In the Matter of an Arbitration
Pursuant to the *Colleges Collective Bargaining Act,* S.O. 2008

Between:

ONTARIO PUBLIC SERVICE EMPLOYEES UNION
(the Union)

- and -

COLLEGE EMPLOYER COUNCIL
ONTARIO COLLEGES OF APPLIED ARTS AND TECHNOLOGY
(the Employer)

Re: Union Grievances filed between November 17, 2009 and February 24, 2010

PRELIMINARY AWARD

Paula Knopf - Arbitrator

APPEARANCES:

For the Employer: Wallace Kenny, Counsel
Robert Church
Christine Emond
Don Sinclair

For the Union: Janet Borowy, Counsel
Robin Gordon
Mary Ann White
Darryl Bedford

The hearing of this matter was held in Toronto on December 6, 2010.

The Ontario Public Service Employees Union (the Union) and the College Employer Council Ontario Colleges of Applied Arts and Technology (the Employer) have a very complex Collective Agreement covering the academic staff at all the Colleges in Ontario. This Employer and the Union are sophisticated parties. Because of the nature of their mandates, their negotiations are often protracted. The negotiations leading up to the current Collective Agreement were no exception. The new contract was not resolved until months after the previous one had expired. In the interim, the Employer exercised its right to impose new terms and conditions of employment. One of the items of the imposed terms and conditions included a provision that precluded to suspend the Union's right to file and process Union grievances until a new Collective Agreement was signed. Nevertheless, the Union continued to file individual and Union grievances during that period. The Employer asserts that the Union grievances are inarbitrable. The Union challenges this alleged bar to arbitrability. The parties have asked for a Preliminary ruling on the question of whether the Union grievances filed between November 18, 2009 and February 24, 2010 are arbitrable.

In order to focus and expedite the determination of this matter, the parties presented their case on the basis of the following Agreed Statement of Facts:

1. The Ontario Public Service Employees Union ("OPSEU") is the exclusive bargaining agent that represents 9,000 full time and partial-load faculty members including but not limited to teachers, instructors, counsellors and librarians at the 24 Ontario Colleges of Applied Arts and Technology. Under the Colleges Collective Bargaining Act, (CCBA), the Colleges Employer Council ("the Council") is the bargaining agent acting on behalf of the colleges in negotiating collective agreements with unionized staff. Pursuant to the CCBA, the parties participate in a centralized bargaining process for the academic bargaining unit.

2. Article 32 of the prior collective agreement and of the Collective Agreement which was finalized on July 7, 2010 sets out a grievance procedure. Article 32.09 provides for Union grievances and that,

> The Union or Union local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such Grievance shall not include any matter

> upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of the employees.
>
> Such grievance shall be submitted in writing by the Union Grievance Officer at the Head Office or a Union Local President to the Director of Human Resources or as designated by the College, within 40 days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of the grievance procedure detailed in 32.02.

3. This grievance concerns whether Union grievances filed during the period of November 18, 2009 and February 24, 2010 are arbitrable. The Union holds the position that the Collective Agreement is retroactive and applies to the period in question. The Employer Council holds the position that at the time the grievances were filed no collective agreement was in effect between the parties. The parties agreed to appoint a single arbitrator to determine whether the grievances were arbitrable and to proceed by way of legal argument.

History of Scheduling Grievances

4. The parties have a long-standing practice of jointly scheduling union and individual grievances. Article 32.03 A provides the representatives of the Council and the Union meet monthly to review the matters referred to arbitration and agree to the assignment of a Chair to hear the grievance.

5. Since 2001, in a Letter of Understanding appended to the Collective Agreement, the parties have further agreed that it is their mutual desire that complaints be adjusted as quickly as possible and that neither party is entitled to refuse more than two tentative arbitration dates on any grievance.

2009 Negotiations

6. Pursuant to Section 3 (2) of the *Colleges Collective Bargaining Act, 2008*, S.O. 2008 Ch 15 ("CCBA"), on June 3, 2009, OPSEU sent notice to bargain to the Council for a new collective agreement. The collective agreement in effect at the time expired as of August 31, 2009.

7. The parties met in negotiations between June and November 2009. Attempts at negotiating a new collective agreement were unsuccessful. A Conciliation Officer was appointed by the Ministry of Labour to assist the parties to reach a

settlement at the negotiations. The Conciliation Officer issued a report to the Minister of Labour, pursuant to Section 7 (3) of *CCBA,* that he has been unable to assist the parties in settling the new collective agreement.

8. On October 30, 2009, the Minister of Labour issued a notice to the parties of the Conciliator's report. Negotiations subsequently broke off on November 12, 2009 with no further dates planned.

9. On November 12, 2009, pursuant to Section 15 (1) (b) of *CCBA*, and 16 days following the Ministry of Labour's notice of the Conciliation Officer's report to the parties, the Colleges announced that it would introduce revised terms and conditions of employment for faculty beginning November 18, 2009 if the parties were unable to settle by that date. The Colleges advised the Union's bargaining team on November 12 that if it implemented the revised terms union grievances would be suspended.

November 18, 2009 Terms and Conditions.

10. On November 18, 2009, revised terms and conditions became effective. The cover page of the terms specified that,

> These terms and conditions became effective on November 18, 2009 unless otherwise indicated in the term and condition. Salary increases were retroactive to September 1, 2009. These terms and conditions will remain in effect until a new collective agreement is entered into with OPSEU.

11. The revised terms of Article 32.03A included a new paragraph in bold as follows:

> **(As the joint scheduling committee meetings are suspended until a new collective agreement is signed with OPSEU, the scheduling of individual grievances will be dealt with at the local level between the Local Union and the College. Any notices to arbitrate received from individual employee grievances will be dealt with by an arbitrator being selected by lot from the above list. That arbitrator will then be canvassed for dates acceptable to the Local Union and the College. This process will be in place until a collective agreement is signed with OPSEU.)**

12. The Union grievance provisions, Article 32.09 of the revised terms, set out the following new notation in bold:

> **(Union grievances are suspended until a new collective agreement is signed with OPSEU.)**

13. The duration clause of the revised terms and conditions was as follows:

Article 36 DURATION

(These terms and conditions became effective on November 18, 2009, unless indicated otherwise. Salary increases are retroactive to September 1, 2009. These terms and conditions will remain in effect until a new collective agreement is entered into with OPSEU.)

36.01 This Agreement shall take effect commencing on the date of signing and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26) and shall continue in full force and effect until August 31, 2009, and shall continue automatically for annual periods of one year unless either party notifies the other party in writing in January, 2009, that it desires to amend this Agreement.

36.02 Negotiations shall begin within 30 days following notification for amendment as provided in 36.01. Proposals having application to an individual College only which the parties to this Agreement agree are appropriate for discussion at meetings directly between a College Committee of three members (as appointed under 7.01) shall be held at mutually agreed dates during the period of one month following receipt of the notification referred to in 36.01. Failing settlement, such proposal(s) may then be included as matters for discussion in the negotiations between the parties of this Agreement.

14. The union’s bargaining team issued a communication to employees on November 16, 2010 acknowledging that they had been advised that colleges would not be accepting union grievances.

The Last Offer Vote

15. On February 2, 2010, the Council made application to the OLRB to hold a last offer vote on the Council's offer of January 27, 2010. The official count was finalized on February 24, 2010. More than 50% of the ballots cast were in favour of accepting the offer.

16. The Council prepared the January 27, 2010 Management Offer for Settlement and copies of the 24-page document were distributed to employees and available on both parties’ web-sites.

17. The January 27, 2010 Management Offer document highlighted for the employees that “except for the changes contained in this document, all other provisions of the previous collective agreement will remain the same. Changes to the previous collective agreement are underlined and bold.”

18. The Grievance procedure changes included the addition and deletion of names to the list of agreed to arbitrators who could act as the Chair of the Arbitration panel

and a change to Article 32.03 D to update the language to reflect recent changes to the *CCBA*.

19. The Management offer also included a change to the Duration of the collective agreement - Article 36 as follows:

> 36.01 This Agreement shall take effect commencing on November 18, 2009, save and except the changes to article 19.07 B which is effective December 1, 2009 and articles 11.01 E 3, 11.01 F 2, 11.02 C 2, 11.08 and 11.09 which are effective January 31, 2010 and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26) and shall continue in full force and effect until August 31, 2012, and shall continue automatically for annual periods of one year unless either party notifies the other party in writing in June 2012, that it desires to amend this Agreement.

20. OPSEU took the position and advised the Council that Article 36.01, the duration article, should be changed because of its non-compliance with subsection 3(2) of the *CCBA*. OPSEU specifically contested the language that required the notice of bargaining to be provided in writing in June. It was OPSEU's position that the *CCBA* provided the option of notice within 90 days of the expiry of the collective agreement.

21. Following the vote OPSEU continued to dispute the notice to bargain provision in Article 36.01 on the grounds that it ran afoul of the *CCBA*. The parties later agreed to alter the Duration article notice to bargain provisions to provide for 90 days.

Renewal Collective Agreement

22. Following the vote in March 2010, OPSEU refused to sign the collective agreement as presented by the Council for signature and took the position that it would sign a collective agreement that included the Council's editorial comments and summation page which formed an integral part of the last offer received. The Council brought a bad faith bargaining charge against the union pursuant to s.4 of the CCBA for refusing to sign the agreement as presented. The OLRB, in a decision dated June 7, 2010, found the union to be in violation of the S.4 and directed the union to sign the collective agreement without further delay.

23. In April 2010, the Council signed the new collective agreement and on July 7, 2010 OPSEU signed the new collective agreement.

24. The renewal collective agreement includes the Union grievance provision, Article 32.09 [with the same terms] as the previous collective agreement:

> The Union or Union Local shall have the right to file a grievance based on a difference directly with the College arising out of the Agreement concerning the interpretation, application, administration or alleged contravention of the Agreement. Such grievance shall not include any matter upon which an employee would be personally entitled to grieve and the regular grievance procedure for personal or group grievance shall not be by-passed except where the Union establishes that the employee has not grieved an unreasonable standard that is patently in violation of this Agreement and that adversely affects the rights of employees.
>
> Such grievance shall be submitted in writing by the Union Grievance Officer at Head Office or a Union Local President to the Director of Human Resources or as designated by the College, within 40 days from the occurrence or origination of the circumstances giving rise to the grievance commencing at Step One of the grievance procedure detailed in 32.02.

25. The Duration clause in the renewal collective agreement is as follows:

> Article 36.01 This Agreement shall take effect commencing on November 18, 2009, save and except the changes to article 19.07 B which is effective December 1, 2009 and articles 11.01 E 3, 11.01 F 2, 11.02 C 2, 11.08 and 11.09 which are effective January 31, 2010 and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26) and shall continue in full force and effect until August 31, 2012, and shall continue automatically for annual periods of one year unless either party notifies the other party in writing within the period of 90 days before the agreement expires that it desires to amend this Agreement.

Grievance Scheduling Committee Reconvenes

26. On March 5, 2010, following the final offer vote, the Joint Scheduling Committee met to start scheduling individual and policy grievances.

27. OPSEU brought 41 union grievances filed between November 19, 2009 and February 23, 2010 forward to the Joint Grievance Scheduling committee for referral to arbitration.

28. On March 12, 2010, Don Sinclair, Executive Director of the Council, wrote Mary Ann White, OPSEU CAAT - Academic representative on the Joint Grievance

Scheduling Committee, to advise her that the Council would not agree to schedule any union grievances for arbitration that were filed between November 17, 2009 and February 24, 2010. It was the Council's position that such grievance rights were suspended during that time as a result of the Colleges implementing new terms of employment on November 18, 2010.

29. On March 22, 2010, Mary Ann White responded on behalf of OPSEU that it was OPSEU's position that union grievances filed after November 18 are arbitrable pursuant to article 32, with reference to article 36. Any issues of jurisdiction, including the arbitrability of grievances, are properly determined by the assigned arbitrator(s).

30. On June 30, 2010, the parties agreed that the preliminary issue regarding the arbitrability of the union grievances would go before an arbitrator. The CAAT - Academic Union grievances filed between November 18, 2010 and February 24, 2010 are currently held in abeyance subject to the ruling of the arbitrator on this preliminary matter.

One other factual issue was raised. Some individual Colleges may have dealt with Union grievances differently during the relevant period. Some accepted them and discussed them with their local Union representatives with the aim of resolution. The parties asked me to remain seized with the potential implications of local responses, should that issue become relevant. However, as the following analysis and conclusions will show, this issue has become moot.

Submissions of the Union

The Union acknowledges that the Employer imposed new terms and conditions of employment effective November 18, 2009 that included a suspension of Union grievances. However, the Union stressed that the bargaining unit voted on Management's Offer for Settlement dated January 27, 2010, that included the provision that the new Agreement would take effect November 18, 2009, except for specified changes to particular articles which did not include the Union grievance provisions in 32.09. Therefore, it was said that the strict reading of the language would require acceptance of jurisdiction to hear Union grievances filed during the life of the new Collective Agreement. In support of this, the Union traced the history of the duration

clause of the parties' Collective Agreement. In the previous contract, it read:

> This Agreement shall take effect commencing on the date of signing and shall have no retroactive effect or application (except Salary and Schedules in Article 14 and Article 26 . . . .)

In the Revised Terms and Conditions imposed November 18, 2009, it read:

> These terms and conditions became effective on November 18, 2009, unless indicated otherwise. Salary increases are retroactive to September 1, 2009. These terms and conditions will remain in effect until a new collective agreement is entered into with OPSEU.

The final language of Article 36.01 in the new Collective Agreement became:

> This Agreement shall take effect commencing on November 18, 2009, save and except the changes to article 19.07 B which is effective December 1, 2009 and articles 11.01 E 3, 11.01 F 2, 11.02 C 2, 11.08 and 11.09 which are effective January 31, 2010 and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26) and shall continue in full force and effect until August 31, 2012, and shall continue automatically for annual periods of one year unless either party notifies the other party in writing within the period of 90 days before the agreement expires that it desires to amend this Agreement.

The Union stressed the difference between the phrase "date of signing" and "is entered into", arguing that the difference is significant and signals that as soon as the new Collective Agreement is determined, its terms become effective, unless there is a specific duration to a particular term which is not indicated for the Union grievance Article 32.09. The Union stressed that the Employer drafted this language and did not include anything to suggest that there would be any limits on the Union's right to file and process Union grievances during the life of the contract.

Further, the Union argued that the information the Colleges sent out to the bargaining unit members before the vote effectively promised that if the final offer were accepted, its terms would replace the imposed terms and conditions. The literature distributed by the Colleges included the following:

What happens if the Final Offer is Accepted
There appears to be some confusion among faculty about what will happen if the final offer is accepted. The following will happen:

- The colleges and the union will have a full collective agreement in effect and will remain in effect until it expires on August 31, 2012.
  . . . . .
- The new collective agreement will replace the terms and conditions introduced last November.

Summary of Colleges' Offer of Settlement to Faculty
Term of Contract

- Three-year contract
- Contract runs from September 1, 2009 to August 31, 2012

The Union argued that the language circulated by the Employer sent a clear message that if the terms in the Final Offer were accepted, they would become effective November 18, 2009, except for identified clauses that do not relate to this case. One of those terms was the right of the Union to file grievances. Therefore, it was said that it would be contrary to the provisions of the vote to interpret the contract in any other way. The Union also referred to the definition provisions of the *Colleges Collective Bargaining Act, supra:* "collective agreement means a written collective agreement between the Council on behalf of the employers and an employee organization respecting terms and conditions of employment negotiable under this Act." The Union stressed that this language does not require that a document be "signed" to constitute a collective agreement. Therefore, the Union argues that the Final Offer set out by this Employer was effectively the "written agreement" that had the impact of becoming fully operational because it replaced the old Collective Agreement that expired on August 31, 2009. It was said that this provided the important continuity between the previous and the new Collective Agreement. As a consequence, the Union argues that the date that the language of the Collective Agreement was ultimately finalized or that the Union signed is irrelevant in this case.

Further, the Union points out that several of the Union grievances that it attempted to process during that period involve matters that arose under the previous Collective Agreement or involve rights that flowed into and/or survive the freeze provisions. Therefore it was said that nothing about the imposed terms and conditions can preclude

access to arbitration on those matters. Some examples were given, such as grievances concerning Article 2 “preference to full time designation”, and job security issues.

The Union argued that on a policy and “practical” level, it makes more “labour relations sense” to allow these grievances to be heard. It was submitted that this approach would respect ongoing statutory and contractual rights, allow for the resolution of important vested rights and recognize the continuity of the collective bargaining relationship between the parties. In support of its positions, the Union relied upon the following authorities: *Canteen of Canada Ltd. and RWDSU* (1984) 15 L.A.C. (3d) 305 (Mitchnick); *Penticton and District Retirement Service and Hospital Employees' Union, Local 180* (1977) 16 L.A.C. (2d) 97 (Weiler); *Dayco (Canada) Ltd. v. C.A.W.-Canada*, [1993] 109 D.L.R. (4th) 609, 2 S.C.R. 230; *Algonquin and Lakeshore Catholic District School Board and OECTA*, [2000] 61 C.L.A.S. 1 (Shime); *Superior North Catholic District School Board v. OECTA,* [2000] O.L.A.A. No. 492 (Surdykowski); *Alberta Liquor Control Board and AUPE* (1987) 29 L.A.C. (3d) 24 (Ponak); *Hamilton-Wentworth District School Board and OSSTF - District 21*, [2004] 21 79 C.L.A.S. 57 (Newman); and *Durham Memorial Hospital and London & District Service Workers’ Union, Local 220* (1991) 19 L.A.C. (4th) 320 (Kaufman).

Submissions of the Employer

The Employer argued that none of the cases relied upon by the Union dealt with similar facts because there is no other situation where the Employer made it so abundantly clear that it was suspending the right to process Union grievances during the period of the statutory freeze. The Employer stressed that on November 12, 2009, it advised the Union that it would not accept any Union grievances after November 18th, and the terms and conditions imposed November 18th stated clearly: “Union grievances are suspended until a new collective agreement is signed with OPSEU.” Further, the imposed terms made the statutory provisions allowing for the extension of time for the filing of grievances inapplicable [CCBA s. 14(16)]. It was said that all this made it very clear to the Union that its own grievances would not be arbitrable until a new contract was

signed. This was said to be in contrast to the Employer's decision to allow individual grievances to be processed even when no contract was in place. It was said that the Union was fully aware of the impact of the Employer's terms and conditions, as evidenced in the Union's communication to its membership on November 16, 2009 advising:

> The Colleges told the faculty team and the Ministry-appointed conciliator that the Colleges would not be accepting any union grievances. Only grievances from individuals would be accepted. This is an imposed condition of employment.
>
> Union grievances are policy grievances filed to protect the faculty from policies which violate the collective agreement.
>
> Taking away the union's right to file a grievance on behalf of all faculty, or groups of faculty, is a substantial takeaway and an unequivocal concession.

The Employer emphasized that nothing in any subsequent communication to the Union or in the Final Offer documentation gave any indication that the right to file Union grievances would be reinstated or revived retroactively. Instead it was said to be clear that the right would not arise until the new contract was finalized. Therefore, the Employer argued that it would be wrong to conclude that this history could be rewritten to revive access to arbitration of Union grievances during that period.

The Employer also asserts that the current Collective Agreement should not be deemed to have been "finalized" or in place until it was signed by both parties. It was stressed that the contents of the contract remained in dispute after the vote, including the wording of the duration clause. These problems were detailed in the decision of the Ontario Labour Relations Board, issued June 7, 2010, that ultimately ordered the Union to sign the Collective Agreement in the form presented to it by the Employer in March 2010. Although the Employer argued that no Collective Agreement was actually finalized until the Union did sign on July 7, 2010, the Employer pointed out that it "voluntarily" agreed to resume acceptance of Union grievances after the announcement of the acceptance of the Final Offer Vote on February 24, 2010. Therefore, the Employer argued that while it could have taken the position that no Union grievances were arbitrable until after July

7th, it is only arguing inarbitrability between November 18 and February 24, 2010.

The Employer acknowledged that the drafting of the duration clause in this contract was unusually complicated because some provisions had already been implemented and there was no desire to take any rights away. Therefore, it was important to identify when certain rights were triggered. However, it was stressed that there never was any intent to undo the suspension of the Union's ability to file grievances between November and February. It was argued that it would be "absurd" to conclude that the period of suspension can be transformed back into a period when Union grievances would now be arbitrable. It was suggested that if the Union's position is accepted, this would "magically convert" the suspension of the Union's right to grieve into an "absurd legal fiction". The Employer argues that such a conclusion would be inconsistent with the Employer's right to implement changes in terms and conditions and would effectively convert events that have already occurred. It was also argued that the duration clause in the new Collective Agreement should read to put into effect the substantive changes to language and rights, but not to alter the events that occurred before the new contract was finalized. It was also said that the Union's position is ironic because it seeks to assert rights prior to its signing the contract on July 7th.

It was stressed that the "reality of collective bargaining" is that the parties understand that the imposed terms and conditions alter the expectations of the parties. It was said that there could be "no reasonable expectation" on the Union's part that the finalization of the Collective Agreement would alter or change the nature of the terms or conditions of employment that suspended its right to grieve from November 18, 2009 to February 24, 2010. Therefore, it was said that the Union should understand that the suspended right to file Union grievances during the relevant period cannot be "written out" of effect after the fact. Further it was stressed that the rights under the new Collective Agreement are not enforceable during a period when no grievance rights existed. Therefore, it was said that the Union could have no reasonable expectation that the finalization of the terms of the contract would alter the nature or effect of what had happened up to that point.

Turning to the issue of Union grievances that may involve rights arising from the previous Collective Agreement or that vested prior to November 18, 2009, the Employer points out that the Union had notice on November 12, 2009 of the fact that the Employer would be suspending the right to file Union grievances effective November 18, so the Union could have filed any of those grievances in the interim and/or filed them after February 24, 2010. The Employer also argued that the Union cannot expect that the provisions of the previous contract would stay in place after it expired and that it takes clear language to transform the legal effect of things that have been done.

In support of all these submissions, the Employer relies upon *Penick Canada Ltd. and International Chemical Workers, Local 412 (1966) 17 L.A.C. 296 (Weatherill); Commemorative Services of Ontario and SEIU, Local 204* (1997) 69 L.A.C. (4th) 11 (G. Brandt); *Hamilton Wentworth District School Board v. OSSTF, District 21,* [2004] O.L.A.A. No. 536 (Newman); *Capital Taxi v. CAW-Canada Local 6056* (2006) 149 L.A.C. (4th) 97 (MacDowell); *Royal Diamond Casino v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3000* (2003) 118 L.A.C. (4th) 371 (Dorsey); *Precious Plate Ltd. v. Communications and Electrical Workers of Canada* (1987) 27 L.A.C. (4th) 329 (O'Shea).

Reply Submissions of the Union

In response to the Employer's suggestion that the Union is seeking an "absurd" result in this case, the Union submitted that the concept of retroactivity is, itself, an equally "absurd" concept or "legal fiction", but it operates to allow contractual rights to be continued from contract to contract without interruption, despite the timing of actual negotiations. In contrast, it was said that it would be "absurd" to prevent these grievances from going forward when it makes "good labour relations sense" for them to be resolved.

Further, it was submitted that it would be wrong to conclude that the Collective

Agreement was not operational or finalized until the signing on July 7th because all the components of the Collective Agreement were “alive” and put in place as outlined in the Employer’s language for the Final Offer vote. Further, for all other purposes the parties conducted themselves after February 24th as being bound by those terms, and the events thereafter only pertained to the finalization of the details of language, not substantive rights.

Decision

This case raises unique questions regarding the consequences of these parties’ bargaining experience.

It is helpful to approach the case with the relevant principles from arbitral jurisprudence in mind. The parties' relations are governed by statute and their collective agreement. Pursuant to the *Colleges Collective Bargaining Act,* their Collective Agreement must be in writing, but its binding effect does not depend on the existence of a “formal document”. This is because negotiations are not always concluded in a “model form” and sometimes require some time before all the “t’s” are crossed and the “i’s” are dotted on a formal contractual document. So the arbitral authorities simply require clear or “certain” language that articulates terms that are identifiable by a third party. Once that is achieved, a collective agreement can be said to be in place: see *Canteen of Canada, supra,* at p. 307. Therefore, it is not necessary for a bargain to be signed for its terms to be effective, so long as they are clear and discernable.

Jurisprudence has also given us guidance on the importance and effect of “duration” clauses in collective agreements. Their purpose is to provide a fixed date for the negotiation and renegotiation of successive agreements and they can provide continuity or limits on terms of the rights and obligations of the parties. They can ensure that the basic terms and conditions remain in place unless modified by the parties. Therefore, duration clauses are interpreted as conferring retroactive benefits unless specific language indicates otherwise or unless this would lead to an absurd result: *Penticton and District Retirement Service, Algonquin and Lakeshore Catholic District School*

Board and *Superior North Catholic District School Board and O.E.C.T.A., supra.* However, while many duration clauses often make specific monetary clauses retroactive, such as wage rates, it requires clear language to transform the legal effect of things done by the parties during the time when no collective agreement language was in effect: *Penick Canada Ltd. and International Chemical Workers, Local 412, supra.*

Another fundamental concept that jurisprudence explores is the question of the enforceability or effect of rights that arise under expired collective agreements. The seminal case is *Dayco (Canada) v. C.A.W.-Canada, supra.* It determined that where rights under a contract are intended to survive the expiration of the collective agreement or "vest" during the term of a contract, such as retirement benefits, an arbitrator does have jurisdiction to hear grievances that concern those rights, even if they are filed after the expiry of the contract. This principle was also applied to a job posting grievance that was filed after the expiry of the contract: *Algonquin and Lakeshore Catholic District School Board and O.E.C.T.A., supra.* On the other hand, where no collective agreement or dispute resolution mechanism is in place, there may be no jurisdiction for an arbitrator to enforce a right that arose after the expiry of the old contract: *Royal Diamond Casino v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3000, supra.*

These principles must now be applied to the facts at hand. To do this, it is helpful to summarize the chronology of relevant events:

June 3, 2009	Notice to bargain was given
August 31, 2009	Previous Collective Agreement term ended
November 12, 2009	Collective bargaining talks were "broken off" and the Employer advised the Union that it would impose new terms and conditions effective November 18, 2009
November 18, 2009	New terms and conditions imposed, including the term "Union grievances are suspended until a new collective

	agreement is signed with OPSEU”
February 10, 2009	Final Offer Vote held on Employer’s Offer
February 24, 2009	Announcement of Final Offer Vote in favour of acceptance
March, 2009	The Employer presented the Union a collective agreement for the Union to sign with a duration clause that read: “This Agreement shall take effect commencing November 18, 2009 save and except the changes to article 19.07 B which is effective December 1, 2009 and articles 11.01 E 3, 11.01 F 2, 11.02 C 2, 11.08 and 11.09 which are effective January 31, 2010 and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26) and shall continue in full force and effect until August 31, 2012, ...
June 7, 2009	The OLRB ruled that the Union had failed to bargain in good faith by failing to sign the Collective Agreement as presented to it by the Employer in early March
July 7, 2009	The Union signed the new Collective Agreement

As is always the case in labour arbitration, the task of the arbitrator is to give effect to the results of the collective bargaining process in the context of the parties’ statutory rights. In the case at hand there might have been an interesting theoretical debate that could be explored as to when these parties’ Collective Agreement was “finalized”. Was it the date of the Vote, the date the Vote was announced, the date the Employer presented a document for signature or that it signed it, or the date the Union was ordered to sign or the date when the Union finally signed? However, the fact is that this does not have to be determined. What we have here is the benefit of time that shows us that a Collective Agreement does exist. By the parties’ agreement, they have a Collective Agreement that “came into effect” November 18, 2009. The task then becomes to determine the effect of the parties’ language with respect to its Duration clause and what they intended with respect to retroactive effect.

It must be concluded that they chose to put their terms into effect November 18, 2009. They would have been within their rights to give some or no retroactive effect to any of

its terms. They could have made the contract effective as of the date it was signed. They did this in their previous contract, except with respect to certain salary and related provisions that were made retroactive. However, in this round of bargaining, they chose to exercise their respective rights and bargaining power to craft a Duration clause that put the Agreement in effect as of November 18th, months earlier than its actual signing or “finalization”. This had the desired effect of keeping in place the salary increases that had been unilaterally implemented as of September 1st. The parties also provided that some specified terms would come into effect December 1, 2009 or January 31, 2010. This shows that the parties were able to specify what terms had effect before and after November 18th. It is helpful to see this clause with its phrases separated to understand its meaning:

> This Agreement shall take effect commencing on November 18, 2009,
>
> save and except the changes to article 19.07 B which is effective December 1, 2009 and articles 11.01 E 3, 11.01 F 2, 11.02 C 2, 11.08 and 11.09 which are effective January 31, 2010,
>
> and shall have no retroactive effect or application (except Salary Schedules in Article 14 and Article 26)
>
> and shall continue in full force and effect until August 31, 2012, and shall continue automatically for annual periods of one year unless either party notifies the other party in writing in June 2012, that it desires to amend this Agreement.

When seen this way and applied to the context of these parties’ bargaining, it becomes clear that the parties agreed that their new contract would come into effect on November 18th, except for certain articles that would trigger later, and that there should be no retroactive effect or application prior to November 18th, except for the Salary Schedules that had actually been implemented as of September 1st. Therefore, they were respecting the Salary scales in place before the effective date of the contract, but agreeing that the remainder of the Agreement becomes effective as of November 18, 2009, except for those specified items that would come into effect December 1 and

January 31st. To read this any other way would lead to the absurd result that there would not be any effective terms and conditions in place as of November 18th. It is a basic precept of contract interpretation that all words have to be given meaning. Therefore, that date must be given meaning and effect.

What then were the rights of the parties as of November 18th with respect to the filing of Union grievances? The new Collective Agreement that came into effect that day contained the same provision as the previous contract regarding Union grievances. There were no changes made to Article 32.09. That provision allowed for the Union to file certain types of grievances arising out the Collective Agreement. Nothing in the contract limits the Union's rights to file grievances on the basis of any date. One would expect clear language to limit or read out the Union's right to file grievances arising out the Collective Agreement. This is a right protected by Article 14 of the *Colleges Collective Bargaining Act, supra.* Therefore, absent any clear language in Article 32.09 or elsewhere in the Collective Agreement, it is impossible to conclude that the new Collective Agreement intended to limit the Union's right to grieve differences arising on an unspecified date after the Collective Agreement came into effect.

The Employer has presented a forceful argument, asserting that it had made it clear that it had exercised its right to change conditions by "suspending" the Union's right to file Union grievances between November 18, 2009 and February 24, 2010. The terms had also included that the right would not revive until the Union signed a new contract. Indeed, the Union's own communications to its membership cited above indicate that it understood the Employer's intent and desire. Therefore, that was the situation in place during the period when the altered terms were imposed. However, the effect of that situation was eliminated when the new Collective Agreement's terms contained no limit on the retroactive application of Article 32.09 and recognized anew the Union's right to file grievances. For the Employer to succeed in this objection to arbitrability, one would have to have clear language that signaled the parties' agreement that the Union's right to file and process Union grievances does not take effect until February 24th or some other specified date. No such language exists in the parties' Collective Agreement.

Therefore, this cannot be seen to be akin to the situation in *Royal Diamond Casino v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3000, supra,* where there had been no dispute mechanism in place at the time the Union wanted to process grievances. While the "mechanism" had been suspended, the wording of this Duration clause put it back in place "effective November 18, 2009" and thereby forms the foundation of the Union's right to process those grievances.

These conclusions do not lead to any "absurd" result as the Employer suggests. Yes, they do undo the Employer attempt to bar Union grievances that were filed during the period of altered terms and conditions. But the achievement of the Collective Agreement wipes out many of the effects of the alterations. That is precisely what the new Collective Agreement is designed to achieve. Further, the collective bargaining relationship and regime contemplates the ability of the parties to pick and choose the duration and applicability of contractual rights and terms during periods of a contract's life, during a statutory freeze and even during the gap when no contract is in place. Giving retroactive effect to the provisions that the parties choose to keep in place often bridges that gap. No "absurdity" is created when the parties choose to keep the fundamental right to grieve in place. This situation is quite different than the ones in the cases cited by the Employer and in particular *Royal Diamond Casino v. National Automobile, Aerospace, Transportation and General Workers Union of Canada, Local 3000, supra.* In those cases there were no collective agreements in effect at the time of the grievance or alleged violations, whereas in our case the parties have agreed that their Collective Agreement came into effect November 18th. While this may be a rewriting of their particular histories, that is the prerogative of their bargaining creativity. Since they have chosen to give effect to their contract as of that date, that decision must be enforceable.

For all these reasons, it must be concluded that nothing in the Collective Agreement precludes the arbitrability of Union grievances filed during the period in question. Therefore, I need not address the issue of whether certain grievances should be treated

differently because they involve rights that may have accrued during or continued after the life of the previous agreement. However, it should be clear that this ruling does not affect any other arguments that remain available to the parties with respect to the merits or other aspects of arbitrability relevant to the specific cases.

I remain seized with respect to the implementation of this Award.

Dated at Toronto this 18th day of January, 2011.

"Paula Knopf"

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Paula Knopf - Arbitrator