

IN THE MATTER OF AN ARBITRATION

BETWEEN: ALGONQUIN COLLEGE

AND ONTARIO PUBLIC SERVICE EMPLOYEES UNION

AND IN THE MATTER OF A GRIEVANCE RELATING TO CERTAIN
INSTRUCTIONAL ASSIGNMENTS

BOARD OF ARBITRATION: J.F.W. Weatherill, Chairman
E.E. Marszewski, Union Nominee
R. Hubert, Employer Nominee

A hearing in this matter was held at Ottawa on April 25, 1980.

C. Paliare for the union

F.G. Hamilton, Q.C., for the employer

I N T E R I M A W A R D

This grievance, filed on May 17, 1978, is a group grievance filed by employees affected by certain instructional assignments made for the period of May and June, 1978.

In order that the nature of the issue to be determined may be understood, we shall set out a brief general outline of the facts, based on the statements of counsel. Those statements do not reveal any significant differences as to the facts in general, but we make no findings of fact at this stage of the proceedings. There will no doubt be variations from case to case with respect to the individual grievors, and in some cases such variations may have substantial significance. There is, however, a question of general interpretation arising in the circumstances, and in our view that question may be separately dealt with. The resolution of the general question will, in all likelihood, facilitate the resolution of the individual cases.

The College operates in five teaching Divisions: Business;
² Applied Arts ³ and Technology, ⁴ Trades; Health Sciences and
⁵ Continuing Education. The instant case involves the assign-
ment of certain teaching duties in the Continuing Education
Division to teachers in the Business, Applied Arts and Technology
and Trades Divisions. These assignments were given to some

fifty-five teachers in those Divisions (being about ten per cent of the College's teaching complement), for the period of May and June, 1978. The teachers involved had, it appears, carried out such teaching assignments as had been given them in their respective Divisions for the academic year 1977-78. The collective agreement contemplates a ten-month academic year beginning in September. When regular classes are completed, teachers then spend the rest of the academic year marking examinations, preparing results, and carrying out the various tasks associated with the conclusion of one academic year and preparation for the following one.

In the past, at Algonquin College at least, teachers from the Divisions referred to have, in some cases, accepted assignments to teach night courses in the Continuing Education Division during the May-June period. Some of the grievors had accepted such work in the past; others had not. Acceptance of such assignments was voluntary, and the work was separately paid for, at an hourly rate. That is, payment for such teaching assignments appears to have been over and above the payment received by the teachers in respect of their regular appointments, as though it were

under a separate and distinct contract.

In the spring of 1978, the President of the College announced that full-time teachers might be assigned to teach in the Continuing Education Division in the May-June period, and that they would not receive compensation beyond their regular salary payments. Reference was made, however, to the payment of overtime in accordance with the provisions of the collective agreement. Teachers involved in such assignments were, it appears, relieved of certain other duties which would have been required of them during that period.

The grievance alleges that the assignments in question, made for the May-June 1978 period, are in violation of the collective agreement. The relief claimed is fourfold:

- 1) that instructional assignments be made in a manner consistent with the Memorandum of Agreement and with past practice in the Collège;
- 2) that Extension and Continuing Education programs and courses not previously included in the regular assignments of full-time employees be not so included except at the request or consent of the teacher;
- 3) that where teaching in the May-June period is outside of the regular assignment but voluntarily undertaken, it be compensated as previously, pursuant to Appendix II of the collective agreement;
- and 4) that where

teaching in the May-June period is outside the regular assignment but assigned in 1978 on a mandatory basis, it shall be compensated pursuant to article 4.01 and Appendix I of the agreement.

In the general statement of the grievance, reference is made to article 4 and article 8.09 as well as to Appendices I and II of the collective agreement. It is not necessary at this stage to set out the Appendices. Article 4, and article 8.09 are as follows:

4.01 The Colleges will establish teaching schedules that adhere to the following:

	Group 1 (Academic Post Secondary)	Group 2
Maximum teaching hours per week	19	21
Maximum teaching hours per year	700	900
Maximum teaching hours for Nursing per year		775
Maximum contact days per year	180	190

The maximum teaching hours per week shall be determined on a rolling average for a period not exceeding three months.

Each contact day (being a day in which one or more teaching hours occur) or part thereof assigned by the College and performed in excess of the annual maximum number of contact days for the Group concerned as set out above shall be paid on the basis of 1/180th of the employee's annual salary for Group 1 and 1/190th of the employee's annual salary for Group 2, provided, however, any payments for work in excess of time limits will not be pyramided.

4.02 (a) Recognizing the unique characteristics of each College, the diversity of programmes and instructional techniques and the consequent range and variety of individual assignments, the parties agree that within three (3) weeks following the publishing of instructional assignments in September, a College Instructional Assignment Committee of six (6) persons (three (3) persons to be appointed by each party

and to include the College President or Senior Administrative Academic Officer) shall meet to:

- (i) consider the application of Section 4.01 to the instructional assignments across the College;
- (ii) resolve apparent inequitable instructional assignments;
- (iii) consider a claim by an individual that his instructional assignment is inequitable.

The Committee shall in its considerations have regard to such variables affecting assignments as:

- (a) nature and number of subjects to be taught;
- (b) level of teaching and business experience of the faculty and availability of technical and other resource assistance;
- (c) necessary academic preparation and student contact;
- (d) examination marking and assessing responsibilities;
- (e) size of class;
- (f) instructional mode(s);
- (g) assignments ancillary to instructional activities;
- (h) previously assigned schedules;
- (i) other assignments;
- (j) necessary excessive travel time between assignments.

(b) A majority decision of the College Committee shall be binding upon the parties and the employee(s) concerned.

(c) If the teacher's complaint is not resolved by the Committee, he may file a grievance as to the application of Section 4.01 within ten (10) days of receiving the Committee's decision referred to in paragraph (b) above and refer the grievance to arbitration as referred to in Section 9.03.

4.03 The academic year shall be ten (10) months in duration and shall, to the extent it be feasible in the several Colleges to do so, be from 1st September to the following 30th June. The academic year shall in any event permit year round operation and where a College determines the needs of any programme otherwise, then the scheduling of a member in one or both of the months of July and August shall be on a consent or rotational basis.

4.04 The assigned hours of work for Librarians and Counsellors shall normally be thirty-five (35) hours per week but shall not be formally assigned in excess of thirty-five (35) hours per week.

4.05 The parties agree that no college shall circumvent the provisions of this Article by arranging for unreasonable teaching loads on the part of persons who are excluded from or not included in the academic bargaining unit.

4.06 During the teaching schedule, employees shall not take any employment, consulting or teaching activity outside the College except with the prior written consent of this Department Head.

4.07 Where the Colleges require the performance of work beyond the limits herein established, the Colleges shall provide any such employee with proper work facilities during such period.

8.09 Extension and Continuing Education programmes and courses which are not included in the regular assignment of full-time employees are excluded from the application of this Article for all purposes.

At the hearing, it was urged by the union that the board's procedure should be to deal first with the general question of interpretation which arises, retaining jurisdiction to deal (if it should be necessary) with the individual cases, if the question of general interpretation is resolved in favour of the union. That is, in our view, the most orderly and expeditious way for this board to proceed in this particular case. Such an order of proceeding is analagous to that almost universally followed in discipline and discharge cases, where the question of "liability" is determined separately, the board retaining jurisdiction to deal with the matter of the question of damages, should the need arise. In the instant case, if the general question of interpretation is resolved in the employer's favour, then the grievance will be dismissed. If it is resolved in the union's favour, then the board can, if necessary, determine, after hearing appropriate evidence, what relief may be accorded to particular individuals.

The actual form of presentation of the issue is, we think, a matter best left to counsel. Counsel may well be content to argue the general question as it appears from the circumstances set out above. If counsel do not agree to this, but evidence is sought to be adduced, then the union may proceed with one of the cases (presumably its "best case") on the issue of "liability", the board remaining seized of that case, and of all the others, on the issue of damages.

The general question as it now appears (and we may wish to refine the statement thereof once the matter has been fully argued), is: whether or not the employer may properly direct full-time teachers in other Divisions, who have had assigned instructional assignments during the previous portions of the academic year, to accept instructional assignments in the Continuing Education Division in the May-June period, and, if so, whether or not their compensation therefor is limited to that to which they may be entitled under the overtime provisions of the collective agreement.

The hearing will continue, in accordance with the foregoing, on a date to be agreed upon.

At the hearing on April 25, 1980, the employer raised a question as to the notice which ought to be given to others having a right to participate in the proceedings. In particular, reference was made to the reasons for judgment of Callaghan J. released on September 27, 1979, in an application to commit certain persons (including the President of Algonquin College) for failure to comply with the terms of a decision of a Board of Arbitration rendered in a matter involving the union and Fanshaw College. In the light of that judgment, and having regard to other representations which were made, this board then adjourned the proceedings. We now deal with the question of the notice which, in our view, ought to be given with respect to the continuation of hearing of this case.

The case of OPSEU v. Isabelle et al. (the case referred to above) was an application in Weekly Court for an order of committal to jail, a fine, and a writ of attachment against certain individuals and also against certain Colleges of Applied Arts and Technology. The grounds on which the order was sought were that those persons and institutions had not complied with the decision of a board of arbitration rendered

in an arbitration of a grievance "of an interpretive nature" between this union and Fanshaw College of Applied Arts and Technology. The grievance related, it is said, to a number of issues concerning vacation entitlement under a collective agreement dated the 15th day of February, 1977, between the union (the same union that is party to this case) and The Ontario Council of Regents for Colleges of Applied Arts and Technology. That would appear to be the same collective agreement as that which is before this board.

The application was, in fact, dismissed, but on the ground that the remedies sought "are weapons to be used sparingly and when and where disobedience to an order of the Council [sic] has been wilful". On the issue of concern here, it is apparent that the application was successful, his Lordship stating at p. 5 of the reasons that "In these circumstances, therefore, it is my view that the award of the Board, interpreting the provisions of the agreement arising out of a policy grievance, was of such a nature as to in fact bind the Council to that interpretation and through the Council all the colleges under the agreement".

Earlier in his reasons Callaghan J. stated that "There are no doubt many issues subject to arbitration arising from the application, administration or alleged contravention of the agreement which in resolution would have no effect beyond the particular college involved". Discipline cases, for example, come to mind as instances in which the Council, and other Colleges, would not appear to have such an interest as to entitle them to notice of and participation in the proceedings (apart from the notice given to the Council under article 9.03 of the collective agreement). The instant case, however, involves an issue of interpretation of a general provision of the collective agreement. Counsel for the union did not take the position that the interpretation sought would be binding only against Algonquin College.

Although we are told that the decision of Callaghan J. was "upheld" by the Court of Appeal, there is nothing before us as to what the views of that Court may have been with respect to the binding effect of an arbitration award in these circumstances.

In our view, it is not for this board - at least not in the grievance before us - to make a final and binding determination of the effect our award might have on other Colleges subject to the collective agreement. We must, however, take a position on that question in order to make the proper direction with respect to the notice to be given.

The board of arbitration is established pursuant to the collective agreement, and in accordance with the requirements of The Colleges Collective Bargaining Act, 1975. The collective agreement itself is made pursuant to that legislation. The agreement is, as the Act contemplates, between the "Council" and the "employee organization" (that is, the union). Those are the parties to the agreement, and it may be noted that they are the only "parties" within the meaning of the Act: see sec. 1 (k) thereof.

Sec. 47(1) of the Act requires that every agreement provide for "final and binding settlement by arbitration" of "all differences between an employer and the employee organization"

organization and upon the employees covered by the agreement who are affected by the decision", and by sec. 47 (2) (6), "any employer, employee organization or employee affected by the decision" may move to enforce it by the procedure therein set out. It is to be noted that the Council is not an "employer" under this Act. The individual Colleges (and there are some twenty-two Colleges covered by the collective agreement), are the employers.

We have, with great respect, some difficulty with the notion that the decision even in a matter of interpretation, in an arbitration case between the union and one College is thereafter final and binding against all Colleges. We note that, under that Act, such decisions are binding on "the employer" and not on "employers" generally, nor on the Council. Under article 9.04(c) of the collective agreement, however, the decision is binding "upon all parties concerned, including the employee(s) and the College". The Council, of course is a "party" to the collective agreement - the only management "party", as we have seen. It does not necessarily follow, in our view, that the

"the Council is also bound as a party by definition".

It is no doubt the case that "a unified system of dispute resolution" is intended by the collective agreement, at least to a degree. It is, again with great respect, not quite so clear that "It would destroy the unity of the system that has been established if arbitration awards are limited in effect to the particular College involved," nor that "There can only be one meaning ascribed to the terms of the agreement in the interpretation of that agreement". The parties may, for all we know, be able to accommodate themselves to inconsistency, which they may prefer to the general establishment of an interpretation others might consider wrong. It may be remembered that while arbitration awards are subject to judicial review, they are not subject to appeal. To extend the scope of an award, then, is to enshrine the first decision in an authoritative manner, whereas the real genius of the system is to arrive, on a case-by-case basis, at interpretations elaborated in the light of a series of circumstances. Of course, the first decision on any point will, in the nature of things, carry considerable weight.

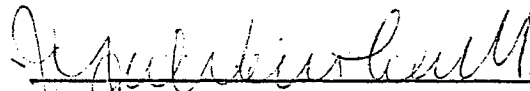
However that may be, it is our view, both on the basis of our reading of the Act and the collective agreement, and on the basis of remarks of Callaghan J. in the case referred to, that notice must at least be given to the Council in cases such as this. The Council, as party to the collective agreement, has a real interest in the system as a whole. As a practical matter, it would be most cumbersome to notify and allow the participation of the other Colleges as separate entities in cases such as this. That would be, we think, to extend the grievance procedure beyond that contemplated by the collective agreement. It is, rather, the appropriate role of the Council to make, if it wishes to do so, any separate appearance or representations from those of the particular College involved in proceedings of this type.

We note, as did Callaghan J, that it is the Council and the Union which, pursuant to article 9.04(a) of the collective agreement, appoint the Chairman with respect to each grievance referred to arbitration. This must mean

members of the board are appointed by the College and the Union respectively. When the date and place of hearing have been established, notice thereof should be given to the Council which may then attend and (if the matter is in doubt) establish its right to participate.

In the instant case, then, this board directs the parties; that is the College and the Union, to ensure that notice of hearing in these proceedings is provided to the Council. Such notice is to be given as soon as the date and place for the continuation of the hearing have been established, and the notice should set out the issue as it has been described above. A copy of this interim award will be sent to the Council when it is issued.

DATED AT TORONTO, this 2nd day of July, 1980.



Chairman

June 2, 1980

ADDENDUM

DECISION OF BOARD MEMBER, UNION NOMINEE,
E. E. MARSZEWSKI

1. I have now had an opportunity to review the Interim Award of this Board and while I generally agree with the facts and position as set out in the Interim Award, there are a number of matters with which I disagree or upon which I feel further comment is necessary.

2. First, it was quite apparent at the hearing that the request raised that same day, by Counsel for the Employer, for an adjournment of the hearing on the basis that the Council of Regents had received no notice of the proceedings, took those present by surprise. Surely Counsel for the Employer, knowing that one of the principal purposes of the arbitration process is to avoid delays in the adjudication of grievances, and knowing that an adjournment might mean a substantial delay, should have given notice of his objection at an earlier time in order to enable the Council of Regents to send a representative to the hearing if it chose to do so. The arbitration process is not enhanced by sudden requests for adjournments on the day of the hearing.

3. Moreover at the hearing, Mr. Hamilton attempted to differentiate between his role as solicitor for Algonquin

and his long-standing role as solicitor for the Council

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credulity to hear his assertion that the Council of Regents had no knowledge of the instant case despite his dual capacity as Counsel for the Council of Regents and Counsel for Algonquin College, and particularly in view of Article 9.04(a) of the collective agreement which requires the Council, along with the Union, to appoint the Chairman with respect to each grievance that will be referred to arbitration.

4. Secondly, it is necessary to point out and emphasize that the reasons for judgment of Mr. Justice Callaghan in the case of Ontario Public Service Employees Union vs Isabelle et al were adopted by the Court of Appeal, thereby making the decision of Mr. Justice Callaghan the decision of the Court of Appeal. Having carefully reviewed the reasons for judgment of Mr. Justice Callaghan, I disagree with Mr. Weatherill's statement at page 13 of his Award where he states that he has:

"... some difficulty with the notion that the decision even in a matter of interpretation, in an arbitration case between the union and one College is thereafter final and binding against all Colleges."

That was the very issue before Mr. Justice Callaghan and the Court of Appeal in the Ontario Public Service Employees Union vs Isabelle et al case.

5. In the Isabelle case the Union sought an Order for

which decision was registered as a decision of the Supreme Court of Ontario. The decision which was registered in the Court involved a policy grievance between the Union and another College (Fanshawe College) and that grievance was resolved in favour of the Union. The position of the Union was that the decision in the Fanshawe case should be applied to all academic employees of the 22 Community Colleges in the province of Ontario for which the Ontario Council of Regents for Colleges of Applied Arts and Technology is the bargaining agent.

6. The defense raised by the Respondents in the Isabelle case was that they had not been parties to the Fanshawe decision and thereby were not bound by that Award (it is the very type of defence that would be raised by the Council of Regents and other Community Colleges if we had not granted the adjournment requested at the original date of hearing).

7. Mr. Justice Callaghan interpreted the Colleges Collective Bargaining Act and the relevant provisions of the collective agreement and concluded at page 4 and 5 of his Award as follows:

"The prominent role of the Council in the negotiation and arbitration process under the Act and the Agreement indicates a clear intention to establish a unified system of dispute resolution to the extent possible in dealing with the employer and employee relations at the 22 colleges. It

herein had no notice of the arbitration and were denied their right to lead evidence of past practices, it is to be noted that the Council as party to the agreement was notified. The agreement provides that representatives of the Council and the Union shall meet monthly to review the matters referred to arbitration and agree to the assignment of a chairman (Article 9.04 (a)). If such evidence was relevant or necessary, then it was the responsibility of the Council to notify the various colleges of the grievance and its import. (Emphasis added)

8. It seems clear to me from the reasons for judgment of Mr. Justice Callaghan, the wording of the Collective agreement and the Colleges Collective Bargaining Act that any notice to the Council of the date and nature of the grievance should be given to the Council by the College. I cannot agree with the position taken by Mr. Weatherill at page 16 of his Award that it is for "the College and the Union, to ensure that notice of hearing of these proceedings is provided to the Council". The Council has de facto knowledge of the grievance by virtue of Article 9.04(a), but in addition, as already stated, the responsibility for providing that type of notice should fall to the College. Failing such notice by the College, an adjournment such as the one granted in this case should never be granted since it ought not be in anyone's interest to further delay these proceedings.

9. Thirdly, while I am of the opinion that it is necessary and most expeditious to proceed with the general question of

is quite conceivable that if the general question is resolved in the employer's favour, there may still be grievances of particular individuals that may require specific review.

10. If Counsel for the Union decides to proceed with the general question by selecting what would presumably be its "best case" on the issue of "liability", that should not preclude the Union from being able to bring forward any of the individual grievor's cases at a later time in the proceedings where the particular facts may somewhat distinguish that grievor's case from the "sample" case.

11. In fact, my notes reveal, contrary to what is set out at page 7 of the Award of the majority, that the Union did not say that "if the general question of interpretation is resolved in the employer's favour, then the grievance will be dismissed". Rather, it was the position of Mr. Paliare that a resolution of the general question would probably assist the parties in reassessing the merits of the individual cases so that, perhaps, a number of them will not have to be adjudicated based on the Board's decision on the general question of interpretation.

A D D E N D U M

While we do not consider it appropriate to comment on each of the matters dealt with in the opinion of the union nominee, there are two points with which we think we must deal lest what is said in the interim award be misunderstood:

1. As to the decision of the Ontario Court of Appeal in the Isabelle case, all we were told at the hearing of this matter was that the decision of Callaghan J. had been sustained without reasons being given. Callaghan J. had dismissed the union's application without costs. The thrust of Callaghan J's remarks. had been in a general way favourable to the union's position. We do not, however, know whether or not the Court of Appeal, in upholding a decision dismissing the union's application, was in agreement with everything said by Callaghan J. in the course of his decision (which was given orally).

2. The board does in the interim award, accede to the request of counsel for the union that we proceed to deal with the general question of interpretation which arises in the case.

to each of them, then the determination of that point would surely be binding for all the cases before us. If there is no such general question (although in our view there clearly is), then the request should not be made, and each case should be dealt with individually. In making his request of the board, counsel for the union said (according to the chairman's verbatim notes): "I would ask you to deal with the case as a matter of principle: could the employer, under the collective agreement, make the assignment? Rather than deal with it on an individual case-by-case basis; we want to be able to deal with them individually, but it would be more expeditious if the board would say the college was right or wrong". Later, in reply counsel for the union stated, "We are not asking for two bites at the apple; the procedure I suggest is for the parties to adduce whatever evidence they want, and then address argument as to whether or not this scheduling was permissible under the collective agreement". In the interim award the board has, in effect, accepted the view put forward by counsel for the union and it has, as it indicated at the

