9-17-2000

Nova Scotia (Minister of Education & Culture) v NSTU

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;* **Supplementary Award**

BEFORE: Innis Christie, Arbitrator

HEARING DATE: July 11, 2000

FINAL WRITTEN SUBMISSIONS: August 1, 2000

AT: Halifax N.S.

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

FOR THE MINISTER: Eric Durnford, counsel
Mike Sweeney, Director of Regional Education Services, Department of Education

DATE OF AWARD: September 17, 2000

Supplementary award with respect to a 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 agreed that the Halifax Regional School Board would be used as an example in this arbitration and that my award would determine the obligations of all school boards in Nova Scotia. My award was dated June 10, 1999. The Minister unsuccessfully sought judicial review in the Supreme Court of Nova Scotia Trial Division and the Appeal Division. After considering the judgement of the Appeal Division, rendered in May 2000 the parties appeared before me, on July 11, 2000, to deal with issues arising in the application of the Award. They subsequently submitted written materials.

SUPPLEMENTARY AWARD

This Supplementary Award deals with issues that the parties agree are properly before me, with my jurisdiction to consider some of the issues over which the parties dispute my jurisdiction and with those issues in so far as I have concluded that I have jurisdiction over them. The parties agree that I have jurisdiction to deal with the quantification of the damages to be paid to individual teachers and the methodology for doing that and with the question of whether interest could or should be ordered paid on those amounts. Counsel for the Minister has requested

that I rule on the effect of the time limit in this Collective Agreement for the filing of grievances on the start date for the calculation of damages. Counsel for the Union has taken the position that I have no retained jurisdiction to deal with that issue, but, in the alternative, has made submissions on it.

For reasons elaborated in what follows I have concluded that I do not have retained jurisdiction over the "start date" issue, but that, if I am wrong about that, that on the facts here the start date was not affected by the time limit in this Collective Agreement.

I have again retained the jurisdiction that I retained in my Award of June 10, 1999, and specifically I have retained jurisdiction to deal with the quantification of the damages to be paid to individual teachers and the methodology for doing that.

I have further concluded that the teachers who have not been paid according to the increments to which they are, and have been, entitled are entitled to simple interest on the unpaid amounts.

The Process. As noted on p. 2 of my June 10, 1999 Award in this matter, at the hearing before me on April 12, 1999, the Grievor Union requested "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 that hearing the Union requested "that any order to pay retroactive to November 1, 1997, specify that interest be paid." It is also noted in my June 10, 1999 Award that;

> At the outset 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.

At the very end of the Award I stated;

> 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.

Under date of May 25, 2000 I received the following letter from counsel for the Union in reference to this matter, copied to counsel for the Minister:

> The Nova Scotia Court of Appeal has affirmed your award in this matter. Accordingly I would ask that you reconvene the hearing to deal with issues arising from the application of the award, including the question of interest and other matters regarding which the parties are unable to reach agreement.

Under the same date I received the following faxed letter from counsel for the Minister also in reference to this matter;

> I have just received a copy of a letter of today's date sent to you by Ms Lafferty regarding the above in which she requests you to reconvene the hearing...

"to deal with issues arising from the application of the award, including the question of interest and other matters regarding which the parties are unable to reach agreement."

The Minister strongly disagrees with the implication from this request that there is any outstanding issue other than the question of possible interest - the awarding of which will be opposed by the Minister.

This was followed, under date of May 29, by this faxed letter from counsel for the Union, again copied to counsel for the Minister;

We spoke briefly this morning. Thank you for confirming you availability to reconvene on Tuesday. July 11 to deal with the issue of interest on this Award.

I note from you Award that you retained jurisdiction to deal with any issues arising from its application. To clarify, at this stage, I do not know whether there are any additional issues, apart from interest. If there are. hopefully they will be identified by the parties in advance of July 11 so that they may be addressed at that time as well.

Under that same date I received the following fax from counsel for the Minister, copied to counsel for the Union;

I have a copy of a fax Ms. Lafferty sent you this morning regarding the above. ...

As previously advised on May 25th, 2000, the Minister strongly disagrees with any suggestion being made that there is any issue in your retained jurisdiction other than possible interest.

To be quite frank, I am perplexed by what appears to be an attempt by the Union to enlarge the scope of the Grievance to matters not grieved. Any jurisdiction you retained was, as the Minister understood, the usual incidental jurisdiction to deal with matter arising from the application of the Award i.e. in this

> instance, the finding that the Board is required to pay all affected teachers "any pay owing to them as a result of not having been paid .." in accordance with your interpretation of the Collective Agreement from November 1, 1997, to the time of the grievance This could include quantification of any payments, but there is no expectation that there will be a problem.
>
> The matter of possible interest was a specifically retained issue which, I note, arose at the time of the hearing, and not before.

Under date of May 31, 2000, I wrote to both counsel as follows;

> ...the hearing in this matter will be reconvened on July 11 to deal with the issue of interest on this award and such other matters as the parties may agree to put to me or which, upon notice and after hearing the parties, I decide are properly before me.

At the hearing counsel for the Union opened by advising me that the parties had not agreed that I was seized of any issue other than that of interest. She asked that I continue to retain whatever jurisdiction I had retained upon release of my Award, including jurisdiction over the quantification of payments to be made to each teacher entitled under the Award. In her submission each of the teachers affected by my Award of June 10, 1999, is entitled to amounts equivalent to the salary increments to which I held her of him entitled which have been withheld, and will be withheld, from November of 1997 to the date of payment.

Counsel for the Minister submitted that what remains to be dealt with is the remedy flowing from my Award. He outlined the different methodologies for calculating amounts owed advocated by the parties. He did not disagree that I should retain

jurisdiction to settle any disagreement over which is to be applied, should they produce different results in individual cases. Significantly however, he submitted that no teacher's entitlement under my Award could start earlier than March 23, 1998, thirty days before the Grievance was filed, because the Collective Agreement has a thirty day time limit for the filing of grievances. This issue of "start date", he submitted, was within my retained jurisdiction and had to be settled.

Counsel for the Union submitted that she had had no notice until the evening before the hearing that the "start date" was an issue. In this context I offered her the opportunity to submit written argument on this point, which she declined. Later in the hearing counsel agreed that after the hearing I would receive submissions with respect to the awards counsel for the Minister had submitted demonstrating how arbitrators have dealt with collective agreement time limits in the context of continuing grievances. This was a significant aspect of the submission by counsel for the Minister with respect to the "start date" issue.

The Start Date. Counsel for the Union stated that there are teachers who have been relying on the payment of amounts owing on the basis of a November 1, 1997 start date.

Mike Sweeney, Director of Regional Education Services, who was called as a witness by the Minister at the reconvened hearing, testified under cross-examination that he had discussions with Harold Doucette of the Union following the May 2000 Court of Appeal decision upholding my June 10, 1998 Award. They discussed the correct methodology to be used to calculate the amounts owing to individual

teachers. Mr. Doucette had based all of his calculations on a November 1, 1997 start date. Mr. Sweeney acknowledged without hesitation that he had never taken issue with this in his conversations with the Union, as recently as June 2, 2000. However, he testified, the Department of Education had taken a different view of the start date throughout, and his silence was not concurrence. All of these discussions had been at the initiative of the Union, and all were without the advice of legal counsel.

I agree with counsel for the Minister that Mr. Sweeney's conversations with Mr. Doucette did not constitute a waiver by the Minister of the right to make the arguments about "start date" which I have considered, nor was the Minister estopped by these conversations. There is no evidence here that any representative of the Minister held out to the Union or any teachers affected, if that is relevant, that it had accepted the Union's position on the "start date", that it knew or should have known that the Union was relying on any such holding out or that the Union or the teachers had in fact relied to their detriment on any such holding out.

What is in issue here, according to counsel for the Minister, is the permissible scope of the remedy where there is a continuing breach of a collective agreement which imposes a time limit on the right to grieve. Arguably, he conceded, each time the Minister paid without taking account of the increments which are the subject of my June 10, 1999 Award a new right to grieve arose, but such grievances had to have been filed within the time limits set by the Collective Agreement. For the reasons discussed below, I agree with him that such would be the case if the time limits here applied as he says they do, but on that I disagree with him.

This Collective Agreement makes specific provision for Union grievances such as this one. Article 42.03 (a)(ii) provides;

> (ii) Union's Informal Discussions
> Where the Union is the grievor the Union shall, within thirty (30) clear days of the effective knowledge of the facts which gives rise to an alleged grievance, meet with the Regional Education Officer to discuss the matter. The Regional Education Officer shall answer the matter within ten (10) days of the discussions. Where any matter cannot be settled by the foregoing informal procedure, it shall be deemed to be a "grievance" and the procedure in "Step One", "Step Two" and "Step Three" shall be followed
>
> ...
>
> **Grievance**
>
> Step One - The aggrieved party shall, within ten (10) clear days of receipt of reply pursuant to (a) present the grievance in writing to one of the Executive Directors of Education (or designate) ...

Article 42.07 then provides;

> 42.07 If advantage of the provisions of this Article has not been taken within the time limits stipulated herein, the grievance shall be deemed to have been abandoned. On the other hand, the grievor(s) may proceed to the next step in the case of absence of a stipulated meeting or answer within the stipulated time limits. Said time limits may be extended by mutual written agreement.

There is no question that on its face this is an effective mandatory time limit.

Mr. Sweeney testified, with documentary corroboration, that in late 1997 and early 1998, during negotiations for the first post-freeze Collective Agreement, the Union had sought restoration of all scales "including appropriate level of service" and the

3% by which salaries had been rolled back, but that the Minister was unwilling to do that because the Department was aware of the arbitration award and litigation that led to the decision of the Court of Appeal in *NSGEU v. QEII* (1998), 166 NSR (2d) 194.

"Why", counsel for the Minister asked, "was this Grievance, claiming that teachers salary increments should be adjusted effective November 1, 1997 not filed earlier than April 23, 1998, when other unions in Nova Scotia had much earlier filed different grievances based, fundamentally, on the same interpretation of the Collective Agreement and the *Public Sector Compensation (1994-97) Act*?". Surely, he submitted, the Union must be held to have had "effective knowledge of the facts which [gave] rise to [this]... grievance" the first and each subsequent time the Minister paid without taking account of the increments which are the subject of my June 10, 1999 Award. No grievance had been filed after the arbitrator in the *NSGEU v. QEII* had made his award in December 1997. He noted that that Award was quashed on judicial review January 6, 1998, and reinstated by the Court of Appeal effective on April 12, 1998. It was not until then that the Union filed this Grievance.

In my opinion that question and submission are effectively answered by what I said at pp. 19-23 of my June 10, 1998 Award on the different point of whether the Union had acquiesced in the Minister's interpretation of the provisions of the current Collective Agreement, signed on February 3, 1998 and effective November 1, 1997, with respect to increments;

> 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. ...
>
> 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" .. 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. ...

These passages suggest that the Union did have "effective knowledge of the facts which [gave] rise to [this]... grievance" in that it knew it was at odds with the Minister in its interpretation of the Collective Agreement. However, the point critical to the issue before me here is made in the following comments;

> [I]t 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. [emphasis added]

My conclusion is that the Union cannot be said to have had "effective knowledge of the facts which [gave] rise to [this]... grievance" until it had an understanding of the correct interpretation of s. 10(3)(b) of the *Public Sector Compensation (1994-97) Act*. Arguably, it could first have been fixed with such knowledge upon the release of the Slone Award between the NSGEU and the QEII in late December, but that award was immediately taken on judicial review and quashed on January 6, 1998. Effectively, therefore, the Union did not have "effective knowledge of the facts which [gave] rise to [this]... grievance" until the Slone Award was reinstated by the Court of Appeal on April 12, 1998.

On this basis I have reached the conclusion that the Union's Grievance was timely with respect to the Halifax School Board's failure to pay the increments to which the affected teachers were entitled from November 1, 1997 onwards.

However, the primary position of counsel for the Union at the July 11, 2000 hearing and thereafter was that the issue of the start date was disposed of by my June 10, 1999 Award and that I have no retained jurisdiction to deal with that issue.

The Grievance letter, dated April 23, 1999 stated;

> 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 , *as of*

> *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 by the Teachers Provincial Agreement. [emphasis added]

There was no issue taken at the hearing on April 12, 1999 with the start date and the grievance had been allowed, so, counsel for the Union submitted this issue was no longer properly before me. It had been disposed of, she submitted, by my June 10, 1999 award and was not addressed on judicial review. With emphasis added to capture the essence of this submission by counsel for the Union, at pp. 2-3 of that award I stated;

> *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 it 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* [emphasis added]

My Conclusion and Order, at pp 27-8, with emphasis similarly added, was;

> ...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* [sic] *rights from then forward, under the relevant Schedules, would appear to be similar* [Emphasis added]

I note that the order is not to pay only "to the time of the Grievance". That would be nonsensical, given that there was, and is, a continuing failure to pay in accordance with the rights of the teachers who had become entitled from November 1, 1997 onwards. The final sentence in the Order quoted, as well as being marred by a typographical error is, in hindsight, less direct and forceful than it should have been, but its meaning is, I suggest, clear.

In case I am wrong in concluding that the Union did not have "effective knowledge of the facts which [gave] rise to [this]... grievance" until the Slone Award was reinstated by the Court of Appeal on April 12, 1998 I will also rule here on this submission by the Union.

Counsel for the Minister submitted that what had been dealt with in my Award was the question of liability, with any issues about the remedy left to be determined as a matter of my retained jurisdiction. Counsel for the Minister is certainly correct in pointing out that there is nothing in the text of my June 10, 1999 Award other than the passages quoted from pp. 2-3 and 27-8 that addressed the "start date" issue. On the other hand, there was no suggestion that start date was a divisive issue, so it was appropriate to deal with it cursorily, without there necessarily being any assumption that it would be dealt with later, as part of my retained jurisdiction.

In *Union Gas Co. of Canada and International Chemical Workers, Local 741* (1972), 2 LAC (2d) 45 (Weatherill, chair) the board of arbitration dealt expressly with the issue of whether, by not raising the effect of a time limit on the remedy available in a continuing grievance upon receipt of the grievance or by not arguing

the point in the initial hearing "on the merits", the employer waived its right to raise that issue subsequently in a hearing to determine the quantification of payments. The facts as stated by the Board of Arbitration at p. 47 make this clear;

> The company takes the position that compensation cannot properly be awarded in respect of any period more than 30 days prior to the filing of the grievance No objection was taken to the timeliness of the grievance itself and the company's contention, it seems, was raised only after the award in this matter was issued (the matter of compensation having been left for determination following the decision of the merits of the case).

In ruling on this issue Board simply stated at p. 49

> There have been many cases in which grievances of a continuing nature have been brought and where recovery has been limited to the period coming within the limits set out in the collective agreement. We are aware of no cases in which acceptance of such a grievance has been held to constitute waiver of the right to contest the extent of liability.

The issue here is not the effect of "the acceptance of such a grievance". It is the effect of my ruling in the Award on "the merits" on the issues before me here that I am concerned with. *Union Gas* speaks to that as well, but whether it is persuasive in this case depends on what that Board meant when it referred in brackets to the "matter of compensation having been left for determination following the decision."

At the April 12, 1999 hearing before me, it will be recalled, the Union requested "that any order to pay retroactive to November 1, 1997, specify that interest be paid." It is also noted in my June 10, 1999 Award that "the parties agreed... 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." On the face of it, leaving the "matter of compensation ...for determination", as was done in *Union Gas*, is both broader with respect to the arbitrator's retained jurisdiction to determine compensation and narrower with respect to retained jurisdiction generally than remaining seized, as I did in my June 10, 1998 Award to deal with issues arising from the application of the award "including the quantification of any payments ordered".

Is the "start date" issue here a question of liability or of "the quantification of any payments ordered" or otherwise a matter "arising from [the] application" of Award. Is it, in the words of counsel for the Minister, in his correspondence leading up to the July 11, 2000 hearing, an aspect of

> the usual incidental jurisdiction to deal with matter arising from the application of the Award i.e. in this instance, the finding that the Board is required to pay all affected teachers "any pay owing to them as a result of not having been paid..." in accordance with your interpretation of the Collective Agreement from November 1, 1997, to the time of the grievance. This could include quantification of any payments, but there is no expectation that there will be a problem.

I have concluded that the assumption the parties would reasonably think was reflected in my award was that if I found against the Minister the school boards would pay as of November 1, 1997, not that the start date would be determined as a matter of "application" or "quantification". My Award of June 10 is explicit, and was unchallenged on judicial review, with respect to the date from which the teachers affected are to be paid the increments owed to them.

I need not cite here the cases relied on by counsel for the Union in her written submission of July 24, 2000, to the general effect that an arbitrator cannot reopen "the merits" and amend an earlier award in the guise of dealing with the quantification of damages or some other aspect of his or her retained jurisdiction. Obviously there may be room for disagreement over what constitutes amending the earlier award and what was left to be determined as part of the arbitrator's retained jurisdiction. I do not find that these authorities, which seem to me to go beyond what it was agreed would be submitted, add anything of much use in that determination.

Only if I am wrong on this basis for concluding that the start date for the payment of increments owing to teachers is settled as being November 1, 1997 and in concluding that the Union did not have "effective knowledge of the facts which [gave] rise to [this]... grievance" until the Slone Award was reinstated by the Court of Appeal on April 12, 1998, would the issue arise of the permissible scope of the remedy where there is a continuing breach of a collective agreement which imposes a time limit on the right to grieve.

Because counsel for the Minister has not disputed that this is a continuing Grievance and because I do not see that it is the interest of the Union to do so, I will not dwell long on the distinction between continuing grievances and one time grievances, including those with continuing effects. These distinctions are not as easy as they appear at first sight. I continue to hold the views I expressed in *Canada Post Corp. and CUPW (Bilingual Positions)* (1993), 35 LAC (4^{th}) 300, at p.308;

Brown and Beatty, Canadian Labour Arbitration, 3rd ed., looseleaf, state in para 2:3128:

> Continuing violations consist of *repetitive breaches of the collective agreement rather than simply a single or isolated breach* They usually involve the non-payment of money, an illegal strike or benefit premiums, or the assignment of work... It has been suggested that the correct test is the one developed in contract law, namely, that there must be a recurring breach of duty, not merely recurring damages.

(Emphasis added, footnotes omitted.)

... the requirement that "there must be a recurring breach of duty" .. is drawn from the award of arbitrator Getz in *Re Province of British Columbia and B C N U* (1982), 5 L.A.C. (3d) 404, quoting Gorsky, *Evidence and Procedure in Canadian Labour Arbitration* (1981), in a case that involved hiring the grievor into the wrong salary step. The learned arbitrator stated at p. 415

> The duty to assess Mrs. Williams' experience was a single duty, not a recurrent one. The employer was under no obligation to make fresh assessments of that experience from time to time at periodic intervals. The decision that the employer reached in the discharge of its duty to assess, if wrong, no doubt has continuing consequences for her, in that each time she was paid a salary based on that wrong decision, she suffered harm. But that additional harm did not constitute a fresh breach of the employer's promise. To describe this as a "continuing breach" is, in my view, to deprive the concept of all meaning.

In *Re Port Colbourne General Hospital and O.N A* (1986), 23 L.A C. (3d) 323, cited by counsel for the union, at p. 328 the majority of a board of arbitration chaired by Kevin Burkett stated

> Allegations concerning. .the improper awarding of a promotion... while they may have ongoing consequences, constitute discrete non-continuing violations of the collective agreement.

The key, in my opinion, is this. Time-limits are not put in collective agreements to suggest that where the time has expired no wrong has been done, which is why arbitrators always apply them reluctantly. They are there to allow a party acting under a collective agreement, usually the employer, to know where it stands after

> the lapse of the agreed time, until it takes a fresh step, with respect to which it must once again consider the consequences.
>
> In the case before me the time-limits in the collective agreement do not mean that the employer could adopt the policy here in issue, wait 25 days and then administer the collective agreement in accordance with that policy free of any possibility of challenge through the grievance procedure. What they do mean is that the employer can rely on the fact that if there is no grievance within 25 days after it has made a particular promotion or work assignment based on the policy that action, and the consequences that flow automatically from it, cannot be grieved. However, the next such action based on the policy may be grieved ...

In my opinion from November 1, 1997 on, each time the School Board paid a teacher based on what was known after the Court of Appeal decision of April 12, 1998 to be, and to have been, an improper increment it took a fresh step. Thus I agree with counsel for the Minister that this is a continuing Grievance. Because that is so, quite aside from when the Union had "effective knowledge of the facts which [gave] rise to [this]... grievance" and the fact that start date was not part of my retained jurisdiction, the Employer could not have treated this Grievance as time barred except with respect to failures to pay before March 23rd 1998. My conclusions on those issues are important with respect to failures to pay increments from November 1, 1997 to March 23, 1998, but not beyond that.

Methodology for Calculating Amounts Owing to Individual Teachers. I heard discussion of and, I think, understood the different methodologies tentatively adopted by the parties to quantify the amounts not paid to individual teachers because they had been improperly denied increments from November 1, 1997 on. The problem, of course, is that entitlements have continued to change and depend on the changing circumstances of individual teachers. Beyond saying that the

calculation of individual daily rates based on the standard number of teaching days in each year seemed to me to offer the best hope of a programmable formula I cannot offer the parties any assistance with these calculations. This is indisputably part of my retained jurisdiction, and I continue to retain it after the issue of this award.

If the parties are unable to agree, I will reconvene the hearing at the request of either party, to rule with respect either to the methodology for calculating amounts owing to individual teachers or the amounts calculated in individual cases.

Interest. The submission by counsel for the Union is that amounts equivalent to the salary increments to which I held the affected teachers to be entitled have been withheld, and will be withheld, from each of them from November of 1997 to the date of payment, through no fault of theirs or the Union's. Therefore, she submitted, each is entitled to interest on those amounts on the basis that the purpose of an award of damages is to put the wronged party as nearly as possible in the position that he or she would have been in had there been no breach of obligation.

The original Grievance was filed April 23, 1998 and was heard by me on April 12, 1999. The final order following the judgement of the Court of Appeal is dated May 17, 2000. Because of the delay involved, to achieve the purposes of the awarding of interest the Union seeks compound interest from November of 1997 to the date of payment at the rate prevailing through the period in issue.

Counsel for the Union agreed with counsel for the Minister that the awarding of interest by arbitrators is discretionary under collective agreements which do not explicitly address the point.

The Minister's submission is that there should be no interest paid, because the law is not clear that Grievors under collective agreements are entitled to interest. Nor, in his submission, is it clear that I, as arbitrator under the Collective Agreement and legislation which apply here, have jurisdiction to award interest. If I do have jurisdiction, counsel submitted, the awarding of interest is discretionary and none should be awarded here, because my authority to do so is doubtful, because interest was claimed only at the original hearing, not in the Grievance itself, and because both parties had proceeded on the basis that the roll-back was to be permanent, subject to negotiated increases. It was, counsel submitted, only because of the April 12, 1998 decision of Court of Appeal in the case involving the Nova Scotia Government Employees Union and the QEII Health Sciences Centre, that the Grievance in this matter was filed.

The Grievance in this matter was resubmitted in evidence. It is in the form of a letter, dated April 23, 1999, from Harold Doucette, Executive Staff Officer of the Union, to Mike Sweeney, Director of Regional Education Services, who was called as a witness by the Minister at the reconvened hearing. The relevant passages are the following:

> The alleged grievance arises out of the recent decision of the Nova Scotia Court of Appeal registered on April 8, 1998 between NSGEU and 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.

Neither in this letter nor in any document subsequently exchanged between the parties prior to the hearing before me on April 12, 1999 was there any explicit mention of "interest".

Although I have read them with interest, I will not review here the cases submitted by both parties on the issue of whether an arbitrator has authority to award interest where there is no explicit authority to do so in the Collective Agreement or the applicable legislation. As counsel for the Minister acknowledged, the reported arbitration awards are trending strongly in favour of the exercise of such authority. Indeed, in the awards submitted on behalf of the Minister the very arbitrators who, in the awards from the early 1980's, denied themselves any such inherent jurisdiction, a scant few years later appear to take such jurisdiction with little question. It is, perhaps, worthy of note that in one of those early awards, that of a board chaired by R.H. McLaren in *Keeprite Inc and Keeprite Independent workers' Union* (1982), 8 LAC (3d) 35, the following appears, at p. 44,

> [I]t seems clear that the principle of the common law measure of damages for lost expectation does not embody interest except where there was a failure to pay money when it was due under a contract The common law proposition has been altered by statute

Apart altogether from question of the usefulness of the common law, particularly when shorn of statutory improvements, as a guide for determining the limits of

arbitral power under Canadian labour legislation, I would point out that we are here concerned with "a failure to pay money when it was due under a [collective agreement]".

In past cases, some of which were cited to me here, as arbitrator under other collective agreements, I have awarded interest. In my opinion my authority to award interest is part of my implied remedial authority. It flows from the legislation under which I have been agreed upon as surely as does my authority to award damages. I agree with Arbitrator Swan in *Canada Post and CUPW (Tang)* (1999), 79 LAC (4^{th}) 439, where he says at pp. 446, after considering the awards of the issue of whether simple or compound interest should be awarded;

> Each of them recognizes that the purpose of awarding interest is compensatory and not punitive, and that while various presumptions about how interest is to be calculated, and various mechanistic principles to simplify that calculation, may appropriately be considered, ultimately the purpose is to attempt to achieve a degree of fairness between the parties. ... Perhaps the overriding principle is best expressed by the Union nominee in the City of Ottawa case, Mr. J. Herbert, who observes in his concurring addendum
>
> > The payment of interest and its manner of calculation is a discretionary matter, in the contest of certain applicable presumptions, and the board's responsibility is to fashion a remedy which is both effective and fair. ...

There was no explicit request for interest in the Grievance letter here, but Counsel for the Union clearly requested it in her opening submissions at the April 12 hearing in this matter, and Counsel for the Minister has obviously had plenty of opportunity to respond to the details of her submissions with respect to interest.

Turning to the submission on behalf of the Minister that I should, in the exercise of my discretion not direct the payment of interest, counsel's first submission was that I should not order because the law is not clear that Grievors under collective agreements are entitled to interest, nor is it clear that I as arbitrator under the Collective Agreement and legislation which apply here have jurisdiction to award interest. As I have already indicated, I think my jurisdiction is clear, so I reject that argument. As I advised the parties at the close of the hearing, I consider it appropriate to award interest here.

I agree that both parties proceeded on the basis that the roll-back was to be permanent, subject to negotiated increases, until the Union understood from the April 12, 1998 decision of Court of Appeal that such was not the effect of the *Public Sector Compensation (1994-97) Act.* I do not see, however, why that makes it fair or just that the employing school boards, or the taxpayers who ultimately finance them, should continue to have the benefit of not having paid the increments. Rather the benefit of the increments should be fully transferred, *ex post facto* through the mechanism of the payment of interest, to the teachers lawfully entitled to it. I see no basis in this submission by counsel to exercise any residual discretion I may have to refuse to order the payment of interest.

Counsel agreed that there was no issue of fault on the part of either party relevant to the awarding of interest.

In response to the Union request that I order the payment of compound interest from November of 1997 to the date of payment at the rate prevailing through that period in issue, counsel for the Minister submitted that if I were to award interest it should be on the basis of the oft-relied upon decision of the Ontario Labour Relations Board in *SEIU, Local 183 v Hallowell House Ltd.* [1980] OLRB Rep. 35. That somewhat rough and ready method of determining simple interest on an unpaid periodic entitlement is to multiple half the total amount to be paid to an employee (i.e. the average amount he or she has been owed for the whole period) by the prime rate of interest published by the Bank of Canada for the month in which the grievance was filed.

In support of the Union's request that I order compound interest counsel relied most directly on Arbitrator Swan's award in *Canada Post and CUPW (Tang)* cited above, in which he in turn relies heavily on "the central award" of Arbitrator Burkett in *Canadian Broadcasting Corp. and NRPA* (1995), 45 LAC (4^{th}) 444. I accept that this may be a circumstance in which the payment of compound rather than simple interest would mean that the situations of the teachers entitled would be made to more closely approximate the situation they would have been if their increments had been paid as they became entitled. It is still, however, only an approximation, and one achieved through a much more complex, time consuming and difficult to understand set of calculations.

The awarding of compound interest has not been the practice in arbitration awards between these parties or generally in Nova Scotia. While not governing in any sense, I note that it was undisputed that the civil courts in Nova Scotia award simple

interest on judgement debts. I assume these practices have engendered, or reasonably should have engendered, some, probably rather vague, expectations on the part of the parties to this Collective Agreement about the basis upon which interest will be awarded. I am not satisfied that in this case there are good enough reasons to defeat those expectations. I therefore accept the submission of counsel for the Minister that the interest to be paid to each of the teachers entitled to compensation for the non-payment of increments is to be on the basis of the decision of the Ontario Labour Relations Board in *SEIU, Local 183 v. Hallowell House Ltd.* [1980] OLRB Rep. 35.

Conclusions and Order. For all of the foregoing reasons I make the following orders:

1. I retain jurisdiction to deal with any issues arising from the application of my award between these parties dated June 10, 1999 and from the application of this Award, including specifically the quantification of the damages to be paid to individual teachers who were improperly denied increments and the methodology for doing that.

2. I have no jurisdiction to determine that the start date of the quantification of the damages to be paid to individual teachers is other than November 1, 1997, because that was determined by my Award of June 10, 1999.

   If I am wrong in that, then on the facts here the Union's Grievance was not out of time in claiming damages on behalf of teachers affected starting November

1, 1997, because the time limit under Article 42.03 (a)(ii) did not start to run until the Union had "effective knowledge" of the April 8th, 1998 judgement of Nova Scotia Court of Appeal in *NSGEU v. QEII.*

3. The damages to be paid to individual teachers who were improperly denied increments are to be paid with interest from the first date of entitlement after November 1, 1997 to the date of payment.

4. The interest to be paid to each of the teachers entitled to compensation for the non-payment of increments is to be on the basis of the decision of the Ontario Labour Relations Board in *SEIU, Local 183 v. Hallowell House Ltd.* [1980] OLRB Rep. 35.

Innis Christie
Arbitrator