IN THE MATTER OF AN ARBITRATION

BETWEEN:

HANOVER SCHOOL DIVISION NO. 15

- and-

HANOVER TEACHERS' ASSOCIATION NO. 15

IN RE: THE TERMINATION OF EMPLOYMENT OF KONRAD MENDRES

***UNDER THE PUBLIC SCHOOLS ACT*, R.S.M. 1987, C. P250**

AWARD OF ARBITRATION BOARD

On August 19, 1998, this Arbitration Board met to consider the matter of the termination of an employment agreement between Hanover School Division No. 15 and Konrad Mendres under *The Public Schools Act.* At the outset, counsel for the School Division raised an issue as to the jurisdiction of the Arbitration Board to hear this matter, citing the provisions of Section 92 of *The Public Schools Act* and, in particular, subsections 92(4) and 92(5).

Subsection 92(4) provides:

"Where an agreement between a teacher and a school board is terminated by one of the parties thereto, the party receiving the notice of the termination may within seven days of the receipt thereof request the party terminating the agreement to give reasons for the termination, in which case the party terminating the agreement shall, within seven days from the date of receipt of the request, comply therewith and where the school board terminates the agreement of a teacher who has been employed by the school board under an approved form of agreement for more than one full school year, as defined by the minister by regulation, the following clauses apply:

(a) the teacher, by notice in writing served on the school board within seven days of the date the reason for terminating the agreement was given, may require that the matter of the termination of the agreement be submitted to an arbitration board composed of one representative appointed by the teacher and one representative appointed by the school board and a third person who shall be chairman of the board of arbitration, mutually acceptable to and chosen by the two persons so appointed, none of whom shall be a member or employee of the school board;

(b) each party to the agreement shall appoint its representative to the board of arbitration within 10 days of the serving of the notice by the teacher under clause (a);

(c) where the members of the arbitration board appointed by the parties cannot agree on a decision, the chairman shall make the decision and his decision shall be deemed to be a decision of the arbitration board;

(d) the issue before the arbitration board shall be whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement;

(e) where, after the completion of hearings, the arbitration board finds that the reason given for terminating the agreement does not constitute cause for terminating the agreement it shall direct that the agreement be continued in force and effect and subject to appeal as provided in The Arbitration Act the decision and direction of the arbitration board is binding upon the parties;

(f) the arbitration board shall, within 30 days after its appointment make its decision and shall immediately forward a copy thereof to each of the parties and to the minister;

(g) where a board of arbitration is appointed under this Part the remuneration to be paid to and the expenses incurred by the members of the board in carrying out their duties shall be borne equally by the parties to the dispute."

(operative words are underlined)

In essence, counsel for the School Division argues that Mr. Mendres was not entitled to resort to arbitration because he had not been employed by Hanover School Division No. 15 (under an approved form of agreement) for more than one full school year at the date of termination. In this regard, evidence was adduced to establish that the employment agreement in effect at the time of Mr. Mendres' termination of employment is "an approved form of agreement" dated May 27, 1997, but executed by Mr. Mendres in mid-August, 1997, whereby Mr. Mendres' employment commenced on the 27th day of August, 1997 on a half-time basis, and deemed to continue in force, and to be renewed from year to year, unless and until terminated by one of four methods set out in Clause 6 thereof (Exhibit 14) (hereinafter referred to as "the 1997-1998 Agreement").

By way of a letter dated January 28, 1998, Gilbert Unger, Superintendent of the Hanover School Division No. 15, informed Mr. Mendres that the Board of Trustees had decided to terminate his employment effective January 27, 1998 (Exhibit 1).

Considering only this particular employment agreement (Exhibit 14), and whether one considers the commencement date of Mr. Mendres' employment to be the date on the agreement (i.e., May 27, 1997), or mid-August, 1997 when it was signed, or the date employment was expressed to commence (i.e., August 27, 1997), Mr. Mendres had not been employed for more than one full school year when his employment was terminated on January 27, 1998.

However, the fact is that Mr. Mendres had been employed by Hanover School Division No. 15 as a temporary teacher on a half-time basis pursuant to *another* approved form of agreement dated June 11, 1996, that employment commencing on August 26, 1996 and ending on June 30, 1997 (Exhibit 11) (hereinafter referred to as "the 1996-1997 Agreement").

Counsel for the Association and Mr. Mendres adduced evidence establishing that prior to the 1996-1997 Agreement with Hanover School Division No. 15, Mr. Mendres was employed by Seven Oaks School Division No. 10 as a substitute teacher, teaching 36.5 days in the 1995-1996 school year and 5.5 days in the 1994-1995 school year (Exhibit 15). In addition, Mr. Mendres was also employed as a substitute teacher with the Transcona School Division for some periods of time within those two school years.

Prior to these periods of substitute teaching in two different school divisions, evidence was adduced to establish that Mr. Mendres had previously been employed by River East School Division No. 9 for approximately 26 years, but resigned therefrom effective June 30, 1994.

Notwithstanding Mr. Mendres' prior employment as a teacher in Hanover, Seven Oaks, Transcona and/or River East School Divisions, Mr. Simpson argued that subsection 92(5) of the Act, entitled "Accumulated Teaching Service", did not give Mr. Mendres the right to have the matter of the termination of his employment submitted to an arbitration board. Subsection 92(5) provides:

> "Where a teacher enters into an agreement with a school board and has previously been employed as a teacher by that or one other school board in the province for more than one full school year within three years prior thereto, that prior period of employment shall, for the purposes of subsection (4), be deemed to be time during which the teacher was employed under the new agreement."

(operative words underlined)

Mr. Simpson argued that, in his view, Mr. Mendres had not been employed for more than one full school year under the 1996-1997 Agreement with Hanover (i.e., *that school board),* nor had he been employed by Seven Oaks or Transcona (i.e., *one other school board)* for more than one full school year within three years prior to his employment with River East which ended on June 30, 1994. Consequently, Mr. Mendres is not entitled to arbitration under subsection 92(4) of the Act.

Counsel for the School Division argues that, because the Arbitration Board can only be appointed pursuant to the statutory provisions of subsection 92(4), and because Mr. Mendres does not qualify under the provisions of subsections 92(4) and 92(5) for arbitration, it follows that this Arbitration Board can not be appointed and has no authority to hear this matter.

Counsel for the Association and Mr. Mendres argued that the School Division should be estopped from raising the issue of jurisdiction because, by its delay in so doing and in proceeding under the provisions of Section 92 to date, the School Division should be deemed to have waived its jurisdictional argument. In support of this position, Mr. Myers referred us to Re Regency Towers Hotel Ltd. and Hotel and Club Employees' Union, Local 299 (1973) 4 L.A.C. (2d) 440, which dealt with a preliminary objection relating to arbitrability in a grievance where mandatory time limits under a Collective Agreement had not been strictly followed but the objecting party did not raise an objection in a timely fashion, and the Arbitration Board held that the defect was waived. Mr. Myers cited several other decisions (International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (U.A.W.-C.I.O.) in re Massey Harris Company, Ltd. (1952) L.A.C. 1059; Re Civil Employees' Union No. 43 and Municipality of Metropolitan Toronto (1962) 34 D.L.R. (2d) 711; Re Inglis Ltd. and United Automobile Workers, Local 525 (1974) 6 L.A.C. (2d) 288; Re Woodlands Enterprises Ltd. and International Workers of America Local 1-184 (1975) 9 L.A.C. (2d) 367), all of which dealt with Collective Agreements between the parties and procedural provisions therein. Mr. Myers argued that both the School Division and Mr. Mendres had followed the provisions of Section 92 to this point in time, as evidenced by the School Division's letter of January 28, 1998 (Exhibit 1) referencing Section 92(3) of the Act, Mr. Mendres' letter to the School Division dated February 2, 1998 (Exhibit 2) referencing Section 92(4) of the Act, the School Division's letter of February 3, 1998 to Mr. Mendres (Exhibit 3) again referencing Section 92(3), which accompanied the Superintendent's report dated January 20, 1998 (Exhibit 4), and Exhibits 5, 6 and 7 evidencing the respective appointments by the parties of their nominees, who, in turn, requested me to act as Chairman, all of which demonstrated an intention to proceed to have the matter of termination of Mr. Mendres' employment agreement determined under

subsection 92(4). Therefore, counsel for the Association urged us to hold that the School Division had waived any objection as to jurisdiction it may have had.

Mr. Simpson argued that the authority to arbitrate this matter arises from the statutory provisions under *The Public Schools Act* and not under a Collective Agreement between the parties, and, therefore, like it or not, neither party can waive issues of jurisdiction because they do not have the authority to do so. Equally, the Arbitration Board can only be created by virtue of the statutory provisions and, therefore, if those provisions do not apply, then there can be no Arbitration Board.

While I do have some sympathy for Mr. Myers' argument in this regard, like it or not, I must agree that the statutory provisions of the Act can not be waived by any of the parties. I am mindful of the decision of Scott, A.C.J.Q.B. (as he then was) in Newton v. Tataryn (1990) 65 Man.R (2d) 175, which dealt with an objection to proceedings before the Manitoba Association of Registered Nurses' Discipline Committee by counsel for Mr. Tataryn on the grounds that the hearing did not commence within the time limits set out in Section 36(1) of *The Registered Nurses Act,* notwithstanding that the original hearing date was within the required time frame but was adjourned to a later date by consent of counsel. Estoppel and waiver were argued in that case. After reviewing jurisprudence concerning the doctrine of promissory or equitable estoppel, as well as waiver or acquiescence, Scott, A.C.J.Q.B. cited, at page 181, para. 26, the decision of Re Essex County and Essex Incorporated Congregational Church Union, [1963] A.C. 808 (H.L.), at pp. 820, 821 in which Lord Reid stated:

> "...I need not consider whether this amounted to a consent to widening the reference to the tribunal, because, in my judgment, it is a fundamental principle that no consent can confer on a Court or tribunal with limited statutory jurisdiction any power to act beyond that jurisdiction, or can estop the consenting party from consequently maintaining that such court or tribunal has acted without jurisdiction."
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> Scott, A.C.J.Q.B. went on to say, at page 181, pare. 29:
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> "...in my opinion, the provision in question is a statutory provision for the general benefit of the public...it is not a contingent or less serious jurisdictional defect, but one that goes to the very heart of the jurisdiction of the adjudicating tribunal. It could therefore not be waived."

As the provisions of subsections 92(4) and 92(5) are mandatory, and not discretionary, I must dismiss the Association's argument that the School Division has waived or is estopped from raising the issue of jurisdiction, and now turn to that issue itself.

Under subsection 92(4) of the Act, a teacher whose employment agreement has been terminated is entitled to require that the matter of the termination be submitted to an arbitration board if that teacher "has been employed by the school board under an approved form of agreement for more than one full school year, as defined by the minister by regulation". The fundamental question is, therefore, whether Mr. Mendres, prior to the termination of the 1997-1998 Agreement on January 27, 1998, was employed by Hanover School Division No. 15 *under an approved form of agreement for more than one full school year.*

Lest it is unclear as to the definition of "one full school year", reference to a letter from Gilbert Unger, Superintendent of the School Division, dated June 5, 1996 to Mr. Mendres (Exhibit 10) and the 1996-1997 Agreement whereby Mr. Mendres was employed as a temporary teacher commencing August 26,

1996 to June 30, 1997 (Exhibit 11) would tend to establish that "one full school year" would span that period of time. However, further assistance to define "one full school year", as defined by the minister by regulation, is obtained by reference to Regulation 471/88, filed November 7, 1988, re *The Public Schools Act*, wherein it is stated:

> "For the purpose of subsection 92(5) of the Act 'one full school year' means a fall term and the next following spring term or a spring term and the next following fall term."

Counsel for the Association suggested that the onus to establish that Mr. Mendres had not been employed by the School Division for more than one full school year was upon the School Division since it was raising the issue. Counsel for the School Division countered that it was for the Association and Mr. Mendres to establish entitlement to arbitration under subsection 92(4). Regardless, Mr. Myers suggested that there was no evidence before us to determine whether the 1996-1997 Agreement was for less than one full school year and, therefore, the School Division had failed to prove that Mr. Mendres had not been employed for more than one full school year.

With respect, it seems clear to me on the evidence adduced that Mr. Mendres had not been employed for more than one full school year under the 1997-1998 Agreement (Exhibit 14) since the commencement of his employment therein was stated to be August 27, 1997, and he was terminated effective January 27, 1998. A question was raised as to whether Mr. Mendres' employment was as of the date of the agreement itself (i.e., May 27, 1997), the commencement of employment as of August 27, 1997 as stipulated in Clause 1 of the agreement, or the date upon which it was signed by Mr. Mendres, which was in mid-August, 1997. Since one full school year had not elapsed between any of those dates, it is unnecessary to consider which date is applicable. However, reference to authorities on the law of contract would suggest that there is no agreement until the parties have made one and, in this situation, such an agreement must be in writing signed by the parties thereto, pursuant to subsection 92(1) of the Act, which states:

> "Every agreement between a school board and a teacher shall be in writing signed by the parties thereto and sealed with the seal of the school board and except in the case of a school board authorized to use another form of contract approved by the minister shall be in Form 2 of Schedule D."

It can not be said, therefore, that there was an agreement between the parties until it was signed by them, and since it was established that it was signed in mid-August, 1997, that, in my view, would be the date upon which the agreement would take effect, and on which Mr. Mendres became employed by the School Division. Notwithstanding that it is stated in Clause 1 that "such employment to commence on the 27th day of August, A.D. 1997", once the parties signed the agreement, they were bound by it. Nevertheless, in my view, the reference in subsections 92(4) and 92(5) to employment for more than one full school year refers to the school year itself and not the date on which the agreement was signed.

Since the 1997-1998 Agreement does not entitle Mr. Mendres to arbitration, we must look to subsection 92(5) to see whether he had been employed by Hanover School Division No. 15 "or one other school board in the province for more than one full school year within three years prior thereto" (my emphasis).

Prior to the 1997-1998 Agreement, Mr. Mendres had been employed by Hanover pursuant to the 1996-1997 Agreement, whereby he was employed as a temporary teacher, that employment commencing on August 26, 1996 and ending on June 30, 1997. He had, therefore, been employed for one full school year by Hanover School Division No. 15, that being the 1996-1997 school year. However, it is clear that

Mr. Mendres was not employed by Hanover under the 1996-1997 Agreement for more than one full school year.

It is also clear that Mr. Mendres was not employed by one other school board in the province for more than one full school year within three years prior to the 1997-1998 Agreement with Hanover, the evidence being that he resigned effective June 30, 1994 under an agreement with River East School Division and had only performed periodic substitute teaching in the Seven Oaks and Transcona School Divisions prior to the 1996-1997 Agreement.

Upon an initial review of subsection 92(4), it did appear that one might interpret that subsection to mean that since Mr. Mendres had been employed by Hanover under an approved form of agreement for the full school year of 1996-1997, and was also employed under an approved form of agreement at the time of his termination in January, 1998, having been employed there under since at least August 26, 1996, it might be said that he had been employed by Hanover "for more than one full school year" under "an approved form of agreement" if both agreements were taken into consideration. However, to give subsection 92(4) that interpretation, one would have to give either no meaning or a very liberal meaning to the phrase "under an approved form of agreement for more than one full school year". That is to say, one would have to consider that phrase to include the two approved agreements (one for the 1996-1997 school year and the other for the 1997-1998 school year). Only then could one conclude that Mr. Mendres had been employed for more than one full school year at the time of his termination.

To come to this conclusion, we would have to ignore the fact that the agreement under which Mr. Mendres was terminated did not commence until at least mid-August, 1997 (when it was signed), although the agreement stipulates that such employment commenced on August 27, 1997, as well as the fact that his employment under the previous agreement with Hanover ended on June 30, 1997. These were two separate agreements, the earlier one being for employment as a temporary teacher, albeit for a full school year (a term contract); whereas, the latter agreement was not as a temporary teacher under a term contract but, rather, for "permanent" (subject to certain conditions) employment.

In our view, the "approved form of agreement" referred to in subsection 92(4) means the agreement between the teacher and the School Division, which is terminated. When read in this light, the teacher has the right to arbitrate the matter of the termination if, under that agreement, the teacher had been employed for more than one full school year.

Furthermore, a contrary interpretation would ignore subsection 92(5) since it would render unnecessary that provision. That is to say, there would be no need to include a provision "where a teacher enters into an agreement with a school board and has previously been employed as a teacher by that (school board) or one other school board...for more than one full school year within three years prior thereto, that prior period of employment shall, for the purposes of subsection (4), be deemed to be time during which the teacher was employed under the new agreement".

In our view, therefore, reference to "an approved form of agreement for more than one full school year" in subsection 92(4) must mean a single agreement which was in existence for more than one full school year, or, alternatively, the agreement under which the teacher is terminated, but if that teacher had been previously employed by the same school board or one other school board in the province for more than one full school year within three years prior to the agreement under which termination was effected, then, as provided in subsection 92(5), the teacher would have the right to refer the termination of the employment agreement to arbitration under the provisions set out in paragraphs (a) to (g) in subsection 92(4) of the Act.

If judicial authority is required to support this interpretation, then we would refer to Agassiz School Division No. 13 v. Hooge (1981) 14 Man.R. (2d) 222, a decision of Mr. Justice Wilson of the Manitoba

Court of Queen's Bench, who, in interpreting subsection 92(5) of *The Public Schools Act* (now subsection 92(4)), stated, at page 232, paragraph 32:

> "At all events the word 'an' is capable of the meaning which appeals to me, namely to confine it to none but the existing agreement of hire, which of course excludes service interrupted by ten years or more, as here."

We have come to the conclusion that, under the provisions of subsections 92(4) and 92(5), Mr. Mendres has not been employed by the Hanover School Division No. 15 under an approved form of agreement for more than one full school year at the time of his termination and, therefore, can not refer the matter of his termination of employment to arbitration under *The Public Schools Act.* It follows therefrom that this Arbitration Board does not have the statutory jurisdiction to hear the matter.

In accordance with the provisions of paragraph (g) of subsection 92(4) of the Act, the remuneration to be paid and the expenses incurred by the members of the Arbitration Board in carrying out their duties shall be borne equally by the parties to this dispute.

Dated at the City of Winnipeg, this 25 day of August, 1998.

David Marr, Chairperson

I do not concur with the above Award and am attaching my reasons.
Dated at the City of Winnipeg, this 26 day of August, 1998.

Mark A. Gabbert, nominee of the Association of Konrad Mendres

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IN THE MATTER OF AN ARBITRATION

BETWEEN:

HANOVER SCHOOL DIVISION NO. 15

and

HANOVER TEACHERS' ASSOCIATION NO. 15

IN RE: THE TERMINATION OF EMPLOYMENT OF KONRAD MENDRES UNDER *THE PUBLIC SCHOOLS ACT*, R.S.M. 1987, c. P250

DISSENT OF MARK A. GABBERT
Nominee of the Association

With respect, I must dissent from the decision of the majority of the Board not to take jurisdiction in this case. My disagreement with the majority centres on its interpretations of subsections 92(4) and 92(5) of The Public Schools Act which begin at page 11 of the Award.

In the view of the majority, the phrase "an approved form of agreement" in subsection 92(4) of The Public Schools Act must be interpreted to mean

> "the agreement between the teacher and the School Division which is terminated." When read in this light, the teacher has the right to arbitrate the matter of the termination if, under that agreement, the teacher had been employed for more than one Fill school year (Award p. 12; emphasis in the original).

At p. 13, the Award refines its definition of "an approved form of agreement" in 92(4) to take account of the provisions of subsection 92(5), so that the language in 92(4) is taken to mean

> a single agreement which was in existence for more than one full school year, or, alternatively, the agreement under which the teacher is terminated, but if that teacher had been previously employed by the same school board or one other school board in the province for more than one full school year within three years prior to the agreement under which termination was effected, then, as provided in subsection 92(5), the teacher would have the right to refer the termination of the employment agreement to arbitration under the provisions set out in paragraphs (a) to (g) in subsection 92(4) of the Act.

The Award's interpretation is rooted in a decision to give the indefinite article "an" a more precise meaning than "any" or "any of whatever number" or "any and all."[1]

Consequently, the Award concludes that Mr. Mendres has no right to count both of the approved agreements under which he served in Hanover School Division as together constituting the "more than one full school year" stipulated in subsection 92(4).

In coming to this conclusion, the majority concluded that to give the indefinite article "an" its general meaning would be to ignore subsection 92(5) since it would render unnecessary that provision. That is to say, there would be no need to include a provision that "where a teacher enters into an agreement with a school board and has previously been employed as a teacher by that (school board) or one other school board...for more than one full school year within three years prior thereto, that prior period of employment shall, for the purposes of subsection (4), be deemed to be time during which the teacher was employed under the new agreement' (Award, p. 12; emphasis in original).

With respect, I cannot agree that such a conclusion follows when "an approved agreement" is taken to refer to any and all approved agreements rather than simply the particular one under which the teacher was dismissed. The case of Mr. Mendres himself provides a ready example of where what we might call the portability rights delineated under subsection 92(5) would apply, even if the reference to "an approved agreement" found in subsection 92(4) were taken to refer to any number of such agreements and not narrowly to the agreement under which termination took place. Recall that in 1996-97, Hanover School Division employed Mr. Mendres under an approved form of agreement. Had he been dismissed during 1996- 1997, during his first year of employment with Hanover Division, the provisions of subsection 92(5) would have assured his right to a hearing to determine whether he had been dismissed for just cause. This is because, between June 1994 and June 1997, Mr. Mendres's previous service at River East had to be taken into consideration pursuant to subsection 92(5). Certainly, therefore, the portability provisions in subsection 92(5) would not have been irrelevant to Mr. Mendres had he been dismissed during that year, notwithstanding any inclusive interpretation of the word "an" in 92(4). Needless to say, the provisions of subsection 92(5) would not be irrelevant to any other school teacher in a similar situation.

Further, in concluding that the phrase "an approved agreement" in subsection 92(4) must refer to the agreement under which the teacher was serving when dismissed, the Award accepts the definition of the word "an" used by Mr. Justice Wilson of the Manitoba Court of Queen's Bench in an earlier case involving The Public Schools Act. In Agassiz School Division No. 13 v. Hooge (1981) 14 Man.R. (2d) 222 at p. 232 Mr. Justice Wilson states that "[A]t all events the word 'an' is capable of the meaning which appeals to me, namely to confine it to none but the existing agreement of hire, which of course excludes service interrupted by ten years or more, as here."

Here again, with respect, I must disagree with the conclusions the Award draws. I do so for several reasons.

First, recognizing that it had a range of meanings, Mr. Justice Wilson canvassed the definitions of the indefinite article "an" provided by a number authorities. The definitions of the term that he cites reveal the ambiguous nature of the word "an" which may have both a more general meaning of "any of whatever number" or a more particular meaning of "the" as in *"the"* agreement. In the end, Mr. Justice Wilson tells us, he is thrown back on context to decide how in a particular case "an" is best interpreted (see Hooge (1981), p.231, para. 30). Rather than simply assuming that the definition chosen by Mr. Justice Wilson applies to the present case simply because it is the definition used in a previous case that has some similarity to the present one, we must assess the context to which Mr. Justice Wilson applied the term. If the context in the present case, by which I mean not simply the statutory language construed but also the circumstances of the case, is significantly different from that prevailing in Hooge (1981) then we can reasonably entertain other meanings of the word in question that are more applicable to the present case.

It must be remembered that, though in Hooge (1981) Mr. Justice Wilson is interpreting the Public Schools Act, that Act was revised in 1987, so that the case before us is not covered by the language that Mr. Justice Wilson was construing. In fact, in 1981 the Public Schools Act had just been revised in ways which altered its language on the matter of portability rights of teachers with previous service. The new language provided that "where the school board terminates the agreement of a teacher who has been employed by the school board under an approved form of agreement for an aggregate of at least 20 teaching months of paid service" the teacher would have recourse to arbitration and the school board would have to show that the dismissal was for just cause. (Hooge (1981), pp. 226-227). This was a loosening of previous provisions before 1981 which provided explicitly that a dismissed teacher had the right to arbitration only "if *the* agreement has been in effect for more than two years" (Hooge (1981), p. 228; emphasis mine). The 1980 version remained in effect until 1987 when the current wording of subsections 92(4) and (5) came into force.

The case before Mr. Justice Wilson involved a school teacher, Mr. Hooge, who had been dismissed after serving for roughly one and one-half academic years at Agassiz School Division No. 13. Mr. Hooge's most recent service at Agassiz was not of sufficient duration to meet the test of either the law as it read prior to 1981 (two years under "the agreement") or the law as revised in 1981 (an aggregate of at least 20 paid months under "an approved form of agreement"). Mr. Hooge argued, however, that earlier service in Agassiz during 1967-68 and 1968-69 should be counted toward his aggregate service of 20 paid months. If this previous service under other agreements were counted, then the test of the revised law, namely 20 months of employment in aggregate, would be met.

In the end, Mr. Justice Wilson decided for the Division against Mr. Hooge. Why? A chief preoccupation was his concern that, had the Division lost, then every school division would be obliged to undertake an exhaustive search of the entire employment record of any teacher it hired in the hope of determining whether or not the prospective employee had a total of twenty months of employment calculated on the basis of several previous employment agreements. Mr. Justice Wilson saw this as an administrative nightmare; yet, failing such an investigation, a school board "might find itself locked into arbitration on

the delicate question of termination of employment because of a contract or contracts long since expired" (Hooge (1981), p. 229).

The chief thing that needs to be said about these concerns of Mr. Justice Wilson is that they are entirely irrelevant to the present case. Subsection 92(5) of the current Public Schools Act solves the problem by limiting a teacher's prior relevant service for purposes of subsection 92(4) to the previous three years. There would, therefore, be no need for school boards to undertake any unrealistically extensive investigations of a teacher's previous employment record. Indeed, one might expect that it would be standard procedure for a school board to make inquiries about the previous several years of teaching experience of any candidate for employment, whatever the provisions of the relevant legislation might be.

It is readily apparent, then, that the practical considerations that troubled Mr. Justice Wilson are no longer an issue and we need not take them into account in the present case. In addition to practical difficulties, however, Mr. Justice Wilson was concerned that defining the term "an" to mean "any and all" approved agreements would be "a complete change from the earlier legislation under which the period of employment relied upon must be through an uninterrupted contract of hire, *"the* agreement" (Hooge (1981), p. 231, emphasis in original). Further on, he remarks that "if the Legislature had in mind the accumulation of service under a plurality of agreements the legislation could have been so worded" *(ibid.).*

With all respect, one might just as easily conclude that, had the Legislature wished to confine the agreement in question to *"the* agreement" as was the case in the pre-1981 s. 281(3) of the Act, it could certainly have made itself clear on the matter precisely by continuing to use the definite article "the" instead of the inherently more general indefinite "an". To the contrary, in 1981 the revised statute dropped that particular reference to *"the* agreement" when it cut the phrase "if the agreement has been in effect for more than two years". In its place, the Legislature substituted a new subsection 92(5) (in force between 1980 and 1987) with the considerably more generalizing phrase "under an approved form of agreement for an aggregate of at least 20 teaching months". With all respect, the 1981 revisions certainly invited the more general interpretation that Mr. Hooge proposed; and one suspects that Mr. Justice Wilson's contrary interpretation (and what he refers to as the "appeal" of the particular definition of "an" he chose) had much to do with the practical considerations noted above but which, as we have seen, no longer prevail.

But we are not, of course, interpreting either the pre-1981 statute or the statute as it existed between 1981 and 1987. Rather, this Board is governed the statute as revised in 1987. With respect, I contend that the 1987 revisions go further to justify interpreting "an approved agreement" to mean "any and all such agreements" or "any of whatever number." First, the 1987 revisions do not return to the old pre-1981 language, but continue to refer to "an approved form of agreement" (subsection 92(4)). Further, a new section, 92(5), makes it clear that portability rights can persist despite breaks in service, so long as during the previous three years the teacher has been employed for more than one academic year. There is absolutely no suggestion in the current subsection 92(5) that the "more than one full school year" of teaching referred to must be done under a single agreement, that a period of teaching under an agreement for temporary employment would not suffice for the purposes of subsection 92(5), or that the requirements of subsection 92(5) cannot be satisfied by, say, one period of teaching at the beginning of the three year period and another period of teaching at the end of the three year time window and so on.

The point here is that the 1987 version of The Public Schools Act justifies our giving the word "an" its general meaning of "any and all" or "any of whatever number", as Mr. Justice Wilson put it. With respect, had the Legislature wished it to be otherwise, it could have clearly indicated that the agreement in question in subsection 92(4) was the agreement in force at the time of a teacher's dismissal and no other; that the employment referred to in subsection 92(5) had to be under an agreement of permanent

rather than temporary employment; that the employment referred to in subsection 92(5) had to be continuous and not interrupted and so on. But, significantly, the 1987 language does none of these things.

Construing the language of the current Public Schools Act in a way that takes "an approved agreement" to refer to "any and all such agreements" leads to different conclusions in Mr. Mendres's case than those reached by the present Award. On the interpretation adopted here, Mr. Mendres would have been entitled to a hearing into his dismissal on the grounds that he had served more than one full academic year as a teacher in Hanover School Division. In calculating his service in Hanover, his 1996-97 service would have counted as one academic year under an approved agreement. His subsequent half-year of service in 1997-98 under another approved agreement, when added to his service in 1996-97, would have sufficed to meet the test of having served more than one full school year in Hanover School Division under an approved form of agreement as required by subsection 92(4). On those grounds, I would have held that this Board had jurisdiction to hear Mr. Mendres's grievance

With respect, I must conclude by saying that the interpretation of the Public Schools Act proposed here is not only more consistent with changes that have occurred in the legislation since 1980 but also more consistent than that of the Award with the concern for fairness and equity that the Act presumably embodies. Recall that, as the present Award has it, Mr. Mendres would have been entitled to arbitration in during first year of service (1996-97) in Hanover Division because the provisions of subsection 92(5) treated that year as if it were part of the statutory three year portability period. Yet a year later, even though Mr. Mendres had returned to teaching in 1996-97 well before the expiry of the three year period stipulated in subsection 92(5), resuming a career that stretched back to the 1960s and included two decades of teaching in River East School Division, the Award deems him to have been away from the classroom too long to satisfy the statutory requirements that must be met if he is to have a hearing into his dismissal. With respect, such an outcome strikes one as both unfair and bizarre.

It is important to remember that the issue in the present Award is not whether Mr. Mendres should get his job back. Rather, it is whether a teacher with many continuous years of experience should have the right to a hearing to determine whether he was dismissed for just cause. There is a reasonable interpretation of The Public Schools Act as it now reads that would have allowed Mr. Mendres to have his day in court. With respect, I submit that the present Board should have adopted that interpretation.

All of which is respectfully submitted,

Mark A. Gabbert
Nominee of the Association

Dated this 4th dray of September 1998.

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[1]For a discussion of the various definitions of "an" referred to here see Agassiz School Division No. 13 v. Hooge (1981) 14 Man.R. (2d) 222, pp. 222, 231-2. See also *The Concise Oxford Dictionary*, which gives "any" as a general meaning for "an", and goes on to give a general definition of "any" as "no matter how much or how many or of what sort". I take this to be the sense of "any and all" or "any of whatever number" used by Mr. Justice Wilson as the general definition of "an" in Stooge (1981), p. 231.