IN THE COURT OF APPEAL OF MANITOBA

Coram: Philp, Helper and Steel JJ.A.

B E T W E E N:

THE FLIN FLON TEACHERS' ASSOCIATION NO. 46 OF THE MANITOBA TEACHERS' SOCIETY	)	***V. J. Matthews Lemieux*** *for the Appellant*
(Applicant) Appellant	)	***R. A. Simpson*** *for the Respondent*
- and -	)	
	)	*Appeal heard:* ***April 18, 2000***
THE FLIN FLON SCHOOL DIVISION NO. 46	)	
	)	*Judgment delivered:*
(Respondent) Respondent	)	***July 28, 2000***

STEEL J.A.

1.0 Introduction

1 This is an appeal from the motions judge's refusal to set aside an arbitration award. The substance of the matter concerns the interpretation of ss. 97(1) and 126(2) of *The Public Schools Act*, R.S.M. 1987, c. P250 (the *Act*).

2 In 1996, the *Act* was amended to include several new provisions. In particular, s. 126(2) ousted an arbitrator's jurisdiction with respect to four areas.

Appeal from (1999), 139 Man.R. (2d) 176

3 In an arbitration between these two parties, the arbitrator held that he had no jurisdiction to award clauses in relation to mainstreaming, disruptive students, due process for principals and vice-principals and transfers of teachers because such matters were not disputes within the meaning of the *Act*, were excluded by s. 126(2) or both.

4 In an application seeking judicial review of the arbitrator's decision, Justice Morse held that the arbitrator was correct in his interpretation of the legislation and its application to the proposed clauses.

5 I agree with the motions judge's decision for the reasons that follow.

2.0 Background

6 Some reference to the history of teacher bargaining in Manitoba is necessary since, at all three levels, both parties relied extensively on the history of bargaining between the parties for the purpose of interpreting the new provisions within the context of the legislation as a whole. However, the facts are set forth fully in the motions judge's reasons and I will repeat only that background information necessary to provide a context for my reasons.

7 Shortly after World War II, teachers received the right to bargain collectively and the right to strike. They did so bargain from 1948 until 1956 under *The Labour Relations Act*, S.M. 1948, c. 27, of Manitoba.

8 In 1956, at the request of both the Manitoba Teachers' Society (MTS) and the Manitoba Association of School Trustees (MAST),

collective bargaining for teachers was removed from the ambit of *The Labour Relations Act* and instead, dealt with under the *Act*. The right to strike or lockout was removed and was replaced by compulsory binding arbitration.

9 From 1956 until 1996, any issue between teachers and school boards concerning terms and conditions of employment that fell within the definition of "dispute" in s. 97(1) of the *Act* was dealt with by binding interest arbitration. There were many differences between school divisions and teachers as to what matters could be considered to be disputes under the *Act* and therefore arbitrable under the jurisdiction of the *Act*.

10 Throughout the history of teacher collective bargaining in Manitoba, teachers took the position that most matters should be negotiable and subject to arbitration, while school boards took the position that the scope of bargaining and arbitration should be restricted.

11 Although at first matters such as salaries, allowances and leaves were primarily the subject matter of "disputes" under the *Act*, over time, arbitrators accepted that such diverse issues as lay-offs, lunch hours, class size and contact time also came within the definition of "dispute" and therefore within the jurisdiction of compulsory binding arbitration.

12 MAST was dissatisfied with many arbitration awards that it perceived had the effect of limiting and restricting the ability of school boards to manage school division business in accordance with their mandate under the *Act*. MAST was also concerned because additional

requirements imposed upon school boards as a result of the arbitration process carried with them additional costs. This concern and dissatisfaction came at a time when government funds for education were being reduced, and yet school boards were under pressure not to increase taxes.

13 In 1996, after producing a discussion paper and considering a report from a Review Committee, the government introduced amendments to the *Act*. Although MAST did not achieve all of its objectives, some of its concerns were addressed by the amendments, namely, that the legislation should specifically exclude from arbitration the four matters which form the basis of s. 126(2). It should be noted that MAST had also asked for the exclusion of other matters, as well as "any matter which may be ancillary or incidental to any of the foregoing" matters, but the legislation was not amended to include those other matters.

14 The legislation did not otherwise restrict the rights of the parties to arbitrate matters which had been previously held to be arbitrable. Nor did it amend the definition of the word "dispute" in s. 97(1).

3.0 The Statutory Framework

15 Under s. 127(8) of the *Act*, an award of an arbitrator is binding on all of the parties. The prerequisite to the arbitrator acting, however, is that there be a matter in "dispute," as that word is defined in the *Act*. Therefore, traditionally, the starting point for determining an arbitrator's jurisdiction has been s. 97(1) of the *Act*, which defines "dispute":

> "**dispute**" means a controversy or difference or apprehended controversy or difference between a school board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the school board, or the teacher or teachers that are not specifically set out in this Act or The Education Administration Act or in the regulations made under either of those Acts; but does not include a controversy or difference arising out of the termination or threatened termination of the contract of a teacher by reason of alleged conduct unbecoming a teacher on the part of a teacher.

16 Thus a matter will only be a dispute if it is a matter which affects the terms or conditions of employment and has not already been specifically set out in the *Act*, in *The Education Administration Act*, R.S.M. 1987, c. E10, or in the Regulations.

17 The jurisprudence to date has given the definition of "dispute" a broad and liberal interpretation. In the case of *Dauphin-Ochre School Area No. 1 v. Dauphin-Ochre Division Association No. 33 of Manitoba Teachers' Society et al.*, [1971] 4 W.W.R. 138 (Man. C.A.), this Court held that a sickness and accident insurance plan was a matter concerning the "terms or conditions of employment" of teachers.

18 Again, in *Rolling River School Division No. 39 v. Rolling River Division Association No. 39 of The Manitoba Teachers Society* (1979), 3 Man.R. (2d) 7 (Q.B.), the court held that a proposed term of the collective agreement, regarding lay-offs, was a term which fell within the

phrase "terms or conditions of employment" in s. 97(1). Wright J. indicated, at para. 9, that:

> ... [T]he real question to be determined is whether the contents of [the proposed clause] can be regarded fairly as being incidental to or consequent on terms or conditions of employment, ...

19 Further support for a broad interpretation of working conditions where the parties operated under a similar statutory regime can be found in the Ontario police cases where the Ontario High Court and subsequently the Ontario Court of Appeal held that the matter of two-men patrol cars was an arbitrable issue that fell under the umbrella of working conditions. See *Re Town of Dryden and Dryden Police Association* (1972), 32 D.L.R. (3d) 21 (Ont. H.C.), and *Re Metropolitan Toronto Board of Commissioners of Police and Metropolitan Toronto Police Association* (1975), 57 D.L.R. (3d) 161 (Ont. C.A.).

20 As well as dealing with the terms and conditions of employment and the privileges, rights and duties of the parties, a proposed clause must not deal with a matter that is specifically set out in the relevant legislation. In other words, the parties cannot dispute a matter upon which the Legislature has already spoken:

> The arbitrators cannot make an award in an area prohibited by the Act or in conflict with legislation dealing specifically with a matter. ....
>
> . . . . .
>
> In connection with the matter of statutory prohibition it should be recognized at the outset that there is a distinction between the

> general powers given the School Division under the Act, which contain no mandatory direction, and express obligations which the School Division must perform or specific legislation dealing with terms and conditions of employment. .... [I]f a provision in the statute can be interpreted properly to mean the legislature has chosen to deal fully with the terms or conditions of employment of teachers in a specific area, then it is not open to the parties to engage in the collective bargaining process in that area. But if that interpretation cannot be made then there should be no impediment to collective bargaining so long as the negotiations do relate to terms or conditions of employment of teachers.
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> [*Rolling River School Division No. 39*, *supra*, at paras. 4 and 12, per Wright J., and see *Manitoba Teachers' Society (Portage la Prairie Division Association No. 24 and Evergreen Teachers' Association No. 22) v. Portage la Prairie School Division No. 24 and Evergreen School Division No. 22* (1981), 14 Man.R. (2d) 233 (Q.B.), aff'd (1982), 14 Man.R. (2d) 340 (C.A.).]

21 In 1996, the Legislature introduced amendments which affect the scheme of compulsory binding arbitration and, specifically, the jurisdiction of the arbitrator as defined by s. 97(1). Section 126(2) lists four areas that are not arbitrable:

> **Matters not referable for arbitration**
> **126(2)** Notwithstanding any other provision of this Act, the following matters shall not be referred for arbitration and shall not be considered by the arbitrator or included in the arbitrator's award:
>
> (a) the selection, appointment, assignment and transfer of teachers and principals;
>
> (b) the method for evaluating the performance of teachers and principals;
>
> (c) the size of classes in schools;

(d) the scheduling of recesses and the mid-day break.

22 Section 126(2) should be read in conjunction with the new s. 131.4, which provides:

> **Obligation to act fairly**
> **131.4(1)** A school board shall act reasonably, fairly and in good faith in administering its policies and practices related to the matters described in subsection 126(2) (matters not referable for arbitration).
>
> **Failure to comply**
> **131.4(2)** Any failure by a school board to comply with subsection (1) may be the subject of a grievance under the collective agreement and may be dealt with in accordance with the grievance process set out in the agreement.

23 As well, again in response to the requests of MAST, the legislation imposed certain mandatory factors that an arbitrator was required to consider in financial matters. These are set out in s. 129(3) of the *Act*:

> **Factors**
> **129(3)** The arbitrator shall, in respect of matters that might reasonably be expected to have a financial effect on the school division or school district, consider the following factors:
>
> (a) the school division's or school district's ability to pay, as determined by its current revenues, including the funding received from the government and the Government of Canada, and its taxation revenue;
>
> (b) the nature and type of services that the school division or school district may have to reduce in light of the decision or award, if the current revenues of the school division or school district are not increased;

(c) the current economic situation in Manitoba and in the school division or school district;

(d) a comparison between the terms and conditions of employment of the teachers in the school division or school district and those of comparable employees in the public and private sectors, with primary consideration given to comparable employees in the school division or school district or in the region of the province in which the school division or school district is located;

(e) the need of the school division or school district to recruit and retain qualified teachers.

24 Section 129(2) requires the arbitrators to explain their reasoning "as to how the requirements of subsection (3) have been applied."

4.0 Decision

4.1 Standard of Review

25 On appeal, both parties agreed that the standard of judicial review to be adopted in this case was a standard of correctness.

4.2 Standard of Statutory Interpretation

26 As well, both parties are agreed that a purposive approach should be taken to the task of interpreting the provisions of the *Act*:

> Today there is only one principle or approach [to statutory interpretation], namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. [Iacobucci J., in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21: quoting

> Elmer Driedger, *Construction of Statutes* (2d ed. 1983) at p. 87, referring to the broad purposive interpretive approach. See also *Driedger on the Construction of Statutes* (3d ed. 1994) by Ruth Sullivan, at p. 131; *R. v. Chartrand*, [1994] 2 S.C.R. 864 at p. 875; *LeClair v. Director of Residential Care (Man.) et al.* (1999), 138 Man.R. (2d) 10 at para. 23 (C.A.), per Helper J.A.]

27 Of course, the parties disagree as to how that general proposition should be applied in this situation. The appellant argues that each of the four clauses in question relate to the working conditions of the applicant and thus fall within the definition of "dispute" as contained in s. 97(1) and, furthermore, that they are not excluded from arbitration by s. 126(2).

28 It is submitted that the broad and liberal interpretation given to the definition of "dispute" in s. 97(1) by the courts is appropriate since the legislation takes away the teachers' right to strike in exchange for compulsory binding arbitration. Given this trade-off, the courts should be slow to interpret legislation in a way which will restrict or limit arbitration. The object of the legislation must be broadly construed to encourage collective bargaining.

29 It follows, the appellant submits, that the provisions of s. 126(2), which exclude areas from the jurisdiction of arbitration, should be considered exclusions and narrowly construed. An exception should not be construed more widely than is necessary to fulfill the values which support it. See Ruth Sullivan, *Driedger on the Construction of Statutes* (3d ed. 1994), pp. 369-70.

30 It is the task of this Court to give a fair and reasonable interpretation to the language of the provisions within the context of the legislation as a whole. In the final analysis, all of the authorities dictate a common sense approach to legislative interpretation.

31 It is difficult to read the amendments as a whole within the context of the legislation and the background history of the parties without coming to the conclusion that the amendments are not akin to statutory exclusions, as urged by the appellant, but legislation enacted to remedy a long-standing concern. The amendments appear to be a response to the concerns of the school boards that new articles were being imposed upon them by arbitrators which were resulting in increased costs.

32 I agree with the comments of the motions judge, who, in turn, adopted the comments of Arbitrator Chapman in the decision at hand and Arbitrator Scurfield in *The Brandon Teachers' Association No. 40 of The Manitoba Teachers' Society v. The Brandon School Division No. 40* (unreported, February 6, 1998), where they held that the language in s. 126(2) was clear and unambiguous and indicated that it was the intent of the Legislature not to include certain items in the scheme of binding arbitration.

33 This is clear, not only from the language chosen by the Legislature, but also from considering the legislation in a purposive way and in accordance with the plain and simple meaning of the words chosen by the Legislature.

34 Further support for this position can be had with reference to the other amendments made at the same time, such as s. 129(3), which now requires that an arbitrator, in making an award, consider a number of factors in respect of matters that might reasonably be expected to have a financial impact upon the school division, including the school division's ability to pay.

35 It is also apparent that the Legislature intended s. 131.4(1) to be read together with s. 126(2) and, in effect, to provide some protection to teachers in respect of those areas which were being withdrawn from arbitration. While teachers have lost the right to seek an arbitrated solution when parties cannot reach a mutual agreement as to matters defined by s. 126(2), they were still given the right to file a grievance if the Division exploits its primacy in these areas in a manner which is not consistent with the newly imposed duty to act reasonably, fairly and in good faith.

36 Although the general purpose of the *Act* may be said to encourage collective bargaining on a broad range of issues, clearly the intent of the Legislature in enacting s. 126(2) was to address a specific perceived problem. In that sense, the amendments are remedial and are to be interpreted broadly. That does not mean that every possible connotation or extension of a chosen word is applicable, but they cannot be interpreted in a manner which would defeat the clear purpose of the legislation.

37 I find that the motions judge was correct when he held that the proper approach to interpretation of the amending legislation was that it

"be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects."

4.3 Disputed Clauses

1. Mainstreaming

38 The appellant sought to have a new clause imposed dealing with the mainstreaming and integration of special needs students into the classroom. The proposed clause is as follows:

> .01 The Association and the Division agree that the integration/mainstreaming of children with special needs into regular classrooms shall occur only when the necessary conditions for a positive educational experience exist for both the child with special needs and the students in the regular classroom.
>
> .02 The Association and the Division further agree that a careful and thorough examination of alternatives shall take place when decisions are made regarding the determination of the necessary conditions for a positive educational experience.
>
> .03 The Association and the Division further agree to jointly develop a detailed procedure to determine the necessary conditions for a positive educational experience, to allow for a careful and thorough examination of the alternatives and to provide a just and impartial appeal procedure for the regular classroom teacher.

39 Arbitrator Chapman concluded that he had no jurisdiction to grant such a clause on the ground that, although it was not prohibited by s. 126(2), it did not fall within the definition of a "dispute" in s. 97(1) of the *Act*.

40 The proposal with respect to mainstreaming has a direct effect upon a duty imposed on the school board and specifically set out in the *Act*, that is, its duty to provide adequate school accommodation. Sections 41(1)(a) and 41(4) require the board to provide school accommodation from Grades 1 to 12 for all persons entitled to education, which includes every person who has attained the age of six years (see s. 259). Thus, it is a duty specifically set out in the *Act* and does not fall within the definition of "dispute" in s. 97(1).

41 Many issues in dispute between the parties have a variety of aspects to them. Almost any matter of educational policy or decision that is taken in a school division can have some impact on a teacher's employment conditions. There must be a significant connection or nexus between the matter and the teacher's conditions of work. The matter in dispute must "be regarded fairly as being incidental to or consequent on terms or conditions of employment" (*Rolling River School Division No. 39*, *supra*, at para. 9). As Arbitrator Scurfield said in the Brandon award, it is a question to be decided in each case whether the clause in question is a matter which predominantly involves working conditions or whether it is a matter which predominantly affects educational policy.

42 That does not mean that every time a dispute affects educational policy there can be no arbitration. Whether or not it falls within the definition of "dispute" must depend upon the specific circumstances of each case, and the specific language of the proposed clause.

43 In this case, I agree with the finding of the motions judge. It is true, as the appellant asserts, that mainstreaming is an educational policy that also impacts upon the working conditions of teachers. However, it can only be said to fall under the concept of working conditions in the very broadest sense. Mainstreaming is predominantly an educational policy issue and the implementation of it clearly rests within the jurisdiction of the board.

2. Disruptive Students

44 The appellant requested a new article on disruptive students which reads as follows:

> .01 A student whose behaviour affects the safety or learning of other students shall be considered a disruptive student.
>
> .02 When a teacher indicates to the principal that a student exhibits behaviours which affect the learning or safety of other students, the principal shall, within five (5) working days of notification, convene a meeting involving the teacher(s), the principal and other support staff as deemed necessary. This committee shall review the concerns and determine whether the student shall be deemed disruptive.
>
> .03 Where a student is declared disruptive the following actions shall occur:
>
> (a) Appropriate programming, placement and supports for the student shall be established.
>
> (b) A full-time educational assistant shall be provided to assist the teacher until the behaviour has been corrected.

(c) No more than two (2) students who have been designated as disruptive according to this article shall be placed in any classroom.

(d) A schedule shall be developed to review the case and to determine the effects of the supports and whether the student should continue to be deemed disruptive.

.04 Where a teacher is not satisfied that the identification of, programming for, and/or placement of a student is appropriate, the teacher may appeal to a committee established by the Board. This committee shall have the authority to alter placements and/or supports as it deems necessary.

Before passing judgment, the committee shall afford the teacher and/or his/her representative an opportunity to make a presentation. The committee shall make its recommendation within ten (10) working days of receipt of the appeal.

.05 A student who continues to be disruptive even though programs and/or supports are in place shall be removed from a regular classroom and placed in a program to address the inappropriate behaviour.

45 Arbitrator Chapman concluded that he had no jurisdiction to grant such a clause because it fell within s. 126(2)(c), which dealt with class size, and teachers would have a direct involvement in policy formation.

46 This raises the question as to whether there is a distinction between class composition and class size. Both the arbitrator and the motions judge agreed that there was such a distinction. The two words are not synonymous. Class size deals with the number of students the teacher will

teach and class composition deals with the type of student a teacher will teach.

47 Although they are not the same, it is hard to imagine setting class size without considering composition. The two are intimately linked. A class of thirty students is different depending on whether it is a high school mathematics class or a Grade 1 class. In this case, the proposed clause has a direct impact on class size. By limiting the number of disruptive students to two in any particular class, the clause impacts on the size of that class.

48 Just as mainstreaming is predominantly a question of educational policy, so is the issue of disruptive students. Such students have a right to attend school and it is the responsibility of the school board to provide adequate school accommodation and to make provision for their education. The implementation and operation of a policy dealing with disruptive students, aside from considerations of the health and safety of the teachers involved, is predominantly a matter of educational policy and not one that should be decided upon by compulsory binding arbitration.

3. Due Process

49 The appellant requested a new clause on "due process for principals and vice-principals." The proposed clause reads as follows:

> .01 No principal or vice-principal covered by this Collective Agreement shall be demoted without just and reasonable cause.

.02 When the board demotes any principal or vice-principal covered by this Collective Agreement, and where the affected principal or vice-principal is not satisfied that the demotion is for just and reasonable cause, the board's actions shall be deemed to be a difference between the parties to, or persons bound by, this Collective Agreement under Article 11:00.

.03 When such a difference is referred to a board of arbitration under Article 11:00, the board of arbitration shall have the power to:

a) uphold the demotion;

b) rescind the demotion;

c) vary or modify the demotion;

d) order the board to pay all or part of any loss of pay and/or benefits in respect of the demotion;

e) do one or more of the things set out in sub-clause a), b), c) or d) above.

50 The appellant argues that the words contained in s. 126(2)(a) dealing with selection and appointment of principals is restricted to the initial selection only and not to any subsequent action. I agree with the arbitrator and the motions judge that this narrow interpretation would frustrate the intent and purpose of s. 126(2)(a).

51 Under s. 27 of the *Education Administration Miscellaneous Provisions Regulation*, Man. Reg. 468/88 R, a school board has the responsibility for designating a principal for every school. This is not a duty that may be delegated. To interpret s. 126(2)(a) as referring only to the initial appointment or selection of a teacher as principal would mean

that a school board has no authority to demote and change principals without going through the arbitration process. I do not believe that was the intent of s. 126(2)(a). The words as used in s. 126(2)(a) do not refer only to the initial act of hiring or placement, but also to ongoing decisions throughout the employment relationship.

52 However, it should be noted that the right to be dealt with fairly and the right to grieve for principals and vice-principals are retained by means of s. 131.4 of the *Act*. Therefore, should a party wish to challenge the manner in which a principal or vice-principal was demoted, it may do so by filing a grievance under s. 131.4(2) of the *Act*.

4. Transfer

53 The appellant proposed the following clause relating to transfer of teachers:

> .01 The Association recognizes the right of the Division to assign teachers employed by the Division to schools under the jurisdiction of the Division.
>
> .02 Prior to the Division making any final decision on the transfer of a teacher, the Division shall provide to that teacher an opportunity for consultation with respect to the proposed transfer, the details of the intended assignment, and the interests of the teacher.
>
> .03 The most reasonable notice possible, given the circumstance, shall be provided to the teacher.
>
> .04 The Division's right to initiate transfer shall always be exercised fairly and reasonably having due regard for all of the circumstances including the educational needs of the Division and the interests of the teacher involved.

.05 The Division shall bulletin and post all teaching or assignment vacancies in the staff room of each school in the Division.

54 The Association argues that the transfer referred to in s. 126(2)(a) refers to actually transferring and moving the teacher from school to school. The proposed clause on the other hand deals with the workplace fairness and includes such issues as notice and consultation and posting of vacancies where the Division has decided to transfer.

55 The movement of teachers between schools is clearly a matter within the exclusive jurisdiction of the school board. The unfettered discretion of the school boards in this area is confirmed in s. 101(5) of the *Act*, which refers specifically to the right of school boards "to suspend or discharge a teacher for proper and sufficient cause or to transfer a teacher at the discretion of the school board." Under s. 136(2) of the *Act*, the sole restriction on the ability of the school board to transfer a teacher occurs where the transfer would amount to an unfair labour practice.

56 To differentiate transfers, which are within the exclusive jurisdiction of the school board, and issues of notice and consultation in relation to transfers is a distinction without a difference. I agree with the motions judge that all issues relating to the transfer and assignment of teachers were intended by the Legislature to be excluded from arbitration and that matters such as consultation and notice are inextricably bound up with and form part of the larger issue of teacher transfers, subject only to the duty of fairness under s. 131.4 of the *Act*.

5.0 Conclusion

57 The appeal is dismissed with costs.

J.A.

I agree: J.A.

I agree: J.A.