R.S.N.S. 1989, as am., for the proposition that "Where an enactment is repealed, the repeal does not ... (c) affect a right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment". It suffices to say that here, as pointed out by counsel for the Union, I am not dealing with the repeal of the *Public Sector Compensation (1994-97) Act* but with the termination of its effect by its own terms.

Conclusion and Order. For all of these reasons this Grievance is allowed. The Halifax Regional School Board is ordered to pay all affected teachers any pay owing to them as

a result of not having paid them in accordance with Articles 18, 43 and Schedules D1 and D2 of the Collective Agreement as interpreted here from November 1, 1997 to the time of the Grievance. There rights from then forward, under the relevant Schedules, would appear to be similar. My understanding is that the parties have agreed that all other Regional School will act in accordance with this ruling.

As stated at the outset, the parties agreed that I should retain jurisdiction to deal with any issues arising from the application of this Award, including specifically the question of whether the school boards are obligated to pay interest. I will, therefore, reconvene the hearing in this matter at the request of either of the parties to deal with that issue, with quantification of the payments to be made, should the parties be unable to agree upon them, and with any other matters arising from the application of this Award.

Innis Christie
Arbitrator

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