

95C462 ALGONQUIN VS SNYDER

IN THE MATTER OF AN ARBITRATION

BETWEEN:

ONTARIO COUNCIL OF REGENTS FOR COLLEGES OF APPLIED ARTS AND  
TECHNOLOGY IN THE FORM OF ALGONQUIN COLLEGE  
(hereinafter called the "College")

- and -

ONTARIO PUBLIC SERVICE EMPLOYEES UNION  
(FOR ACADEMIC EMPLOYEES)  
(hereinafter called the "Union")

GRIEVANCE OF FRANKLIN SNYDER  
OPSEU FILE NO. 95C462  
(hereinafter called the "Grievor")

ARBITRATOR: Richard H. McLaren, C. Arb.  
C. Vezina, Union Nominee  
Andrew Shields, College Nominee

COUNSEL FOR THE COLLEGE: Vincent P. Johnston  
J. Lynn Thomson

COUNSEL FOR THE UNION: Frederica Wilson  
Michael Gottheil

HEARINGS IN RELATION TO THIS MATTER WERE HELD AT OTTAWA, ONTARIO, ON OCTOBER 6,  
1995 AND JANUARY 16, 1996.

## INTERIM AWARD

Mr. Franklin Snyder is a ten year employee of the College working as a professor. He applied for and received a parental leave relating to the birth of his daughter in 1994. Unfortunately the child died in December of that year. This tragic and horrible event ultimately led to the cancellation of the parental leave. Mr. Snyder returned to work after the teaching assignments for the winter term in 1995 had already been set out and determined. As a consequence he grieved the treatment which the College afforded him during that term and the summer of 1995. The grievance reads:

I have been assigned a vacation period and I've been assigned a teaching load during the summer months; both are in contravention of the collective agreement.

### SETTLEMENT DESIRED

that the present winter term be considered a "nonteaching period", that I will take my vacation during the normal college vacation period, and return to classroom teaching in Fall 1995. (Exhibit 1)

The Board of Arbitration convened to hear the above grievance at Ottawa, Ontario on Friday, October 6, 1995. Before the hearing got underway, Counsel requested an adjournment to discuss procedural matters. That discussion turned into a more broadly based one searching for a settlement of the grievance. The discussions were conducted entirely by the Counsel for the parties on that day, Ms. Lynn Thomson for the College and Mr. Michael Gottheil for the Union. As a result of the subsequent events, these two individuals became witnesses at the second day of hearings before the Board on January 16, 1996. At the time of these discussions between Counsel, the Board had absolutely no involvement in the efforts made to settle the matter. At the end of the day, the Board was informed that a settlement was possible but that an additional day of hearings ought to be booked in the event that the settlement did not occur. On that basis the Board booked the second day of hearings, which was used subsequently for a hearing of this matter.

An issue has now arisen between the parties as to whether a settlement was achieved as a result of the discussions on October 6, 1995. It was the position of the College that a final and binding settlement had been agreed to, which they asked to be determined and declared by this Board. It was the position of the Union that no final agreement had been concluded and that the objection to proceeding in this matter based upon a binding settlement be rejected and the matter proceed on its merits. In support of its position, the College called as a witness its Counsel at the first day of hearings, J. Lynn Thomson and Mr. Peter Casey, the Grievor's Department Chair. In support of its position, the Union called Mr. Gottheil, the initial Counsel on behalf of the Grievor and the Union at the first day of hearings.

The testimony reveals that settlement discussions were initiated by Union Counsel with the initial request being for a monetary settlement. The College Counsel advised that a monetary settlement was not one to which the College would agree. Mr. Gottheil testifies that during the next phase of the discussions "innovative solutions" were searched out. Agreement was achieved on certain items, to which the Board will return in its discussions momentarily. The difficulty with any complete settlement was going to be associated with how to deploy the Grievor in his employment during the semester when the matters agreed upon would take place. This was caused by the fact that the agreed upon items would make the Grievor unavailable for parts of the teaching terms between January of 1996 and August of 1996. There was a difference in opinion as to what ought to be done with the Grievor's work for the College during that period. It is really in respect of this aspect of the discussions that the issue arises as to whether there was a binding settlement or merely a proposal to be considered by the College.

The testimony reveals that eventually the discussions got around to discussing this remainder period and a proposal emerged from the Union side suggesting that the Grievor team teach for the required teaching periods in that time frame. Ms. Thomson advised she did not believe that the proposal would be acceptable to the College.

Nevertheless, she agreed to take it back to the College. She testifies that to her surprise they did agree. However, they wanted assurances that if they were to investigate this possibility; and, if it was found to be one which was workable, that it would result in the settlement of the grievance. It is on this very point that the parties are now apart and have differences as to the consequences of the settlement.

There was toward the conclusion of these discussions some suggestion by Mr. Gottheil that the matter ought to be put in writing. Ms. Thomson suggested that it was not necessary and that she would trust Counsel for the Union. She testifies that she would put the matter in writing the following week. Mr. Gottheil testifies that he does not recall whether she said this or not. In any event, the matter of the discussions were put in writing by letter dated

October 11, 1995. That letter reads:

VIA FACSIMILE

Dear Mr. Gottheil:

**Re: Algonquin College & OPSEU; Snyder**

Further to our discussions on Friday, October 8 [sic], 1995. This will confirm my understanding of the agreement reached to adjourn the hearing date of October 8, 1995 to conclude settlement discussions.

The following proposal was advanced by the College in order to resolve the grievance on a without prejudice basis:

- 1) during the upcoming 1995-96 year, Mr. Snyder would teach during the fall term; during the eight months beginning January, 1996 he would receive his two months vacation, his ten professional development days, his six weeks preparation time for his fall courses (all as provided for under the collective agreement);
- 2) in addition, the College would provide an additional one month vacation to Mr. Snyder during the eight month period; and
- 3) duties would be assigned to Mr. Snyder for the period of the eight months which remained having allowed for items 1) and 2).

The stumbling block was the duties to be assigned under item 3. You advanced a proposal, which was to have come from Mr. Snyder, that the remaining time be spent team teaching. I indicated that we would not be in a position to respond to that proposal without consulting with the other teacher. We agreed to adjourn on the following terms:

- a) Peter Casey, Mr. Snyder's manager, would explore the possibility of team teaching and discuss this with Mr. Snyder within a reasonable period of time; .
- b) in the event that Mr. Casey agreed to the team teaching, or proposed an alternative plan for

item 3, with which Mr. Snyder would agree, the grievance would settle on the terms set out from 1 to 3, with the clarification of how the remaining time would be spent incorporated;

c) in the event that Mr. Casey did not agree to team teaching and no alternative could be found, the matter would be rescheduled to deal with the issues which would have gone forward on the 8th of October.

I now understand that during the course of Mr. Snyder's meeting to explore team teaching, which was held the morning of the 10th (within a reasonable period of time), he first requested payment for the month (which you and I had discussed and I had told you the College rejected) and then informed Mr. Casey that he no longer wished to settle this matter on the terms proposed. It is the College's position that, until the issue of team teaching is resolved, Mr. Snyder cannot resile from the agreement reached on October 8, 1995.

What is your position?

Yours very truly,

"SIGNED "

J. LYNN THOMSON

(Exhibit 2)

It was submitted in argument on behalf of the College that deals are the cornerstone of the labour relations. Individuals cannot resile from such agreements because of the uncertainty it would create. It was submitted that what occurred on October 6, 1995 was a verbal agreement which has the same final settlement effect as if it were a written agreement. Pursuant to that agreement, all that was required was certain future action to be taken by Mr. Casey with respect to team teaching and the settlement would be achieved. It was, however, a contingent arrangement because there was a possibility that a team teaching opportunity would not arise through the efforts of Mr. Casey. If that occurred, then the parties would have to mutually agree on what the teaching assignments would be. It was submitted that the evidence was not really in dispute, but the spin which was put on it was in dispute. It was further submitted that the parties had, through their Counsel, reached a final and binding settlement and that it ought to be so declared by this Board. In support of the College's position reference was made to the following cases:

An unreported decision between OLBEU & The Crown in Right of Ontario (Liquor Control Board of Ontario) a decision by a Board of Arbitration chaired by Arbitrator Waisglass dated March 17, 1992; An unreported decision between St. Clair College & Ontario Public Service Employees Union a decision by a Board of Arbitration chaired by Arbitrator Shime dated July 13, 1992; Re Vancouver General Hospital, 21 L.A.C. (3d) 275 (Hope, 1985).

It was submitted on behalf of the Grievor and the Union that there was not a final settlement. What had occurred was a proposal by the Union for team teaching. The College was unable to accept that without consultation. What this amounted to was a mere offer without an acceptance. The result is that there is no binding agreement which could be used to prevent this arbitration hearing from proceeding. It was submitted that there was little that the parties really disagreed with in respect of the testimony of each of the witnesses. It was further submitted that there must be clear evidence that there is a settlement, particularly when the consequences of the finding of a settlement are taken account of as is suggested by the case. In support of its position reference was made to the following cases:

Re Pacific Forest Products Ltd., 14 L.A.C. (3d) 151 (Munroe, 1983); Re Town of Glace Bay, 42 L.A.C. (4th) 188 (North, 1994).

The Board must determine if there was a final settlement by counsel or merely a proposal from the Union which the College was retiring to consider? A second issue may arise if there was a final and binding settlement: what is the interpretation of the letter containing the alleged settlement terms with respect to the team teaching?

Counsel for the College wrote up the alleged settlement the day after her return from the long weekend following the discussions of October 6, 1995. This letter was filed as Exhibit 2. The evidence was, that the Grievor had changed his mind with respect to the discussions which had taken place the previous Friday. The Grievor was not called to testify, and therefore, did not confirm this evidence. The letter is written to reflect the understanding of the College Counsel arising out of the discussions of the previous Friday; but it also must have of necessity been written with the knowledge that the Grievor might be resiling from whatever had transpired on the previous Friday as is indicated by the penultimate paragraph.

The starting point for the analysis ought to be the language contained in the letter which was written before it was known that this dispute and the testimony and arguments related to it at the time of the hearing in January, 1996 would occur. The viva voce evidence is that the College would only explore team teaching if the Union would agree that it would settle the grievance. At the time of writing the letter, it was known to the College that the Grievor might " . . . no longer wish to settle this matter on the terms proposed" . The language of the letter stands as the best indicator of what the drafter thought at the time of writing was the arrangement that had been made. That language in its opening paragraph makes reference to an "... agreement reached to adjourn the hearing date ..." in order to allow the possible conclusion of settlement discussions. The chosen form of expression would suggest, at least in the Board's reading of the language selected, that what had transpired was that progress had been made towards settlement; but, the progress was insufficient to culminate in a settlement; and, in any event a settlement was incapable of completion on that Friday. Thus, there was an agreement that Friday, but it was really a partial one and one to adjourn for the completion of the settlement discussions.

The testimony and submissions of the parties make it clear that there was no dispute that there was an agreement to points 1) and 2) of the letter filed as Exhibit 2. The letter refers to these items as a proposal which was advanced by the College on a "without prejudice" basis. The viva voce evidence reveals that these were really agreed upon items. The letter must refer to them as a proposal because of what else had to be accomplished. The letter does not suggest that the proposal advanced by the College was necessarily accepted as the final and binding solution to this matter. The second page of the Exhibit goes on to refer to a proposal from the Union which would relate to the third point of the first page. It was: that after the time spent in items 1) and 2) had been exhausted then the "remaining time be spent team teaching". The Counsel for the College goes on in the letter to indicate that they could not respond to the proposal of the Union without "consulting with the other teacher". The letter then goes on to state that there was an agreement to adjourn the October 6, 1995 hearing on the following terms and then sets out three possibilities in clauses a), b) and c) on page 2 of the letter. Thus, there appears to be an agreement on two substantive points and a process to establish the third substantive point coupled with an agreement to adjourn but all expressed in language that suggests no final and binding settlement because the third point remained unresolved.

The various alternatives for resolution of the third point were that Mr. Casey would explore and discuss the possibility of team teaching. The testimony of all concerned is to the effect that there were some doubts about team teaching; and, there was a desire on the part of the College to explore the effect on morale that it might have. It is for those reasons that the College was being cautious in agreeing that team teaching might be the assigned duties referred to in item 3).

The next alternative, clause b), contemplated that there if Mr. Casey agreed to team teaching, or he and Mr. Snyder agreed to something else, then the grievance would settle on the terms of items 1) through 3), allowing for the clarification of how the remaining time would be spent for purposes of item 3). It is this provision which is

really at the heart of the matter before the Board. The College says that there was a unilateral right in Mr. Casey as the department head to agree to the team teaching having explored it as provided for by clause a), and, having decided to engage in team teaching. It would be all the action required to achieve the settlement and contemplated a final and binding resolution of the grievance. The third clause goes on to contemplate the alternative, that if there was no team teaching, then the grievance would be rescheduled to deal with the issues which would have gone forward on the day of hearings in October. Thus clauses a) to c) represent alternatives for the completion of item 3. Clause c), the third alternative, would be no settlement. The second alternative would be settlement on team teaching or an agreed upon variation. The first alternative was a necessary condition to clauses b) or c). Thus, the arrangement might not exist at all because of an assessment that team teaching was not an option and nothing else could be agreed. What this amounts to is a conditional settlement not a final one. This explains why at the outset of the letter items 1) and 2) are referred to as a proposal and not as agreed to items as the viva voce evidence suggests. It had not been worked out, but a framework for it to be worked out had been established. Before that occurred it was derailed by the Grievor. This was a conditional settlement at best and not one which was final and binding. When the letter was drafted it was known the Grievor was changing his mind, yet the letter was not drafted as if it were a final and binding settlement.

The balance of the letter then goes on to explain the circumstances of the previous day in which Mr. Snyder may have taken a different view of his willingness to participate in the arrangements discussed on October 6, 1995. The letter then sets out the College's position and asks for the position of the Union. The answer to that question has never been put, other than to argue the matter of the existence of a settlement before the Board.

There is a certain natural rhythm or flow to the discussions as they seem to have unfolded with the proposal of team teaching originating from the Union, originally thought to be unacceptable by the College Counsel, but being informed by her client otherwise. She then returned to advise the Union of that, but saying that if that was to be the resolution it would have to be also on the basis that if team teaching was available, it would settle the grievance. The letter as examined and discussed in this award does not reflect the same natural rhythm or flow suggested by the testimony.

Mr. Gottheil has never formally replied to the letter of October 11th, although there is correspondence back and forth between Counsel following other telephone discussions, all of which was filed with this Board. It strikes the Board as unusual that if there was substantive or serious disagreement with the contents of Exhibit 2 an experienced lawyer of the excellent calibre of Mr. Gottheil would have chosen never to have communicated those disagreements to the College Counsel. Instead he would have chosen to communicate those disagreements relatively quickly. The position of the Union is only ascertained at the hearing in January of 1996. It may be that Mr. Gottheil could never respond to the letter and that the Grievor now wishes to take a different position than had been taken at the date of the discussions. Nevertheless, this does not change the issue of determining if there was a binding settlement on the Friday October 6, 1995.

The facts after the event are that Mr. Casey did agree to team teaching (see Exhibit 7); and, therefore, the settlement could be considered complete by this Board if it agrees that there was a final and binding settlement as between the parties on October 6, 1995. Even if team teaching is feasible and the Grievor would engage in it with someone else clause b) still contemplates what it describes as a "clarification" is to be incorporated into item 3. That is not a completed settlement. As was stated previously it is a conditional one. Team teaching by its very nature requires consensus and co-operation. The parties must have contemplated that some further concurrence in the arrangement was required from the Grievor, and at the very least a discussion between Mr. Casey and the Grievor regarding the possibility of team teaching as contemplated in clause a). That was after October 6th not forthcoming. If the parties contemplated further concurrence or consent from the Grievor as this Board finds, then the settlement was in essence still in gestation and was not sufficiently final or formulated to be considered as a "final and binding settlement". Therefore, this Board concludes that the objection of the College to proceeding because a settlement was achieved on October 6, 1995 is not made out. If no settlement was achieved then the matter must proceed before this Board on its merits without further regard to the alleged settlement of October 6th. It is so ordered.

The Board retains jurisdiction as to the interpretation and implementation of this Interim Award. The parties are directed to proceed to the merits of this matter at a time to be arranged with the Board in the event they are unable to resolve the matter themselves.

DATED AT LONDON, ONTARIO THIS 21st DAY OF FEBRUARY, 1996.

Richard H. McLaren, C.Arb.

I concur

C. Vezina, Union Nominee

I concur

see Addendum attached

Andrew Shields, College Nominee

CONCURRING ADDENDUM OF  
COLLEGE NOMINEE

I agree that there was a natural flow to the October 6th discussions, as the testimony indicated they unfolded: a proposal eventually accepted on the understanding that it would constitute full settlement of a matter in dispute - a frequent occurrence in the labour relations field. Fortunately, a change of heart subsequent to such an agreement, occurs less frequently. Team teaching may indeed require cooperation between those involved. I do not agree, however, that an agreement as to a team teaching assignment constituting the basis for a grievance settlement requires further consultation of third parties before being concluded and considered final.

The testimony in this case indicates more than an intent to reach a settlement on October 6, 1995; rather it indicates that a conditional settlement was reached and that the condition was subsequently met.

Notwithstanding the above, I agree that, in this context, the content of the October 11th letter must be analyzed. While it is noteworthy that this letter was drafted in the comfort of the knowledge that a settlement had been reached the previous week, I agree that an analysis of that letter's content can legitimately lead to the end result outlined in the award in this difficult case.