

93G135 MOHAWK VS BRYANT, JACOBS

IN THE MATTER OF AN ARBITRATION

B E T W E E N:

MOHAWK COLLEGE

(The Employer)

- and

ONTARIO PUBLIC SERVICE EMPLOYEES UNION

(The Union)

AND IN THE MATTER OF THE GRIEVANCES OF S. BRYANT AND N. JACOBS 93G136 AND 93G135

BOARD OF ARBITRATION:

Kenneth P. Swan, Chairman
George Metcalfe, Employer Nominee
Ed Seymour, Union Nominee

APPEARANCES:

For the Employer:

Barry J. Brown, Counsel

For the Union:

R.P. Stephenson, Counsel
Ray Czajkowski, Chief Steward
S. Bryant
N. Jacobs

A W A R D

This arbitration concerns the grievances of Professor Shirley H. Bryant and Professor Ruby Jacobs, both dated July 20, 1993, relating to their placement on the salary grid. At the outset of the hearings, the parties were agreed that the board of arbitration had been properly appointed, and that we had jurisdiction to hear and determine the matter at issue between them.

Both grievances seek the placement of the grievors at the maximum salary available on the salary schedule specified in paragraph 14.03 A 1 (a) of the collective agreement, Step 17 at the time of the grievance. In addition, both grievances seek retroactive remuneration based upon accession to the maximum step effective 1988.

This matter has a considerable history, which it is necessary to set out in some detail to put in context the issues to which this arbitration gives rise. The facts, both in relation to this history and in relation to the qualification of the individual grievors, are not really in any dispute. The parties are in dispute, however, over the application of the collective agreement to certain events in relation to the grievors.

Both parties presented their respective positions to us as "preliminary objections". In fact, however, the positions were really quite substantial legal arguments which are best considered in the context of the merits of the grievances themselves.

The grievors are both long-standing Professors in the Nursing Program of the College who have for many years been at the penultimate step in the salary schedule. Neither of them has the specific formal qualification required to advance to the maximum step as specified in paragraph 14.03 A 1 (b), namely a four-year Canadian university degree "or more", although they have significant and impressive post-secondary educational qualifications.

In previous collective agreements, the salary schedule included a note in the following terms:

NOTE: Formal educational qualifications not specified above will be subject to evaluation by the Joint Educational Qualifications Subcommittee.

The Guidelines to the salary schedule, then found in Appendix I to the collective agreement, also included a provision establishing the JEQS in the following terms:

JOINT EDUCATIONAL QUALIFICATIONS SUBCOMMITTEE

The parties agree to the establishment of the Joint Educational Qualifications Subcommittee to consider and rule on further formal educational qualifications for the purpose of maximum salary level identification at the salary scale. Such Committee shall be composed of three (3) representatives of the Union and Council of Regents respectively and shall decide the Committee's procedure. Any further qualification must be agreed to by the representatives of both the Council of Regents and the Union and shall be in writing.

The grievors applied to the JEQS in 1988 for a declaration of equivalency of their qualifications to a four year degree. When this application met with no success, grievances were filed and processed to arbitration before a board chaired by arbitrator Martin Teplitsky, Q.C., which issued its award on October 16, 1990. A majority of the board of arbitration found that the grievors' qualifications, which included a three-year diploma course in nursing at a hospital school of nursing, a one year university program in nursing education, and a subsequent Bachelor of Arts degree, did not fit within the requirement for a four-year Canadian university degree or more" set out in the collective agreement. The majority further determined that, the parties having provided for the JEQS procedure for determining qualifications, a board of arbitration had no jurisdiction to sit in appeal on decisions of the Committee or to interfere with the outcome of its deliberations. In the result, the grievances were denied.

Subsequently, correspondence passed between the parties relating to the possibility of a new appeal to the JEQS.

In the 1987-89 collective agreement, the parties had agreed to the establishment of a task force to develop an in-service teacher training program, completion of which would entitle a successful candidate to access to the maximum step on the salary schedule. In the 1989-91 collective agreement, the In-Service Teacher Training Program Certificate was added to the formal qualifications for advancement to the maximum. The grievors, however, approached the question of qualifications by making a new application to the JEQS to have their Diploma in Nursing Education qualifications declared as the equivalent of the In-Service Teacher Training Program Certificate by the JEQS. The evidence suggests that there were other applications similar to this on behalf of other employees elsewhere in the system.

Ultimately, the JEQS met at a regularly scheduled meeting on November 1, 1991. We have no evidence about what occurred at that meeting, but the events have been exhaustively explored in other arbitrations, and we will attempt here an even-handed outline of what the proceedings. Apparently because of weather conditions, one of the representatives of the Council of Regents on the Committee was delayed. Certain motions were put before the meeting by the Union representatives, and were voted on. In respect of two motions, the recorded votes were three in favour, none against, with the two representatives of the Council of Regents present abstaining. Other motions were also put before the meeting, but were not voted on until all three members representative of the Council of Regents were present.

The grievors here rely upon one of the two motions voted on while only two members representative of the Council of Regents were present. The effect of that motion was to recognize a teaching certificate achieved as the result of 180 hours of study as comparable to the In-Service Teacher Training Program Certificate, and thus as an effective qualification to permit access to the maximum step on the salary schedule. In the case of the grievors, the Diploma in Nursing Education apparently would satisfy this equivalency requirement, and it is therefore argued that, as of November 1, 1991, the grievors had received a favourable ruling from the JEQS in relation to the equivalency of their personal qualifications to the formal qualifications set out in the collective agreement for progression to the maximum.

The validity of the outcome of the voting on this motion as a resolution of the JEQS was an immediate matter of dispute. At several Colleges, including this one, management declined to recognize the validity of the resolution, while individual Professors and the Union asserted that it was valid. Grievances were filed, and processed to arbitration.

In the meantime, the collective bargaining process was underway between the parties for a new collective agreement, which was executed on November 9, 1992 to be effective from September 1, 1991 to August 31, 1994. This is the collective agreement during the term of which the present grievances were filed.

In this collective agreement, the salary schedule was moved to clause 14.03, and the required qualifications for the maximum step were revised to the original wording, with the deletion of any reference to the in-service teacher training program certificate. However, clause 14.03 A 4 was amended to provide for four additional qualifications which would entitle the holder to progress to the maximum step of the salary schedule. None of these is directly applicable to the grievors. Moreover, subparagraph 14.03 A 4 (iv) reads as follows:

The In-Service Teacher Training Program Certificate. As this is a unique in-service College program equivalencies are not considered.

In the result, therefore, by November 9, 1992, the parties had agreed in collective bargaining that the JEQS would have, at least for the future, no authority to approve the kind of equivalency which was at issue at the November 1, 1991 meeting, and which is relied upon by the grievors here to permit them to progress to the maximum.

In the meantime, a grievance had been filed by Gary Fordyce, a Professor at Fanshawe College and, as it happens, a Union Representative on the JEQS. Professor Fordyce' 8 grievance was in his personal capacity, since he would himself have benefited from one of the resolutions passed, but Fanshawe College had refused to allow him to

advance to the maximum on that basis, taking the apparently universal position of the Council of Regents and all of the Colleges that the resolution was not valid.

The dispute between the parties was resolved by Re Fanshawe College and OPSEU (Fordyce Grievance 92A085), April 20, 1993 (McLaren). Without going into detail as to the reasoning of the majority of that board of arbitration, the outcome was that the grievance was allowed, Professor Fordyce was declared to be entitled to the benefits of the motion before the JEQS, and the matter was remitted to the parties for discussions about the appropriate remedial action to be taken in the circumstances. Those discussions failed, and the matter was remitted to the board of arbitration for a resolution of the outstanding issue, which was in effect whether the decision of the board of arbitration constituted a finding that the JEQS had made a benchmark decision which had application across the entire Community College system. The board of arbitration found that it had decided the individual grievance before it, and that it was therefore functus officio and had no further jurisdiction to make the kind of ruling sought by the Union. The supplementary award is Re Fanshawe College and OPSEU (Fordyce Grievance 92A085) Supplementary Award, December 14, 1993 (McLaren).

Meanwhile, other cases were working their way through the system. In Re Loyalist College of Applied Arts of Technology and O.P.S.E.U. (Harvey and Storms Grievances. 92B134 and 92B135), January 26, 1994 (Howe) a board of arbitration considered two grievances filed under the 1989-91 collective agreement. The Union's position was that the issue of the validity of the resolutions of the JEQS on November 1, 1991 had been determined by the Fanshawe College (Fordyce) awards, and that the matter was thus, in effect, res judicata.

Relying heavily on the decision of the Supreme Court of Canada in Isabelle v. Ontario Public Service Employees Union [1981] 1 S.C.R. 49, the board of arbitration unanimously concluded that it would not be appropriate to accept as conclusive the factual and legal findings made in the Fanshawe College (Fordyce) awards. The board of arbitration thus permitted the College to adduce evidence about what happened on November 1, 1991, not only from the witnesses who testified in the Fanshawe College (Fordyce) arbitration, but also from other witnesses who produced further documentary evidence not before the McLaren board of arbitration in Fanshawe College (Fordyce).

Ultimately, with reluctance and with expressions of respect for the McLaren board of arbitration, a majority of the Howe board, in Re Loyalist College of Applied Arts and Technology and Ontario Public Service Employees Union (Harvey and Storms Grievances. 92B134 and 92B135), supplementary Award, August 29, 1994, concluded that the motions introduced on November 1, 1991 whose validity was disputed by the Colleges were in fact not valid resolutions of the JEQS, and therefore did not have the effect of entitling the grievors to advance to the maximum on the salary schedule.

The latest development in this process, at least in the sense of the development of the collective bargaining relationship, although it arises from an award issued earlier than the Loyalist College awards, is Re Fanshawe College and Ontario Public Service Employees Union (Newell. et al. Grievances 93F600-93F606), March 30, 1994 (McLaren). In this arbitration, the board of arbitration had to deal with eight grievances filed by individuals who would have been entitled to advance on the salary schedule if the November 1, 1991 JEQS resolution were valid. The grievances, however, were not filed until after the first award in the Fanshawe College (Fordyce) case on April 20, 1993. Therefore, the grievances were filed during the currency of the 1991-94 collective agreement, and the specific provisions of that agreement prohibiting any finding of equivalency in relation to the In-Service Teacher Training Program Certificate were at issue between the parties. Also at issue was an argument by the Union that the College was prevented from reopening the question of the validity of the JEQS resolution of November 1, 1991 by the principles of res judicata and issue estoppel.

The board of arbitration concluded that the grievances arose under the 1991-94 collective agreement, and therefore fell to be determined in accordance with the terms and conditions of that collective agreement. Essentially because of that finding, the board concluded that the doctrine of res judicata did not apply, the Fanshawe College (Fordyce) case having arisen under a different collective agreement with different provisions in relation to the very

matter at issue. Moreover, the board of arbitration declined to exercise its discretion to apply the doctrine of issue estoppel.

Finally, the board of arbitration declined to recognize any vested rights arising from what occurred during the currency of the previous collective agreement. The board of arbitration found that it was constituted under the current collective agreement, under which it must decide the matters put before it. In the result, the board of arbitration determined that it would go ahead and hear the grievances, on their merits, and would permit a full re-hearing of the factual issues surrounding the meeting of November 1, 1991. In resolving the matter, it determined that it would apply the 1991-94 collective agreement.

We have set out this jurisprudence, some of which actually was perfected after the hearing before us was concluded, solely for the purpose of providing context to the deliberations which follow. We have no evidence on which we can judge the correctness of the factual determinations of either the Fanshawe College awards or the Loyalist College awards on the question of the events of November 1, 1991. Similarly, we have no real basis for assessing the validity of the legal conclusions drawn by either the McLaren boards or the Howe board. We have some specific submissions put before us, and we are required to deal with them independently. To the extent that the awards described above have relevance as persuasive authority to the legal determinations which we must make, however, we may refer to the reasoning of those awards in deciding the issues before us.

The Union's so-called preliminary objection, which is really a pre-emptive argument aimed at disposing of the entire matter at issue between the parties here, is that the College, in refusing to implement the reasonable consequences of the finding in Re Fanshawe College (Fordyce) -- that the JEQS decided on November 1, 1991 that qualifications equivalent to the In-Service Teacher Training Certificate permitted holders of those qualifications to advance to the maximum on the salary schedule -- is simply attempting to re-litigate the matters finally determined in the Fanshawe College (Fordyce) case. This argument, however, simply cannot succeed.

In Isabelle et al. v. Ontario Public Service Employees Union [1981] 1 S.C.R. 449, the Supreme Court of Canada dealt with contempt proceedings against four Colleges in the Colleges of Applied Arts and Technology system for refusal to implement an award issued in an arbitration involving another College. The Court found that, while the Council of Regents for Colleges of Applied Arts and Technology is the bargaining agent for all of the Colleges, and concludes only one collective agreement for each bargaining unit with the Union, it has "no managerial or administrative role in respect of the operation of the Colleges" (at p. 454). The Court therefore found that, although the collective agreement is concluded between the Council of Regents and the Union to apply to all of the Colleges, arbitrations arise as between a grievor or the Union and a particular College, and awards in any such arbitration bind only the grievor, the Union and the College itself at which the grievance arose.

While, as the Union points out in argument, this is a case of contempt proceedings and the question of natural justice is raised in the course of the reasons of Chief Justice Laskin, at page 457 the following appears by way of a more general statement of the law relating to arbitrations:

There is no hierarchy of adjudication in collective agreement arbitration and one arbitration board is not bound (unless the agreement or statutes so provides) by an award and a particular interpretation given by another board which disposed of a similar issue in previous proceedings.

To a certain extent, this proposition is echoed in another decision of the Supreme Court shortly thereafter, Canada Safeway Limited v. Manitoba Food and Commercial Workers Union Local 832 [1981] 2 S.C.R. 180, in which Chief Justice Laskin, on behalf of the Court, adopted the dissenting reasons of Monnin J.A. of the Manitoba Court of Appeal. The reasoning adopted, sub nom. Re Manitoba Food and Commercial Workers Union. Local 832 and Canada Safeway Ltd. (1981) 120 D.L.R. (3d) 42, at 488, includes the following statement:

I therefore conclude that res judicata and estoppel have no place in the settlement of labour disputes by private tribunals or by boards of arbitration. It is a principle to be reserved for the court-rooms.

While the Union argues that the situation of a finding of fact about a central event, made in the course of the deliberations of a body with deliberative and dispositive powers over the rights of the parties fits into a different category than an interpretation of the collective agreement, such as was involved in Isabelle, we simply cannot agree. If anything, findings of fact in a proceeding involving a different employer seem to us to be a far less tenable basis for the application of the doctrines of res judicata and issue estoppel than an interpretation of the same collective agreement in an arbitration involving a different employer. That is the conclusion reached by the Howe board of arbitration in the Loyalist College (Harvey and Storms) awards, and we respectfully adopt the same conclusion.

Moreover, the situation before us is one where the factual findings in relation to the JEQS must also be dealt with in light of the conclusion of a new collective agreement. Therefore, the additional reasoning employed by the McLaren board in the Re Fanshawe College (Newell. et al.) case also applies. We therefore decline to accept the Union's pre-emptive argument, and we find that the doctrines of res judicata and issue estoppel do not prevent the College from putting the Union to the strict proof of the validity of the November 1, 1991 proceedings of the JEQS, as well as to the demonstration of their relevance and conclusiveness in light of the subsequent amendment of a collective agreement.

We turn now to the College's pre-emptive argument. That argument is simply that, whatever occurred at the JEQS on November 1, 1991, and whatever its validity at the time, the parties have effectively annulled the impact of the outcome of that meeting to the extent that it would have provided these grievors with access to the maximum step on the salary schedule. The College points out that some of the new qualifications which grant access to the maximum step as set out in paragraph 14.03 A 4, in fact adopt some of what was purportedly done at the disputed meeting on November 1, 1991, in that other motions voted on that day have been enshrined elsewhere in the paragraph, either in the form in which they were voted on or in a somewhat amended form. Nevertheless, when the time came to consider the motion of the JEQS which would have granted equivalency to the present grievors, the central parties resolved the issue in a way which is completely unfavourable to the grievors, and prevents them from achieving the maximum step. Whatever might have been the effect of the JEQS motion prior to the conclusion of the new collective agreement, therefore, it has been overruled by agreement of the parties themselves.

We were referred by the College to a long line of cases beginning with Re United Steelworkers and International Nickel Co. of Canada Ltd. (1970), 22 L.A.C. 286, the effect of which is summed up in the following quotation from page 288 of that award:

We have no jurisdiction to extend the scope of the agreement, or to determine rights arising under another agreement than the one before us, notwithstanding that its terms may be the same, or that the qualifications attaching to such rights may not have been met until sometime after the present agreement came into effect. The claim before us is for holiday pay for July 1, 1969, and that claim can only be based upon the collective agreement which expired in July, 1969. It cannot therefore be determined by a board of arbitration appointed after a collective agreement which became effective in November, 1969.

Arbitrators have followed this reasoning with more or less enthusiasm over the years. The weight of arbitral authority is to the effect that both the substantive law and the remedial authority to be applied by a board of arbitration arise from the collective agreement under which that board was appointed, and only under that collective agreement: see Re Goodyear Canada Inc. and United Rubber Workers. Local 232 (1980), 28 L.A.C. (2d) 196 (M.G. Picher), Re Parkwood Hospital and Ontario Nurses' Association (1984), 14 L.A.C. (3d) 215 (Weatherill), Re Romi (Division of Ault Foods Ltd.) and United Food and Commercial Workers. Local 175 (1986), 25 L.A.C. (3d) 377 (Weatherill), Re FBM Distillery Co. Ltd. and Brewery. Malt and Soft Drink Workers. Local 304 (1987), 31 L.A.C. (3d) 122 (Brown), Re Mack Canada Inc. and International Association of Machinists. Lodge 2281 (1988), 2 L.A.C.

(4th) 304 (Burkett) and Re St. Lawrence College of Applied Arts and Technology and Ontario Public Service Employees Union (Price Grievance), December 31, 1991 (Burkett).

Applying those awards at face value would, in effect, preclude us from considering anything which happened under a previous collective agreement, and the severity of such a conclusion has caused arbitrators from time to time to take a somewhat closer look at the doctrine. In Re Clarke Institute of Psychiatry and Ontario Nurses' Association (1982), 5 L.A.C. (3d) 155 (Beck), the majority of a board of arbitration found that, where there was a demonstrable breach of a current collective agreement continuing a series of breaches of collective agreements dating back many years, a board of arbitration established under the most recent collective agreement and seized of the substance of the dispute had jurisdiction to award a remedy back to the earliest breach. In Re Regional Municipality of Ottawa-Carleton and Canadian Union of Public Employees Local 503 (1990), 16 L.A.C. (4th) 353 (Haeffling), a board of arbitration determined that it had jurisdiction to determine, under the current collective agreement, the correct accrual of vacation leave credits for employees on parental leave, although the parental leave concerned occurred during the currency of a previous collective agreement.

In Re St. Joseph's Health Centre (London) and Ontario Nurses' Association, unreported, November 30, 1993 (M.G. Picher), a board of arbitration established under a current collective agreement was required to decide whether a grievance specifically alleging a breach of a previous collective agreement was arbitrable. The grievance arose from the unusual circumstances that another board of arbitration, established in a still previous collective agreement, had found that there was a breach of the earlier collective agreement, but that it had no jurisdiction to award damages for losses suffered under the intermediate collective agreement, the agreement in respect of which the grievances, filed after its expiry and re-negotiation, alleged a breach. The board of arbitration found that, regardless of when it had been established, and in accordance with what collective agreement, it was properly seized of a breach of a previous collective agreement, and that it had jurisdiction to hear and determine the grievance on the basis of the previous collective agreement.

In doing so, the majority of the board of arbitration did not rely on the decision of the Supreme Court of Canada in Re Dayco (Canada) Ltd. and National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (1993) 102 D.L.R. (4th) 609 (S.C.C.), a decision issued after the majority award in Re St. Joseph's Health Centre (London) was drafted. There is, however, some discussion of that case in the dissent and the addendum in the St. Joseph's case. In many ways, the Re Dayco (Canada) Ltd. decision is as central to the issue before us in relation to the arbitrability of the present grievance as were the decisions of the same Court in relation to the res judicata and issue estoppel.

Re Dayco (Canada) Ltd. involved the entitlement of a class of retired employees to group insurance benefits, the right to which had been established under a previous collective agreement. Following the expiry of that collective agreement, the employer gave notice that those benefits would be discontinued. The Union filed a grievance, after the expiry of the collective agreement of which it alleged a breach of the provisions.

The arbitrator found that he had jurisdiction to determine a breach of the expired collective agreement, that the mere expiry of a collective agreement does not preclude the arbitrability of a grievance alleging a breach after the expiry, and that it is possible for a promise of retirement benefits to survive the expiry of the collective agreement in which that promise is found. The Supreme Court of Canada, unanimous on this point, found that the appropriate standard of judicial review of a determination by an arbitrator relating to his or her jurisdiction is the standard of correctness, and that the arbitrator had met that standard. The decision of the Court, however, clearly distinguishes between rights which crystallize at the time of retirement, and rights which are fluid, in the sense that they are subject to alteration in the collective bargaining process. Referring to another decision of the Court, Hemond v. Cooperative federal du Quebec [1989] 2 S.C.R. 962, the Court makes the following comment distinguishing the two cases:

First, there is no doubt that the prospective employment relationship can only be governed by one collective agreement, and that the most current. While an employee continues to be a part of the bargaining

unit, he or she is of necessity subject to the vicissitudes of the collective bargaining process. However, on retirement a worker withdraws from that relationship, and at that point his or her accrued employment rights crystallize into some form of "vested" retirement right. It is quite possible that this right may only be enforceable through collective action by the union on the retirees' behalf. However, if that is the case, this arises out of the structural peculiarities of our labour law system rather than any apparent point of principle.

While, therefore, the Re Dayco (Canada) Ltd. decision is useful in clarifying some of the difficult questions about the arbitrability of a grievance filed only after the expiry of the collective agreement of which it alleges a breach, it does not deal with the question before us. The right to advance to the maximum step can only be found to be a vested right if it is one which, on a proper interpretation of the collective agreement, the parties intended to be vested. Therefore, it is necessary to look in some detail at what the parties must have intended in the circumstances of this case. In our view, even taking the most generous view of the jurisdiction of a board of board of arbitration to grant remedy for a breach of a previous collective agreement, there are two insurmountable obstacles in the way of success for the grievors and the Union in this matter.

The Union's first position in response to the Employer's pre-emptive argument is that this board of arbitration was properly appointed under the 1989-91 collective agreement, and that we draw our jurisdiction from that agreement. This argument runs immediately afoul of the mandatory time limits set out in the grievance procedure in the collective agreement, specifically the longstanding provision which is now clause 32.05 A:

If the grievor fails to act within the time limits set out at any Complaint or Grievance Step, the grievance will be considered abandoned.

The complaint stage, found in clause 32.02, requires that there be a discussion with the employee's immediate supervisor within 20 days after "the circumstances giving rise to the complaint have occurred or have come or ought reasonably to have come to the attention of the employees. All of the subsequent grievance stages are based upon the expiration of a time period after the reply at the previous stage, or a failure to reply within the time limits specified for a reply to be delivered. Not only have these time limits been found to be mandatory in any number of previous arbitrations, there is no statutory discretion under the Colleges Collective Bargaining Act for this board of arbitration to relieve against those time limits, whatever the equities of the situation.

In the present case, the union argues that the employees were not required to invoke the grievance procedure until the outcome of the Re Fanshawe College (Fordyce) case was known. There was a lengthy correspondence between a solicitor acting on behalf of the grievors as individuals and the Chair of the Staff Affairs Committee of the Council of Regents, culminating in a letter from the latter to the former dated March 26, 1992, clearly denying that the JEQS Committee deliberations of November 1, 1991 could provide any comfort to the grievors. Moreover, there was never any doubt that the College itself was refusing to apply this resolution to the case of the grievors, and at the very least by March 26, 1992 it must have been obvious that the Council of Regents was not going to intervene with the College in order to require it to allow the grievors to advance to the top step. In the result, a grievance filed in July 1993, even though it refers to the Fanshawe College (Fordyce) award as the triggering fact, simply must be out of time. In our view, therefore, we have no jurisdiction to act as a board of arbitration established under the 1989-91 collective agreement. The Union's alternative argument is that, even if our jurisdiction is under the current collective agreement, this is a continuing grievance, since the grievors are paid incorrectly every time they are paid. While there may therefore be an issue as to the amount of retroactivity which we can award, we can decide whether their current pay is incorrect, and thus look at how they got to the present situation in order to decide that point. While there may be merit in the union's argument in relation to continuing grievances as an exception to the strict time limits under this collective agreement, we would still face the problem that the outcome which the grievors are requesting is one which the parties specifically addressed in this collective agreement and which they decided against the interests of the grievors. For the Union to succeed in this case, therefore, we would have to accept the following propositions:

1. The resolution of the JEQS on November 1, 1991, assuming for the sake of argument that it was valid and binding, gave the grievors a vested right to advance to the maximum step on the salary schedule.
2. The right which was vested was one which the parties to the collective agreement could never take away.

We do not think these propositions can succeed. The Re Dayco (Canada) Ltd. case certainly does not say that every right which is granted under a collective agreement is thereafter immutable. It deals with a specific kind of right, one which depends upon the retirement of an employee, and it deals with a 21 breach of that right by one party acting unilaterally, rather than by both parties acting together. In our view, there is nothing in the Re Dayco (Canada) Ltd. decision to give any comfort to the grievors or the union in the present situation.

Moreover, the Re Regional Municipality of Ottawa-Carleton award, also relied upon by the Union for this proposition, does not really deal with the vesting of a right under a previous collective agreement, but only the determination under the present collective agreement of entitlements in respect of service under previous collective agreements. Here again, only one party was attacking the entitlements of the employees earned under previous collective agreements; before us, both parties are united in determining, by an amendment to the collective agreement, that whatever was done on November 1, 1991 should not be allowed to stand in respect of persons in the same position as the grievors.

In our view, it is simply impossible to get around the fact that the parties have turned their minds in collective bargaining to the very issue in dispute, and have reached the conclusion that the grievors should not succeed. While they have done that in general terms, the impact on the grievors and others in the same situation is unmistakable, and must have been known to the parties. There is no provision made for grandparenting or red circling, and it may even be that the change to the collective agreement would have retroactive effect. We do not have to concern ourselves with that issue, nor do we even have to concern ourselves with whether the parties can take away a pay increase which has already been validly granted.

Here, in our view, an event occurred on November 1, 1991 which has been continuously disputed by this College, and has never been resolved, by arbitration or otherwise, in favour of the grievors' position. When the collective agreement came open for re-negotiation, the parties specifically turned their minds to the issue, and resolved the interpretation question by changing the collective agreement to the detriment of the grievors and others in their position. Our responsibility is to interpret the collective agreement and to apply it to the facts before us. In doing so, we cannot come to any other conclusion but that, regardless of the validity of what occurred at the JEQS on November 1, 1991, the present grievances under the present collective agreement must be denied.

In doing so, we also express some sympathy for the grievors in their attempts to alter what they consider to be an unfair assessment of their formal educational qualifications. It is not for us, however, to determine what is fair or not in that regard; the parties themselves have complete control over such questions, and they have determined, no doubt based upon far more information and a much clearer view of the overall picture than we can ever have, that the grievors' qualifications should not permit them to reach the final step on the salary schedule.

In the result, therefore, the grievances are denied.

DATED AT TORONTO this 10th day of January, 1996.

Kenneth P. Swan, Chairman

I concur

"George Metcalfe"
George Metcalfe, Employer Nominee

I concur

"Ed Seymour"
Ed Seymour, Union Nominee