January 29, 1991

Board:
Martin H. Freedman, Q.C., Chairperson
Dunlop H. Kells, Nominee of the School Division
M.B. Nepon, Nominee of the Teachers' Association

Appearances:
Mel Myers, Q.C., for the Association
Rob Simpson, for the District

**IN THE MATTER OF AN ARBITRATION PURSUANT**

**TO A COLLECTIVE AGREEMENT**

**BETWEEN**

**LEAF RAPIDS SCHOOL DISTRICT NO. 2460**

**AND**

**LEAF RAPIDS LOCAL ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY**

**GRIEVANCES OF ASSOCIATION, HUGH McKINNON, CAROLE BOWMAN and AL WILLIAMS**

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## AWARD OF ARBITRATION BOARD

By a Collective Agreement between Leaf Rapids School District No. 2460 (the "District") and Leaf Rapids Local Association of The Manitoba Teachers Society (the "Association") we have been constituted an arbitration board to determine certain grievances. The relevant extract from the Agreement was filed with us as Exhibit 1, and reads in its entirety as follows:

> "**ARTICLE 10A - TRANSPORTATION ALLOWANCE**
>
> The following annual transportation allowance shall be paid, in addition to salary, to each teacher:
>
> (1) Where both spouses are employed as teachers by the District, each will receive the single teacher's rate and the allowance for children, if any, shall be paid as per TD1 form on file.
>
> (2) No spouse or dependent allowance will be paid unless the spouse and dependents reside with the teacher in the District.

(3) . . ."

The rates are rates for a single person, a spouse, children 12 years and over and children under 12 years.

The relevant portion of Article 10A, which gives rise to these grievances, is Paragraph (2) quoted above.

The grievances are all similar, although the fact situation in each of the three individual grievances is different. To take Exhibit 4 as an example, McKinnon has grieved that the District has misapplied and/or misinterpreted and/or violated Article 10A of the Agreement by failing to pay to him the spouse and dependent transportation allowance which he alleges he is entitled to receive. The grievances of Ms. Bowman and Mr. Williams are similar. In Ms. Bowman's case the grievance relates to a dependent allowance and in Mr. Williams' case it relates to a spouse allowance. The Association alleges noncompliance by the District with the mentioned provisions.

We heard evidence from two of the grievers. Carole Bowman is a Vice-Principal and a teacher who has been employed by the District for about 15 years. There is one school in the District which covers Kindergarten to grade 12. This grievance relates to an allegation by Ms. Bowman that a transportation allowance in respect of her child, Stacey, was not paid to her.

It seems to be common ground that the transportation allowance, when paid, is paid monthly. It is added to the salary which each teacher receives on a monthly basis. In September 1989 Stacey Bowman was enrolled at the University of Alberta in Edmonton. She had graduated from high school in Leaf Rapids in June, 1989. She went to Edmonton at or about the start of September. During Christmas, 1989, Stacey came home. She also came home in her reading break in February 1990, and at the end of her school year in April. She worked in Leaf Rapids during the summer and went back to University in Alberta in the fall of 1990. Ms. Bowman said that she did not receive the travel allowance in respect of Stacey for the period of time that Stacey was at the University of Alberta.

We should note that the Agreement in question expires on December 31, 1989 and any award we give cannot have effect in respect of periods after that date. Some of the evidence did relate to time periods after that date, but the principle with which we will be dealing is not affected in any way by the timing issue.

Ms. Bowman was told that the reason she did not receive a transportation allowance in respect of Stacey was that Stacey was not residing with her in the District. Ms. Bowman lives in Leaf Rapids with her husband and with a 16-year-old child. She said that when Stacey was not at school at the University of Alberta, she resided in Leaf Rapids with the family.

In cross-examination Ms. Bowman amplified her evidence. While at the University of Alberta Stacey lives in residence. She takes her meals there and sleeps there. Ms. Bowman did not know whether Stacey had a lease on her accommodation at the University. Certainly in the fall of 1989 she was living, eating and sleeping in residence. Ms. Bowman agreed that until Stacey went to Alberta she had received the transportation allowance in respect of her spouse and two dependent children.

She was aware that the amount of the transportation allowance had been negotiated and changed over the years. At one time it reflected a reimbursement of actual expenses involved in flying from Leaf Rapids to Winnipeg. She also acknowledged that the purpose of the transportation allowance was to give the teacher an opportunity to take a trip from Leaf Rapids to Winnipeg (at the District's expense).

Hugh McKinnon testified. He has been employed by the District for about eight years and is a teacher in the senior high school section. He lives in Leaf Rapids with his wife and with his two children, who are

ten and seven years old. He said that in 1989 his wife and children went to the United States. She was intending to go to college in Massachusetts about 20 miles north of Boston where her parents lived. She arrived there about mid-August (1989) but discovered there was some difficulty in registration so she could not go to college. She did not come back because coincidentally her mother became ill and her father was also ill. Mrs. McKinnon therefore stayed in Massachusetts with the children who went to school there. She stayed to assist her parents, who were ill, and she was for most of the school year. Mr. McKinnon went there at Christmas and in the spring break, and at the end of the year in July.

The transportation allowance was denied him because the District said his wife was not living in Leaf Rapids. He disagreed with this interpretation and testified that in his view his wife and children did reside with him in Leaf Rapids in 1989.

He agreed in cross-examination that the illnesses of his wife's parents were not brought to the attention of the District. When his wife left Leaf Rapids in August 1989, her intention was to live in Massachusetts and attend school. She lived in Massachusetts, slept there and ate there, at her parents' house with her children. She and the children are back in Leaf Rapids now, said Mr. McKinnon, and he was receiving the transportation allowance in respect of them. He agreed that the transportation allowance was designed to allow him and his family a trip out of Leaf Rapids because of the isolation of Leaf Rapids.

Evidence was not heard from Mr. Williams because he was away at University The facts in respect of Mr. Williams were presented, essentially by agreement, and are as follows. Mr. Williams taught at Leaf Rapids in 1988-1989 and in 1989-1990. In August 1989, he confirmed to the administration that his wife would not be living in Leaf Rapids in 1989/90 but would be living in Thompson and attending nursing school there. There were occasional visits during that school year by Mrs. Williams to Leaf Rapids and by Mr. Williams to Thompson. He resigned from the District in June 1990, and he and his wife moved to the United States. She did not move back to Leaf Rapids after moving to Thompson. He was advised that he would not receive the transportation allowance because she had moved to Thompson and was not residing with him in Leaf Rapids.

That was the evidence adduced on behalf of the Association.

There were two witnesses who testified for the District. Barbara Bloodworth is the Secretary-Treasurer of the District and has been such since November, 1988. The Agreement in question, covering the 1988/89 calendar years, and expiring December 31, 1989, is one with which she is familiar. She testified that the decision is usually made at the start of the school year in September as to which teachers have spouses and dependents living with him or her in Leaf Rapids, and the travel allowance is then calculated. It is added to the salary and paid on a monthly basis. She was asked how it is determined who is "residing" with whom. She said that Leaf Rapids is a very small town. There are only 30 teachers there and they all know each other well. They know who graduates and who goes away to school and so on. She checked the prior practice and simply carried on in the same manner. If a spouse had lefts she confirmed that with the teacher and if there was any uncertainty, she would clarify the facts with the teacher.

Mrs. Bloodworth testified, and the Association acknowledged, that a consistent practice had been followed in the case of Ms. Bowman. In other words, if children of teachers were away at University, it had been the practice in the past, and was continued on in the case of Ms. Bowman, that no travel allowance was paid in respect of that child. Similarly, said Mrs. Bloodworth, the practice was followed consistently in the case of Mr. Williams and Mr. McKinnon.

Mrs. Bloodworth said that she confirmed with Mrs. McKinnon that she was not residing in Leaf Rapids and also with Mr. Williams who agreed his wife was not living in Leaf Rapids.

The other evidence adduced for the District was from Terry Cooper, who is a labour relations consultant with the Manitoba Association of School Trustees and has been in that position for about 13 years. He negotiates and administers collective agreements in Northern Manitoba and has responsibility in connection with the Leaf Rapids agreement. He produced collective agreements in Leaf Rapids (or extracts from them) for about 17 years. While this evidence was objected to, the Board allowed the evidence in. Excerpts from the Leaf Rapids Division agreements were introduced (Exhibit 7) and then recent agreements in other Northern school districts (Mystery Lake, Churchill, Lynn Lake and Frontier) were introduced as Exhibits 8, 9, 10 and 11 respectively. Mr. Cooper said that transportation allowances are found in Northern, isolated districts such as the ones whose agreements were introduced. He said that some districts tie the amount of the allowance to the expense of a trip out of the district to Winnipeg, and some have a fixed amount. The intent, he said, was to allow teachers and their families to "get out" of the isolated community and to travel to Winnipeg.

He acknowledged in cross-examination that the other agreements introduced through him were different, in wording at least, than the one before us.

There was no other evidence submitted by either party.

The Association argued that this case, and these grievances, depended upon the meaning in the Agreement of the phrase "reside with" the teacher. The Association said the real question to determine in each case was, where is the "real home" of the spouse-or dependent? The spouse or dependent may leave for many reasons but that does not affect the question of residence. The teacher may take a sabbatical and "live" some place else but his or her residence does not change. Residence would only change, said the Association, if not only the fact of living elsewhere existed, but the intention also existed not to continue to reside in Leaf Rapids.

The clause should be interpreted in a dynamic fashion, said the Association. For example, children who grow up and go away to University should be encouraged to do so, and to give a broad and liberal interpretation to this clause would be consistent with that goal. This was really an isolation allowance, said the Association, and the reasons for the absence from Leaf Rapids are irrelevant. This is a special benefit, negotiated because of the isolation of Leaf Rapids. For the District to be correct one would have to draw a line, which was in fact impossible to draw. For example, if a spouse or dependent was sick and in the hospital, or away for perhaps a one month period, how could one determine whether that person was "residing" with the teacher in the District? Would the answer be different if the time period was one week, or two months? Where would the line be drawn?

The Association argued that a spouse or dependent could have more than one residence, and in its argument it provided us with a number of authorities. In connection with some of these authorities, to which we will refer, the Association argued that there was no practical difference between the phrase "ordinary resident" or "ordinarily resident" or similar phrases, as appear in many of the cases, and the phrase appearing in this Agreement, "reside". The cases strongly supported the position of the Association, it was argued, and the allowance ought to be paid.

The District acknowledged that the clause was a form of isolation allowance and said that the purpose of it was to allow teachers and families residing in Leaf Rapids to leave the community at District expense once a year. The evidence indicated that was the purpose of the clause, and this was not a unique situation. The clause ought to be interpreted, said the District, consistently with the intention, and that was to allow families and members of families who were in Leaf Rapids to leave on a trip. The clause was not intended to bring home family members who were away from Leaf Rapids. If that were the intention, that would be of no more importance to teachers in Leaf Rapids than, for example, to teachers in Winnipeg. The purpose of the clause was clearly to allow teachers stuck in isolated community, and their dependents, to leave.

So, said the District, it would be ludicrous to require an allowance to be paid in respect of (say) a dependent child who had decided to travel the world for a year. Similarly, a dependent child who decided to go away for University should not be the subject of an allowance. Nor should the spouse who decides to live near Boston for a year. Why should the District be required to pay the transportation allowance in respect of those persons?

The clause in question clearly contemplated that there might be no payment made in a particular case. Two conditions must exist in order for a payment to be made, said the District. The first was that the spouse and/or dependent in question must reside with the teacher; and, secondly, they must reside with the teacher in Leaf Rapids.

Many of the cases referred to by the Association, said the District, were not applicable because of the particular wording of the statute or regulation in question, and as mentioned, we will refer to some of these cases below.

The District argued that "reside" had a very different meaning than "ordinary resident", or "ordinarily resident", and for that reason many of the cases submitted by the Association were not applicable.

As an alternative argument the District submitted that if the clause was not clear, it had nevertheless been consistently applied and it was not open to the Association to challenge the application of the clause during the currency of the Agreement. In any case, the three situations before us, said the District, did not raise factual bases upon which the Association could properly challenge the application.

The Association in reply argued that there was a change, illustrated by facts brought out during Mr. Cooper's evidence, made in 1981 in the Agreement's predecessors, changing the clause in question from the category of an escape or isolation allowance to that of a simple travel allowance. In 1981, according to Mr. Cooper's evidence, said the Association, the calculation of the allowance was no longer tied to air fare, but became a simple flat dollar amount.

The parties each submitted to us a number of legal authorities. We have read them all and will refer to those which we consider relevant. We should stress, however, that in coming to our conclusion we are mindful of the wording which the parties have negotiated, with care and with the assistance of skilled advisors. They have used words in their Agreement under the heading "Transportation Allowance". The scheme of Article l0A is that there is a mandatory transportation allowance paid to all teachers in addition to salary. However, paragraph (2) stipulates that the transportation allowance is not paid unless the Person in respect of whom it is paid, that is the spouse or the dependents:

> "reside with the teacher in the District"

We must say that the sense we derive from the way in which the parties have chosen to frame the transportation allowance provision is that of a more immediate and current sense rather than that of a long term or historical sense. In other words, the use of the words "reside with the teacher in the district" convey to us the meaning and impression of the present, or immediacy, or currency. We think the parties were looking at and must be presumed to have been looking at the situation on a case by case basis from the point of view of present facts and present intentions, rather than over a longer term period. We will this return to this concept below.

The Association referred to the decision of the Supreme Court of Canada in the well known income tax case Thomson and The Minister of National Revenue 1946 S.C.R. 209. In that case, as the Court makes clear, the single point for determination was whether the appellant came within the scope of the charging provisions of The Income Tax Act and whether he was "residing or ordinarily resident" in Canada

during the year in question. The Act contained no definition of the phrase "residing" or "ordinarily resident" but the Court said that such phrases should receive the meaning given to them by common usage. The Court referred to dictionary definitions which gave the meaning of "reside" as being "to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place".

During the course of his judgment Mr. Justice Rand noted that the word "residing" was not a term of invariable elements. He said that:

> "It is quite impossible to give it a precise and inclusive definition. It is highly flexible . . . " (24)

In referring to the expression "ordinarily resident" he said that it carried "a restricted signification" and should be contrasted with special or occasional or casual residence. It was held to mean residence "in the course of the customary mode of life of the person concerned". Mr. Justice Rand noted that the expressions involving residence should be distinguished from the concepts of "stay" or "visit".

Relying on Thomson the Association argued that the spouse and/or dependents in each of the three cases before us was clearly residing in the Leaf Rapids District with the teacher in question.

The Association also referred us to the judgment of Mr. Justice Morse of The Manitoba Court of Queen's Bench in Anema v Anema R.F.L. 27, 156 in which (at 157) the learned judge said:

> "It is certainly true that a person may leave a province where he resides and actually reside elsewhere for a special purpose such as service in another country for the Canadian government, and yet remain ordinarily resident in such province. The test is: 'where is the petitioner's real home?'."

The Association argued that here the dependents in question, while they may have left Leaf Rapids for particular purposes, were clearly still residing there in the sense contemplated in Anema where the person in question was found to be ordinarily resident in the province.

In a number of the cases, referred to in Anema and others, the concept of the petitioner's real home or the individual's real home is referred to. In the three cases here, said the Association, the real homes of the dependents were clearly in Leaf Rapids even though they were temporarily away from Leaf Rapids, in each case, for a limited period of time.

The Association also referred us to the judgment of the Ontario Court of Appeal in MacPherson v MacPherson 70 D.L.R. (3d) 564. In this, another family law case, reference was made to the oft-quoted test framed by Karminski, J. in Stransky v Stransky (1954) 2 All E.R. 536 at 541:

> ". . . where was the wife's real home…?"

Karminski, J. had noted that the English legislation used the term "resident" as well as the term "ordinarily resident". Mr. Justice Evans, while dissenting in the result, observed (and the majority does not take issue with him on this point) that (568):

> ". . . mere temporary absences, such as for holidays abroad, would not create gaps in the period of ordinary residence."

He referred to the facts in Stransky where the wife's absence from England was dictated by the exigencies of her husband's work and there was no intention on her part to make her home in another country.

We were referred, as well, by the Association to the judgment of The Supreme Court of Canada in Attorney General of Canada and Rees v. Canard 1975 3 W.W.R. (1). One question in the Canard case was whether the deceased ordinarily resided on the reserve. In that case (at page 21) the Court refers to the judgment in The Manitoba Court of Appeal where that Court, after referring to a number of the cases referred to above, found that the deceased was at the time of his death ordinarily resident on the reserve in question. The Court of Appeal said (and on this issue the Supreme Court did not reverse the Court of Appeal):

> "He normally lived there, with some degree of continuity. His ordinary residence there would not be lost by temporary or occasional or casual absences."

In Wright, Danson and Sanborn v Koziak and Albrecht, 1980 1 W.W.R. 481 the Alberta Court of Queen's Bench was considering certain questions involving controverted elections. At page 491 et seq the Court said:

> "These cases [among others to MacPherson] indicate that the term 'ordinary residence' is defined in terms of 'real home'. The question asked is: Where did the petitioner regularly, normally or customarily live? . . . These cases would seem to establish that single students living in halls of residence during a university term are ordinarily resident in the homes wherein their parents live and to which they return on vacations.
>
> When a person lives in a hall of residence for eight months of the year, a defined period which he is not entitled to renew and which, as the evidence shows, is generally not repeated, that hall cannot be called his 'real home', the place where 'in the settled outline of his life he regularly, normally or customarily lives'. Nor, in my view, can it be said that in most cases enrolment at a university is more than a temporary stage in a person's career .."

The Wright case is relied on by the Association as a clear indication of the appropriate approach to be taken in the case before us.

Further cases referred to by the Association should be mentioned. Re Fulford and Townshend 1970 3 O.R.493 is a judgment of The Surrogate Court in Ontario. It involved a question of jurisdiction, as only the Surrogate Court of the county in which the infant in question resided at a particular time had jurisdiction to determine the matter. The Court said (page 500 et seq):

> "There is a very good discussion of the meaning of the word 'residence' in Words & Phrases, Legal Maxims, 2nd ed., vol. 4,

> p. 759 et seq. It says that 'the word 'residence' is an elastic term and takes colour from the context in which it is used' . . . From the decided cases relating to the meaning of residence, it would appear that generally 'residence' means a person's permanent place of abode and not his temporary place of abode. A person's mere temporary abode in a place such as his being there on vacation, a business trip, in hospital or at school, does not constitute residence in that place. The mere physical presence of a person in a place does not constitute his residence there but in addition he must have the present intention of remaining there for some time but not necessarily for all time . . ."

The Court found there to be a difference between residence and domicile (the latter being more permanent) and between residence and mere sojourn (the latter being not as permanent).

Fulford was referred to in the judgment of the Supreme Court of Ontario in Morrone and Wawanesa (unreported) March, 1990. That was an insurance case in which the question of the residence of two visitors to Canada at issue. The parents of Stella Marrone came from Greece to visit their daughter and others in Canada While here they were in an automobile accident and the father died. The parents had come to Canada on about three occasions and in each case stayed with their daughter, in each case for about two or three months. The Court found that this was a normal visit by parents to their children in another country and that the parents had no intention of remaining in Canada. The Court referred to the finding the Ontario Surrogate Court in Fulford and Townshend also referred to the Thomson case. The Court found that it would be a distortion of the language on the facts of the case in question to conclude that the parents "resided" with the daughter.

All of these cases, said the Association, strongly supported its argument that residence in Leaf Rapids was not lost or abandoned by what were clearly in each case temporary absences from the community.

The District referred us to the judgment of the Ontario Court of Appeal in Re Halliday 1945 O.R. 233. In that case the Court adopted, inter alia, a portion of the judgment of Ridley J. in an earlier English case (238):

> "The place of residence of a person is the place where he eats, drinks, and sleeps."

As is made clear in the judgment of the Ontario Court of Appeal, to which the District referred us, in Re Spek and Lawson et al 43 O.R. (2d) 705, in Re Halliday the Ontario Court of Appeal was only construing the word "reside", and the Court in Re Spek clearly differentiated that phrase from the phrase "ordinarily resident" which was not considered in the Halliday case. In our view the approach adopted in the Spek case, to differentiate between the word "reside" and the phrase "ordinarily resident" or similar words and phrases, is appropriate, and one which has to be made. In Spek the Court, referring to the relevant provisions of the Legal Aid Act, said as follows (712):

> "The use of the word 'resides' in s. 16(1) and of the words 'ordinarily resident' in s. 16(9) is, in my opinion, not accidental or an error on the part of the draftsman. Rather, I believe that the draftsman made a deliberate choice of words. Although 'resides' is a flexible word and can have many meanings, in s. 16(1) I believe it means the place where the

> applicant actually resides at the time the application is made, i.e., the place where he or she eats, drinks and sleeps"

(and here the Court refers to the words of Ridley, J. quoted above). The section in question was the section which determined the area where an applicant could apply for legal aid.

All these cases suggest to us that the concept of residence is a concept which is, in some respects, narrower than the concept of ordinary residence. "Residence" or "reside" does have, as we indicated above, and the words convey, a sense of the present, or the immediate, or of current status and of present factual connection. "Ordinarily resident" connotes the concept of a broader time period, which of necessity admits of intervals or gaps where immediate connection with a territory is broken.

In Blaha v Minister of Citizenship & Immigration (1971) C.F. 521 the Citizenship Appeal Court (Pratte J.) was determining a question under the Canadian Citizenship Act. He said (524):

> "These two words 'reside' and 'residence' do not have a definite meaning in law; their meaning varies with the context in which they are used. Since I am to decide the meaning of these terms in the Canadian Citizenship Act, I am unable, therefore, to rely on decisions in which the courts have had to specify the meaning of those same words in other statutes, such as a tax statute"

(and here he refers to the Thomson case).

Having canvassed the relevant authorities we return to the provisions of the Agreement. It is, after all, our task to construe the Agreement according as best we can to the intention of the parties who entered into it. The parties have agreed that no transportation allowance will be paid unless the spouse and dependents:

> "reside with the teacher in the District"

Having considered the phrases used in various statutes and in other cases, it is clear that the parties here have decided to construct quite a narrow test for entitlement. It is our conclusion that in order for the transportation allowance to be paid the person in respect of whom it is paid must be physically present with the teacher in the Leaf Rapids School District for a material or substantial part of the relevant time. The person must not only "reside … in the District", he must also reside "with the teacher" in the District. This wording clearly connotes a physical presence, with the teacher, in Leaf Rapids, and we think it can only mean such a presence for a material or substantial part of the relevant time.

While brief temporary absences, such as for short periods of time on vacation, or involuntary stays, for example, in hospital, in our view would likely not interrupt the continued "residing with" the teacher in the District, in each of the three cases before us the facts are at the other end of any continuum which might be said to exist. It might be difficult to draw a line indicating exactly at what point a short absence becomes too long an absence, for the purposes of the section; in the three cases before us that question need not be answered because it does not arise. From September to December 1989, only during the Christmas period was Stacey Bowman residing "with" her mother in the Leaf Rapids School District. In our view, while she might have been and probably was at all time ordinarily resident in Leaf Rapids, she "resided" where she lived, ate and slept, which was in Edmonton, Alberta. Clearly, however, she did not

"reside with" her mother in Leaf Rapids. The same result applies in respect of the McKinnon wife and children, and in respect of Mrs. Williams.

The appropriate test, in our view, is not the test of ordinary residence, but rather the test of residing with the teacher, and that residing connotes a physical presence in the Leaf Rapids School District. Standards in income tax and family law cases relating to ordinary residence are not applicable here. We think that by the words they used the parties intended there to be a relatively narrow standard applied, and in each of the three cases before us the transportation allowance was not properly payable.

For these reasons, the grievances are denied.

Dated at Winnipeg, this 29th day of January 1991.

Martin H. Freedman, Q.C.