DOCKET: CI 98-01-08495
(WINNIPEG CENTRE)

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

THE FLIN FLON TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY	) VALERIE MATTHEWS LEMIEUX) for the applicant
applicant,	)
- and -	)
THE FLIN FLON SCHOOL DIVISION NO. 46,	) ROBERT A. SIMPSON) for the respondent
respondent.	)
	) JUDGMENT DELIVERED:) JUNE 23, 1999

MORSE, J.

[1] This case involves an application for judicial review.

[2] The applicant has applied for an order to set aside an arbitration award made by Jack Chapman, Q.C. with respect to four clauses of the award and to remit those portions of his award back to arbitration on the merits.

[3] Mr. Chapman was appointed pursuant to s. 131.1(3) of *The Public Schools Act*, R.S.M. 1987, c. P250 ("the Act"), to act as mediator-arbitrator in connection with a dispute between the applicant and the respondent because the parties themselves were unable to conclude a new revised collective agreement.

[4] Mr. Chapman was unsuccessful in mediating the dispute, and, pursuant to s. 131.5 of the Act, the process was converted to arbitration, with Mr. Chapman assuming the role of arbitrator.

[5] Mr. Chapman dealt with most of the items in dispute. But, with respect to the following four items, namely:

14. Mainstreaming
15. Disruptive Students
17. Due Process for Principals and Vice Principals
20. Transfer

Mr. Chapman held that he had no jurisdiction to deal with them. He reached this conclusion by reason of s. 126(2) of the Act, which reads:

Matters not referable for arbitration
126(2) Notwithstanding any other provision of this Act, the following matters shall not be referred for arbitration and shall not be considered by the arbitrator or included in the arbitrator's award:

(a) the selection, appointment, assignment and transfer of teachers and principals;

(b) the method for evaluating the performance of teachers and principals;

(c) the size of classes in schools;

(d) the scheduling of recesses and the mid-day break.

[6] Mr. Chapman dealt with the history of bargaining between the parties since World War II. He did so because the parties rely on it, as did Mr. Chapman, for the purpose of interpreting the language of the legislation, its purpose, and the position of the parties with respect to it. I will outline as briefly as I can some of that history.

[7] Shortly after World II, teachers received the right to bargain collectively. They did so bargain from 1948 until 1956 under *The Labour Relations Act* of Manitoba. In 1956, at the request of both the Manitoba Teachers' Society ("MTS") and the Manitoba Association of School Trustees ("MAST"), collective bargaining for teachers was removed from the ambit of *The Labour Relations Act* of Manitoba. The right to strike or lockout, neither of which had ever occurred, was removed and was replaced by compulsory binding arbitration.

[8] Between 1956 and 1988, there were various disputes between school divisions and teachers as to what matters were arbitrable. Generally speaking, arbitrators gave a broad interpretation to the word "dispute" found in s. 97(1) of the Act, which defines "dispute" as follows:

> 'dispute' means a controversy or difference or apprehended controversy or difference between a school board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the school board, or the teacher or teachers that are not specifically set out in this Act or The Education Administration Act or in the regulations made under either of those Acts; but does not include a controversy or difference arising out of the termination or threatened termination of the contract of a teacher by reason of alleged conduct unbecoming a teacher on the part of a teacher;

[9] Arbitrators accepted a number of items which they considered to be within the definition of "dispute", and, over a period of time, articles dealing with such diverse matters as lay-offs, lunch hours, class size, and contact time were imposed.

[10] Teachers advocated that most matters should be negotiable and subject to arbitration while school boards took the position that the scope of bargaining and arbitration should be restricted. MAST was dissatisfied with many arbitration awards that it perceived had the effect of limiting and restricting the ability of school boards to manage school division business in accordance with their mandate under the *Act.* MAST was also concerned because additional requirements imposed upon school boards as a result of the arbitration process carried with them additional costs which were not generally recognized by

arbitrators. This came at a time when Government funds for education were being reduced, and yet school boards were under pressure not to increase taxes.

[11] MAST lobbied the Government for change. In January 1995, the Government prepared a number of principles which were to form the basis for discussion involving MAST and MTS. The Government also set up a review committee that heard representations from MTS and MAST. Eventually the committee made a report to the Government. In the late summer of 1996, Bill 72—*The Public Schools Amendment Act*—was introduced into the House. Certain amendments were made to the Bill which was ultimately passed as amended and generally became effective as of January 1, 1997.

[12] It is quite apparent from the material filed by the parties that, although MAST did not achieve all of its objectives, some of its concerns were addressed by Bill 72, namely, that the legislation should specifically exclude from arbitration the selection, appointment, assignment and transfer of teachers, teacher evaluation, and class size. These requests found their way into s. 126(2) of the Act, to which I have referred. MAST had also asked for the exclusion of other matters, as well as "any matter which may be ancillary or incidental to any of the foregoing" matters, but the legislation was not amended to include these other matters.

[13] Concurrently with s. 126(2) of the Act, the Legislature enacted s. 131.4, which provides:

> **Obligation to act fairly**
> 131.4(1) A school board shall act reasonably, fairly and in good faith in administering its policies and practices related to the matters described in subsection 126(2) (matters not referable for arbitration).
>
> **Failure to comply**
> 131.4(2) Any failure by a school board to comply with subsection (1) may be the subject of a grievance under the collective agreement and may be dealt with in accordance with the grievance process set out in the agreement.

[14] Although s. 126(2) designates certain matters that were to be excluded from arbitration, the legislation did not otherwise restrict the right of the parties to arbitrate matters which had previously been held to be arbitrable. Nor did it amend the definition of the word "dispute" in s. 97(1). However, again in response to the requests of MAST, the legislation imposed certain mandatory factors that an arbitrator was required to consider in financial matters. These are set out in s. 129(3) of the Act, which reads:

> **Factors**
> 129(3) The arbitrator shall, in respect of matters that might reasonably be expected to have a financial effect on the school division or school district, consider the following factors:
>
> (a) the school division's or school district's ability to pay, as determined by its current revenues, including the funding received from the government and the Government of Canada, and its taxation revenue;
>
> (b) the nature and type of services that the school division or school

district may have to reduce in light of the decision or award, if the current revenues of the school division or school district are not increased;

(c) the current economic situation in Manitoba and in the school division or school district;

(d) a comparison between the terms and conditions of employment of the teachers in the school division or school district and those of comparable employees in the public and private sectors, with primal consideration given to comparable employees in the school division or school district or in the region of the province in which the school division or school district is located;

(e) the need of the school division or school district to recruit and retain qualified teachers.

And s. 129(2) requires the arbitrators to explain their reasoning "as to how the requirements of subsection (3) have been applied".

[15] Both parties have drawn comfort from the history of collective bargaining between teachers and school divisions, as well as the matters that were before the Legislature prior to the enactment of Bill 72.

[16] It is the submission of the applicant that each of the four clauses in question relate to the working conditions of the applicant and thus fall within the s. 97(1) definition of a "dispute" and that furthermore they are not excluded from arbitration by s. 126(2).

[17] As pointed out by counsel for the applicant, prior to the amendments to the *Act* made by Bill 72, any matters relating to a term of employment or work to be done by a teacher that is not dealt with elsewhere in the *Act* or in *The Education Administration Act* or in the regulations made under these Acts could be the subject of collective bargaining. If agreement could not be reached at the negotiating table or with the assistance of a conciliator, such dispute conic be submitted to compulsory arbitration.

[18] The position of the respondent is that Mr. Chapman reached the right conclusion with respect to the four clauses in question.

[19] The first issue raised by the parties is the standard of judicial review to be adopted in this case. The applicant argues for a standard of correctness; the respondent argues for a standard of patent unreasonableness.

[20] I think the proper standard of review is that of correctness. I agree with counsel for the applicant that courts have consistently held that crucial deference is to be afforded to the decisions of labour arbitrators, unless legislation must be applied or interpreted, in which case a standard of correctness applies.

[21] The position of the respondent is that Mr. Chapman was appointed under and acquired jurisdiction from the Act. The respondent argues that at no time did Mr. Chapman have to determine his own jurisdiction to arbitrate the matters in issue. Once clothed with jurisdiction, a decision whether a matter was arbitrable was within his jurisdiction. Judicial deference should, therefore, be paid to a decision on the question whether a matter was arbitrable or not.

[22] The respondent, as well, relies on a statement made by Mr. Justice Iacobucci in *Canadian Broadcasting Corp. v. Canada (Labour Relations Board), [1995]* 1 S.C.R. 157 ("*CBC')*, at p. 187:

> As a general rule, I accept the proposition that, curial deference need not be shown to an administrative tribunal in its interpretation of a general public statute other than its constituting legislation, although I would leave open the possibility that, in cases where the external statute is linked to the tribunal's mandate and is frequently encountered by it, a measure of deference may be appropriate....

[23] I am unable to accept the respondent's submission on this point. It seems to me clear that, in determining whether a matter was arbitrable or not, Mr. Chapman was not called upon to interpret the statute by which he was clothed with jurisdiction to enter upon the arbitration. Rather he was called upon to interpret a legislative provision that specifically excluded matters from his jurisdiction. I think there can be no doubt that, in enacting s. 126(2), the Legislature intended to limit the jurisdiction of an arbitrator. The interpretation of this subsection goes to the very heart of an arbitrator's jurisdiction. I do not think it is a question of law within the arbitrator's jurisdiction. In the *CBC case,* Mr. Justice Iacobucci said at p. 178:

> Generally speaking, where the tribunal whose decision is under review is protected by a broad privative clause, its decision is subject to review on a standard of patent unreasonableness. However, this is only true so long as the tribunal has not committed a jurisdictional error. Jurisdictional questions addressed by the tribunal are independently reviewed on a correctness standard. An error on such a jurisdictional question will result in the entire decision of the tribunal being set aside.

[24] As well, in *United Brotherhood of Carpenters and Joiners of America, Local 579 v, Bradco Construction Ltd.,* [1993] 2 S.C.R. 316, Sopinka, J. stated at pp. 332-3:

> Where the relevant legislative provision is a true privative clause, judicial review is limited to errors of jurisdiction resulting from an error in interpreting a legislative provision limiting the tribunal's powers or a patently unreasonable error on a question of law otherwise within the tribunal's jurisdiction....

And at pp. 336-7:

> ... the rationale for deferring to an arbitrator's interpretation of a collective agreement does not necessarily apply to afford deference to a finding of law made by the arbitrator, when this involves interpretation of a statute or a rule of the common law. Generally, these are not matters within the expertise of the arbitrator, and in the absence of a legislative intention that deference should be paid to findings of law made by an arbitrator, such findings would be reviewable on a standard of correctness. In this regard, a distinction can be drawn between arbitrators, appointed on an *ad hoc* basis to decide a particular dispute arising under a collective agreement, and labour relations boards responsible for overseeing the ongoing interpretation of legislation and development of labour relations policy and precedent within a given labour jurisdiction. To the latter, and other similar specialized tribunals responsible for the regulation of a specific industrial or technological sphere, a greater degree of deference is due their interpretation of the law notwithstanding the absence of a privative clause.

> In a number of past decisions, this Court has indicated that judicial deference should be accorded to the decisions of arbitrators interpreting a collective agreement even in the absence of a privative clause. For example, in *Douglas Aircraft Co. of Canada v. McConnell,* [1980] 1 S.C.R. 245, Estey]. commented, at p. 275, with the rest of the Court concurring on this point, that
>
> > the law of review has evolved, even in the absence of a privative clause, to a point of recognition of the purpose of contractually-rooted statutory arbitration: namely, the speedy, inexpensive and certain settlement of differences without interruption of the work of the parties. The scope of review only mirrors this purpose if it concerns itself only with matters of law which assume jurisdictional proportions.
> >
> > Although this passage might be taken to suggest that an arbitrator's decision on any question of law may be immune from review, I am of the view that it refers to questions of law in interpreting the collective agreement and not the interpretation of a statute or a rule of common law....

[25] There is, in the Act, no privative clause customarily found in labour relations statutes. The closest provision to the usual privative clause is s. 129(5) which provides that the decision of an arbitrator is binding on the parties. The legislation does not, therefore, seek to prohibit judicial review.

[26] I conclude, as I have said, that the decision of the arbitrator is to be reviewed on a standard of correctness.

[27] I turn now to consider the principles of statutory interpretation which should be employed in interpreting the provisions of the *Act*.

[28] The parties are agreed that a purposive approach should be adopted. The correct approach is to construe the legislation in a way that best ensures the attainment of its object and purpose—see *Clarke v. Clarke* (1990), 73 D.L.R. (4th) 1 at p. 10:

> ... the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose.

As well, s. 12 of *The Interpretation Act,* R.S.M. 1987, c. 180, provides:

> Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects.

[29] Where the parties part company is as to the manner in which s. 126(2) and the definition of "dispute" in s. 97(1) should be interpreted.

[30] The applicant submits that, as a rule of statutory interpretation, exceptions to legislative provisions such as s.126(2) are to be narrowly construed See *Driedger on the Construction of Statutes* (3rd ed.), pp. 369-370] and that, given a purposive approach to the *Act*, the word "dispute" in s. 97(1) should be interpreted broadly. The applicant refers to the award of arbitrator Scurfield in *The Brandon Teachers' Association No. 40 of the Manitoba Teachers' Society v. The Brandon School Division No. 40* (unreported, February 6, 1998) in which Mr. Scufield held that the definition of "dispute" continues to be broadly defined under the new statutory regime. The applicant further submits that the object or

purpose of Part VIII of the Act, both pre and post Bill 72, is to encourage teacher collective bargaining on a broad range of issues unless these matters are specifically excluded from the dispute resolution mechanism set out in the *Act*. The purpose of the legislation, it is said, is not to preclude or limit the scope of bargaining or the jurisdiction of arbitrators to resolve disputes which might arise. The applicant's submission then is that the meaning of s. 126(2) must be determined within the context of the overall purpose of Part VIII of the *Act* and not by asserting, as the respondent appears to assert, that s. 126(2) alone is remedial legislation which must be broadly defined. The applicant contends that narrowly to construe working conditions so as to exclude clauses on mainstreaming, disruptive students, due process for principals and vice principals, and transfer is not in keeping with the decision of Manitoba courts rendered prior to Bill 72. According to the applicant, it was never the purpose of Bill 72 to ignore more than forty years of history nor to annul all the benefits negotiated under previous collective agreements.

[31] In her brief, counsel for the applicant stated at paragraph 35:

> It is important to note that s. 110.1 which is part of the revised bargaining scheme set out in Part VIII indicates collective bargaining may be carried out in respect of terms and conditions of employment, including those described in ss. 126(2) (matters not referable for arbitration)'. As the phrase 'terms and conditions' has been broadly defined by the Courts, it is submitted that for s. 110.1 and the definition of 'dispute' to make sense, ss. 126(2) must be narrowly construed. To do otherwise, means that of all the issues in dispute in this case, the Association would only be able to pursue wages, allowances and leaves. Such a construction is not consistent with the Court decisions cited above, which were well known, and available to the government at the time the legislation was drafted....

[32] On the question of jurisdiction, Mr. Chapman concluded:

> Clearly the entire Act must be considered. It is a comprehensive and lengthy enactment comprising some 160 pages with some 239 major sections and a large number of subsections. There are also numerous regulations and there is some other referenced legislation. However, the primary document governing the relationship between Teachers and Boards is the Act. Obviously, the Act deals with a multitude of other aspects of the educational system but part VIII, entitled Collective Bargaining, encompasses the vast majority of the legislation concerning that relationship. I hasten to add that there are also other references in the Act, in the regulations and in some other legislation concerning that relationship.
>
> In accordance with all of the above I have considered the Act as a whole and, in particular, the amendments previously referred to and enacted as a result of Bill 71 [sic].
>
> I do not find any ambiguity in the language chosen by the legislature. The Act, inter alla, sets out, in some detail, a scheme or plan for the resolution of disputes between Teachers and Boards. The intent of the Act is obviously to avoid the strike/lockout possibilities and to replace it with a system of binding arbitration. The definition of dispute under 97(1) (supra) which, as previously stated, has been in the legislation for some period of time, remains unchanged. That definition refers to 'matters or things affecting or relating to terms or conditions of employment or work done'. There is no limitation to that definition excepting for items 'that are not specifically set out in this Act or the Education Administration Act or the regulations under either of those Acts' and does not include a dispute arising out of a termination or threatened termination.
>
> This particular arbitration relates to the imposition of a Collective Agreement and reference has been made to section 110.1 of the Act, which reads:
>
> > '110.1 Subject to this and any other Act, collective bargaining may be carried out in respect of terms and conditions of employment, including those described in subsection 126(2) (matters not referable for arbitration).,

> Obviously, that section confirms that the parties may bargain collectively with respect to terms and conditions of employment including those matters listed in section 126(2) but refers to listed matters that are not referable to arbitration. I am satisfied that the legislature, in enacting section 126(2), clearly mandated that certain items could not be referred to arbitration and were not to be considered by the arbitrator. This prohibition is, in my view, clear and unambiguous. Additionally, the legislature, under section 129(3), mandated that certain factors be considered in any issue having financial consequences. It is clear that an arbitrator is bound by those provisions.
>
> The question that has arisen, both previously and in this arbitration, is whether certain items could be considered a dispute under the umbrella of working conditions. I need not repeat my previous comments with respect to that issue. The legislature, under section 126(2), has clearly expressed its intent to identify certain specific matters excluded from arbitration. This is abundantly clear, not only from the language chosen by the legislature but also from considering it from a 'purposive' approach.
>
> Whether the legislation is interpreted 'broadly' or 'narrowly', it must primarily be interpreted in accordance with the plain and simple meaning of the words chosen by the legislature. Although 'remedial' may be a misnomer from the perspective of one or other of the parties, I am satisfied that the amendments are remedial in the sense that they seek to address a specific perceived problem. They are to be interpreted broadly but that does not mean that every possible connotation or extension of a chosen word is applicable. The words chosen must be given their plain, common, simple and ordinary meaning. They cannot be interpreted so broadly or narrowly as to defeat the clear purpose of the legislation. In this case, the purpose of the amendments was clearly to remove certain items from arbitration. There is a principle of law which states that one cannot do indirectly what one cannot do directly. Obviously the words cannot be interpreted so as to permit prohibited matters from being arbitrated. Similarly not every possible extension of the terms chosen can be deemed to be inarbitrable. Common sense and common usage must prevail.

[33] In my judgment, Mr. Chapman reached the right conclusion. Although the general purpose of Part VIII of the *Act* may be said to be to encourage collective bargaining on a broad range of issues, clearly the intent of the Legislature in enacting s. 126(2) was to limit the jurisdiction of an arbitrator by excluding four specific matters from arbitration. I think Mr. Chapman was correct in concluding, as he did, that the amendments enacted by Bill 72 were remedial in the sense that they seek to address what was perceived to be the need to address specific problems, and in that sense the words in s. 126(2) are to be interpreted broadly. The "specific perceived problem" was the status of the collective bargaining process and the perceived impingement upon management rights and responsibilities by reason of arbitration awards. I think Mr. Chapman was also correct in concluding that the words in s. 126(2) are not to be interpreted so as to permit prohibited matters from being arbitrated. I do not, therefore, agree with the applicant's submission, which in effect would define the word "dispute" in s. 97(1) broadly so as to permit arbitration of matters which have been removed from the jurisdiction of an arbitrator by s. 126(2). I agree with arbitrator Scurfield in the *Brandon Teachers' award* that an arbitrator under the *Act* has no right to override the clear intent of the legislative amendments or to attempt to avoid their meaning by giving a broad interpretation of the definition of "dispute" and by interpreting s. 126(2) in a narrow and restrictive manner. I accept that whether a particular provision sought be included in a collective agreement is arbitrable must be determined by reference to the specific words used in s. 126(2). If, given the purpose of s. 126(2) the meaning is clear, effect must given to it.

[34] I deal now with the four disputed clauses.

1. Mainstreaming

[35] The applicant sought to have a new clause dealing with the mainstreaming and integration of special needs students into the classroom. The proposed clause is as follows:

.01 The Association and the Division agree that the integration/ mainstreaming of children with special needs into regular classrooms shall occur only when the necessary conditions for a positive educational experience exist for both the child with special needs and the students in the regular classroom.

.02 The Association and the Division further agree that a careful and thorough examination of alternatives shall take place when decisions are made regarding the determination of the necessary conditions for a positive educational experience.

.03 The Association and the Division further agree to jointly develop a detailed procedure to determine the necessary conditions for a positive educational experience, to allow for a careful and thorough examination of the alternatives and to provide a just and impartial appeal procedure for the regular classroom teacher.

[36] Mr. Chapman concluded that he had no jurisdiction to grant such a clause on the ground that, although it were not prohibited by s. 126(2), it did not fall within the definition of a "dispute" in s. 97(1) of the Act. He said at pp. 22 and 23 of his award:

> The Association argues that 'mainstreaming' falls within the umbrella of 'working conditions' and that the teachers should have the opportunity to express their concerns. As mentioned, that aspect of the issue might be desirable and I would hope the teachers would be given the opportunity to have input into many aspects of the integration of special needs students. However, one cannot disregard Part III of the Act which mandates certain duties on Boards and, in particular, sections 41(1)(a) and 41(4). In essence these two sections require the Board to provide adequate school accommodation from grades 1 to 12 for all persons entitled to education as defined in section 259 which mandates that every person who has attained the age of 6 years has the right to attend school.
>
> I am of the opinion that such policy and the implementation of it, clearly rests within the jurisdiction of the Board. I agree with Arbitrator Scurfield who said, at page 12 of the Brandon award, that 'he did not believe it was the role of the Arbitrator to shape the educational policy of the Division through an arbitration award'. I note the Division has a policy respecting Special Education Services which addresses many of the concerns raised by the teachers.

[37] Although Mr. Chapman did not say so, it seems to me that the proposed clause would affect matters such as the assignment of teachers and class size. As these are both matters which are excluded from arbitration by s. 126(2), Mr. Chapman did not have jurisdiction to award this clause.

[38] As well, I agree with arbitrator Scurfield's conclusion in the *Brandon Teachers' award* that this sort of clause is only "in the broadest sense" within the ambit of working conditions. The clause would, however, have an effect on the duties of a school board under the sections of the Act to which Mr. Chapman referred.

[39] The applicant contends that the provisions of s. 41, to which Mr. Chapman referred, do not, on their own, establish any terms or conditions of employment. The applicant says that it is only an enabling provision for a statutory body, i.e. a school board. The applicant submits that nothing in s. 41 prohibits a school board working with teachers on a cooperative basis to achieve what s. 41 requires.

[40] Section 41 is not, in my opinion, a mere enabling section. It imposes duties upon school boards. As Mr. Chapman observed, subsections 41(1)(a) and (4) require school boards to provide adequate school accommodation from grades 1 to 12 for all persons entitled to education as defined in s. 259, which provides that every person who has attained the age of 6 years has the right to attend school. In addition, subsections 41(1)(9) and (i) require school boards to employ teachers and other personnel and, subject to the Act and regulations, prescribe the duties that teachers and other personnel are to perform.

[41] These duties, imposed by statute, have required school boards to develop policies to implement them. The respondent says—and this was not challenged by the applicant—that in furtherance of their obligations, school boards are required by the Department of Education to have in place a detailed protocol for the education of children with special needs. The proposed clause could affect such a policy or protocol. To say that this would justify an arbitrator declining jurisdiction so as not to affect such policy does not mean, as the applicant suggests, that every time educational policy is involved there can be no arbitration, except for wages, allowances, and leaves. Whether or not arbitration can be held must depend on the specific circumstances of each case.

2. Disruptive Students

[42] The applicant proposed the following clauses:

> .01 A student whose behavior affects the safety or learning of other students shall be considered a disruptive student.
>
> .02 When a teacher indicates to the principal that a student exhibits behaviors which affect the learning or safety of other students, the principal shall, within five (5) working days of notification, convene a meeting involving the teacher(s), the principal and other support staff as deemed necessary. This committee shall review the concerns and determine whether the student shall be deemed disruptive.
>
> .03 Where the student is declared disruptive the following actions shall occur:
>
> (a) Appropriate programming, placement and supports for the student shall be established.
>
> (b) A full-time educational assistant shall be provided to assist the teacher until the behavior has been corrected.
>
> (c) No more than two (2) students who have been designated as disruptive according to this article shall be placed in any classroom.
>
> (d) A schedule shall be developed to review the case and to determine the effects of the supports and whether the student should continue to be deemed disruptive.
>
> .04 Where a teacher is not satisfied that the identification of, programming for, and/or placement of a student is appropriate, the teacher may appeal to a committee established by the Board. This committee shall have the authority to alter placements and/or supports as it deems necessary.
>
> Before passing judgment, the committee shall afford the teacher and/or his/her representative an opportunity to make a presentation. The committee shall make its recommendation within ten (10) working days of receipt of the appeal.
>
> .05 A student who continues to be disruptive even though programs and/or supports are in place shall be removed from a regular classroom and placed in a program to address the inappropriate behavior.

[43] Mr. Chapman held at p. 24:

> Although such students may be disruptive and, under certain circumstances, might constitute a threat of harm to fellow students and/or teachers, it must be noted again that the obligation of the Division is to provide adequate school accommodations and to make provisions for the education of such students. Additionally, the Division has the ultimate authority respecting discipline. I note that the Division has a comprehensive policy, entitled 'Freedom From Abuse'

which deals with all types of abuse which might occur and that the principals in consultation with the teacher may take certain actions and may recommend certain further actions to higher officials of the Division. It would appear that this policy was developed cooperatively with the Association. Although the policy recognizes that problems may occur, the Division has not given up its authority to deal with them. If the proposal of the Association was to be accepted, the teacher would have a direct involvement in the policy formulation of the Division. Additionally, it relates to size of class in the sense that it mandates the number of such types of students who can be assigned to a class and also that assistants would be assigned.

[44] The submission of the applicant is that, like the mainstreaming clause, this proposed clause deals with working conditions and the learning environment in the classroom, including safety, and that the arbitrator did, therefore, have jurisdiction to award the clause. The applicant says, as well, that the proposed clause deals not with the issue of class size but rather with class composition, something that is not excluded from arbitration under s. 126(2)(c).

[45] I agree with the applicant that class size deals with the number of students a teacher will teach, that composition of a class deals with the type of student a teacher will teach, and that class composition is not excluded from arbitration by s. 126(2)(c). I think, as well, that the clause does have an impact upon the working conditions of teachers, and I can well understand why teachers would not wish to have more than two disruptive students in a class.

However, I am of the view that Mr. Chapman was correct in holding that the clause relates to the size of classes in the school. It could prevent the school division from increasing the size of a class by including more than two disruptive students. As well, the proposed requirement that a full time educational assistant be provided relates directly to the assignment of teachers. I note that disruptive students have a *prima facie* right to attend school, and school boards have a responsibility under the Act to provide adequate school accommodation and to make provision for their education. The implementation and operation of a policy dealing with disruptive students is not one to be decided jointly by the parties or by arbitration.

3. <u>Due Process</u>

[46] The applicant's proposed clause reads:

.01 No principal or vice-principal covered by this Collective Agreement shall be demoted without just and reasonable cause.

.02 When the board demotes any principal or vice-principal covered by this Collective Agreement, and where the affected principal or vice-principal is not satisfied that the demotion is for just and reasonable cause, the board's actions shall be deemed to be a difference between the parties to, or persons bound by, this Collective Agreement under Article 11:00.

.03 When such a difference is referred to a board of arbitration under Article 11:00, the board of arbitration shall have the power to:

a) uphold the demotion;

b) rescind the demotion;

c) vary or modify the demotion;

d) order the board to pay all or part of any loss of pay and/or benefits in respect of the demotion;

e) do one or more of the things set out in sub-clause a), b), c) or d) above.

[47] Mr. Chapman concluded that he did not have jurisdiction to award this clause. He said (at p.25-6):

> ... I am of the view that this particular proposal is not arbitrable under section 26(2) in sub-section (a) thereof, dealing with 'the selection, appointment, assignment and transfer of teachers and principals'. I have already stated that any of those actions must be deemed to include any subsequent acts and not only the initial one. I note under 126(2)(b) that the method of evaluating the performance of teachers and principals is not arbitrable. However, if the Board acts improperly in administering its policy or in its evaluations the provisions of 131.4(a) might well come into play and the matter arising out of the results of the evaluation, in certain circumstances, might be arbitrable. I deny the request of the Association.

[48] The applicant contends that the words "selection" and "appointment", which are not defined in the Act, should be given their ordinary clear meaning. *The Shorter Oxford Dictionary* (3rd ed.), defines "selection" as "the action of selecting or choosing out; a particular choice; choice of a particular individual or individuals". The word "appointment" has the meaning of "the action of nominating to, or placing in, an office".

[49] The applicant argues that these words relate only to the initial selection or appointment of a person to be a principal or vice principal, that the proposed clause does not interfere with the ability of a school board to select or to appoint a principal, and that the clause merely seeks to establish just cause for removal from such a position.

[50] The proposed clause, it is said, deals with demotion or removal from office and not with appointment or selection. As well, according to the applicant, the clause is within the definition of "dispute" in s. 97(1).

[51] In my view, such a narrow interpretation would frustrate the intent and purpose of s. 126(2)(a). Under s. 27 of the regulations, a school board has the responsibility for designating a principal for every school. This is not a duty that may be delegated. The applicant's proposal is that once a teacher is designated as a principal then that person cannot be demoted, except for cause. However, I think this proposal has a direct effect on the ability of a school board to select, appoint, assign, and transfer a principal. To interpret s. 126(2)(a) as referring only to the initial appointment or selection of a teacher as principal would mean that a school board has no authority to demote without going through the arbitration process. I do not think that this result was intended by the legislation. In my judgment, the Legislature did not intend that s. 126(2)(a) would have application only to the initial appointment, selection, assignment, and transfer of a principal.

[52] Principals, as teachers, have protection under s. 92 of the Act. They cannot be dismissed without just cause. But the same protection is not afforded to principals as such under the Act. However, s. 131.4, to which I have referred (in paragraph [13]), gives some protection to teachers. It requires a school board to act fairly in administering its policies and practices.

[53] The applicant argues that the ability to file a grievance pursuant to this subsection is possible only if the school board has a policy or practice in relation to the matters set out in s. 126(2). If it does not, then no statutory duty of fairness applies and no grievance can be filed.

[54] In my opinion, however, it can reasonably be said that a failure of a school board to have policies and practices in place is a failure by a school board under s. 131.4(2) to comply with subsection (1). Giving a broad and purposive interpretation to s. 131.4(2), I am of the view that s. 131.4(2) was not

intended to restrict the right to grieve only to the administration of policies and practices but should be interpreted to permit a grievance if a school board fails to have such policies and practices in place.

4. <u>Transfer</u>

[55] The applicant proposed the following clause relating to transfer of teachers:

> .01 The Association recognizes the right of the Division to assign teachers employed by the Division to schools under the jurisdiction of the Division.
>
> .02 Prior to the Division making any final decision on the transfer of a teacher, the Division shall provide to that teacher an opportunity for consultation with respect to the proposed transfer, the details of the intended assignment, and the interests of the teacher.
>
> .03 The most reasonable notice possible, given the circumstances, shall be provided to the teacher.
>
> .04 The Divisions' right to initiate transfer shall always be exercised fairly and reasonably having due regard for all of the circumstances including the educational needs of the division and the interests of the teacher involved.
>
> .05 The Division shall bulletin and post all teaching or assignment vacancies in the staff room of each school in the Division.

[56] On this issue, Mr. Chapman held (at p. 26):

> The Association has proposed an article which, although it recognizes the right of the Division to assign teachers, nevertheless would mandate that the Division shall consult with the teacher respecting a number of aspects of the transfer, including that the most reasonable notice possible be given, that id right to initiate transfer be exercised fairly and in a reasonable manner considering the educational needs of the Division and the interest of the teacher involved, and that all teaching or assignment vacancies be posted. I am of the view that issues relating to transfers and assignment vacancies be posted. I am of the view that issues relating to transfers and assignments are not arbitrable under the provisions of 126(2(a) of the Act…. I am satisfied that I do not have jurisdiction to deal with this particular proposal and accordingly it is denied.

[57] In my opinion, Mr. Chapman was correct in coming to this conclusion.

[58] The position of the applicant is that the word "transfer" in s. 126(2)(a) refers to moving a teacher from school to school and that the proposed clause recognizes the right of the school division to do so. But the applicant submits that the issues raised by the clause involve working conditions rather than interference with or prohibition of teacher transfers and that, while s. 126(2) prohibits an arbitrator from interfering with the authority of a school division to move teachers to a different school subject to the duty of fairness in s. 131.4(2), s. 126(2) cannot be considered in isolation from the overall purpose of Part VIII of the Act and from the broad definition of "dispute".

[59] In my opinion, all issues relating to the transfer and assignment of teachers are intended to be excluded from arbitration. Matters such as consultation and notice are, I think, part of the larger issue of teacher transfers. To do what the applicant proposes would clearly interfere with the right of the school division to transfer at will, subject only to the duty of fairness under s. 131.4 of the Act.

[60] While Mr. Chapman did not refer to it, the respondent points to s. 101(5) of the Act. This subsection specifically refers to the right of a school board "to suspend or discharge a teacher for proper and sufficient cause or to transfer a teacher at the discretion of the school board".

[61] For the foregoing reasons, I dismiss the application to set aside Mr. Chapman's award or decision with respect to the four clauses in question.

[62] As this appears to be the first case in which the question of the interpretation of the new amendments to the Act has been dealt with in court, I make no order as to costs.

MORSE, J.
June 23, 1999
Winnipeg