

IN THE MATTER OF AN ARBITRATION

BETWEEN:

KWANTLEN UNIVERSITY COLLEGE

(the “Employer”)

AND:

KWANTLEN FACULTY ASSOCIATION

(the “Union”)

(Preliminary Issue on Cross-College Meeting Times)

ARBITRATOR:

Vincent L. Ready

COUNSEL:

Colin Gibson for
the Employer

Weldon Cowan for
the Union

WRITTEN SUBMISSIONS:

April 22 and 29 and
May 5, 2005
Vancouver, BC

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BACKGROUND

This dispute between the parties arises out of a larger collective bargaining dispute between provincial university colleges, collectively represented by the British Columbia Public School Employers Association and their faculty associations, collectively represented by the Federation of Post-Secondary Educators and the BC Government & Service Employees' Union. In the overall college-faculty collective bargaining dispute, certain issues were decided at a "MID" or common table and other issues were decided at local tables. One of the items agreed upon at the MID table was the issue of a stipend in exchange for negotiated savings offsets. When the federation of unions at the common table agreed with this exchange, they agreed to fund the stipend by finding the required savings from certain sections of the common agreement: sick days, bereavement leave, compassionate or family illness leave, HR Database, Electronic Registry. Local Faculty Associations could then agree to follow suit, and find savings in their own Collective Agreements. In this manner, Kwantlen University College and its Faculty Association agreed to the 2% stipend in exchange for finding the necessary funding out of its Collective Agreement.

The actual wording from the Memorandum of Agreement between the Kwantlen University College and Kwantlen Faculty Association links the concept to that found at the larger MID table:

The 2% “net zero” stipend/cost recovery option set out in the MID Memorandum.

The Union proposed that the elimination and/or amendment of Article 12.13 of the parties’ Collective Agreement would form part, if not all, of the necessary cost savings. The Employer disagreed. It declared that Article 12.13 was void with the passage of the *Public Education Flexibility and Choice Act* (the “Act”). Consequently, before the parties could attempt to find the cost savings necessary to fund the 2% stipend, they requested that I determine the following preliminary issue.

THE ISSUE - THE APPLICABILITY OF THE ACT TO ARTICLE 12.13

The issue is whether or not Article 12.13 of the Collective Agreement is currently void under the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c.3 or, phrased another way, is Article 12.13 in contrast with certain sections of the *Act* and thus rendered void? The parties agreed that I could decide the issue by written submissions.

ARTICLE 12.13

Article 12.13 of the parties’ Collective Agreement reads as follows:

Cross College Meeting Times

The University College timetable shall provide two three-hour time blocks per week during which no classes shall be scheduled.

RELEVANT PROVISIONS OF THE *PUBLIC EDUCATION FLEXIBILITY AND CHOICE ACT*

Section 2(c) of the *Public Education Flexibility and Choice Act* (the “Act”) reads as follows:

2. Despite any other *Act* or a collective agreement, an institution has the right to...
 - (c) determine its hours of operation and the number and duration of terms or semesters during which instruction is offered to students.

Section 4(2) of the *Act* states:

A provision in a collective agreement entered into before or after the coming into force of this section that is inconsistent with or limits, restricts or interferes with an institution’s exercise of the rights established in this Part is void to the extent of the inconsistency, limitation, restriction or interference.

The *Act* was passed in February, 2002.

SUBMISSIONS OF THE PARTIES

THE EMPLOYER

The Employer submits that the *Act* renders Article 12.13 null and void. By requiring the College to set aside two three-hour blocks of time each week during which no classes are scheduled restricts the Employer's right to "determine its hours of operation...during which instruction is offered to students" (Section 2 of the *Act*) and hence Section 4 of the *Act* renders this provision, by its nature, void as a matter of law, submits the Employer. In support of its argument, the Employer refers to the *Hansard* debates of the Legislative Assembly when the *Act* was introduced, and subsequently passed, and highlights the following statements made by the Minister of Advanced Education:

When institutions have the ability to be responsive, students are better served. By allowing more flexibility on class sizes and by providing the possibility of extended instructional days or more terms or more semesters, pressure for additional capital costs will also be much reduced. That means that the same dollars will be able to meet the needs of more students.

THE UNION

Conversely, the Union, in its submission, refers to the history of Article 12.13. It submits that Kwantlen University College was once a part of Douglas College and the language found in Article 12.13 was taken directly from the Collective Agreement between Douglas College and its Faculty Association. The

language currently exists in that Collective Agreement as Article 15.3 and has not been challenged by that Employer (Douglas College).

According to the Union, Article 12.13 first appeared in the Kwantlen Collective Agreement in 1981 and has remained in the Collective Agreement ever since. The Union submits that in 1998, a pilot project was implemented at Kwantlen University College which allowed for one two-hour period of cross-college meeting times on Friday afternoons, with the other meeting time to be determined by individual departments. The pilot project was to implement the new timetable for one year, but the new timetable became the norm instead.

In October of 2002 the Union raised a grievance alleging a breach of Article 12.13. The Union requested that Article 12.13 be strictly followed with its two blocks of three hours per week free of instruction time, so that faculty could engage in meetings. The Employer responded by saying that the Union was estopped from enforcing the strict language of Article 12.13 for the life of the Collective Agreement because the Union had not enforced it for several years. Although the *Act* had been passed at the time of the grievance, at no time did the Employer raise the issue of Article 12.13 being voided by the *Act*.

Discussions about the obligations found in Article 12.13 continued to take place throughout 2003, asserts the Union – mainly at labour management committee meetings. Again no mention was made of the *Act* at these meetings.

Finally, on May 27, 2003 the Union again put the Employer on notice that it intended to enforce the strict provisions of Article 12.13, upon the expiry of the current Collective Agreement. In response, the Union asserts that the Employer placed the deletion of Article 12.13 on the bargaining table as one of its proposals. The Employer was unsuccessful in the Article's deletion at the table.

The Union finally argues that the issue of Article 12.13 being void under the *Act* has only come up now that the Union is trying to utilize the Article's deletion for all or part of the cost savings associated with the 2% stipend. As part of its evidence, the Union puts forward an email issued from the College President shortly after the passage of the *Act* referring to the *Act* and its effect on the Collective Agreement – specifically, “distributed learning” and “class size”. The President makes no reference to cross-college meeting times in the email, and the Union asserts that this bolsters its argument. The following is the relevant excerpt from the email:

There are two major factors in the situation we face together. One of them is Bill 28 and the other is the budget shortfall we anticipate. Here are my thoughts on them.

The Act

A legally elected government passed an act that removes certain elements from the purview of collective agreements. As I outlined last week they are:

1. Class size, the number of students enrolled in a class, and the total number of students assigned to a faculty member in a semester, term, or academic year,
2. Assignment of faculty to courses that use distributed learning and distance education,
3. The institution's hours of operation and the number and duration of its terms or semesters,
4. Scheduling of professional development and vacation time, and
5. The provision of instructional support to faculty.

These elements have been removed from our collective agreement and the new act prohibits any institution from inserting them in any new collective agreement. This is now the law. Neither the Board nor I can override it through a new collective agreement, letter of understanding, public proclamation or other document. Any such undertaking would be empty because, as a matter of public policy, the government believes these elements should be the discretion of "management" and has passed this policy into law. We, none of us, can contract or declare our way out of our rights or our obligations under the law.

However, how we operate within the law is up to us.

As I understand the Act, two of its five elements affect Kwantlen University College: class size and assignment of faculty to courses taught by distributed learning (we have a letter of understanding to the effect that teaching courses via distributed learning will be voluntary and I do not anticipate changing this practice). Our collective agreement is silent on the other elements so I, and the Board, as "the employer" already have the right to "impose" these conditions. That has never been the Kwantlen way and it has not now suddenly become the Kwantlen way. We will consult. We are happy to consult. We believe that consultation will lead to better solutions.

Finally, the Union argues that the provisions of Article 12.13 do not conflict with the legislation. Indeed, it argues that Section 2(c) of the *Act* must be read in context and that the section grants institutions the right to determine hours of operation in a general way – allowing institutions the flexibility to be open longer. That is why, so states the Union, Section 2(c) refers to “the number and duration of terms or semesters” during which instruction is offered. According to the Union, the provision is not intended to deal with more specific matters such as timetabling of specific courses – which is what this issue is about.

The Union further asserts that when reviewing this issue I should review the legislation with "the principle of harmonization" in mind, as enunciated in *British Columbia Government Employees' Union v. British Columbia (Government Personnel Services Division)*, 1987, 12 B.C.L.R. 92nd, 97 (C.A.) by Justice Hutcheon:

The decision of the Supreme Court of Canada in *Durham Regional Police Assn.* is the authority for the proposition that the existing legislation must be read in such a way as to harmonize with the Collective Agreement unless the operation of the latter is clearly excluded.

The Union finally submits that this same principle was utilized by Justice Shaw in *British Columbia Teachers' Federation v. British Columbia*

Public Schools Employers' Association, 2004 B.C.S.C. 86. In that case, Justice Shaw overturned the arbitrator's award declaring which Collective Agreement provisions were void by the passage of the *Public Education Flexibility and Choice Act*. Justice Shaw also used, in part, the principle of harmonization.

Since Section 2(c) of the legislation does not clearly "...exclude provisions such as those found in Article 12.13, then Article 12.13 can easily be read in harmony with the provisions of the *Act* – argues the Union. In the Union's view, the Article does not limit, restrict or interfere with the College's hours of operation.

As for *Hansard*, on which the Employer relies, the Union contends that there is no conflict between the purpose of the *Act*, as described by the Minister of Advanced Education in the *Hansard* debates and Article 12.13. According to the Union, nothing about Article 12.13 prevents Kwantlen University College from providing extended hours of instruction, nor does its application affect capital costs. Consequently, Article 12.13 can easily be read in harmony with the *Act*, submits the Union.

EMPLOYER'S REPLY SUBMISSION

In its reply submission, the Employer asserts that the bargaining history of Article 12.13 is irrelevant to the issue before me: whether or not Article 12.13 is currently void as a matter of law under the *Public Education Flexibility*

and Choice Act. If I find that Article 12.13 is indeed void under the *Act*, then the Union cannot utilize it for the cost savings necessary to be found in the Collective Agreement in order for the 2% stipend to apply.

The Employer submits that whether or not it has turned its mind to this question in the past is irrelevant. The issue is simply: either the *Act* renders Article 12.13 void, or it does not.

The Employer asserts that on a plain reading of Article 12.13 and the relevant provisions of the *Act*, the Union's position is untenable. Article 12.13 forces the Employer to refrain from scheduling classes during certain blocks of time during the week. This is precisely the type of restriction the *Act* was designed to address, asserts the Employer.

According to the Employer, the only sensible reading of Section 2(c) of the *Act* is one in which it provides the institution with the right to: determine its hours of operation during which instruction is offered to students; and determine the number and duration of terms or semesters during which instruction is offered to students. Therefore, by restricting the Employer's ability to schedule classroom instruction, Article 12.13 is inconsistent with Section 2(c).

The Employer relies on a number of authorities in support of its arguments: *McLeod v. Egan* [1975] 1 S.C.R. 517 for the arbitrator's duty to apply public statutes which affect the interpretation of a collective agreement; *Paramedical Professional Bargaining Association v. Health Employers Association of British Columbia*, 2003 B.C.S.C. 1908 (SC) for prohibition against the evasion of statutory provisions via negotiations; and *Re Ontario Hydro and Ontario Hydro Employees' Union, Local 1000 et al* (1983), 147 D.L.R. (3d) 210 (CA) for the arbitrator's duty to refuse to apply a collective agreement provision if it runs contrary to public law.

Simply put, the Employer argues that Section 4(2) of the *Act*, renders Article 12.13 void. Hence, this Article cannot be used to achieve cost savings utilized to fund the 2% stipend.

DECISION

Let me begin by saying that there are two aspects to this preliminary issue. One is a narrow and legal interpretation of the question and the other is how does this issue fit with my overall arbitral authority and obligations. These broader arbitral obligations can be found both under the *Labour Relations Code* as well as the Memorandum which the parties themselves signed. Under the *Labour Relations Code*, I am obligated as an arbitrator to view and deal with the real crux of the issue. Further, the Memorandum which the parties signed provided me with the following authority:

Following the result of the process in the previous paragraphs, the local parties at the institution will find cost savings such that the total cost savings in the common and local agreement are equal to the cost of the stipend, and the necessary consequential changes will be incorporated into their local agreement. In choosing between cost savings options, the impact on employees will be a substantive factor. Failing agreement as to the interpretation, application or alleged violation of this provision, either party may refer the difference to Vince Ready and Peter Cameron who will have the authority to render a binding decision, including (without limitation) the authority to amend local agreement provisions that otherwise would be in effect, in order to achieve the total common and local savings of 2%. If there is an outstanding difference that is unresolved as of 40 days from the date of ratification, the difference is deemed to be referred to Vince Ready and Peter Cameron.

In resolving any difference referred to them under this provision, Vince Ready and Peter Cameron shall have the authority of an arbitrator under the *Labour Relations Code* and all the authority expressed or implied by this provision. They may determine their own practice and procedure, which may be different from institution to institution.

(underlining added)

Consequently, all aspects of the issue must be reviewed to arrive at a fair and just result.

On a plain reading of Article 12.13, the cross college meeting times language found in Article 12.13 obligates the Employer, on a weekly basis, to provide two three-hour time blocks free from instruction so that the faculty can

deal with other administrative issues or committee work. Section 2(c) of the Act provides the Employer with the right to determine its hours of operation and the number and duration of terms or semesters during which instruction is offered to students. The Employer has argued that Section 2(c) should be read in two parts: (1) that the Employer has the right to determine its hours of operation during which instruction is offered to students; and (2) that the Employer has the right to determine the duration of terms or semesters during which instruction is offered to students. When viewed in two parts, says the Employer, the obligation found in Article 12.13 is an impingement on the Employer's right to determine its hours of operation during which instruction is offered to students and hence Section 4(2) of the Act renders Article 12.13 null and void, as it does with any Collective Agreement provision which is "inconsistent with or limits, restricts or interferes with an institution's exercise of the rights" established in the Act. I disagree.

Although not determinative, as with the introduction of any piece of legislation, the *Hansard* debates provide guidance as to the intent of the piece of legislation being passed in the House. The Minister of Advanced Education, when addressing the Act upon its introduction in January of 2002 and speaking to the intent of the language, concentrates on the Act providing flexibility to institutions on "class sizes", on "extended instructional days", and on "more terms or more semesters". The Minister's words speak to the length

of the instructional day, and the length of the term or semester – nowhere do these words speak to what is contained in those hours of operation.

The Union argues that in determining the language in any piece of legislation which has an effect on Collective Agreement provisions, one has to bear in mind the principle of harmonization. In doing so, the Union relies on the oft-quoted authority for the principle of harmonization: the Supreme Court of Canada decision in *Durham Regional Police Association v. Durham Regional Board of Commissioners of Police and Attorney General of Ontario* [1982] 2 S.C.R. 709. The British Columbia Court of Appeal utilized this principle in *BCGEU v. British Columbia, supra*, when viewing an arbitration award dealing with a Collective Agreement provision regarding contracting out and a section of the *Forest Act*, R.S.B.C. 1979, c.140, s. 73, which appeared to prohibit any such provision in a Collective Agreement. The Court of Appeal reviewed the Collective Agreement provision and the *Forest Act* provision and found that the two provisions could exist in harmony with each other since the Collective Agreement provision only prohibited contracting out in certain circumstances. The Court affirmed that “existing legislation must be read in such a way as to harmonize with the collective agreement unless the operation of the latter is clearly excluded”.

The same principle was utilized by Justice Shaw in *British Columbia Teachers’ Federation (“BCTF”) v. British Columbia Public School Employers’*

Association (“BCPSEA”), supra, which dealt with this very *Act*, the *Public Education Flexibility and Choice Act*, as it pertained to local school boards. Although that decision dealt with the government appointed arbitrator’s authority in deleting and revising provisions of the various Collective Agreements in the K-12 school system, it is helpful in dealing with the *Act* in question and the principle of harmonization. When applying the principle to the *Act*, Justice Shaw emphasized that the operation of the Collective Agreement provision has to be clearly excluded, before being declared void. He went further by stating that the arbitrator erred in law by failing to apply the principle of harmonization in the case at hand. In Justice Shaw’s view, the arbitrator should have revised certain provisions of the collective agreement to the extent they were in conflict with the *Act*. Justice Shaw thus applied the principle in this manner to the arbitrator’s task.

It should be noted that my task in this collective bargaining dispute is not that much different than that of the government-appointed arbitrator in the school board dispute. In the school board dispute, Justice Shaw found that the arbitrator erred in law by not applying the principle of harmonization to the extent that the arbitrator was to revise collective agreement provisions if they were in conflict with the *Act*. In my view, the same principle of harmonization has to apply to the same *Act* and my task. In fact, the MID Memorandum alludes to a similar role (albeit in a more limited capacity) as that of the arbitrator in the school board dispute:

...who will have the authority to render a binding decision, including (without limitation) the authority to amend local agreement provisions that otherwise would be in effect in order to achieve the total common and local savings of 2%.

I draw a comparison between this case and the *BCTF v. BCPSEA, supra*, in order to emphasize that the principle of harmonization should be taken into account when reviewing this preliminary issue. In this case, the Employer utilizes a similar argument as the arbitrator in the *BCTF v. BCPSEA* case, stating that “the principle of harmonization can only be used when statutory and collective agreement provisions can be read in harmony with one another. It cannot operate in circumstances where a statute renders a collective agreement void”. I agree with the Employer’s statement as far as it goes. However, I disagree that the Collective Agreement, in this case, cannot be read in harmony with the *Act*.

The *Act* did not render the whole Collective Agreement void. It rendered it void only insofar as it was inconsistent with, or limited, or restricted the institution’s right to determine its hours of operation. The *Hansard* excerpt makes it clear that the reference to “hours of operation” found in the *Act* relate to duration of the day – not the school day’s content:

When institutions have the ability to be responsive, students are better served. By allowing more flexibility on class sizes and by providing the possibility of extended instructional days or more terms or more semesters....

(emphasis added)

Since Article 12.13 refers to the school day's content, or scheduling within the school week, I do not find that it restricts the language found in the *Act*. If the language found in Article 12.13 read: "all courses have to be scheduled between the hours of 0800 and 1200 and 1300 and 1600 each day", then it would be obvious that the Collective Agreement provision was voided by the *Act* since it restricted and limited the Employer's ability to determine its hours of operation. However, in my view, Article 12.13, as it currently exists, can exist in harmony with the provisions of the *Act*.

Therefore, in answer to the issue from a narrow legal point of view, Article 12.13 is not rendered void by the *Act*.

I am further bolstered in this view by the Employer's very actions. These actions are not determinative in a legal sense, but they indicate to me that my view of the law was similar to the Employer's own view.

After the passage of the *Act*, the University College President sent an email to faculty outlining which provisions of the Collective Agreement were

affected by the *Act*. In that same email message, the President stated that there was nothing in the Collective Agreement which restricted its hours of operation. He stated that the *Act* removed certain elements from Collective Agreements: class size, assignment of faculty to courses using distributed learning and distance education, the institution's hours of operation and the number and duration of its terms and semesters, the scheduling of professional development and vacation time, and the provision of instructional support to faculty. Later in the same email, the Employer states: As I understand the *Act*, two of its five elements affect Kwantlen University College: class size and assignment of faculty to courses taught by distributed learning...Our collective agreement is silent on the other elements [i.e., hours of operation] so I, and the Board, as 'the employer' already have the right to 'impose' these conditions". Consequently, just as I found no restriction in Article 12.13, from a legal point of view, the President and hence the Employer saw no restriction in Article 12.13 on its ability to determine its hours of operation.

Further, the parties continued to debate the application of Article 12.13 as though it were a live Article in the Collective Agreement. Other institutions, such as Douglas College, after the passage of the *Act*, continued to operate under the very same language as found in Article 12.13 – albeit found in Article 15 of the Collective Agreement with Douglas College. Both the Union and the Employer treated Article 12.13 as though it were a *bona fide* Article after the

passage of the *Act* – as did other Employers and institutions governed by the same *Act*. This too bolsters my application of the *Act* on Article 12.13 and the fact that I have found the two able to exist in harmony with each other. Again, the history is not determinative, but assists me in my view that my interpretation is correct under the law.

Under the law, it is also my obligation to fulfill my duties as an arbitrator in trying to determine the real crux and substance of the issue. If I do not fulfill that duty, I abrogate my duty under the *Labour Relations Code* – more specifically, Section 2 of the *Code* which obligates me to perform my duties in a manner that: (a) recognizes the rights and obligations of employees, employers and trade unions under this *Code*; and (b) encourages the practices and procedures of collective bargaining between employers and trade unions as the freely chosen representatives of employees.

This is a collective bargaining dispute. The parties themselves are also governed by the same *Labour Relations Code* as am I as an arbitrator. As such the parties are obligated to bargain in good faith for the purposes of reaching an “expeditious settlement” of their dispute.

The parties would therefore be better served by concentrating on the language of the MID Memorandum regarding the 2% stipend which the parties agreed to follow:

Following the result of the process in the previous paragraph, the local parties at the institutions will find cost savings such that the total cost savings in the common and local agreements are equal to the cost of the stipend, and the necessary consequential changes will be incorporated into their local agreement. In choosing between cost savings options, the impact on employees will be a substantive factor.

In their own Memorandum of Agreement, the parties agreed to abide by the MID Memorandum:

The 2% “net zero” stipend/cost recovery option set out in the MID Memorandum.

With these provisions in mind, the parties should determine whether or not any true cost savings flow from the elimination or revision of Article 12.13 and/or its modified version which was applicable at their particular institution. This is the real and substantive task at hand.

CONCLUSION

Article 12.13 is not rendered null and void under the *Public Education Flexibility and Choice Act*. The parties are now to determine whether or not Article 12.13 offers the real cost savings which can wholly or partially fund the 2% stipend.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this
17th day of June, 2005.

Vincent L. Ready

Vincent L. Ready