

In the Matter of a Labour Arbitration pursuant to the Ontario *Labour Relations Act*

Between:

**The Ontario English Catholic Teachers' Association
(Occasional Teacher Unit)**

-and-

**Toronto Catholic District School Board
Policy Grievance – Use of Student Supervisors**

Ministry of Labour No. A/Y400089

Arbitrator: Randi H. Abramsky

Appearances

For the School Board: Rob Weir Counsel

For the Association David Bloom Counsel

Hearing: April 29, 2004, October 12, 2004, October 19, 2004, October 20, 2004, January 13, 2005, January 14, 2005, February 14, 2005 and March 4, 2005 in Toronto, Ontario. Additional written submissions on April 7, April 12, and April 19, 2005.

AWARD

On November 25, 2002, the Association filed a policy grievance, challenging the School Board's practice of using uncertified supervisors of students to cover for absent teachers during the instructional portion of the school day. Specifically, the grievance alleges that "[s]upervisors are being used as occasional teachers in secondary classes while our members are not being called for work." The Association asserts that the School Board's practice violates the collective agreement, the *Education Act* and the regulations thereunder. The School Board denies any violation of the collective agreement, the statute or regulations, and asserts, in fact, that this board lacks jurisdiction under the collective agreement to decide this dispute.

Facts

In light of legislative changes, the issue of teacher workload became a matter of concern during in the 2000 collective bargaining negotiations for the secondary teachers, their bargaining agent, the Ontario English Catholic Teachers Association (OECTA) and the School Board. Teachers were required to spend more time in the classroom and it was anticipated that, due to curriculum changes, teachers would have to devote significant time to developing and implementing new programs. As a result, teacher availability for on-call assignments and supervision became an issue of concern. At the time, pursuant to the Ministry of Education regulations, teacher instructional time did not include time performing on-calls or supervision of students.

A typical day of instruction consists of four periods – three instructional periods and one other period, although a number of teachers may teach all four periods. Each period consists of approximately 75 minutes. Except for preparation time, the School Board could assign teachers to cover teacher absences in other classes (on-call assignments) or to supervise students – in the lunch room, the hallways, school grounds, or a classroom - during the remaining time. There was no limitation in the collective agreement on the amount of on-call assignments or supervision. The Union negotiators thought that the amount of time used by the School Board in this way was excessive and sought to limit it.

Initially, the Association proposed eliminating on-calls and supervision, except in emergency situations. That proposal was rejected by the School Board, and the Association then proposed limiting the amount of supervision and on-calls performed by teachers – to put a cap on the amount of time such functions could be performed. The parties eventually agreed to a cap for supervision and on-calls at 120 minutes per week, to a maximum of 300 per month, with a review to be undertaken by the Secondary Schools Staff Allocation Committee.

The Board also proposed hiring 40 to 50 supervisors of students at its schools to undertake supervisory duties in order to relieve the burden on teachers. As Senior Coordinator – Employee Relations Bob Dubniak testified, the Board felt that hiring student supervisors would address the on-call and supervision concerns of the teachers in

a fiscally responsible way. Mr. Dubniak testified that the supervisors would be used in the lunchroom first, and then where needed – in the halls or classrooms, as required.

There is some dispute between the parties regarding exactly what was said about the use of student supervisors during negotiations, particularly as it relates to their use in the classroom. I do not find it necessary to resolve those conflicts. Rather, it seems clear that the School Board, from the outset, intended to have the student supervisors supervise in the classroom – not to instruct the students, but to maintain order and supervise them in the absence of the regular teacher. That was not the Association’s understanding. As Kathleen Gardiner, the Chief Negotiator for OECTA Secondary Unit, testified, her understanding was that supervisors would only be used in the classroom in an emergency – if no teacher was available for an on-call assignment and there was no supply teacher in the school, and if was the last period in the day, the School Board would not have to call in an occasional teacher. Instead a supervisor could be used to supervise the class.

Testimony regarding this bargaining history was admitted over the objection of the School Board. It was admitted to explain the introduction of student supervisors into the schools – how it came about. It was not admitted to deal with the meaning of any collective agreement provision, nor to establish an estoppel, based on comments made in negotiations. The Association raised no such allegation.

In early 2001, the School Board invited applications for the position of “Secondary School Supervisor of Students.” The duties of the position were listed as follows:

Duties:

The primary responsibility of this position will be the supervision of students during the lunch periods

Other duties may include supervision of hallways, library, classroom or other parts of the school premises as directed by the Principal.

The work day will consist of 6 hours, not including lunch break.

This contract will be for a maximum of 85 days between now and June 30, 2001.

Applicants could not be registered students in a Toronto Catholic District School Board school.

Student supervisors were first hired during the spring of 2001. The first full year of their employment was for the 2002-2003 school year and supervisors continued to be employed in 2003-2004 and into the current school year. Depending on the size of the school, some schools received one supervisor of students, some had two and some had three.

Article 1.01, Definitions, of the Occasional Teachers’ collective agreement defines the word “teacher” and “occasional teacher.” The term “teacher” means “a person who is a member of the Ontario College of Teachers and who is employed by the Board to teach in a school....” The term “occasional teacher” means a “teacher’ who is

employed by the Board to teach as a substitute for a ‘teacher’” The provision also defines “long term occasional teacher” to mean “an ‘occasional teacher’ who has been given an assignment lasting 20 or more school days and who has received a letter of appointment to such assignment...” In this case, there is no contention that the School Board is using student supervisors instead of long term occasional teachers. Rather, the issue relates to the Board’s use of student supervisors, instead of occasional teachers, to cover for short-term teacher absences.

Under Article 7 of the collective agreement, the School Board must maintain an “Occasional Teachers’ List”, eligibility for which is “determined in accordance with the Education Act and its Regulations.” Applicants must be certified teachers, and they can indicate their geographic, subject and school preferences. Under Article 7.07, “[a]n occasional teacher who is included on the Occasional Teachers’ List shall be available for assignment or otherwise provide reasonable grounds for refusing such assignment.” Pursuant to Article 7.08, if an occasional teacher refuses four or more assignments within 20 school days, without reasonable grounds for the refusal or if they cannot be contacted for 20 days, the individual “shall be deemed to have resigned from the Occasional Teachers’ List.”

Secondary teacher absences are initially handled by a computerized system, named SEMS (short for “Substitute Employee Management System”). The teacher calls into the system and advises it of his or her absence and whether a supply (substitute) teacher is needed. For each school the board assigns a “threshold” number which applies

to certain (and most) types of teacher absences. The threshold number indicates the number of absent positions that the school will fill internally – either through on-call assignments or student supervisors. Only when the number of teacher absences exceeds the threshold for the school will the SEMS system call the occasional teacher lists to fill the absences.

Amy Gatto, Human Resources Supervisor in charge of SEMS, testified that the system may call an occasional teacher to teach outside of their preferred subject area. The last call by SEMS for an occasional teacher is at 7:50 a.m. If positions to fill still remain (after the threshold is met and the occasional teachers on the list have been called), at 8:00 a.m., the principal may call individuals on the unqualified (uncertified) list. At times, especially when the absence rate is particularly high, absences may go unfilled.

According to Anita Bartolini, former Vice-Principal at James Cardinal McGuigan, teacher absences “generally were covered with supervisors first.” If additional classes had to be covered, an occasional teacher was called in or an on-call assignment was made. Part of Ms. Bartolini’s responsibilities, as a vice principal, was to provide coverage for absent teachers and she often made the assignments.

According to Mark Fenwick, Superintendent since September 2002 and formally Principal at Michael Powers, the student supervisors were used in the classroom only if no teacher was available for that supervision. The supervisors, in his view, were a “last resort” – where there was no qualified teacher – occasional or on-call, whether qualified

to teach the subject area or not. Mr. Fenwick, however, was not present at Michael Powers during either the 2002-2003 or 2003-2004 school years.

In light of the number of schools run by the Toronto Catholic District School Board, the parties agreed to rely on data from seven representative schools in this case. The dates of the records provided for the schools varied. Some covered most of the 2003-2004 school year; others covered a portion of the year. Both parties summarized the raw data provided by the School Board into useful formats.

The evidence shows that on a regular basis, student supervisors are used to supervise students in the classroom in the absence of the regular teacher. At St. Basil College, from the period of September 3, 2003 to April 30, 2004, 420 classes were covered by three student supervisors. At Monsignor Percy Joseph, from February 2, 2004 to April 30, 2004, 134 classes were covered by supervisors. At Pope John Paul II, from September 10, 2003 to February 25, 2004, only 32 classes were covered by supervisors. At St. Patrick Secondary, the supervisors covered 172 classes for the period of September 9, 2003 to April 30, 2004. At St. Joseph Morrow Park, the two student supervisors covered 517 classes during the 2003-2004 school year. At James Cardinal McGuigan, the two supervisors there covered 310 classes from September 2003 to March 31, 2004, and from the period of January to June 2003, they had covered 334 classes. Finally, at Michael Powers/St. Joseph, the student supervisors covered 501 classes from September 2003 to January 16, 2004.

The number of classes that a student supervisor covered in a day varied, but were often one or two. Occasionally, they covered three classes in a day or more. Some were used in the classroom quite a lot, while others were not used at all. At times the classes covered by supervisors were during the lunch period. Generally, a secondary teacher teaches three classes per day.

The evidence showed that, on a number of occasions, the same supervisor covered a class for a number of consecutive days. In one such case at James Cardinal McGuigan, then Vice-Principal Anita Bartolini explained that “for consistency purposes, we decided to let the supervisor assume the classes, to cover for the class”, although she was unsure if there had been a problem obtaining a supply teacher. She acknowledged, however, that it was “more likely” that the supervisor was kept there for consistency purposes.

The School Board provided statistics which show that the number of classes covered by student supervisors is quite small in relation to the total number of classes taught. The statistics provided show that tens of thousands of classes are taught each year. In one of the summaries, the number of teacher absences to fill, for each day that a supervisor was placed in the classroom was provided, but there were no statistics prepared comparing the number of supervisors used in the classroom compared to the number of teacher absences to be filled.

There is no dispute between the parties that the student supervisors did not engage in teaching the students. They did not evaluate the students, mark their work, or interface

with parents. They did not provide assessments of the students' performance, although if there was a significant behaviour issue, the supervisor was expected to deal with it, or report it to the principal's office.

The School Board provided no written documentation outlining the duties of a student supervisor in the classroom. Rather, the School Board's expectations were conveyed to student supervisors verbally.

The evidence showed, however, that the supervisors often performed the same functions as an occasional teacher or a teacher on an on-call assignment. Specifically, they maintained order in the classroom, handed out the assignments and assigned work, and then collected the work. When asked, on cross-examination whether there were times when an occasional teacher did not teach, but only did supervision and hand out assignments, Mr. Dubniak responded that "that's generally the case." As he explained, the occasional teacher is "paid for their qualifications."

Mr. Dubniak further testified, on cross-examination, that the School Board had not issued any restrictions on the number of times or classes that a student supervisor may cover for a teacher in a school year. Nor was there a restriction on the number of times that a supervisor may cover a class for an absent teacher.

Association witness Paul Bergin, a teacher at James Cardinal McGuigan, testified that when he is absent, he leaves a lesson plan for the students to follow, which consists

of work for the students to perform rather than a program of instruction to be delivered. Usually, when he is absent, he is not aware of how his class will be covered – whether by a supply teacher, an on-call teacher assignment or a student supervisor. His expectations are the same for all three – to assign the prescribed work and keep the students on task to ensure that the work gets done.

Ms. Anita Bartolini, currently Vice Principal at Monsignor Percy Johnson and previously Vice Principal at James Cardinal McGuigan, confirmed the functions of a student supervisor in the classroom. She stated that the teacher usually leaves a lesson plan and the supervisor would hand out the work sheets, put the assignment on the board, take attendance and collect the work. The lesson plan is the same, regardless of whether the class is covered by an occasional teacher or a student supervisor. The supervisors would also handle discipline issues, unless they became problematic. The same would be true for an occasional teacher.

Ms. Bartolini testified that the supervisor would not provide instruction. On examination-in-chief, Ms. Bartolini stated that her expectations of an occasional teacher covering a class were not the same as those of a supervisor. She expected an occasional teacher to “make an effort, if possible, to teach the material.” She expected a higher level of expertise because of their teaching certificate. On cross-examination, however, she acknowledged that are “many times” when classes are covered by an occasional teacher who is not qualified in the subject area, and in those circumstances, she would not expect

them to teach the students. She also acknowledged that she would not expect an occasional teacher to mark the student's work or check their homework.

The evidence showed that each school used a single form to record coverage for teacher absences, whether an on-call teacher, a student supervisor or an occasional teacher provides the coverage. Although the titles of the forms varied, just one form was used in each school.

In November 2003, approximately one year after the grievance was filed, the parties added Appendix D to the collective agreement. Appendix D provides as follows:

**LETTER OF UNDERSTANDING
USE OF UNQUALIFIED INDIVIDUALS**

During the course of negotiations, the Toronto Occasional Teachers Local expressed concerns with regard to the Board's assignment of unqualified individuals as occasional teachers when qualified members of the Local might otherwise have been available for such assignments.

In response to such concerns the Board agrees that it will,

- (a) insure that the rates paid to unqualified individuals who are given an occasional teaching assignment, shall be less than those paid to bargaining unit members; and
- (b) at the end of each term of each school year provide to the Local a summary of the use of unqualified individuals which shall include dates and locations of such unqualified assignments. The initial report shall be forthcoming as soon as possible.
- (c) remind the Principals, on an annual basis, that the use of unqualified individuals will be limited to such occasions where qualified occasional teachers are not available.

Association negotiator Jeff Heximer testified on cross-examination about this provision. He acknowledged that, during the relevant negotiations, there was an issue about the principals' use of unqualified (*i.e.*, uncertified) individuals to substitute for absent teachers before the occasional teachers were called, but he insisted that the issue was not limited to the unqualified list and included use of supervisors as well. Ms. Kathleen Gardiner, then Chief Negotiator for the OECTA Toronto Secondary Unit, agreed that there had been an issue regarding the School Board's use of the unqualified list to cover teacher absences. There was no other testimony concerning Appendix D.

Barbara McMorrow, Principal of Mary Ward Catholic Secondary School, a Centre for Self-Directed Learning, testified that at her school non-certified Instructional Assistants assist teachers in delivering the curriculum. They also organize materials and assist in the supervision of students. Ms. McMorrow likened the Instructional Assistants to Educational Assistants, and stated that Mary Ward is a unique school within the Toronto Catholic District School Board. Instead of traditional classrooms, large resource centres are used, all under the direction of a teacher. At Mary Ward, supervisors of students, on occasion, work in a resource area, but only where there is a teacher present. Otherwise, their job is to supervise lunch and the hall ways.

Decision

A. The Jurisdiction of the Board

The School Board asserts that, at the time this grievance was filed in November 2002, there was no provision in the collective agreement which limited the School Board's right to hire and utilize student supervisors in the classroom. Although it acknowledges that Appendix D arguably pertains to the use of student supervisors, it asserts that prior to Appendix D, there was no relevant collective agreement provision. Accordingly, it asserts that, prior to the inclusion of Appendix D, there is no jurisdiction for this Board to address the instant grievance.

The School Board further contends that Article 3.01 (iv) of the collective agreement does not provide the board with free-standing authority to apply the *Education Act*. Article 3.01(iv) provides:

**ARTICLE 3
MANAGEMENT RIGHTS**

- 3.01 The Association acknowledges that it is the exclusive function of the Board to
- (i) maintain order, discipline and efficiency;
 - (ii) hire, direct, classify, transfer, promote, demote, layoff and to discharge, suspend, or otherwise discipline occasional teachers for just cause subject to the provisions of this Agreement;
 - (iii) establish from time to time and enforce written rules and regulations, not inconsistent with the provisions of this Agreement governing the conduct of the Occasional Teacher; and
 - (iv) generally, to manage, maintain and operate its school system in accordance with the laws of the Province of Ontario and the regulations made pursuant thereto.

The School Board asserts that the language found in Article 3.01 (iv) has never been applied to grant arbitrators original jurisdiction to apply provisions of the *Education*

Act to the actions of management, without some “hook” into the collective agreement. In support of this position, the School Board cites to *Re York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers’ Association* (1995), 49 L.A.C. (4th) 123 (Keller); *Re York Region Roman Catholic Separate School Board and Ontario English Catholic Teachers’ Association* (1995), 52 L.A.C. (4th) 286 (Kaplan), *Re Durham District School Board and Ontario Secondary School Teachers’ Federation, District 13* (2000), 87 L.A.C. (4th) 249 (Davie), and *Re British Columbia Public School Employers’ Association and British Columbia Teachers’ Federation* (2004), 124 L.A.C. (4th) 97 (Munroe).

The School Board also submits that the decision of the Supreme Court of Canada in *Re Parry Sound (District) Social Services Administration Board and OPSEU, Local 324* [2003] SCC 42 does not change the result. It submits that even after *Parry Sound*, there still must be a violation of the collective agreement to provide an arbitrator with jurisdiction – not just an alleged violation of a statute. It also submits that the *Education Act* is not an employment-related statute within the meaning of Section 48(12)(j) of the *Ontario Labour Relations Act*. It asserts that the *Education Act* does not provide substantive employee rights like the *Human Rights Code*, *Employment Standards Act* or the *Occupational Health and Safety Act*. If jurisdiction is allowed, the School Board argues, then any provision of any statute could be grieved without a hook into the collective agreement. It asserts that this was not the intent of the Court in *Parry Sound*.

The Association argues that the board has jurisdiction over this grievance under Article 3.01(iv) of the collective agreement, under Section 48(12)(j) of the *Labour Relations Act* and under the ruling of the Supreme Court in *Parry Sound, supra*. All three, in its view, provide the board with the requisite jurisdiction.

The Association asserts that Article 3.01(iv) allows it to challenge an exercise of management's rights on the basis that it is non-compliant with the *Education Act*. It contends that the *Education Act* is the parties' "home statute" and a primary source of the parties' respective rights and obligations. It submits that Article 3.01(iv) engages the provisions of the *Act* and makes disputes regarding compliance with the *Act*, which have a bearing on the employment of teachers and the use of teachers to perform certain work, arbitrable issues. At issue in this case, it contends, is the School Board's compliance with Regulation 298 (21) which allows the School Board to appoint "a person who is not a teacher or a temporary teacher" to teach where no teacher is available, for a maximum of ten days. Also at issue, it asserts, is whether the School Board can designate a period of the instructional day as a period where a qualified teacher is not required as well as issues about the scope of the occasional teachers' bargaining unit work.

The Association further contends that jurisdiction is provided under Section 48(12)(j) of the *Labour Relation Act*. In its view, the *Education Act* is clearly an "employment-related statute" within the meaning of that provision. It submits that while the *Act* contains non-employment related elements, it is an employment-related statute in many ways. It sets out the bargaining units, and duties of a teacher, and statutorily

provides many terms and conditions of employment, the length of the school year and workload of teachers. It submits that it is common for arbitrators to interpret and apply the *Education Act*. In support, it cites to *Re Toronto Catholic District School Board and Ontario English Catholic Teachers' Association (Toronto Elementary Unit)*(2001), 55 O.R. (3rd) (Ont. C.A.); *Re Dufferin-Peel Catholic District School Board and Ontario English Catholic Teachers' Association* {November 15, 2001} unreported decision of Arbitrator Charney; *Re Algonquin and Lakeshore Catholic District School Board and Ontario English Catholic Teachers' Association* [October 10, 1999] unreported decision of Arbitrator Shime and *Re Ottawa-Carleton Catholic District School Board and Ontario English Catholic Teachers' Association* [October 10, 1999] unreported decision of Arbitrator Stanley.

In the Association's view, the cases cited by the School Board are distinguishable and no longer valid after *Parry Sound, supra*. Further, it argues that the Keller and Kaplan awards are also distinguishable because, at the time under Bill 100, the *School Boards' and Teachers' Collective Negotiations Act*, there was no equivalent to Section 48(12)(j) of the *Labour Relations Act* applicable, as there is today.

After closing arguments, one of the arbitration decisions relied on by the School Board, *Re British Columbia Public School Employers' Association and British Columbia Teachers' Federation* (2004), 124 L.A.C. (4th) 97 (Munroe) was overturned by the British Columbia Court of Appeal. *British Columbia Teachers' Federation v. British Columbia Public School Employers' Association* [2005] B.C.J. No. 289; 2005 BCCA 92. Both

parties filed written submissions concerning the impact of this decision, which I will address below.

Analysis

I conclude that this board does have jurisdiction to determine the instant grievance, prior to the inclusion of Appendix D in the collective agreement.

The cases cited by the School Board appear to conclude that a management's rights provision, standing alone, does not provide an arbitrator with jurisdiction to apply the terms of an external statute. There must be a provision or "hook" into the collective agreement for jurisdiction to exist. The award of Arbitrator Keller in *Re York Region Roman Catholic Separate School Board and OECTA*, *supra*, as well as the award of Arbitrator Kaplan by the same name, holds that "[t]o succeed there still has to be a provision of the collective agreement that is allegedly violated or in conflict with an external statute." (49 L.A.C. (4th) at p. 126) Where there is none, there can be no conflict and hence no jurisdiction.

I would note, however, that the language in the management's rights clause was different in those cases than in the present matter. There, the management's rights clause provided that "[t]he terms of this Agreement are subject to the provisions of the School Boards' and Teachers' Collective Negotiations Act, 1980", which included Section 51(1) of that Act. Section 51(1) reads: "Where a conflict appears between a provision of an agreement and a provision of an Act or regulation, the provision of the act or regulation

prevails.” Under that language, Mr. Keller (and Mr. Kaplan) determined that there still had to be a provision in the collective agreement which allegedly conflicted with a statute.

Those two arbitrators, however, noted that under Bill 100, there was no corollary to the power conferred upon an arbitrator under the *Labour Relations Act* to interpret and apply external statutes. The Keller award states at p. 128:

In the recent Bill 40 amendments to the Ontario Labour Relations Act, it was made somewhat clearer that an arbitrator can import and interpret “external” statutes in dealing with issues raised in arbitration. No such amendment, interestingly, was made to the statute governing the relations between these parties. This cannot be ignored.

An arbitrator derives his or her jurisdiction from the collective agreement. It is only logical that there has to be some provision that a party can turn to imbue or empower the arbitrator with the requisite jurisdiction unless there is a provision similar to the one in the Ontario Labour Relations Act which, in the view of many, permits an arbitrator original jurisdiction to interpret and apply an “outside” statute.

Arguably, the decisions of Mr. Keller and Mr. Kaplan are distinguishable in light of Section 48(12)(j) of the *Labour Relations Act*. In addition, as noted, there is a difference in the management’s rights provisions. Arguably, Article 3.04(iv) is broader language which requires the School Board to act consistently with the *Education Act*, without the requirement of a “conflict.”

The decision of Arbitrator Davie in *Re Durham District School Board and Ontario Secondary School Teachers’ Federation, District 13, supra*, however, contains a management rights clause very similar to the one in this case, and was decided under

Section 48(12)(j) of the *Labour Relations Act*. There the management rights clause stated, in relevant part, that “[t]he Board agrees to exercise its management rights in accordance with the Acts and Regulations of Ontario.” The collective agreement was silent in respect to the matter of hiring – the subject matter of the grievance. Specifically it was alleged, on behalf of the Association and an individual, that the individual was not hired, in part, because of her race in violation of the Ontario *Human Rights Code*. The School Board argued that the arbitration board was without jurisdiction to decide the grievance and a majority of the board agreed.

In the board’s view, it did not have inherent or original jurisdiction, under Section 48(12)(j) of the *Labour Relations Act* to interpret and apply the *Code*, in the absence of a difference between the parties relating to the interpretation, application or administration of the collective agreement. It determined, at p. 261, that “[b]efore exercising the power set out in section 48(12)(j) of the *Act* to interpret and apply the *Code*, this board of arbitration must first ensure that, pursuant to the collective agreement, we have the requisite jurisdiction to hear and determine the grievance.”

The Union argued that the Employer’s obligation “to exercise its management’s rights in accordance with the Acts and regulations of Ontario” provided the necessary nexus by importing the *Code* into the collective agreement. Based on the reasoning and analysis set forth in the Keller award, the board rejected that argument. Further, given the silence of the agreement in relation to hiring, the board determined at p. 266 that

“[t]he Union therefore cannot grieve about a subject matter which is not referred to in any manner in the collective agreement.” The School Board urges me to follow this analysis.

In my view, however, in light of *Parry Sound, supra*, the interpretation of Article 48(12)(j) adopted Arbitrator Davie in *Re Durham District School Board, supra*, can no longer be followed. That interpretation was specifically rejected by the Supreme Court in *Parry Sound, supra*.

At issue in *Parry Sound* was whether the board of arbitration had jurisdiction to hear the grievance of a probationary teacher which alleged, in substance, that she had been terminated in violation of the *Human Rights Code*, specifically for going on a maternity leave. The collective agreement stated that “a probationary employee may be discharged at the sole discretion of and for any reasons satisfactory to the Employer and such action by the Employer is not subject to the grievance and arbitration procedures and does not constitute a difference between the parties.” The majority of the board of arbitration determined that Section 48(12)(j) imports the substantive rights of the *Human Rights Code* into a collective agreement over which an arbitrator has jurisdiction. It therefore had the power and responsibility to determine the question of whether discrimination was a factor in the employee’s discharge. The dissenting member of the board of arbitration determined that Section 48(12)(j) could only be utilized if an arbitrator has jurisdiction in the first instance which, due to the language concerning probationary employees, did not exist. Essentially, the dissent followed the interpretation of the statute adopted by the board in *Re Durham District School Board, supra*.

On judicial review, the Divisional Court agreed with the dissent, finding that Section 48(12)(j) confers power on a board of arbitration to interpret and apply the *Human Rights Code* when and if it already has jurisdiction to hear a grievance, but not otherwise. The Court of Appeal did not accept the Divisional Court's interpretation of Section 48(12)(j), but decided the appeal on other grounds, specifically that the board of arbitration had jurisdiction to hear the grievance under the *Employment Standards Act*.

The Supreme Court of Canada determined that the interpretation of Section 48(12)(j) by the majority of the arbitration board in *Parry Sound* was "correct." At para. 23, the Court, per Justice Iacobucci stated:

For the reasons that follow, it is my conclusion that the Board was correct to conclude that the substantive rights and obligations of the *Human Rights Code* are incorporated into each collective agreement over which the Board has jurisdiction. Under a collective agreement, the broad rights of an employer to manage the enterprise and direct the work force are subject not only to the express provisions of the collective agreement, but also to statutory provisions of the *Human Rights Code* and other employment-related statutes.

The Court explained this statement further in paras. 28 and 29. Justice Iacobucci wrote:

As a practical matter, this means that the substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights. The absence of an express provision that prohibits the violation of a particular statutory right is insufficient to conclude that a violation of that right does not constitute a violation of the collective agreement. Rather, human rights and other employment-related statutes establish a floor beneath which an employer and union cannot contract.

As a result, the substantive rights and obligations of the parties to a collective agreement cannot be determined solely by reference to the mutual intentions of the contracting parties as expressed in that agreement. ...The statutory rights of employees constitute a bundle of rights to which the parties can add but from which they cannot derogate.

The Court further rejected the view that Section 48(12)(j) applied only when there is a direct conflict between the collective agreement and the statute. Instead, it read the provision to empower an arbitrator to interpret and apply employment related statutes *even if* there is conflict between the collective agreement and the statute. The Court stated, at para. 44: “The obvious implication is that a conflict between the collective agreement and an employment-related statute is not a condition precedent of the power to bring that statute into practical operation.” Further, at para. 45, Justice Iacobucci stated that “In any event, I am of the view that the inclusion of a management’s rights clause that is sufficiently broad to include the right of management to discharge a probationary employee for discriminatory reasons gives rise to a conflict between the statute and the collective agreement.”

Finally, the Court further ruled that “even if it is true that a dispute must be arbitrable before an arbitrator obtains the power to interpret and apply the Human Rights Code, it does not thereby follow that an alleged contravention of an *express* provision of a collective agreement is a condition precedent of an arbitrator’s authority to enforce the substantive rights and obligation of employment-related statutes.” (Emphasis in original). The Court reasoned that since the employer’s right to manage the enterprise is subject not only to the express provisions of the collective agreement but also the statutory rights of

its employees, which are implicit in each collective agreement, an allegation of a violation of the statutory rights is an arbitrable difference. As the Court ruled, at para. 48: “This, in turn, means that the dismissal of an employee for discriminatory reasons is, in fact, an arbitrable difference, and that the arbitrator has the power to interpret and apply the substantive rights and obligations of the Human Rights Code for the purpose of resolving that difference.”

Parry Sound, in essence, holds that an arbitrator has original jurisdiction to interpret and apply substantive employee rights found in the *Human Rights Code* and other employment-related statutes – without first finding a nexus to an explicit collective agreement provision. There no longer has to be an explicit “hook” into the collective agreement. Instead, an arbitrator has “stand-alone” jurisdiction to enforce the substantive employee rights found in external law because they are implicit in the collective agreement.

Applying the interpretation of Article 48(12)(j) adopted by the Supreme Court of Canada in *Parry Sound*, the School Board’s preliminary objection to the jurisdiction of this board must be denied. Even assuming, without deciding, that Article 3.01(iv) would not provide this board with jurisdiction, the fact remains that an employer must exercise its management rights in a manner which does not violate the substantive rights of its employees contained in employment-related statutes. As determined in *Parry Sound*, the substantive rights of employees found in employment-related statutes are to be applied,

under Section 48(12)(j), “as if they were a part of the collective agreement.” Thus, the absence of an express provision like Appendix D does not negate the board’s jurisdiction.

Therefore, to the extent that the *Education Act* may be deemed an employment-related statute, this Board has jurisdiction under Section 48(12)(j) to determine whether the School Board’s practice of assigning student supervisors to provide supervision in the classrooms during the instructional day violates the substantive rights of the occasional teachers under the *Education Act*. It seems clear to me that the *Education Act*, insofar as it relates to the terms and conditions of employment and rights and responsibilities of teachers, is an employment-related statute within the meaning of Section 48(12)(j). Certainly, not all aspects of the *Education Act* would be enforceable under the grievance arbitration procedure. But those aspects which deal with employee rights and the employment-relationship are “employment-related” and are enforceable through the arbitration process.

The legislature, by using the words “employment-related” statutes – rather than specifying specific statutes (other than the *Human Rights Code*) - must be deemed to have included all statutes which, in whole or in part, are “employment-related.” Clearly, the *Education Act* has many provisions which may be regarded as “employment-related.” As set forth in *Toronto Catholic District School Board and OECTA (Toronto Elementary Unit)*, *supra* at p. 743, the *Education Act*, along with the *Labour Relations Act* and the collective agreement, “are at the core of labour relations in the public sector.” It explained at par. 28:

In the present case, the “outside” statute is the *Education Act* itself or, more precisely, a regulation made under that statute. There is nothing transient about the *Education Act* or its longstanding relationship with the *LRA* and collective agreements. Indeed, the relationship among these three sources is, and has been for years, the core of labour relations in the public sector. Moreover, the centrepiece of dispute resolution in that longstanding relationship has been grievance arbitration. ...

Arbitrators have long been required to interpret and apply the *Education Act* because it related to “employment-related” matters. See e.g., *Re Dufferin-Peel Catholic District School Board and OECTA, supra*; *Re Algonquin and Lakeshore Catholic District School Board and OECTA, supra*; *Re Ottawa-Carleton Catholic District School Board and OECTA, supra*.

In so ruling, I cannot accept the School Board’s contention that *Parry Sound* is not applicable because the provisions of the *Education Act* and the regulations relied upon by the Association do not constitute “substantive rights” of the teachers. The *Education Act* and its regulations clearly relate to the “work” of teachers. If the Association is correct that the instructional program is to be taught and supervised by qualified teachers, then it creates a “substantive right” in the teachers to perform that work. If the Association is correct, the provisions create both an obligation on the part of the School Board and a corresponding right in the teachers. Consequently, I conclude that this board has jurisdiction, under *Parry Sound*, to determine if the School Board’s assignment of student supervisors in the classroom violates, as alleged, the “substantive rights” of the teachers as set out in the *Education Act* and its regulations.

Consequently, for these reasons, I conclude that this Board has jurisdiction to hear and decide this matter, based on Section 48(12)(j) of the *Labour Relations Act*, as interpreted by the Supreme Court of Canada in *Parry Sound, supra*.

The British Columbia Court of Appeals decision in *British Columbia Teachers' Federation v. British Columbia Public School Employees' Association, supra*, follows the Supreme Court's decision in *Parry Sound, supra*, and supports my determination of jurisdiction in this case. In that matter, the British Columbia legislature, through statute, had removed class size from the scope of collective bargaining and expunged such provisions from collective agreements. Instead, class sizes were determined by statute and regulation. The British Columbia Teachers' Federation filed a grievance alleging that the School Boards were in violation of the class size regulations and a question of arbitrability arose.

Arbitrator Munroe determined that the employers' alleged violation of the statute and regulations concerning class size was not arbitrable in light of the legislation removing class size provisions from all collective agreements. As the arbitrator concluded:

An arbitral finding that the legislative provisions on class size are implicit in teachers' collective agreements, thus implying back into those collective agreement provisions of a kind earlier stripped from the agreements by legislative warrant, and legislatively declared not permissibly included now or in the future in teachers' collective agreements, would directly collide with the clearly stated intention of the Legislative Assembly; and for that reason would be incorrect in adjudicative principle.

The arbitrator also determined that jurisdiction could not be based solely on the management's rights provision. He concluded that "a school board's adherence (or not) to [the statute or regulation] is not in the exercise or purported exercise of a management right, just as a school board's adherence (or not) to statutes generally is not in the exercise or purported exercise of management rights." The statutes were not - and could not be - within the ambit of the parties' collective agreement and therefore the dispute was not arbitrable.

The British Columbia Court of Appeal set aside the arbitrator's award on the issue of jurisdiction. Relying on the Supreme Court's analysis in *Parry Sound, supra*, the Court determined that the issue of whether the employer violated the class size regulations was arbitrable, even though class size provisions could not be included in the collective agreement. The legislation, in its view, prohibited the parties' from negotiating about class size and from including such provisions in their agreements, but class size had historically been and remained a term and condition of employment. Non-inclusion in the collective agreement did "not make that subject any less a term or condition that affects the employment relationship." (par. 37). Instead, "[t]he legislation simply transfers those terms and conditions from negotiated determination to statutory determination." (par. 37). The Court continued: "If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of [the statute and regulation]."

The Court found that class size would also affect other terms in the collective agreement such as layoffs and health issues arising from stress. In the Court's opinion, the alleged violation "is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it." It was not necessary for the class size regulations to be "incorporated" into the collective agreement before jurisdiction could be found. Instead, there had to be "a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement...." Often, but not exclusively, that would be an alleged violation of an express or implied management's rights provision. As the Court concluded: "In short, the collective agreement must be interpreted in light of the statutory breach." (par. 38).

The School Board, in its written submissions about this decision, argues that the Court of Appeal's decision is distinguishable from this case because the Court heavily relied on the fact that class size was a term and condition of employment which historically had been negotiated by the parties and included in the collective agreement. In contrast, it submits that there is no evidence here that the issue of whether supervision in the classroom is an exclusive duty of qualified teachers has ever been part of the collective agreement. "In the absence of this factor," it contends that the decision does not give arbitrators "a blank cheque to interpret and apply legislation that is not employment-related or incorporated into a collective agreement."

In response, the Association asserts that the *Education Act* and regulations are incorporated into the collective agreement and are “employment-related.” It submits that the fact that the use of supervisors has not been the subject of specific collective bargaining between the parties does not alter the fact that the use of supervisors directly engages those provisions of the statute and the collective agreement that pertain to the scope of bargaining unit/teacher work.

The School Board also argues that, unlike the situation in British Columbia, there is no statutory bar to prevent the Association from negotiating a limit on the use of student supervisors, and the issue raised in this arbitration could be the subject of collective bargaining between the parties. It submits that the proper forum is collective bargaining. The Association, in response, argues that this submission “misses the point” which is “that it is the position of OECTA that the applicable Education Act and Regulation 298 prohibit the usage which is at issue in this case.”

In my view, the British Columbia Court of Appeals decision does not turn on the fact that, historically, class size provisions were negotiated and included in collective agreements. Rather, what was significant was that class size is a term and condition of the teachers’ employment, regardless of whether it is determined by statute and regulation or by the parties’ in collective bargaining. The Court held that an alleged breach of the class size statute and regulations – that term and condition of employment - is enforceable at grievance arbitration through the management right’s provision, even

though class size was not and could not expressly be a part of the collective agreement. The Court of Appeals decision, in my view, supports a finding of jurisdiction in this case.

The fact that the parties may bargain about the use of student supervisors does not impact this board's jurisdiction to decide this dispute. Clearly, for the reasons stated, I have jurisdiction to determine whether the School Board's use of student supervisors in the classroom, during instructional periods, violates the collective agreement, the *Education Act* and its regulations.

Accordingly, I conclude that I have jurisdiction over this grievance, before the inclusion of Appendix D in the collective agreement.

B. The Merits

The Association alleges that the School Board's use of student supervisors to cover for absent teachers in class during the instructional program of a school day is a violation of *Education Act*. It contends that the supervision of pupils in class during the instructional program is a "core" duty of teachers, and may only be performed by non-certified individuals in an emergency situation when no teacher is available.

The Association relies on various provisions of the *Education Act* and the regulations to support its position. Section 264(1) of the *Act* outlines the duties of a teacher and in subsection (c) includes the duty of "discipline" – "to maintain, under the direction of the

principal, proper order and discipline in the teacher's classroom and while on duty in the school and on the school ground." Similarly, Regulation 298(20)(b) states that "a teacher shall.... carry out the supervisory duties and instructional program assigned to the teacher by the principal..." It submits that the responsibilities of a teacher, under Section 170.2.1 includes "their assignments to provide instruction or supervision or to perform duties in eligible programs, on a regular timetable, during the school year." It relies on the fact that all such duties are considered the "work" of a teacher and count in determining the teachers' "teaching assignment" minimum of 6.67 eligible programs in a day school program. Further, in Regulation 274/01, Section 4(2) a "program of supervision of students" and "a substitution program that provides for classroom teachers to substitute for absent classroom teachers in providing instruction or supervision in eligible programs" counts as an "equivalent program for the purposes of section 170.2.1 of the Act."

These provisions, the Association submits, establish that supervision of pupils in the classroom – whether providing instruction or supervision – is a function to be performed by a "teacher" – either a regular or occasional teacher. The only exception to this, it asserts, is found in Regulation 298(21). That section provides:

Appointment to Teach in the Case of an Emergency

21.(1) Where no teacher is available, a board may appoint, subject to section 22, a person who is not a teacher or a temporary teacher.

(2) A person appointed under subsection (1) shall be eighteen years of age or older and the holder of an Ontario secondary school diploma, a secondary school graduation diploma or a secondary school honour graduation diploma.

(3) An appointment under this section is valid for ten school days commencing with the day on which the person is appointed.

Yet the evidence, the Association contends, establishes that the School Board is placing student supervisors in the classroom, during the instructional portion of the day, as a first, not last resort. It submits that the School Board has regularly assigned student supervisors to the classroom, without first determining that “no teacher is available” and without first utilizing the occasional teacher list.

The School Board argues that while supervision of students may be a duty of teachers, it is not an exclusive duty. Simply because a duty is listed in the statute, it argues, does not make it an exclusive duty of the teachers. It points to some of the other “duties” set forth in Section 264 of the *Act*, such as “to encourage the pupils in the pursuit of learning”, or “to assist in developing cooperation...”, which, it asserts, shows that these “duties” are not the sole responsibility of teachers. To so rule, it contends, would be absurd.

The School Board argues that others in the school system also have a responsibility to supervise students. Under Section 265 of the *Act*, principals have a duty to “maintain proper order and discipline in the school.” It cites Regulation 298(11) for the fact that principals are also responsible for the “instruction and the discipline of pupils in the school” and must “provide for the supervision of pupils during the period of time during each school day when the school buildings and playgrounds are open to pupils.”

In its submission, the principals' assignment of supervisors of students, whether to the lunch room, the hallways, the school grounds or the classroom, is part of this function.

In the School Board's view, the critical fact is that the student supervisors are not teaching; they are not providing instruction or a program of instruction. Rather, when assigned to a class, they are simply supervising the students. It submits that handing out an assignment is not providing instruction. Rather, any assigned work that the students perform is from the lesson plan *of the teacher*, not their own. Therefore, because they do not teach, and other persons beside teachers may supervise students, the School Board contends that the assignment of supervisors to the classroom is not a violation of the *Education Act*.

The School Board contends that not all of a teacher's time, in a classroom, is "instructional" and that "supervision" is not the same as "instruction". In support it cites to *Re Toronto District School Board and Elementary Teachers' Federation of Ontario (Preparation Time Grievance)* [2004] O.L.A.A. No. 423 (E. Newman). At issue in that case was whether calculation of the daily 300 minutes of the instructional program began with the entry bell, and the children entering the school building, or the start of opening exercises. The board determined that the "essential character" of the period was "more supervisory and transitional than instructional" and therefore should not be included in the calculation. The School Board, here, argues that the work performed by the student supervisors is supervisory only, and should not be deemed instructional.

The Association takes a broader view of the concept of providing a program of instruction. In its view, the supervision of students in the classroom, while they are engaged in “planned learning activities” – performing the assigned work – is part of the instructional program and the responsibility of a certified teacher. It asserts that under the Section 170.2.1 of the *Act* and regulations, a “classroom teacher” is “a teacher who is assigned in a regular timetable to provide instruction in a credit course or credit-equivalent course to pupils....” A “credit course” “means a course or program in which a credit or part of a credit may be earned.” Under Regulation 274/01, each credit requires that at least 110 hours of “instruction” be provided. The Ministry of Education’s curriculum guidelines state that “[f]or the purpose of granting a credit, ‘scheduled time’ is defined as the time during which students participate in planned learning activities designed to lead to the achievement of the curriculum expectations of the course.” It then defines “planned learning activities” as follows:

Planned learning activities include interaction between the teacher and the student and assigned individual or group work (other than homework) related to the achievement of the learning expectations in the course. Planned learning activities will be delivered through classroom instruction and activities and/or through community placements related to work experience and cooperative education.

Based on this, the Association contends that the supervision of students who are doing the work assigned in the lesson plan by an absent teacher, in class, is part of the instructional program. The time spent in those activities count toward the 110 hours of instruction for credit purposes. It contends that the provision of instruction is not limited to a teacher interacting with students, but includes supervision while the students perform assigned individual or group work.

The Association also submits that the School Board's position tries to draw a clear line between supervision and the provision of instruction when the two functions cannot be so clearly separated. It asserts that they are not "water-tight" compartments, but overlap, and that is why, under the *Act* and the regulations, supervision in the classroom must be performed by a teacher.

The evidence, it submits, showed that the same duties are performed in the classroom, regardless of whether coverage is provided by an occasional teacher, an on-call teacher or a student supervisor. Yet, the Association argues, the School Board contends that the supervisors are only supervising – not providing a program of instruction. In its view, the School Board cannot designate a period, during the instructional portion of the day, as non-instructional because it is being supervised by a student supervisor. In support, it relies on *London District Catholic School Board and Ontario English Catholic Teachers' Association* [April 19, 2003] unreported decision of Arbitrator Etherington.

Analysis

After careful consideration of the facts, the law and arguments of the parties, I conclude that the School Board may not, under the collective agreement, the *Education Act* and the regulations, assign student supervisors to cover classes, during instructional periods, except in an emergency situation as set out in Regulation 298(21).

The collective agreement defines “occasional teacher” to “mean a ‘teacher’ who is employed by the Board to teach as a substitute for a ‘teacher’ ...who is or was employed by the Board that is part of its regular teaching staff...” Basically, the job of an occasional teacher is to substitute for an absent teacher. There is no guarantee of work, but Article 7 creates an occasional teacher list from which assignments – to substitute for an absent teacher - are to be made. Clearly, not all absences must be filled by occasional teachers. At times, no substitute is required. At times, regular teachers on-call may fill in to cover for an absent teacher. At times, depending on the age of the students, a class may be dismissed.

The issue here is whether the School Board may assign student supervisors to cover classes, during the instructional portion of the day, without first determining whether an occasional teacher is available. The evidence is clear that the School Board has established a “threshold” for each school, which applies to certain types of teacher absences. The attendance management system does not call for occasional teachers for these types of absences until a threshold of absent teachers has been reached. Thus, if the threshold for a school is two, when more than two teachers are absent because of reasons that apply to the threshold, the school is permitted to bring in an occasional teacher. Prior to crossing the threshold, the school must fill the positions internally. It does this either through on-call assignments or assigning student supervisors to the classrooms. The evidence is therefore clear that student supervisors are assigned to cover classes for absent teachers before the occasional teacher list is utilized.

In my view, the School Board's practice is improper under the collective agreement, the *Education Act* and its regulations. The *Act* and the regulations, taken as a whole, clearly indicate that teachers are to both teach and supervise the program of instruction during the instructional day. Under section 170.2.1 of the *Act*, a "classroom teacher" is "a teacher who is assigned in a regular timetable to provide instruction in a credit course or credit-equivalent course to pupils..." There can be no question that the classes assigned to the student supervisors are during the "regular timetable to provide instruction" and involve credit courses or credit-equivalent courses for pupils.

As set forth in the Ministry of Education curriculum guidelines, a credit course is "a course that has been scheduled for a minimum of 110 hours" and "scheduled time" includes both "interaction between the teacher and the student and assigned individual or group work (other than homework) related to the achievement of the learning expectations in the course." Clearly, then, in-class work performed by the students is part of the instructional program for credit purposes. Supervision of that work by the students is the work of a teacher.

It is easy to understand the School Board's view that no "instruction"- in the active-teaching sense - takes place when the regular teacher is absent on a short-term basis. But the instructional program includes more than active teaching. It includes supervision of planned learning activities. Given the broad approach to instruction adopted by the Ministry of Education, the School Board's position that the student supervisors are only supervising and not taking part in the instructional program is not

tenable. It might be true if the students simply sat in the classroom, performing no work or assignments (assuming that could occur and course credit could still be provided). The evidence, however, is that the absent teachers leave a lesson plan or work to be performed by the students. That activity – assigned individual or group work related to the achievement of the learning expectations in the course - is part of the instructional program.

Further, under the *Act* and regulations, substituting for an absent colleague is the work of a teacher. Classroom teachers in secondary schools must “be assigned to provide instruction to or supervision of pupils or to perform duties in an average of at least 6.67 eligible programs in a day school program during the school year.” An “eligible program” means “a credit course, a credit-equivalent course, an equivalent program or a program of special duties.” Under Regulation 274/01, an “equivalent program for the purposes of section 170.2.1 of the Act” includes “a program of supervision of pupils” and “a substitution program that provides for classroom teachers to substitute for absent classroom teachers in providing instruction or supervision in eligible programs.” Under the same regulation, “a classroom teacher is considered to be assigned to provide supervision or instruction in a substitution program ... only when, (a) the classroom teacher who is substituting for the absent classroom teacher actually provides the instruction *or* supervision in the eligible program....” (Emphasis added) Under these provisions, “supervision in the eligible program” counts towards the teacher’s fulfillment of the 6.67 credits. Again, this demonstrates that supervision of pupils, on behalf of an

absent teacher, during periods which are part of the instructional program, is considered under the *Act* and the regulations to be the work of a teacher.

The only exception to this is found in Regulation 298, Section 21. This provision allows a School Board to appoint “a person who is not a teacher or a temporary teacher” for a maximum of ten school days, but only [w]here no teacher is available.” Appendix D in the collective agreement is similar when it states that “the use of unqualified individuals will be limited to such occasions where qualified occasional teachers are unavailable.” Regulation 298, Section 21 allows the use of non-certified individuals as a last resort, when a qualified teacher is unavailable. It does not permit an unqualified individual to be appointed as a first resort, when a qualified teacher is available. In this case, however, student supervisors were assigned to cover classes before the attendance management system even tried the occasional teacher list.

The heading of Regulation 298, Section 21 reads “appointment to teach in the case of an emergency.” The School Board asserts that this provision – and Appendix D – only applies to teaching assignment and the student supervisors do not teach. For the reasons expressed before, that argument is not persuasive. Under the Act, instructional time is for instruction – be it interaction between pupil and teacher or supervision of assigned work. The classes at issue are part of the instructional program, used for credit purposes. They must be taught or supervised by a teacher – a regular teacher, a teacher on call or an occasional teacher, except as provided in Regulation 298(21).

In regard to Appendix D, it would appear that it was included to deal with the Association's concern about the School Board's reliance on the unqualified list when occasional teachers might otherwise have been available, rather than the student supervisors. Its language, however, is broad enough to include both groups. Appendix D reinforces the view that the use of non-certified individuals in the classroom "will be limited to such occasions where qualified occasional teachers are not available." Because, in this instance, student supervisors (unqualified individuals) were assigned to classrooms before the availability of the occasional teachers was explored, the assignment violates Appendix D. It also violates Regulation 298, Section 21.

This conclusion is supported by the decision of Arbitrator Etherington in *Re London District Catholic School Board and OECTA, supra*. In that case, the grievance alleged that the employer had violated the collective agreement by using noon hour supervisors (non-teachers) to cover classes to provide prep time to kindergarten and junior kindergarten teachers during the instructional day. Under the collective agreement, teachers were to be granted a minimum of 200 minutes per week for preparation, consultation, planning and evaluation "during the regular instruction time exclusive of recess and lunch periods." The board determined at p. 23 that, "by choosing the words 'regular instruction time' the parties must have contemplated that the pupils of the teacher who was being provided with prep time relief would be receiving regular instruction from a qualified teacher during that prep time period." The board determined at p. 24 that "it would be an unreasonable interpretation of the words 'regular instruction' to conclude that it could be provided by persons other than qualified teachers or other

persons who are given express legislative authority to teach in an instructional program under the provisions of subsections 19 and 21 of Regulation 298 under the *Education Act*.”

The arbitrator specifically rejected the employer’s contention that the noon hour supervisors were not providing instruction, but only supervision. To allow that, in the arbitrator’s view would be inconsistent with the *Act* and its regulations. Citing sections 3, 19, 20 and 21 of Regulation 298, the board stated at p. 24:

Those provisions clearly contemplate that all school boards will provide an instructional program of a specified minimum duration and will use qualified teachers, or in some legislatively recognized circumstances other specified persons with prescribed qualifications, to provide instruction and supervision to deliver the instructional program. The noon hour supervisors used by the board to provide prep time do not fall within any of the legislatively recognized exceptions to the general requirement that the instructional program be delivered by qualified teachers.

The arbitrator further rejected the idea that there could be periods of non-instruction within the instructional program. This, in essence, is what the School Board is arguing here. The School Board asserts that the classes covered by the student supervisors are non-instructional yet may properly take place within the instructional period. Arbitrator Etherington specifically rejected that idea. He concluded, at p. 26, that “[r]egular instruction time cannot include periods of non-instruction supervised by unqualified persons.” Similarly, he determined, based on the *Education Act* and the regulations, that periods of supervision by non-teachers cannot count as instruction time. I reach the same conclusions here.

In so ruling, I find the decision of Arbitrator Elaine Newman in *Re Toronto District School Board and Elementary Teachers' Federation of Ontario, supra*, to be distinguishable. That case involves whether the period of time between the entry bell and the start of opening exercises should be included as part of the required 300 minutes of the instructional program. The board determined, at par. 135, that the “essential character of [that] period is more supervisory and transitional than instructional” and, accordingly, should not be counted. In contrast, the classes covered by the student supervisors at issue here fall squarely during the instructional program. In the *Toronto District School Board* case, moreover, there was no question of non-teachers performing supervision in the classroom during the instructional portion of the workday.

The School Board provided statistics to show that the number of times that a student supervisor is assigned to a class is quite small in relation to the number of classes taught at a given school. The School Board’s practice, however, cannot be viewed as insubstantial. At least one school, Michael Powers/St. Joseph, assigned student supervisors to cover 501 classes in one semester. That can only be viewed as significant. The number of times student supervisors were assigned to classes varied among the schools, but the evidence presented showed a consistent, regular practice of assigning student supervisors to the classroom during the instructional portion of the day.

Moreover, under the School Board’s approach, there is no limit on the number of supervisors who may be placed in classrooms to cover for an absent teacher, provided that they do no teaching. The only limitation, it asserts, is that they may not teach. If

accepted, that would clearly have a detrimental impact on the work available to the occasional teachers whose function is to replace absent teachers in the classroom. If student supervisors may perform the same functions of handing out work and supervising the class as the occasional teacher – and the evidence shows that they do – there would be very little need for the School Board to hire an occasional teacher to replace an absent teacher.

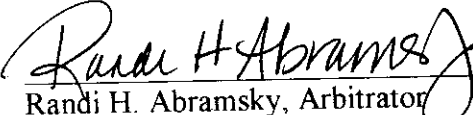
Finally, I find the situation of the Instructional Assistants at Mary Ward to be distinguishable. Mary Ward operates under a different structure than traditional classroom instruction. The Instructional Assistants work in large resource areas in conjunction with and under the direction of a teacher – to assist the teacher. It is a special situation and does not establish that student supervisors may work in the classroom during the instructional portion of the school day, in the absence of a regular teacher.

Accordingly, for all of the foregoing reasons, the grievance is allowed.

Conclusions

1. The board has jurisdiction to decide the instant grievance, prior to the inclusion of Appendix D in the collective agreement.
2. The School Board's practice of assigning student supervisors to cover classes during instructional periods as a first resort, prior to seeking a qualified teacher or occasional teacher, violates the collective agreement, the *Education Act* and the regulations, and I so declare. Student supervisors may only be used in the classroom during an instructional period as a last resort, pursuant to Regulation 298, Section 21.
3. The grievance is allowed. I shall remain seized.

Issued this 20th day of April, 2005.


Randi H. Abramsky, Arbitrator