SUPREME COURT OF CANADA	**COUR SUPREME DU CANADA**
THE WINNIPEG TEACHERS' ASSOCIATION NO. 1 OF THE MANITOBA TEACHERS' SOCIETY	THE WINNIPEG TEACHERS' ASSOCIATION NO. 1 OF THE MANITOBA TEACHERS' SOCIETY
v.	v.
THE WINNIPEG SCHOOL DIVISION NO. 1	THE WINNIPEG SCHOOL DIVISION NO. 1
CORAM:	CORAM:
The Rt. Honourable Bora Laskin, P.C., C.J.C.	Le tres honorable Bora Laskin, C.P., J.C.C.
The Honourable Mr. Justice Martland	L'honorable juge Martland
The Honourable Mr. Justice Judson	L'honorable juge Judson
The Honourable Mr. Justice Ritchie	L'honorable juge Ritchie
The Honourable Mr. Justice Spence	L'honorable juge Spence
The Honourable Mr. Justice Pigeon	L'honorable juge Pigeon
The Honourable Mr. Justice de Grandpre	L'honorable juge de Grandpre
Appeal heard December 17, 1975	Appel entendu le 17 decembre 1975
Judgment pronounced October 7, 1975	Jugement prononce le 7 octobre 1975
Reasons of the Court by	Motifs de jugement par
The Hon. Mr. Justice Martland	L'honorable juge Martland
Concurred in by:	Souscrivent a l'avis de M. le juge Martland
The Hon. Mr. Justice Judson The Hon. Mr. Justice Pigeon The Hon. Mr. Justice de Grandpre	L'honorable juge Judson L'honorable juge Pigeon L'honorable juge de Grandpre
Dissenting reasons by	Motifs de dissidence par
The Chief Justice	Le juge en chef
Concurred in by	Souscrivent a l'avis du juge en chef
The Hon. Mr. Justice Ritchie The Hon. Mr. Justice Spence	L'honorable juge Ritchie L'honorable juge Spence
Counsel at hearing:	Avocats a l'audience:
For the appellant:	Pour l'appelante:
- Mr. F. Allen, Q.C. - Mr. R.T. Willis	- M[c] F. Allen, c.r. - M[c] R.T. Willis
For the respondent:	Pour l'appelante:
- Mr. H.B. Parker - Mr. J.L. Condra	- M[c] H.B. Parker - M[c] J.L. Condra

SUPREME COURT OF CANADA
THE WINNIPEG TEACHERS' ASSOCIATION NO. 1 OF THE MANITOBA TEACHERS' SOCIETY
- v -
THE WINNIPEG SCHOOL DIVISION NO. 1

MARTLAND J.

CORAM:
The Chief Justice and Martland, Judson, Ritchie, Spence, Pigeon and de Grandpre JJ.

MARTLAND J.:

The appellant, hereinafter referred to as "'The Association", is a local association formed with the approval of The Manitoba Teachers' Society, which is a body corporate incorporated pursuant to statute (now R.S.M. 1970, c. T30). The respondent, hereinafter referred to as "the Division", is a body corporate incorporated under The Public Schools Act R.S.M. 1970, c.

P250). The Division initially sued both the Association and The Manitoba Teachers' Society, but the suit against the latter was dismissed, by consent, on the understanding that if judgment were given against the Association it would be as if it were a legal entity.

The action involved a collective agreement between the Division and the Association dated February 18, 1969. The purpose of the agreement was stated in clause 1; which provided:

> 1. PURPOSE
> It is the intention end purpose of the parties to this agreement to promote peace and harmony to improve the working relations between the Division and the members of the Association. to establish acceptable provisions to facilitate the peaceful adjustment of all grievances and disputes between the parties and to provide a basis for both parties to improve the professional services tendered to the taxpayers and the school children of Winnipeg

Clause 10 of the agreement provided that it was made subject to the provisions of The Public Schools Act, The School Attendance Act and the regulations made under The Education Department Act. It further provided that the regulations, By-laws and Code of Rules should remain in force during the term of the agreement.

Clause 11 of the agreement is entitled "Provisions for Settlement of Disputes During Currency of Agreement". In it provision is made for arbitration proceedings in respect of any difference concerning the content, meaning application or violation of the agreement.

In the month of November, 1969, the Association gave notice that it wished to negotiate a new collective agreement with the Division and presented proposals for this purpose. The Division submitted counter proposals. The collective bargaining procedure provided in The Public Schools Act did not end until December, 1970, when a board of arbitration, whose findings were binding upon both parties, gave its award. A new agreement was made on December 29, 1970.

In November, 1969, when negotiations commenced for the new agreement, one of the proposals of the Association was:

That the new agreement for 1970-1971 give consideration to noon-hour supervision, according to the following conditions:

> (a) Noon-hour supervision shall be a voluntary assignment on the part of the teacher;
> (b) Where teachers voluntarily undertake noon-hour supervision assignments, an equivalent compensatory period shall be time-tabled for immediately before or after the period of supervision.

The Division replied to that proposal in these terms:

> Noon-hour supervision has always been considered an extremely important part of the teacher's daily duties, as it relates directly to the safety of the students. The Division has introduced the concept of teacher aides to assist teachers with those parts of the supervision which are least pleasant. Teachers, however, are still required to be available for noon-hour supervision and because The Public School Act requires this supervision we are not in a position to agree to supervision on a voluntary basis.

This proposal of the Association on was withdrawn over the objection of the Division at the outset of the compulsory arbitration proceedings. It would appear that the arbitration board ruled that the matter was not in dispute and would therefore not be arbitrated.

In .May, 1970, during the process of collective bargaining, the Association, after several, meetings with the membership, issued a directive to all members; this took the form of a letter dated May 29, 1970, which read in part:

> The council at its meeting on Thursday, 28th May, 1970 voted in favour of the recommendation. According the membership is requested to maintain the withdrawal of voluntary services and work to contract

conditions at schools.

Previously the teachers had provided many services beyond classroom instruction. These included supervision of extracurricular activity, special tutoring before and after school, supervision of sports and noonhour supervision of lunchrooms and playgrounds. In response to the directive of the Association, the majority of teachers withdrew these services, accepting the opinion of the Association that they were voluntary and not contractual.

On October 28, 1970, the Council of the Association decided to terminate the "work to contract policy" effective November 2, 1970, but the bulletin which announced this decision contained the following:

> At a special Executive meeting held at 4 30 p.m. on Thursday, October 29th, 1970, the following motion re Noon hour duty was carried:
>
> "Whereas the Winnipeg School Division was given an undertaking to apply to the courts for a decision on noon-hour supervision of lunchrooms, halls, and playgrounds,
>
> And whereas the Winnipeg Teachers' Association considers noon-hour supervision of lunchrooms, halls, and playgrounds voluntary,
> Be it therefore resolved that the Executive inform the membership that noon-hour supervision of lunchrooms, halls, and playgrounds is voluntary unless the courts direct otherwise."
>
> It is our hope that the Board will take this matter to the courts, as soon as is possible.

The Division commenced action against the Association in March, 1971, claiming, among other things, damages in respect of the expense incurred by the Division in providing supervisory services which the teachers had refused to provide. The action was dismissed at trial on the ground that the teachers were not obligated in law to provide supervisory services during the midday intermission. This judgment was reversed on appeal by the unanimous judgment of the Court of Appeal. Hall J.A., who delivered the reasons of the Court, stated the issue in the proceedings in the following terms:

> The question upon this Appeal is whether school teachers of the Winnipeg School Division No. 1 are under a duty, arising from contractual obligation, to provide noon-hour supervision at secondary schools, for students under the direction of school principals.

In reaching the conclusion which it did, the Court Appeal placed reliance upon s. 3.1 and s. 3.4 of the Code of Rules and Regulations of the Division to which Code specific reference is made in the collective agreement. Section 3.1 defines the duties of school principals and para. 6 thereof provides:

> 6. the organization of the supervision of pupil activities in school buildings and on school grounds. ..He shall make provision for the supervision of the school during the noon recess and before assembling in the morning and immediately after dismissal in the afternoon. :In elementary schools this shall be intended to include active supervision of the playground fifteen minutes before commencement of classes in the morning and ten minutes before commencement of classes in the afternoon on days when children are playing outside.

Section. 3.4, dealing with the duties of teachers, provides in part:

> Teachers shall carry out their duties in accordance with the regulations of the Department of Education and of the school system under the direction of the principal.

Hall J.A. stated ..is conclusion. as follows:

> The principal is empowered and required to provide the supervision and can only do this through his teaching staff The instructional services and the five-minute period are the minimal requirement of the teachers, but that may be extended on the direction of the principal to include the whole of the noon-hour period; that does not mean every school day but under a rota system such as prevailed in the past. In other words, every teacher must be available for duty every day at least five minutes before the commencement of the afternoon teaching session. But in addition some teachers, according as the rota system operates, must be available on some days for noon-hour supervision.
>
> It is therefore my opinion that school teachers are under a duty arising from an implied contractual obligation to provide noon-hour supervision at secondary schools under the direction of the school principal.

I agree with the view expressed by the Court of Appeal and with the reasons of the Chief Justice in this appeal with respect to this issue.

The next question is as to whether the Association is liable in damages for breach of the collective agreement on the facts of this case. The view of the Court of Appeal is expressed in the following passage from its reasons:

> The issue of noon-hour supervision, though the subject of negotiation, was not placed before the arbitration board, indeed it was withdrawn by the Association over the objection of the Division. The Association relying on the opinion of its solicitor that this service was voluntary, and in face of the contrary opinion of the Division, counseled its members to "work to rule" and to regard noon-hour and other supervision as voluntary.
>
> By adopting that course of action it is my opinion that the Association committed a breach of the binding collective agreement for which it is liable in damages both at common law and by statute for the expense incurred by the Division. in providing noon-hour supervision for the period June l, 1970 to June 30 1972.

This case is concerned with a collective agreement whose stated purpose was to promote peace and harmony to improve working relations between the Division and the members of the Association. To that end, the agreement contained provisions for the settlement of disputes during the currency of The agreement by providing for arbitration proceedings.

These provisions must have been included in order to comply with the statutory provision now contained in s. 381(1) of The Public Schools Act, which I now cite, along with s. 381(3):

> Compulsory provision
>
> 381 (l) Every collective agreement entered into shall contain a provision for final settlement without stoppage of work by negotiation, conciliation, and arbitration, or any of those means, of all disputes between the parties to, or persons bound by, the agreement including the teachers on whose behalf it was entered into, concerning its content, meaning, application, or violation.
>
> Compliance with agreement required.
>
> 381(3) Every party to, and every person bound by, the agreement and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

The contractual obligation of the teachers to provide noon-hour supervision at secondary schools was a matter which was in issue between the Division and the Association, as is shown by the proposal submitted by the Association, in the fall of 1969, for inclusion in the new agreement of a provision that noon-hour supervision should be a voluntary assignment, and by the reply thereto of the Division, to which I have already referred.

Subsequently, as has already been noted, when the matter of the new collective agreement went to arbitration the Association over the objection of the Division, withdrew this proposal, which was never arbitrated.

It is against this background that the conduct of the Association must be judged. On May 25, 1970, the Association, with full knowledge that the contractual obligation of teachers to provide noon-hour supervision was in issue between it and the Division, sent letters to its members, the relevant portions of which are as follows:

> The Executive Committee analyzed the opinions expressed in the poll presented to the membership at the General Meeting on Monday, 25th May, 1973 and recommended to the WTA Council that, effective Monday, 1st June, 1970 the actions designated on the poll form (1) withdrawal of voluntary services and (2) work to contract be implemented by the total membership of the WTA.
>
> The Council at its meeting on Thursday, 28th May, 1970 voted in favour of the recommendation. Accordingly the membership is requested to maintain the withdrawal of Voluntary Services and Work to Contract conditions at schools.
>
> THE MEANING OF WITHDRAWAL OF VOLUNTARY SERVICES
>
> This means the withdrawal of all services, in. connection with extra-curricular activities n all areas - athletics, music, dramatics, hobby or interest groups all areas in which the activities are not an integral part of the school curriculum, and in which the activities are conducted outside of the normal instructional hours: 8:45 - 12:00 and 1:25 - 4:00 p.m. 'Those schools varying from the above pattern of lunch and closing hours will be relating the withdrawal of voluntary services to their particular situations.
>
> WORKING TO CONTRACT
>
> This action would incorporate all of the foregoing restrictions under "Withdrawal of voluntary services". It would have the additional effects listed below:
>
> (a) Teachers would report for duty in the morning to be in their classrooms at 8:45 a.m.
>
> (b) They would report for duty in the afternoon just in time to be in their. Classrooms at 1:25, or five minutes before the opening hour in the afternoon.
>
> (c) No classes or instruction would continue beyond the normal hours for the school.
>
> (d) Lunchrooms and cafeterias would not be supervised by teachers during he noon-hour nor detentions after school closing. (Our solicitor's opinion is that all noon-hour duty is voluntary).

This action was taken with a view to applying pressure on the Division in connection with the negotiations for the new contract. It was done while the 1969 agreement was still in effect. By its action the Association called upon its members to discontinue services which it described as voluntary, but which, in my opinion, the Division was entitled to have performed. In the result, at a time when the contractual obligations of the teachers, under the collective agreement, to perform noon-hour supervisory services was very much in dispute, the Association elected to counsel the withdrawal of those services, and not to have that issue decided, as it was obligated to do, by the procedure laid down in the collective agreement for the settlement of disputes.

In my opinion the action thus taken by the Association constituted a breach of the agreement. Its directions were carried out by its members, and, as a result, the Division was put to expense to provide the services which the teachers had refused to perform.

The next question is whether the Division is precluded from recovering those expenses because it did not proceed to have the issue between it and the Association determined by arbitration, but instead, commenced a court action. With respect to this point it should be noted that it was never raised in this Court or in the Courts below. On the contrary, the Association had expressed to its members its hope that this issue would be taken to the courts by the Division.

In these circumstances it appears to me to be proper to take the same position as was taken by this Court in McGavin Toastmaster Limited v.Ainscouogh et al. in its judgment delivered on April 22, 1975, but not yet reported. In that case court proceedings had been brought by a number of employees to recover severance pay which they claimed was payable under the

terms of a collective agreement with their employer. The Chief Justice, who delivered the reasons of the majority in that case, said:

> This Court raised, suo motu, the question whether the matter in issue here ought properly to have been submitted to arbitration under the grievance and arbitration provisions of the collective agreement between the appellant and the plaintiffs' trade union. In correspondence exchanged between solicitors the question of arbitration was raised and then dropped, and Court proceedings were instituted on May 12, 1971. There was no contention in defence that the appropriate proceedings should have been by way of arbitration under the collective agreement, and it does not appear that any such position was taken either before the trial Judge or in the British Columbia Court of Appeal. This Court refrained therefore in this case from taking any position on this question and its content to deal with the legal issue or issues as having been properly submitted to the Courts for adjudication.

For the foregoing reasons I would dismiss this appeal with costs.

SUPREME COURT OF CANADA

THE. WINNIPEG TEACHERS' ASSOCIATION NO. 1
OF THE. MANITOBA TEACHERS' SOCIETY
v.
THE WINNIPEG SCHOOL DIVISION NO. I

CORAM:
The Chief Justice and Martland, Judson, Ritchie, Spence, Pigeon and de Grandpre J.J.

THE CHIEF JUSTICE

There are two questions of importance in this appeal. The first concerns an issue of contractual obligation of teachers in a large number of Winnipeg Schools. This issue arises out of a dispute between the appellant, the bargaining agent of the teachers, and the respondent, the public body responsible for the administration of the schools, as to whether certain out-of-classroom supervisory functions in respect of the students of the schools are obligatory upon the teachers, or whether they may "work to rule" without breaching any such obligations. The second issue concerns the basis of liability, if any, of the appellant in counselling the teachers to work to contract or work to rule, if it should turn out that the teachers are, as a result, in breach of their obligations. Damages were agreed upon between the parties if liability should be established.

The trial Judge, Hunt J., concluded on the first issue that (to use his own words) "the Division has no right under the present agreements, statutes or regulations, to require it's teachers to provide supervisory services during midday intermission, and there is no evidence that at this time the teachers arc not providing services at recesses or at other times when pupils are in or upon school premises either during the instructional day or when engaged in authorized extra curricular or other activities." In consequence, he also rejected the claim for damages against the appellant, a claim that was couched in terms of an alleged default in fulfilling the collective agreement between the parties. On appeal by the plaintiff Winnipeg School Division No. 1, the Manitoba Court of Appeal unanimously reversed the trial Judge and held on the first issue that (in the words of Hall J.A. for the Court) "school teachers are under a duty arising from an implied contractual obligation to provide noon-hour supervision at secondary schools under the direction of the school principal". On the second issue, liability was imposed upon the appellant herein on the basis that (to quote again the exact words of Hall J.A.) "the Association by counselling its members to withhold this service was in breach of its binding collective agreement with the Division and [was] therefore liable in damages for the expense incurred by the Division in providing that supervision".

Resolution of the two issues in this case is assisted by an agreed statement of facts which was filed as an exhibit. This statement brings into focus, as the governing document between the parties, their collective agreement of February 18, 1969, in which are incorporated a number of other documents, including (1) the form of the individual contract of the full-time teacher and the form of the individual contract of the part-time teacher and (2) the Code of Rules and Regulations of the plaintiff.

A new collective agreement was entered into on December 29, 1970, following negotiations on proposals and counter-proposals and following binding arbitration to settle outstanding differences. The agreed statement of facts stipulates that for

present purposes the collective agreement of February 18, 1969 may be taken as containing all the provisions relevant to the issues herein.

During the negotiations which led to the collective agreement of December 29, 1970 (and which were initiated in 1969 and carried over into 1970) the appellant Association made a proposal on noon-hour supervision (exhibit 17) which was countered by a proposal by the respondent on the same matter. Briefly, the appellant wanted the new collective agreement to express that noon-hour supervision was voluntary and, where provided, would be compensated by equivalent time off. The respondent would not accept this, its position being that although it had introduced teacher aides to assist teachers the latter were still required to be available for noon-hour supervision because, in the view of the respondent, The Public Schools Act required this supervision and hence it could not agree to supervision on a voluntary basis. It appears that noon-hour supervision had previously been required of teachers through provision to that effect in their individual contracts, but the requirement was removed when the parties accepted the Code of Rules and Regulations, adopted in 1954 and revised in September 1970.

When the unsettled items in the negotiations for a new collective agreement went to arbitration, the appellant dropped its proposal on noon-hour supervision, apparently in the belief that it was going to gain its point, but the respondent contended that the matter should be arbitrated. For reasons that do not appear in the record, the arbitration board decided that the matter was not in dispute and hence not arbitrable. That it remained in dispute is not contestable. In this situation, I do not think that any conclusion, pro or con either the appellant or the respondent, can be drawn from the negotiations between them which resulted in arbitration of all other outstanding issues. Some time after negotiations began for the collective agreement which was executed on December 29, 1970, the appellant took a poll of its teacher members on withdrawal of voluntary services and working to contract. As a result, its executive committee, by letter of May 29, 1970, requested teachers, effective June 1, 1970 "to maintain withdrawal of voluntary services and to work to contract conditions at schools". In so doing, the appellant considered that contractual obligations would be fulfilled if the teachers reported at 8:45 a.m. as marking the beginning of the instructional day, and at 1:25 p.m. in respect of the afternoon session. The requirement of attendance at these times is expressed in s. 3.4(2) of the Code of Rules and Regulations under the heading "Duties of Teachers". It reads as follows:

> Teachers shall register in person in their respective buildings and be on duty at least 15 minutes before the opening hour in the morning and 5 minutes before the opening hour in the afternoon.

At the time of action brought in this case the only so-called voluntary services that remained withdrawn were services by way of noon-hour or lunch-hour supervision, and these (on the evidence affected only ten schools out of the eighty under the administration of the respondent. Moreover, they affected some hut not all of the teachers in those schools at any one time. The damages that were agreed upon related to the expense of providing such supervision of pupils in the ten schools.

A direction for noon-hour supervision had been issues by the superintendent of schools to the various school principals under date of September 16, 1970. The principals were also members of the appellant association, and they found themselves in an invidious position with respect to the noon-hour supervision issue. When the arbitration board ruled on September 11, 1970, that the issue was not arbitrable, both parties looked to the courts to deal with the matter. By a bulletin of October 30, 1970, the appellant withdrew the work to contract policy which it had counseled as of June 1, 1970 and recommended that it terminate effective November 2, 1970. At the same time the executive communicated to the teachers a motion adopted October 29, 1970 which recited the undertaking of the respondent to apply to the Courts for a decision on "noon-hour supervision of lunchrooms, halls and playgrounds" and which then declared that the appellant considers this type of supervision to be voluntary, and it concluded that the membership be informed that it is voluntary unless the Courts direct otherwise.

Action was instituted by the respondent in March of 1971, and I have already referred to the conclusion of the trial Judge in favour of the appellant. He could find nothing in the collective agreement nor in the Code of Rules and Regulations nor in any applicable school legislation to impose upon teachers as a contractual duty the noon-hour supervision directed by the respondent. The trial Judge saw the matter as follows:

> ... That some teachers, conscientious and willing to contribute more than a strict interpretation of their obligations requires, have voluntarily provided such services in the past is admitted. Some may have done it out of concern for the pupils and others may have done it to avoid solitary confrontations with their employers or superiors.
> Because this has been so, such services do not thereby become an implied term of the contract of employment of the teacher with the Division. These contracts have all been reduced to writing. They are subject to and automatically change with each collective agreement. They are also governed by the minute and detailed provisions of The Public Schools Act, its regulations, the Code of Rules and Regulations and The Teachers' Society Act. It is a doctrine of the substantive law, applied routinely in many if not all of

> the branches of the law of contract, that in the case of a written or express contract all preceding implications are excluded according to the maximum "expressum facit cessare tacitum".

The Court of Appeal founded itself on this point in article 10 of the collective agreement which, in its relevant part, reads as follows:

> 10. APPLICABILITY OF REGULATIONS, BYLAWS AND CODE OF RULES
>
> This agreement is made subject to the provisions of The Public Schools Act, The School Attendance Act and the regulations made under The Education Department Act. Except as hereinafter provided, the regulations, By-laws and Code of Rules shall remain in force during the term of this agreement and it is understood and agreed that no changes shall be made in the forms of such agreements or in the said Regulations or By-laws or in the Code of Rules of the Division which affect the terms or conditions of employment of teachers by the Division except by agreement of the parties hereto and subject to the approval of the Minister under the Public Schools Act, if such approval is required.

The reference in this article to the Code of Rules and Regulations took the Court of Appeal to s. 3.1 thereof dealing with the "Duties of Principals", and the Court referred, inter alia, to items 1 and 6 of the foregoing section. These provisions (including the general specification of the duties of a principal) are as follows

> 3.1 Duties of Principals
>
> The principal shall be responsible to the superintendent for administering the general policies and programs of the Division, and for keeping his staff informed about such policies and programs. Subject to the provisions of "The Public Schools Act", the "Regulations of the Department of Education", this "Code of Rules", and the directives contained in the "Administrative Manual", the principal shall be responsible for the detailed organization of the school, and for the supervision of all personnel working in the school.
> In carrying out the above, the principal's powers and duties shall include responsibility for the following:
>
> 1. the assignment and supervision of teachers, and the supervision of the instructional program.
> ….
> 6. the organization of the supervision of pupil activities in school buildings and on school grounds. He shall make provision for the supervision of the school during the noon recess and before assembling in the morning and immediately after dismissal in the afternoon.

Section 3.4 of the Code, headed Duties of Teachers (and I have earlier quoted item 2) opens with the following words:

> Teachers shall carry out their duties in accordance with the regulations of the Department of Education and of the school system under the direction of the principal.

Item 1 of this provision reads as follows:

> 1. Teachers shall be responsible for taking all reasonable precautions to safeguard the health and general well-being of pupils in their charge and for any or all pupils of the school as assigned by the principal of the school. They shall enforce the rules governing the conduct of pupils as such rules may be prescribed by the Department of Education, the School Board, the superintendent, or the principal. They shall establish conditions and practices in their classrooms that will contribute to the physical and mental health of the pupils and they shall report promptly to the principal any serious accident or illness affecting pupils in their charge.

As I read the reasons of the Court of Appeal, the foregoing provisions were those mainly relied upon to support a finding of an implied contractual obligation upon the teachers to provide noon-hour supervision under a rota system. The Court of Appeal appeared to rely on another factor which, in my opinion, does not support its conclusion. The Court referred to the collective bargaining proposals on the question of noon-hour supervision, proposals which I considered earlier in these reasons. It said of them that (and I quote the words of Hall J.A.) "the parties clearly recognize[d] the contractual nature of the duty when it was raised as one of the proposals for collective bargaining". This assumes the answer to the very question in issue and it is an inadmissible proposition especially when the position of one negotiating party is accented as tying the other to a position contrary to its negotiating proposal.

I am satisfied that there is nothing in the collective agreement, nor in any of the documents or legislation which are made part thereof or to which it is subject, that expressly puts upon the teachers a duty of noon-hour supervision. That, however, is not the end of the matter, as the trial Judge appears to have thought. I can agree with him that if services were voluntarily performed, they cannot on that ground alone become terms of a teacher's contract of employment by implication of fact. It follows, of course, that advice to or request of teachers that they work to contract or work to rule does not involve the teachers in any breach of contract if they cease to perform the voluntary services.

It is, however, a different matter if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period of time, recognized as part of the obligations of service upon which the relationship has developed. I do not say that this is reflected in the present case. What is, however, evident to me, under the collective agreement relations between the parties here, is that the agreement, as extended by the referential documents, contemplates the assignment of duties to carry out the principal objects of the enterprise in which the parties are engaged and which they have agreed to promote under terms both general and specific.

Almost any contract of service or collective agreement which envisages service, especially in a professional enterprise, can be frustrated by insistence on "work to rule" if it be the case that nothing that has not been expressed can be asked of the employee. Before such a position can be taken I would expect that an express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employed and in furtherance of the principal duties to which he is expressly committed.

On this view of the matter, and having regard to the provisions quoted above from the Code of Rules and Regulations, I find it entirely consistent with the duties or principals and of teachers that the latter should carry out reasonable directions of the former to provide on a rotation basis noon-hour supervision of students who stay on school premises during the noon-hour. so long as the school premises are kept open at such time for the convenience of students who bring their lunch, or who purchase food at a school canteen, if there be one. It was not suggested in the course of argument that the rotation system was itself unreasonable, nor did the issue of compensatory time off arise in this context.

Teachers are, no doubt, inconvenienced if they have to supervise students during their common lunch hour, and I should have thought it not unreasonable that consideration be shown to them by way of compensating time off as a quid pro quo. This issue is not before this Court and I say no more about it. I dispose of the first point on the simple ground that the parties' collective relations envisage that directions will he given from time to time by the principals of the schools which may, when issued, become part of the duties to be discharged under the collective agreement. I do not agree with the Association's contention that any such directions "to be valid must be limited to instructional duties during the instructional day. At the same time, nothing said here should be taken as endorsing the right of the respondent to impose duties upon the teachers either in the early morning before they are required to report or in the late afternoon after the close of the school day, at least where those duties do not relate directly to instructional matters.

It is difficult and, indeed, unnecessary to speak here in more precise terms on the question when "work to contract" or "work to rule" involves a breach of contractual obligation and when it does not. Moreover, the machinery for determining contract disputes as prescribed by the collective agreement is not only better suited than resort to the Court, but ought to have been resorted to here for resolving what emerged as a difference about the nature or scope of the contractual obligation of the appellant's members and of the appellant itself.

This last mentioned point does not seem to have been taken in the Courts below, but; is always open to a Court to consider the question of its jurisdiction suo motu. . It may well be that the arbitration board which was concerned with the negotiation differences between the parties (and not with any differences as to contract obligation under an existing collective agreement) refused to deal with the noon-hour supervision issue because it felt that it was one to be resolved under the collective agreement into which the parties were entering. Article 11 of the agreement establishes both adjustment and arbitration machinery to resolve differences as to the interpretation or application of the provisions of the agreement. Arbitration, as specified under article 11.02, is the resort specified when there is "any difference between the parties to, or persons bound by the agreement or on whose behalf it was entered into, concerning its content, meaning application or violation". In fine, what

the parties brought before the Court in this case was a matter which should have been submitted in the first place to adjustment and, if not adjusted, to arbitration under article 11. Their consent or choice to go to the Courts cannot of itself command the Courts' intercession by way of original adjudication.

On this basis alone, I would allow this appeal, set aside the judgments below and leave it to the parties to use their own adjudicative machinery to resolve their collective agreement differences on the matter brought into issue here On this basis too, what I have said on the noonhour supervision issue would become purely obiter, and any consideration of the question of the appellant's liability would be of the same character. Nonetheless, because the question or jurisdiction was not raised during the hearing in this Court, either by counsel or by the Bench, I deem it advisable to deal with the legal basis of the plaintiff's claim for damages against the appellant.

As I have already noted, the statement of claim alleged only a breach of contract by the appellant, a breach of collective agreement obligation. The plaintiff, now respondent, did not seek relief for breach of contract against the involved teachers. There was no claim against them either for damages or for an injunction or even for a declaration. Although declaratory relief was sought against the appellant Association, the relief mainly pursued against it was in damages for breach of contract. Despite this, the Court of Appeal first saw or approached the issue as one of tort liability, saying (to use its words) "the basis upon which liability is sought to be imposed is that the Association, through its council and executive, counseled the membership to commit a breach of contract". Nothing however followed by way of developing any ground for imposing liability or inducing or procuring a breach of contract. At the most, the Court of Appeal intimated, by its references to statutory provisions forbidding a teacher to strike and making a collective agreement binding upon a bargaining agent, that the appellant was liable for counselling a breach of statutory obligation. Yet nowhere did it expressly say that the teachers were in breach of any such obligation.

We are left to guess whether the Court of Appeal thought that the teachers who refused to provide noon-hour supervision were thereby on strike. That Court did not say so, and, in my opinion, this was not, in the circumstances, a strike. Here was an issue on which the appellant and the respondent had each taken counsel's opinion, and contrary opinions were given. The question was whether there was or was not a contractual obligation respecting a certain function, and by insisting on their view of the matter (one supported by the trial Judge in this case) the teachers were not on strike, as that term applies in labour-management relations. If they had been called off their jobs as teachers to reinforce their opinion that they were not obliged to provide noon-hour supervision of students, the case would be different.

The Court of Appeal shifted its first premised basis of liability by saying (after referring to the "work to rule" policy of the appellant) that "by adopting that course of action…..the Association committed a breach of the binding collective agreement for which it is liable in damages both at common law and by statute for the expense incurred by the Division in providing noon-hour supervision for the period June 1, 1970 to June 30, 1972". I am unable to understand how liability for damages for breach of a collective agreement can arise at common law which did not, in this country, give any legal force to a collective agreement, but the Court of Appeal's reference to and quotation from International Brotherhood of Teamsters v. Therien, [1960] S.C.R. 265 indicate that the Court was referring only to the suability and liability of the appellant as a legal entity. Beyond this,. I can see no application here of any of the doctrines of the Therien case, which involved a threat by a union to picket a company with which it had a collective agreement in order to force it to terminate a business relationship (which it did) with an independent contractor who had refused to join the union and, being an employer, was, indeed, precluded by statute from becoming a member of a union. The action in that case, brought by the independent contractor, sounded in tort and was held to lie both at common law and under statute by reason of the use of illegal means, being the unlawful threat to violate the collective agreement, which required arbitration of all differences arising thereunder. The Therien case was recently considered by this Court in Western Construction and Lumber Co. Ltd. v. Jorgensen, [1974] S.C.R. 826.

The Court of Appeal's last word on liability was that which I quoted at the beginning of these reasons and which I now repeat, namely, that "the Association by counselling its members to withhold this service was in breach of its binding collective agreement with the Division and…..therefore liable in damages for the expense incurred by the Division in providing that supervision". The Court of Appeal did not refer to any provision of the collective agreement which was breached by the appellant, and l have been unable, after a close examination of the document, to find any such provision. Counsel for the respondent was unable to point to any clause of the collective agreement which the appellant breached (as contrasted with breach by its individual members) by reason of the "work to rule" policy which it adopted. The only breach which could possibly be envisaged was a failure to resort to arbitration, but this was a failure of both parties and, in any event, could not give rise to the claim made herein for damages, nor is it a point open to the respondent herein when it decided to pursue a claim for damages against the Association through the Courts. Such a claim could arise in contract against the Association (only if it had expressly under-written the performance by the individual teachers of their respective individual contractual obligations, but no such underwriting or guarantee was even suggested in argument, let alone made the subject of pleading.

It is plain to me that the basis upon which liability was imposed upon the appellant is untenable. If there was to be liability here, it would have to sound in tort and be based upon an unlawful, an unjustified interference by the Association with the

contractual obligations of the teachers to their employer, the respondent. Not only was such a claim not advanced but the elements of such a cause of action are wanting here. We are concerned with an intentional tort, whose ingredients were examined in depth in D.C. Thomson & Co. Ltd. v. Deakin, [1952] 2 All E.R. 361, and which also arose for consideration in this Court in Newell v. Barker and Bruce, [1950] .S.C.R. 385. Whether the contention be that there was a direct procurement of a breach of contract by inducing one of the contracting parties not to perform it, with intent to prevent its performance or whether it be that there was an indirect procurement by the use of illegal means rather than by direct inducement, there is simply no basis here for a holding adverse to the appellant. To take the second aspect of the tort first, I have already pointed out that there were no illegal means here such as those which formed the basis of liability in the Therien case or those which formed the basis of liability in J.T. Stratford & Son Ltd. v. Lindley, [1965] A.C. 269. Any attempt to found liability on direct inducement must fail for the reason set out in Fleming, The Law of Torts (4th ed. 1971), at p. 608, namely, that there is no actionable tort "if [the defendant] acted under a bona fide belief that he would not infringe contractual rights, e.g. after going to the trouble of seeking legal advice, mistaken though it turn out to be". A bona fide dispute as to the very existence of a contractual obligation, a dispute in which the parties hereto were directly involved, cannot be a foundation upon which one of them can be successfully charged with intentional procurement of a breach of that obligation without justification so as to become liable to the other in tort. The respondent had a remedy in contract against the teachers if it had chosen to pursue it.

For all the foregoing reasons, I would allow the appeal and dismiss the claim for damages. The appellant is entitled to its costs throughout.