

IN THE MATTER OF AN ARBITRATION:

B E T W E E N:

ROLLING RIVER SCHOOL DIVISION ("Division")

Employer

-and-

ROLLING RIVER TEACHERS' ASSOCIATION OF THE
MANITOBA TEACHERS' SOCIETY

Union

RE: STUDENT SERVICES CO-ORDINATOR GRIEVANCE

AWARD

BOARD OF ARBITRATION: MICHAEL D. WERIER, Chairperson
 GERALD D. PARKINSON, Nominee of the Division
 DAVID LEWIS, Nominee of the Union

APPEARANCES: ROBERT A. SIMPSON, Counsel for the Employer
 GARTH H. SMORANG, Counsel for the Union

DATES OF ARBITRATION: APRIL 30 and MAY 1, 2008

LOCATION OF ARBITRATION: WINNIPEG, MANITOBA

INTRODUCTION

This matter came before the Board for hearing on April 30 and May 1, 2008. The Division employs Student Services Coordinators ("SSC") who are members of the bargaining unit. At issue in this case is the role played by the SSC in selecting, supervising and evaluating resource teachers employed by the Division pursuant to their job description.

The Union's grievance arose in part from a case involving the termination of a resource teacher employed by the Division and concerns arising from this case. The Union's grievance filed June 19, 2001 challenges the Division's utilization of the SSC. The Union's grievance requested that the Division:

1. Acknowledge that it has misinterpreted and/or misapplied and/or violated the Collective Agreement, *The Education Administration Act and Regulations*, and *The Public Schools Act*.
2. Revise the job description for the SSC to remove the responsibility to assist Superintendents and Principals with the selection and supervision of staff.
3. Commit to not utilizing SSCs in the future for either evaluation or supervision of teaching staff represented by the Union.

4. Offer such other remedy as may be fair and reasonable in the circumstances.

OPENING STATEMENT OF THE UNION

On behalf of the Union, Mr. Smorang indicated that the grievance concerns an evaluation process. Brenda Nicholson ("Nicholson"), a teacher, was evaluated over the course of three years and at the end of this time a decision was made to recommend termination. The Board ultimately accepted this termination. In two of the three relevant years the teacher was employed in a resource capacity and the reasons for recommending termination are set out in a report prepared by the Superintendent with the help of two Principals and a third person being Parrott, a SSC. The termination was ultimately overturned by a Board of Arbitration chaired by Blair Graham in an Award dated July 31, 2007. The termination is not an issue in this case.

Subsequent to the hearing, Mr. Justice Nurgitz of the Manitoba Court of Queen's Bench concluded that the arbitrator committed substantial errors, set aside the arbitration award and substituted an order that the Division had cause to terminate Nicholson (2008 MBQB 192).

The Union indicated that there were two general grounds for the termination:

- (a) Confrontational argumentative attitude combined with an unwillingness to take direction from the Principal;

- (b) Lack of demonstrated skills and competency in teaching.

What is clear is that the termination was a result of substandard performance based on evaluations of the teacher throughout her teaching tenure.

Mr. Smorang indicated that the focus of the Union's case will be to examine the role of Debbie Parrott ("Parrott") as a SSC. Parrott was a member of the bargaining unit and a person not designated as Principal in the evaluation process. The question is whether it was appropriate within the powers of the Division to so involve Parrott in the role that she ultimately played.

The Union indicated that they are not only wishing to look at what the Division mandated the SSC to do, but what the Division mandated Parrott to do in the aforementioned circumstances. The question in this case is whether the SSC crossed the line from what a bargaining member can legitimately do.

The Union's position is that the role of management is to make human resource decisions such as termination. When it comes to evaluation, the ultimate responsibility lies with the Superintendent. While Principals are in a bargaining unit, they have statutory powers and are mandated to participate in the hiring, assignment and evaluation of fellow teachers. Statutorily, Principals are in charge of their school, including supervision of staff at that school.

The resource teacher reports to the Principal, and the Union accepts that the Principal is the first level of administration and has some duties and administrative functions in that regard. Overall, it is the Union's position that human resource decisions are made by people above and outside the bargaining unit. While it is acknowledged that in many workplaces a lead hand or charge nurse can supervise like a Principal, the difference with the Principal is that there are statutory empowerments. In this case, there is a question of statutory interpretation and delegated powers. An issue will be whether the Principal has the right to delegate certain of his or her statutorily given powers.

In the final analysis, the Union is asking the Board to accept that by the job description and the Division's actions in directing the SSC, it has de facto made her an administrator with duties at least equivalent to a Principal. By doing so, the Union will be arguing that the Division contravened its legislative powers in *The Education Administration Act and Regulations* and also in *The Public Schools Act*.

By expanding the powers to the SSC, the Division violated legislation by in effect making the SSC a co-evaluator. More generally, based on labour relations and bargaining unit principles, the line between those who manage and those who work has been blurred and this will create divisions within the bargaining unit.

By way of remedy, the Union is asking the Division to remove from the SSC's job description the responsibility to assist the Superintendent and Principal with selection

and supervision of teaching staff and is seeking an order that the School Board and Division refrain in future from using the SSC in that capacity.

OPENING STATEMENT OF THE DIVISION

On behalf of the Division, Mr. Simpson noted that the grievance alleges a breach of the Collective Agreement ("Agreement") and of Provincial legislation. The onus is on the Union to establish such breaches, and it appears that no specific sections of the Agreement are alleged to have been breached. The position of the Union appears to be that there was a breach of the legislative provisions by reason of the alleged involvement of the SSC. What is not clear is the extent of the SSC involvement or whether the Union maintains they cannot be involved at all in the duties that they performed.

The Division pointed out that neither the Agreement, existing legislation, common law, or commonsense prohibit the involvement of the SSC in hiring, supervision and evaluation. Mr. Simpson noted that when it comes time to deliberate on this issue it is important to bear in mind there are individuals like the SSC who are in scope and who have specialized assignments with or without specific increments for their specialty. If the Board was to conclude that the Division stepped over the line in this case, great care must be taken as to how the Board fashions a ruling and great care must be taken to not make any kind of sweeping statement which could have a great impact on the functioning of school divisions.

Overall, it was submitted that the position of the Division is that someone performing the role of a SSC, while not making human resource or management decisions, can and is involved in processes in the area of hiring, supervision and evaluation.

EVIDENCE

The parties agreed the most of the facts were not in dispute. As a result, a Statement of Agreed Facts and Documents was submitted and is reproduced here:

1. The Rolling River School Division ("the Division") and the Rolling River Teachers' Association of the Manitoba Teachers' Society ("the Union") (collectively referred to as the Parties) are parties to a collective agreement dated July 30, 2003. A copy of the Collective Agreement will be filed as Exhibit 1.
2. The Parties agree that the Arbitration Board has been properly appointed to hear and determine a grievance filed by the Union and that the Board has jurisdiction to determine the issues between the Parties as further set out in the grievance. A copy of the grievance will be filed as Exhibit 2.
3. Effective June 18, 1982 and revised May 6, 2004, the Division adopted and implemented a school division regulation entitled "Teacher Supervision and Evaluation". The regulation sets out the manner in which teachers are supervised

and evaluated by the Principal of the school and/or the Superintendent of the school division. A copy of the School Division Regulation will be filed as Exhibit 3.

4. The Division employs resource teachers within the School Division who report to a Principal. A copy of a document entitled "Resource Teacher Job Description" will be filed as Exhibit 4.
5. In addition to resource teachers, the Division employs a "Student Services Coordinator". The position falls within the bargaining unit. The Student Services Coordinator reports to the Assistant Superintendent of the School Division. At all material times the Student Services Coordinator position was filled by Parrott. A copy of the Student Services Coordinator job description will be filed as Exhibit 5.
6. Among the responsibilities assigned to the Student Services Coordinator are:
 - (a) Provide leadership in the evaluation of existing programs, and utilization of staff and resources as it relates to special needs; make any recommendations for any revisions or alterations as required.
 - (b) Assist the Superintendent and Principals with the selection and supervision of staff, particularly in the special needs and educational assistant areas.
7. The Division employs a Superintendent of the school division, who, at all material times, was Mr. R.N. Whitley. A copy of the Superintendent's job description will be filed as Exhibit 6.

8. The Division also employs school Principals. A copy of the job description for school Principals will be filed as Exhibit 7.
9. The grievance, filed by the Union, originates from an evaluation process conducted upon Nicholson, a teacher employed by the Division on a full time permanent contract since May 2001.
10. At various points throughout her employment with the Division Nicholson was assigned to duties as a Classroom teacher and at other points she was assigned duties as a Resource teacher. Specifically, during the school years 2003/2004 and 2004/2005 Nicholson was assigned as a Resource teacher. In both these years she was formally evaluated by the Division as to her performance in that assignment.
11. On or about November 29, 2004 Debbie Parrott wrote a letter to Brenda Nicholson re: meeting on Thursday, November 24, 2004 with carbon copies to Kathleen Slashinsky, school Principal, and to Nicholson's personnel file. A copy of the letter will be filed as Exhibit 8.
12. Ultimately, at the end of the 2005/2006 school year the Superintendent submitted a Confidential Report to the Rolling River School Division Board of Trustees recommending that Nicholson's contract with the Rolling River School Division be terminated by written notice on the basis that she had not demonstrated the skills

necessary for competency in teaching. A complete copy of Mr. Whitley's Report with attachments will be filed as Exhibit 9.

In addition, Diane Beresford ("Beresford"), Deputy CEO of the Manitoba Teachers' Society, testified for the Union. Her evidence is summarized below.

The Division chose not to call any witnesses, but tendered the following four documents:

1. Review of Rolling River School Division Evaluation Process-Resource Teacher prepared by Sue Kathler of People First HR Services on March 27, 2008 (Exhibit 11);
2. Curriculum Vitae of Sue Kathler (Exhibit 12);
3. Expert Report of Gail Bagnall, Superintendent/CEO of Lord Selkirk School Division, dated March 28, 2008 (Exhibit 13);
4. Resume of Gail M. Bagnall (Exhibit 14).

Division counsel confirmed that the authors of the above reports were not requested to be cross-examined. Union counsel indicated that submissions would be made in closing argument as to the weight, if any, to be placed on the opinions of Kathler and Bagnall.

EVIDENCE OF THE UNION

Beresford is the Associate General Secretary of the Manitoba Teachers' Society ("Society") and functions as the Deputy CEO. She taught for fifteen years and was Vice-President and President of the Society, which has approximately 14,000 members.

Beresford stated that teachers undergo both a formal evaluation process and self-directed professional growth. The Union provides supervision and evaluation workshops during the year to encourage such professional growth.

Beresford provided an overview of teacher remuneration. Teachers' salaries are based on a grid and there are certain additional allowances for performing administrative tasks. Teacher assignments are in the discretion of the Superintendent having due regard to the Agreement. Principals are in the bargaining unit and some of their authority is set out in the regulations passed pursuant to *The Education Administration Act*. For example, the Principal is to participate in the hiring, assignment and evaluation of teachers (s. 30 Regulations).

According to Beresford, teacher evaluations are done by the Principal or Vice-Principal which involves one on one interviews and formal evaluations. There are also formal observations and regular meetings dealing with the teacher's objectives and goals. Evaluations are generally comprised of a series of events so that nothing comes as a surprise. The evaluation ultimately ends up on the Superintendent's desk. Beresford referred to *The Education Administration Act* and *The Public Schools Act*. In neither statute is a teacher given any responsibility for evaluations.

Beresford commented on the job description of a resource teacher. The resource teacher provides support to students with special needs and to teachers. They are not

assigned a classroom and they report to the Principal of the schools to which they are assigned. The Principal has a statutory responsibility for the programming of all students, including those with special needs.

Beresford also noted that under *The Public Schools Act Regulation* a Principal must ensure that a pupil is assessed as soon as reasonably practicable if he or she is having difficulty meeting the expected learning outcomes (s. 4(1)). The Principal must also ensure that a pupil with special needs has an Individual Education Plan ("IEP") prepared by the teacher and other in-school personnel (s. 5(1) and 5(2)).

Beresford also commented on the Rolling River School Division Regulation dealing with teacher supervision and evaluation. The regulation reiterates what is set out in the statute in that the Principal is responsible for supervision and evaluation of teachers and observes the teachers in the classroom.

Beresford indicated that a Principal doing an evaluation may not have had teaching experience in a given area. Beresford stated that a Principal could get feedback from other sources with respect to the evaluation of a teacher and that there is a line between offering objective information and actually doing an assessment or value judgment. For example, there is a difference between asking whether or not a consultant has met a deadline and that is objective information versus asking a department head whether a teacher is competent to teach a senior high school course. The Principal can gather information, but has to make an assessment and reach a conclusion and cannot co-opt

peers into the process in terms of making a judgment on competency or suitability to teach. Because the Principal is a member of the bargaining unit, the Union has concerns if the Principal gets opinions and involvement from peers in doing an evaluation. A Principal has a statutory duty to evaluate and is also head of the school as well as a team leader. Sometimes the relationship of the Principal as a union member and as head of the school works and the Union recognizes this. Discipline, reassignment and transfer come however from the Superintendent, and there is a line drawn between these two jobs.

Beresford testified that there is a real danger when someone in the bargaining unit takes over the role of management in disciplining, transferring, etc. These are duties which belong to senior administration of the school division, and once peers behave as a manager the effectiveness of the union is undermined.

Beresford commented on the Rolling River School Division Regulation dealing with the school Principal role, expectations, authority and accountability. It sets out the Principal's role in evaluating teaching effectiveness accurately and impartially and submitting to the Superintendent evaluation reports on school staff. In addition, the Principal is to observe, advise, and where necessary, give general direction to operational personnel regarding the performance of their assigned duties. The Union sees nothing objectionable regarding these roles.

Beresford also testified with respect to the Rolling River School Division Regulation

regarding SSC job description. There are 23 key responsibilities set out in the description and the Union has concerns about the clause indicating that the SSC assists the Superintendent and Principals with the selection and supervision of staff, particularly in the special needs and educational assistant areas. While the Union has no problem with providing input with respect to the education assistant needs, the problem is with the professional staff. The Union objects to the participation of the SSC in the hiring process. Also, the reference to supervision could mean coordinating work or directing day-to-day work which includes evaluation and recommendations for discipline which are the purview of the Principal.

If the SSC in the Division was a senior administrative position, the Union would not object to their participation in evaluation. Beresford also commented on a teacher's personnel file. Normally a Superintendent has access to the file, and under *The Public Schools Act* the School Board or a person acting on behalf of the School Board shall provide a teacher with access to their personnel record upon request. The placing of a document on a personnel file is only done through the Superintendent's office. The significance of a letter going on file is that it has to be vetted by the Superintendent and the SSC should not have any authority to place such a letter on the file.

Beresford also testified about the specific involvement of the SSC in Nicholson's termination and was referred to Exhibit 9, a confidential report to the School Division Board of Trustees which was prepared by the Superintendent, R.N. Whitley. Beresford testified about the Union's concerns about various involvements the SSC had in

Nicholson's evaluation. They included the following:

1. The SSC attended a meeting on December 1, 2003. The concern was that the purpose of the meeting was to review concerns and issues about performance and the meeting could be construed as reviewing possible disciplinary action;
2. Nicholson received a letter dated December 3, 2003 from the Superintendent. The Union's concern is why the SSC was being copied on this letter;
3. The SSC attended a meeting on June 18, 2004 with Nicholson. Again the Union's concern was that the SSC did not have an obligation or a statutory duty to evaluate and therefore should not be at the meeting. She took notes and spoke at the meeting. The Union feels that it is inappropriate as a member of the bargaining unit and as a peer member to take this kind of role in the meeting;
4. On September 28, 2004, the Superintendent wrote to Nicholson with regards to her performance evaluation and it was copied to the SSC. The Union would ask the questions why the SSC was being copied and feels that it was inappropriate in the circumstances as it dealt with an evaluation;
5. On June 23, 2005, the Superintendent again wrote to Nicholson about her assignment for the 2005/2006 year, that a final report would be given on her performance on May 1, 2006, and a decision could be made regarding her

employment status at that time. Again, the Union believes that it is inappropriate that the SSC would be included in this type of letter which could be regarded as being disciplinary in nature;

6. The SSC was present at the Board of Trustees meeting dealing with the potential termination of Nicholson, and the Union's position is that the SSC as a fellow union member has no place at a hearing with the Principal and Superintendent to determine if a contract is to be extended or not and it is not appropriate or right for the SSC to play such a function.

On cross-examination, Beresford acknowledged that Nicholson filed a complaint with respect to Parrott's involvement in her case in that she was unprofessional. Beresford acknowledged that she was aware that the complaint related to Parrott's involvement in the evaluation. While she was not specifically aware that the complaint was dismissed because the process is confidential, she was aware that the complaint "had gone away".

Beresford agreed that the parties have recognized that there are individuals under the Agreement who are appointed to specialized positions and that the Superintendent is responsible for appointment of such positions. While the Superintendent is responsible for the assignment of Principals, sometimes Boards will get involved or there may be a reference to a Parent Advisory Council. While the Board hires a teacher, generally the offer comes from the Superintendent who of course is an employee of the Board which is the employing authority.

Beresford acknowledged that legislation such as *The Education Administration Act* and *The Public Schools Act* is not exhaustive and that it obviously cannot cover everything, but maintained that it does set out general areas of responsibility and that “it is a pretty good list”. While it is a general job of the Principal to evaluate the teachers’ assistants (“T.A.’s”), Beresford acknowledged teachers are involved to the extent that having conversations with a Principal is not inappropriate and that it is helpful. The only way to evaluate without input is through observation. Beresford did maintain that it was helpful to consult and acknowledged that that was not listed in the 39 duties. With respect to the Principal’s duties, Beresford maintained that the “buck” stops with the Principal, but that the Principal had to have access to staff to fulfill their duties under the regulations passed pursuant to the legislation.

Beresford acknowledged that the Principal is responsible for ensuring that IEPs are done and agreed that the Principal must rely on others to fulfill his or her duty under the regulations. She agreed that IEPs are prepared in relation to students with special needs and that the challenges with these students can be many and varied. She also agreed that very often therapists and psychologists are involved with these students and that the Principal charged with the responsibility for the IEP has to rely on these people. In response to a question that the Principal may not have a background in special needs, Beresford replied that the Union’s position is that it behooves the Principal to become more expert in this area. Obviously the Principal cannot be an expert in every area and so the Principal has to rely on others.

Beresford agreed that part of a resource teacher's role may involve the preparation and submission of IEPs, behavioural plans and funding applications. She acknowledged that the SSC offers assistance, advises and supports resource teachers. She stated that if a resource teacher was having difficulty, the SSC would become involved in training. She would not agree that they are involved in direction as she maintained that the SSC should have a collaborative approach with the resource teacher. Beresford said that rather than offering direction to a teacher, if there was difficulty, the SSC would offer a template to provide other kinds of reports, workshops or professional development. If the resource teacher is not improving, the Union would take the position that the SSC should approach the Principal with the teacher for the purposes of seeking help. The Union would hope that the Principal would be involved before it gets to this point. The roles of the teacher, the Principal, and the SSC are different, and the SSC's role is to support and assist the teacher. Beresford agreed that the SSC is the Division's special needs expert and she did accept that the Principal may have to go to the SSC for advice and rely on them, if appropriate. Beresford maintained that it was appropriate for the SSC to provide information and input, but the decision on assessment and evaluation should remain with the Principal. It was suggested to Beresford that if an IEP was useless would you not expect the SSC to indicate to a Principal that while the IEP was submitted on time it was of no value, Beresford indicated that she thought it was fair to say that you can ask for input of a factual nature, but not assessment. In addition, she indicated that the Principal should be acting with the resource teacher, but that does not mean that the Principal cannot access information from the SSC.

Beresford agreed that the evaluation reports, while signed by the Principal, were not signed by the SSC. In response to a question with respect to a Principal's inability to fulfill their obligations under the regulations and legislation without access to their staff, Beresford indicated that Principals evaluate outside their field of expertise all the time.

It was suggested to Beresford that a Principal would be shirking his or her responsibility to purport to evaluate without input from experts. Beresford responded that the Principal should follow the teacher throughout the day, watch them interacting, and watch them one on one with students. Also, a Principal should read the IEPs and funding applications and in addition talk to the SSC, but evaluation and assessment must remain the responsibility of the Principal. She agreed that while an SSC might have some involvement with respect to difficulties concerning the preparation of IEPs and funding obligations, the SSC however should not be copied with letters of direction or reprimand, nor should they be present at post evaluation meetings. If difficulties continue, the SSC should continue to be involved in terms of support, assistance and professional development. In her view it was not appropriate for the Principal and the teacher to meet and certain discussions should be held one on one with the teacher and the Principal. The SSC should not be involved in meetings or receive copies of letters that are disciplinary in nature and directive. Beresford maintained that attending a meeting to discuss performance is not appropriate to have the SSC present and that she had every confidence that a Principal could offer feedback without the necessary attendance of the SSC. Beresford agreed that teachers were involved in supervision of students and the

Principal was responsible overall for supervision of students.

Regarding the meeting of April 18, 2006, Beresford maintained that the attendance of the SSC at the meeting just to answer questions was not appropriate because her attendance implied that she was part of the senior management team. With respect to SSC's involvement in the selection process of a resource teacher, Beresford stated that the SSC could set criteria and be part of the selection committee, but it would be the Principal and the Superintendent who would have the ultimate authority to engage the teacher. The decision as to who to select must rest with the Principal and the Superintendent.

Beresford maintained that the SSC cannot be involved in the supervision of teachers, and in response to a question that coaching was an element of supervision, Beresford replied that it was collaboration and that the Union encourages mentoring. According to Beresford, supervision means a position of power or superiority over someone.

EXPERT EVIDENCE OF THE DIVISION

Sue Kathler reviewed the process which was used to evaluate the performance of the Resource Teacher and provided a five page report.

Among other things, she indicated that the SSC is considered a peer with whom the Resource Teacher worked closely. The SSC was in a position to provide feedback to

the Resource Teacher.

She also opined that the valid evaluation of the Resource Teacher would not have been possible without input from the SSC given the absence of any day to day direct supervision and given how closely the SSC worked with the Resource Teacher.

Gail Bagnall's report outlined the role played by the Director of Student Services in the Lord Selkirk School Division. The report attached two appendices; an outline of the job of Director of Student Services and the Role, Responsibility and Performance Evaluation of the Resource Teacher.

In Lord Selkirk, the Director plays a multi-faceted role and assists the Principal in interviewing and short testing Resource Teacher candidates and supporting and mentoring the new Resource Teacher. The Director can provide the Principal with information regarding the timeliness and accuracy of funding applications submitted by the Resource Teacher and to the achievement of standards expected of the Resource Teacher.

SUBMISSION OF THE UNION

On behalf of the Union, Mr. Smorang noted that the facts in this case are not largely in dispute. The Division terminated Nicholson as a result of a conclusion that she did not have the necessary skills to teach. The Division came to the conclusion largely from

evaluations and meetings in 2003/2004 and 2004/2005. Parrott had a significant role in the evaluation process at the Division's direction.

The Union pointed to a number of important facts regarding Parrott's role in the process. In particular, she was present at a December 1st meeting when Nicholson returned from stress leave, a meeting that was ill conceived and poorly handled. She also was the recipient of a variety of letters, attended post-evaluation meetings, and wrote to Nicholson with a copy to the personnel file.

Exhibit 9 is a confidential report of the Rolling River School Division Board of Trustees prepared with Parrott's assistance, and in addition she came to the April 18, 2006 Board of Trustees' meeting. The Union asserted that clearly Parrott, as the SSC, was used in a far greater capacity than merely as an information source. It is fair to conclude that Parrott became equivalent to a co-evaluator. If one accepts the Division's submission that the SSC was an expert compared to the Principal, then it is not too far to suggest that she in fact was the main evaluator. Parrott was utilized in the process which ultimately led to the Board terminating the employment of Nicholson.

When one looks at the facts in their entirety, the Division did the following:

1. It violated the legislation by co-opting the SSC into a role of evaluator, a duty expressly extended to the Principal in the legislation;

2. It violated labour relation principles by in effect making the SSC a manager in a human relations sense and accordingly put her into an inherently conflicted position.

The Union pointed to the legislative scheme governing the responsibilities of teachers and principals, and in particular referred to the provisions of *The Education Administration Act and Regulations*, *The Public Schools Act*, and principles of statutory interpretation as more fully analyzed in *Driedger on the Construction of Statutes*.

The Union referred to *The Education Administration Act*, noting that as between the principal and the teacher, the principal “manages” and the teacher “teaches”. The principal is responsible for evaluating teachers and supervision of staff and the teacher is responsible for teaching type functions.

The Union relied on the maxim of statutory interpretation that to express one thing is to exclude another. Principals are given the statutory right to supervise staff and evaluate teachers, while teachers have not been given any similar responsibilities. It can be presumed that if the legislature intended that teachers perform supervisory and evaluative functions, then they would have expressly stated so.

Another statutory maxim set out in *Driedger* is that where a provision specifically mentions one or more items but is silent with respect to other items that are comparable, it is presumed that the silence is deliberate and reflects an intention to exclude the items

that are not mentioned. Therefore, the Union argued that if the legislature had intended for teachers to perform the same types of functions as principals, then it would have specifically provided for this duty.

A further principle set out in *Driedger* is that legislative drafters strive for uniform and consistent expression. Once a pattern of words has been devised to express a particular purpose or meaning, the pattern is used to express this purpose or meaning each time the occasion arises.

The Union relied on the Supreme Court of Canada's decision in *Knight v. Indian Head School Division No. 19* (1990), 69 D.L.R. (4th) 489. In *Knight*, the Supreme Court held that if it had been the legislative intent to provide both teachers and the Director of Education with the same right of appeal of their dismissal, it would not have expressly restricted Director's rights. Similarly, if the legislature had intended both principals and teachers to perform the same duties, it would not have expressly restricted teacher's duties.

The last principle of statutory interpretation relied upon by the Union was that the provisions of the legislation are intended to work together. In this case, principals are expressly given power to supervise and evaluate, while teachers are not given such power. This creates a consistent framework allowing the parts to fit together, with each part contributing in their respective way.

The Union relied heavily on the decision in *Ottawa-Carlton Catholic District School Board v. Ontario English Catholic Teachers' Association* [1999], O.L.A.A. No. 772. At issue in this case was whether department heads performing evaluations of teachers was contrary to the regulations under *The Education Act (Ontario)* and the provisions of the collective agreement. Principals are not in the bargaining unit and department heads are in the bargaining unit. The employer argued that:

A proper interpretation of the Education Act does not preclude principals from delegating aspects of performance appraisal to department heads. Counsel for the employer argued that the principal remains responsible for the "conduct" of the appraisal and that the legislation did not intend to preclude department heads from a participatory role in performance appraisal. Counsel for the employer submitted that there was no inherent conflict, because the role played by department heads in performance appraisal is a minor one, does not involve any disciplinary aspect, and does not involve a substantial amount of the department head's time.

The majority of the Board determined that the Union's grievance must be allowed and stated at paragraphs 54 and 55 the following:

..... What the legislation says the Board cannot do is develop a performance appraisal policy, or agree to a provision in a collective agreement, which gives department heads the responsibility to conduct the "performance appraisal" of teachers.

We do accept that, as part of a jointly developed Board/OECTA program, a department head may be involved in reviewing the performance of the teachers in their department in the course of the professional development of the teacher. It has been suggested that the policy, as it exists, distinguishes "performance appraisal for growth" from "performance appraisal for review". Further, it was suggested that it is only the latter form of "performance appraisal" which falls within the appraisal contemplated by the legislation, and which must be conducted by principals. We reject this suggestion. For several reasons, it is our conclusion that the "performance appraisal for growth" described in the policy is

not sufficiently distinguished from the "performance appraisal" which the legislation directs be conducted by principals, if it is to be conducted at all. First, the language of the policy is problematic. It is difficult to get away from the fact that what department heads are expected to do under the policy is "performance appraisal". Second, the purpose of that appraisal is not clearly distinguished. What department heads are asked to do appears to us to be a first step in a linked process which may result in a principal doing a "performance appraisal for review". It is difficult to see how a teacher ever reaches the review stage without being singled out by their department head in the first stage of the process. Because the processes are linked in this way the element of participation in professional development of the teacher is overwhelmed by the impression that the department head is the first stage in what could end up being a disciplinary process. The other concern we have with the present policy is that it is difficult to see that the department head's role with respect to probationary teachers is not directly linked to decisions about tenure. For all these reasons we conclude that the present policy does not adequately distinguish a legitimate role for department heads from the "performance appraisal which the legislature directed would be conducted by principals" if it were to be done at all.

The Union referred to Beresford's testimony where she drew the distinction between a teacher assisting with professional growth as opposed to actually doing a performance appraisal and stated that the *Ottawa* decision makes this distinction as well.

The Union maintained that damage is caused to the bargaining unit if the SSC is involved in evaluating a teacher as this puts the parties in conflict. The Union noted that there is a great deal of jurisprudence dealing with inclusion and exclusion in a bargaining unit.

The decision in *North York Public Library Board v. Canadian Union of Public Employees Local 771*, [1992] O.L.R.D. No. 444 is illustrative. In this case the Board determined that the position of Office Services officer was not within the bargaining unit. A determining factor was that the officer played a key role in evaluation and recruitment of staff and

was responsible for annual staff evaluation. The Board found that the officer could impact on other employee's careers and this would result in a conflict of interest if he continued in the bargaining unit. Similarly the Union argued that the role played by the SSC in doing evaluations would put them into a conflict of interest with teachers.

The Union submitted that the Principal's role is to go beyond meetings. The Principal ought to be trained as an evaluator. The Principal's use of other resources must be warranted and used appropriately. As Beresford testified, there is a line between getting information and getting an opinion.

Turning to the evidence at hand, the Union argued that not only did the Division get an opinion, it co-opted the SSC into a role as evaluator.

The Union stated that while they were looking for a statement of principle from the Board, it maintained that the legislative scheme and the facts of the case indicate that the Principal in evaluating a resource teacher is not a "babe in the woods" as he or she might be in evaluating a band teacher or a French teacher. Principals are legislatively mandated under *The Public Schools Act* regulations to sign every individual education plan.

In summary, the Union reiterated that they were seeking a remedy that the SSC's job description be amended to the extent that it not participate in the hiring, supervision and evaluation of teachers as this was beyond the jurisdiction of the Division and that the

Board cease and desist from such utilization. If the Division wants the SSC to have these duties, they can seek to exclude the position from the bargaining unit or create an Assistant Superintendent position to deal with it.

SUBMISSION OF THE DIVISION

On behalf of the Division, Mr. Simpson stated that the whole area of special needs is a very important one and indeed a complex area for any School Division. One has to only look at the legislation in the area and the directives that are set out in the legislation to see what a Division has to go through to ensure that children with special needs are taken care of.

A great deal of expertise is required, including the use of therapists and psychologists. Some experts are hired from outside the school system and some Divisions have engaged an internal expert such as Rolling River did in the context of their SSC.

In looking at the job description it is clear that in essence the Division looks to the SSC as their internal expert to oversee that aspect of education, being special needs. There is a need for a working relationship between the Principal, a resource teacher, and the SSC. The Rolling River School Division does not have an Assistant Superintendent. The SSC is not assigned to a particular school, but oversees the entire program and is a resource to the Principal and all the teachers in the Division. It is clear that a very significant function of a resource teacher is the preparation and implementation of

individual education and behavioral plans which are developed to establish an educational framework for a child.

Funding applications are very important and are used to obtain sufficient funds to provide a program or for an individualized special needs situation. This is reviewed in Superintendent Whitley's report and Arbitrator Graham's decision in *The Rolling River Teachers' Association of the Manitoba Teachers' Society and Brenda Nicholson v. The Rolling River School Division* dated July 31, 2007.

Nicholson's performance with respect to IEPs and funding applications became the source of a great deal of time and energy on the part of staff in 2003/2004 and 2004/2005. IEPs and funding applications are prepared by a team and referred to the SSC and then to the Province. It is important to note that the SSC is an expert in these areas.

Mr. Simpson then turned to the facts in this particular case and stated that all the material functions of the SSC relate directly to special needs. The parties have recognized this in the Agreement by stipulating that there will be appointments and incremental payments. It is clear that the evaluations are conducted by the Principals and no one else. The resource teacher was employed at two different schools and the Principal did evaluations by holding meetings, which is evident if one goes through the report and evaluations. The Division argued therefore that the evaluators were the Principals and Parrott's involvement was to provide assistance to the resource teacher

who was either unwilling or unable to perform in certain areas. It was hoped that her deficiencies would be corrected.

It was submitted that this case involved a two stage process. Initially Nicholson was employed as a resource teacher and the SSC was involved in this process to assist her in 2003/2004 and 2004/2005. At the end of 2004/2005, the Superintendent reassigned her and removed her from the position of a resource teacher. Arbitrator Graham found that this decision was *bona fide* and reasonable. In 2005/2006 Nicholson was no longer a resource teacher and the SSC had no role in that process. The Superintendent, supported by the Principal involved, made the recommendation for termination.

It was noted that counsel for the Union took issue with a number of events, including:

- (a) The SSC receiving certain letters of a personnel nature;
- (b) The SSC's attendance at two post-evaluation meetings;
- (c) The SSC writing a letter to Nicholson with respect to her performance;
- (d) The SSC's attendance at two further meetings.

Mr. Simpson stressed that the December 1st meeting, the letters the SSC received, the meetings she attended and the letters she wrote all occurred when Nicholson was having difficulty performing as a resource teacher. The matters under discussion related to IEPs and funding applications. At this time, the SSC was involved in trying to correct the difficulties.

With respect to the April 18th meeting, the SSC was not involved with the resource teacher during the final year. The arbitration award states that she was there to answer questions. Whether she was there as a resource or not, it was submitted that this case does not revolve around that issue.

It was noted that the job description refers to the SSC assisting the Superintendent and Principal in selection and supervision. It was pointed out that Beresford testified that she had no issue in the SSC establishing selection criteria, being involved in the interview process, and making recommendations following the interview. However, she took issue with the SSC making a decision with respect to hiring or appointments. It was pointed out that the Union has not asserted that the SSC is hiring or making appointments. Therefore it was submitted that the job description which refers to assisting cannot be offensive to the functions outlined by Beresford in her testimony.

With respect to the issue of supervision and evaluation, the Division noted that the Principal is in charge of the school and responsible for supervision and conducting evaluations. The Division submitted however that there are areas and times where it will be impossible for the Principal to properly fulfill the functions without having access to those with greater knowledge or those who have a closer working relationship with the subject matter of the evaluation. It was submitted that this is one of those situations.

The Division submitted that it is a different concept evaluating a classroom teacher as

opposed to a resource teacher. One does not need knowledge in a specific area to evaluate a classroom teacher. An evaluator is in the classroom to determine whether a teacher has the fundamentals to conduct a class which results in learning. Resource teachers play a different role than a classroom teacher.

Beresford testified that an evaluator must follow a resource teacher around while the resource teacher performs their duties. It is possible that some of that can be done and a Principal can get involved with a resource teacher, but there are other areas of a resource teacher's role where a Principal does not have expertise. While the Union hopes that a Principal will become more knowledgeable, a Principal would be remiss if he or she did not seek input from the SSC in conducting the evaluations. The Division is not expecting the Principal to ask the SSC for evaluation of a resource teacher, but does expect the resource teacher to assist the Principal which would involve supervision and direction. The SSC must be able to advise the Principal how well or how poorly the resource teacher is performing in those areas of expertise in which the SSC has become involved. The SSC has to become involved according to the Division if he or she comes into lend expertise and therefore will be providing direction and supervision. Nobody has suggested that there is a supervisor hierarchy between the SSC and resource teacher and that it is supervision in the context of a managerial position involving discipline. There is however a supervisory or directory component.

With respect to evaluation and supervision, the SSC will provide input to the Principal and at times it may relate to performance, but it is the Principal who is responsible for

evaluation and signing off on an evaluation. What the Principal does or does not do with the information from the SSC is entirely up to the Principal.

Exhibit 11 (Review of Rolling River School Division Evaluation Process - Resource Teacher prepared by People First HR Services on March 27, 2008) accepted that the evaluator has feedback from various sources and is not suggesting that the SSC fills in for the Principal. The Principal, in doing a valid appraisal, has to appropriately access input from the SSC in certain areas.

Mr. Simpson referred to the expert report of Gail Bagnall (Exhibit 13) and noted that this was an expert opinion which was not challenged. The Division argued that the approach to this case ought to be that is preferable and necessary for the SSC to be involved in the selection, supervision and evaluation of the resource teacher. The role is not as a manager and an evaluator, but as a colleague with specialized knowledge. The Division submitted that it just makes sense for the Principal to have access to this information and asked why one would try to limit the role of the SSC. It cannot be in the best interest of the students, but the Union says it is because the SSCs are in scope, and with the exception of the Principal, in scope employees cannot be involved by reason of regulations passed pursuant to *The Education Administration Act*.

The Division stated that the Union's position appears to be that because s. 28 and 30 of the aforementioned Act refer to Principals, that one has to interpret that section to exclude all others and that only Principals can be legally involved in the exercise of the

functions set out in those regulations.

The Division argued that if one accepts that interpretation, one is going to have a problem because Principals are going to have to run the whole school on their own.

It was pointed out that the Union does not have a problem with the supervision of an educational assistant by an SSC. The Union cannot have it both ways. There is no question that the first line of responsibility rests with the Principal, but it has to have been contemplated that certain functions would be exercised by others. Out of necessity, a host of others bear and take responsibility for many of the functions that the Principal is ultimately responsible for. It was submitted that s. 30 states that the Principal participates in hiring, assignment, etc., but does not specifically state that this is to the exclusion of all others.

It was also submitted that s. 39 and 96 of *The Public Schools Act* does not specifically state that teachers will do certain specific functions. Beresford in her evidence acknowledged that certain things she did as a teacher on a day to day basis were not necessarily specified in legislation. In particular, paragraph 3 of *The Public Schools Act* refers to other duties which mirror the obligations under s. 96 of the Act. It was submitted that there was nothing in the Act or regulations which expressly or impliedly restricts the ability of the School Board to appoint a teacher or assign a teacher duties such as those assigned to the SSC. Certainly there is nothing in the Agreement between the parties which expressly prohibits such an assignment.

The Division relied on the following authorities:

1. *School District of Snow Lake No. 2309 v. Manitoba Teachers' Society, Snow Lake Local Association No. 45-4*, (1987) 46 Man.R. (2d), Man. Q.B. 211, Man. C.A. 207;
2. *The Crown in right of Ontario (Workplace Safety and Insurance Board) and Canadian Union of Public Employees, Local 1750 (Re)* (2003), 120 L.A.C. (4th) 333;
3. *St. Joseph's Hospital (Elliot Lake) and Ontario Nurses' Association (Re)* (2003), 121 L.A.C. (4th) 201 (Harris);
4. *Red Deer Regional Hospital and United Nurses of Alberta, Local 2 (Re)* (1992), 28 L.A.C. (4th) 415 (Ponak);
5. *Custom Pharmaceuticals and International Association of Machinists and Aerospace Workers, Lodge 171 (Re)* (1998), 74 L.A.C. (4th) 73 (Petryshen).

The Division noted that the onus is on the Union to establish a breach of the Agreement or a breach of some legislative provision which imposes a mandatory obligation on the Division. Mr. Simpson submitted that there has been no breach of the legislation as interpreted by the Courts or any breach utilizing commonsense. He distinguished the cases that were relied upon by the Union. In the *Ottawa-Carleton Catholic District School Board* case (cited above), the finding was that a person had conducted a summative evaluation. This was not the case here, nor was there anything to suggest that there was a delegation by the Principal to the SSC in this case. The Principal fulfilling his overall responsibility has access to and can seek and obtain input, including commentary on performance, from someone with expertise in the area and from someone who has worked with that person and has knowledge. Mr. Simpson pointed to

paragraph 53 of the above decision and noted that there was a finding that it was department head that was doing the appraisal and not the Principal.

In the *North York Public Library Board* decision (cited above), the Ontario Labour Relations Board determined that having regard to the duties and responsibilities of the individual in question, they were performing managerial functions. Mr. Simpson maintained that a decision of this nature depends on the extent to which an employee is making an effective recommendation. In particular, Mr. Simpson referred to a portion of the *North York* decision which stated as follows:

In addition, persons who perform technical functions or exercise craft skills which have been acquired through years of training and experience, will necessarily have a considerable influence over unskilled employees or less experienced "journeymen" or technicians. These experienced personnel will commonly supervise the work of those who are less experienced, and it is part of their normal job function to train and direct such persons and to instill good work habits. Often, it is only the most senior or skilled employees who will fully understand the technical requirements of the job and the tools and material required, and accordingly, it is they who will allocate work between themselves and the other employees in order to accomplish the task in a safe and efficient manner. In such circumstances, it is inevitable that they will have a special place on the "team" and will have a role to play in co-ordinating and directing the work of other employees; but this does not mean that they exercise managerial functions in the sense contemplated by the section.

It was submitted that what was reflected in the above quotation reflected the crux of the matter in this case. The SSC functions as part of a team, but did not exercise management functions.

The Division also relied on the *Snow Lake* decision. An Arbitration Board chaired by

Arbitrator John Scurfield (as he was then known) determined that teachers were not required as part of their contract to supervise students at noon-hour recess. The Agreement in question was silent on the issue.

The school district applied to the Manitoba Court of Queen's Bench for an order quashing the arbitration award. Justice John Scollin quashed the arbitration award and determined that teachers were required to provide such supervision.

Reference was made to the following relevant portion of Justice Scollin's decision:

By the contract in form 2, which is in issue here, the teacher agrees to perform such duties as may from time to time be assigned in accordance with the statute and the regulations; by section 41(1)(i) of *The Public Schools Act*, C.C.S.M., c. P-250, the School Board is empowered, subject to the Act and the regulations, to prescribe the duties that teachers are to perform; and by section 96(c) of the Act, the teacher is under a direct duty to maintain order and discipline in the school. Even more specific are the provisions of Manitoba Regulation 250/90, Part VI of which deals with the duties of teachers. By the general rule in section 29 (now 28(1)) "the principal is in charge of the school in respect of all matters of organization, management, discipline and instruction" and by section 35 (now 28(2)) is "responsible for the supervision of pupils, buildings and grounds during school hours". And by section 40 (now Regulation 32), the principal is required to "exercise disciplinary authority over each pupil of his school from the time of the pupil's arrival until his departure for the day . . ."

These contractual and statutory provisions provide good authority for the principal to assign teachers to supervise the students during their lunch recess, both within the school building and on the school grounds. It would obviously be quite impossible for the school principal to perform personally every single one of the duties which the statutory scheme imposes upon him. For example, only by assignment to individual teachers could the principal carry out his responsibility under section 35 for the supervision of pupils, buildings and grounds during school hours. The statutory scheme is workable only by delegation. The principle here is the same as that in *Carltona v. Commissioner of Works*, [1943] 2 All E.R. 560 (C.A.), which has since applied numerous times to the operations of government departments.

The section numbers referenced in Justice Scollin's decision have now changed. Section 29 is now 28(1); section 35 is 28(2) and section 40 is now 32.

The Manitoba Court of Appeal dismissed the appeal of the Union. In so doing, Justice Joseph O'Sullivan stated:

For his part, I think Scollin, J., was not quite correct in treating the matter as one of construing and applying provisions in a statute, regulations or contract. No doubt the questions of construction are relevant to the determination of the issue, but in the end I think that what Laskin, C.J.C., has said should be accepted as a statement of law of Manitoba in regard to employment contracts generally, and that what must be decided is whether the duties sought to be assigned by an employer are reasonable incidents of the employer/employee relationship in all the circumstances of the case.

Justice O'Sullivan went on to note:

In my opinion, the question is not one merely of construing a statute. I accept rather that, as Laskin, C.J.C., said:

"Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed."

The Division maintained that this decision is supportive of their position. The question is not merely one of construing a statute. The relationship must be governed by a standard of reasonableness.

Regarding the labour relations argument and the fact that the SSC is in a conflict of interest with members of the bargaining unit, the Division submitted that to succeed the Union must point to managerial functions exercised by the SSC, including being involved in decisions to hire or fire or to play a major role in labour relations bargaining. None of those situations pertain here and therefore there is no conflict between the SSC exercising her role as a professional and her position as a member of the bargaining unit.

It was noted that most of the cases submitted by the Division deal with the issue of exclusion or inclusion in a bargaining unit. In particular, some of the jurisprudence highlights the difference between professional and managerial duties and this is analogous to the teaching profession where a given individual may exercise professional supervisory functions as opposed to managerial functions. Mr. Simpson noted that the *Red Deer Regional Hospital* case cited above is an example of an individual being part of an interview process and the decision is authority for the principle that there is nothing inherently wrong with this from a labour relations sphere.

In conclusion, with respect to the second branch of the Union's argument, the Division submitted that labour relations law does not in any way prohibit an individual such as the SSC, who albeit a bargaining unit member, from taking on tasks when the functions are carried out in the context of her expertise. These are not management functions, nor are there any ramifications which create a conflict of interest. In summary, the Division

submitted that the grievance be dismissed.

REPLY OF THE UNION

In reply, Mr. Smorang took issue with the Division's submission that the SSC did not do management functions and asked in this case why she in fact wrote a letter directly to the resource teacher. There was no explanation offered, nor do we know why she was invited to participate in the Board meeting determining Nicholson's employment status. With respect to the *Snow Lake* case, Mr. Smorang pointed out that there is a difference between s. 28(2) duties and s. 30 duties. Clearly under s. 28(2) the buck stops with the Principal. Under s. 30 where members of the bargaining unit participate in management functions, the Principal is at the bottom end and the point becomes can others be involved in that process.

Finally, with respect to the reports tendered by the Division, Mr. Smorang pointed out that an expert is but a witness to assist a trier of fact in making a decision outside the area of the trier's expertise. In this case he pointed out that there are two areas requiring a decision; (a) the effect of the legislation with respect to the SSC, and (b) from the labour relations consideration is the issue affected by the fact that it is a unionized environment. Mr. Smorang submitted that neither question is aided by the expert opinions on either of these issues. He noted that as a Board of Arbitration with expertise, help is not needed on these issues. At most, the expert reports are of little weight because neither of them speak to the issues.

Mr. Smorang referred to Exhibit 11 and stated that the report focuses on best practice from a management perspective without regard to a union's perspective as to the legislation. The report therefore is of questionable value. Likewise, Bagnall's report makes no reference to the legislation or to human resource issues and is of little value.

DECISION

Most of the relevant facts underlying this dispute are not in dispute and are set out in the Agreed Facts, the SSC job description, the Graham Arbitration Award, and the Nicholson Confidential Report to the Rolling River School Division Board of Trustees.

The SSC is a senior position within the Division. The duties of this bargaining unit position involve major responsibilities including, but not restricted to:

- co-ordinate and monitor in collaboration with the Superintendents and the school Principals, all special needs programs within the Division. This leadership would include providing direction, consultation, and support for programs, for classroom teachers in dealing with special needs, and for educational assistants.
- provide leadership in the evaluation of existing programs, and the utilization of staff and resources as they relate to special needs; make any recommendations for any revisions or alterations as required.
- co-ordinate and be actively involved in the process of programming for students with special needs, including funding applications, case conferences, and Individual Educational Plan (IEP) development.
- provide leadership and co-ordination to guidance programs and mentoring programs within the Division.

- assist the Superintendents and Principals with the selection and supervision of staff, particularly in the special needs and educational assistant areas.

The salary premium paid to the SSC is indicative of the highest level of the job responsibilities. In fact, it is higher than the Principal.

The last responsibility set out above is the one under attack by the Union. The Union seeks a remedy which revises the job description to remove selection and supervision of staff and to commit the Division from not utilizing SSC to evaluate or supervise staff.

There is no question that the SSC played a major role in working with and supervising Nicholson in her capacity as a resource teacher. She also participated in a number of meetings which the Union says were disciplinary in nature, the Board of Trustees meeting on April 18, 2006, and was copied with a number of pieces of correspondence which were placed on Nicholson's personnel file.

She also mentored, supervised and critiqued Nicholson's performance. From January 2003 to June 2005 the SSC spent 178 hours assisting Nicholson, not including phone calls to Nicholson or phone calls to and from Principals.

Of particular note is that Parrott did not attend the resource teacher evaluations on December 3, 2004 or February 18, 2005, but did attend a pre-evaluation meeting on October 8, 2004 at the request of the Union. In fact, the Union's letter from Beresford

stated:

I am requesting that Debbie Parrott also attend the meeting as she is the Student Services Coordinator and surely has needed information, especially with regard to the issue of I.E.P.'s and the expectations of both the resource teacher and the classroom teachers in the process. Part of assisting Brenda in successfully meeting expectations is making sure those expectations are clear and specific. Ms. Parrott would, I am sure, have much to contribute. If she is unavailable on Friday, perhaps we could schedule for another day. I am available the afternoon of October 14, the morning of the 18, late afternoon the 19 or 20.

Before turning to a specific analysis of the two pronged argument of the Union, a few preliminary comments are warranted.

Firstly, the scheme enacted by the legislature to govern schools must be respected and adhered to. The issue is to determine the intention of the legislation.

Secondly, I am sensitive to the Union's submission that a unionized workplace must not put members of the same bargaining unit into a conflict position where one evaluates another in a management sense. I find that Beresford's evidence was given in good faith with a genuine interest to deal with real issues facing a Union in dealing with potential conflict between Union members.

I now turn to an analysis of the legislation. The Union's basic position is that the legislation mandates the Principal to be responsible for evaluation, direction and supervision of teachers and that all others are excluded by reason of the fact they are not specifically mandated to do so in the Acts and Regulations.

While Mr. Smorang's argument was comprehensive, vigorous, and attempted to make use of a number of statutory principles to make his case, I am not satisfied on balance that the intention of the legislature was to draw such a line between the various roles that are to be played by the players in the education system.

Firstly, I agree with Division counsel that the legislation refers to the Principal participating in hiring, assignments, etc., but it does not state that this is to the exclusion of all others.

Secondly, it is acknowledged, even by Beresford, that there are roles played by teachers that are not specifically set out in the legislation. Furthermore, there is nothing explicit in the Statutes or Regulations which prohibits or restricts the SSC from performing the duties assigned to it.

Thirdly, while I appreciate that the *Snow Lake* decision has not been regarded favourably by the Union, it remains the law in Manitoba. The principle flowing from the *Snow Lake* decision is that one has to apply a reasonableness standard in assessing what roles and responsibilities are to be performed by a teacher.

Fourthly, the Union placed a great deal of reliance on the *Ottawa-Carlton* case. I also find that this is not determinative of the issue in this case. I agree with Division counsel that the facts are different than the case at hand in that in the *Ottawa-Carlton* case there

was a clear delegation to the department to do the evaluation which was expressly prohibited by the legislation. That was not the case here.

I find that it is reasonable for the SSC in circumstances that exist in this case to supervise and direct a resource teacher and to report to the Principal, and I do not find, based on a review of all the legislation and jurisprudence, that they are precluded from doing so.

To interpret the legislation in a rigid fashion as urged by the Union is not realistic and places unreal expectations on a Principal.

Nor do I find that this was the intention of the legislature in fashioning a scheme to govern the overall structure of the various participants in the school system.

Resource teachers were not always part of the public school system. Over the years there has been a far greater awareness of special needs children. Specialists are employed to meet the demands. These specialists are supervised and mentored by individuals such as the SSC who have developed the expertise necessary to effectively supervise and mentor.

Turning to the specifics of the job description, it was acknowledged by the Union that the SSC was not hiring or making appointments. In fact, the Union did not object to the SSC playing a part in the interview process. The Division does not assert that the SSC

should be a selector. Therefore, in light of the above, I do not find anything offensive in the job description relating to the selection of staff.

Nor am I prepared to say that the Union has established on balance that the reference in the job description to assisting with the supervision of staff, particularly in the special needs and education assistant areas, is offensive. There is a difference between supervision and evaluation. The SSC should be involved in mentoring and providing direction to the resource teacher. Tied into this must be the ability to report to the Principal on how the resource teacher is performing.

There is however a line between supervision and evaluation. Reporting to the Principal on the performance of the resource teacher does not equate to participating in the decision making process. The first is providing information; the later is considering and acting on that information. It is the Principal who completes the evaluation and is ultimately legally bound to be responsible.

The issue is whether the SSC in this case went beyond supervision of Nicholson and was an evaluator. This would then be contrary to the legislation and overstep the line between employee and management.

I do not find that the SSC in this case became a co-evaluator. There is ample evidence of others performing the actual evaluations.

For example, the SSC was not involved in any evaluation which ultimately led to the termination. The SSC was not exercising supervision/evaluation in the context of a managerial position involving discipline. I have no doubt stating that if the Division sought to exclude this position based on the duties performed to date that this application would not satisfy the tests adopted by labour boards across the country.

I turn to the specific actions that Beresford challenged. I find that certain of the actions or involvement of the SSC were ill-advised. However, while ill-advised or inappropriate, I do not find that these actions when analyzed in the context of the entire relationship demonstrate that the SCC was co-evaluating or managing as argued by the Union.

For example, the SSC should not have attended the Board of Trustees meeting on April 18, 2006. The Principal was able to provide information based on reports from the SSC and the SSC should not have been at the meeting. I also find that the letter of September 28, 2004 was disciplinary in tone and should not have been copied to the SSC. I do not find being copied with the June 23, 2005 letter to be improper as it would be formal notice to the SSC that she would no longer be supervising Nicholson.

With respect to the meeting of December 3, 2003, Arbitrator Graham has already found it to be ill-conceived and poorly handled because Nicholson was returning from stress leave and her performance was subject to review. I agree with his assessment. However, I do not find that it was improper for the SCC to be at such a meeting which was part of a professional growth process. I note the SSC was not at follow up meetings where

Nicholson met with the Principals to review their evaluations on February 18 and April 16, 2004. It would not have been appropriate for Parrott to have attended these meetings.

For all the reasons outlined above, the Union's grievance is dismissed and the request for the remedies is denied. I trust that the Division will take note of the areas in which the actions of the SSC were deemed to be inappropriate.

I wish to thank the parties for their helpful submissions.

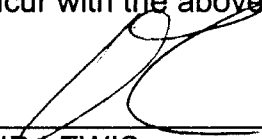
DATED at the City of Winnipeg, in Manitoba, this ²⁴ day of October, 2008.


MICHAEL D. WERIER

I concur with the above Award.


GERALD D. PARKINSON,
Nominee of the Division

I concur with the above Award.


DAVID LEWIS,
Nominee of the Union