

In the Matter of the *Teachers' Collective Bargaining Act*

**And in the Matter of a Grievance of the Union
Regarding Special Certificates under the
*Teacher Certification Regulations***

B E T W E E N:

THE NOVA SCOTIA TEACHERS UNION

("the Union")

- and -

THE MINISTER OF EDUCATION AND EARLY CHILDHOOD
DEVELOPMENT OF THE PROVINCE OF NOVA SCOTIA

("the Employer")

ARBITRATION AWARD

BEFORE

Eric K. Slone, sole arbitrator

APPEARANCES

On behalf of the Union: Gail Gatchalian
Counsel
Pink Larkin

On behalf of the Employer: Kevin Kindred
Counsel
Nova Scotia Department of Justice

Hearings held at Halifax, Nova Scotia on October 15, 16 and 21, 2019
Award released at Halifax, Nova Scotia on November 25, 2019

Introduction

[1] This is a policy grievance initiated by the Union on June 6, 2018 and amended June 26, 2018, alleging breaches of:

- a. Articles 3, 4, 5, 15, 16 and other relevant articles of the Teachers' Provincial Agreement (the applicable collective agreement).
- b. Sections 16, 59 and other relevant sections of the *Teacher Certification Regulations* (made under the *Education Act*).
- c. Sections 12 and 13 of the *Teachers' Collective Bargaining Act*, and
- d. Sections 6 and 12 of the *Teaching Profession Act*.

[2] The gist of the grievance concerns the Employer's decision in about May 2018, to cease granting special certificates to school psychologists, speech language pathologists and social workers working in the public school system. That decision led to other (fully intended) consequences, most notably being a change to the composition of the bargaining unit, which the Union loudly protests.

[3] Although a more exhaustive analysis will follow, borrowing in part from the parties' agreed statement of facts, I will start with a brief abstract or summary of the situation, including some historical context.

Teachers certificates

[4] Teachers - and I speak for the moment of classroom teachers - in the Nova Scotia public school system are eligible to apply for jobs if they hold a valid certificate issued by the Office of Teacher Certification ("the OTC"). That body matches the teacher's credentials with the requirements set out in the governing

regulations. There is typically only a need to apply once, although the level of certificate may be upgraded, qualifying the teacher for salary increases as the teacher acquires more training and credentials. Once granted, a certificate may last for the teacher's entire career.

[5] Once certified, a teacher can apply for teaching jobs. It is understood that a certificate does not guarantee a job. That depends on the availability of such positions. Jobs are typically made available at the level of the education entity, or what was previously called a school board.

[6] Once employed, the teacher automatically becomes a member of the Nova Scotia Teachers Union (the "NSTU") and is governed by the Teachers' Provincial Agreement, local collective agreements, and a number of applicable statutes and regulations. (Teaching is a highly regulated profession.)

Special certificates

[7] For reasons that are largely lost in the mists of history, a number of other professionals employed in the school system have been treated in a similar way to classroom teachers. They have been required to obtain a "special" certificate from the OTC as a prerequisite to obtaining a job. And they have been covered under the same collective agreement(s) and been represented by the same union - the NSTU.

[8] Until very recently, and for many years, the professionals governed in this manner were school psychologists, speech language pathologists and (to an extent) social workers (who I will refer to collectively as "specialists"). At one time other professionals were covered by this system and the language of the

regulations does not appear to have been modernized to conform to the more recent reality.¹

[9] Speaking in the pre-2018 context, specialists were treated as quasi-teachers (my term), in the sense that upon obtaining their special certificate and securing an advertised job, they became members of the NSTU, were governed by the same collective agreement(s) that apply to classroom teachers, participated in the same pension plan, enjoyed the same benefits, and worked a similar schedule including, most significantly, the 10-month “school year.”

[10] While their numbers are small compared to classroom teachers, these specialists have been a fixture within the bargaining unit for more than four decades.

The decision to stop issuing special certificates

[11] In 2018 the Deputy Minister of Education and Early Childhood Development conveyed to the Registrar of the OTC a policy concern that the services provided by specialists should occur on a 12-month basis, i.e. that they should continue during the summer when classes are not in session. The wisdom or otherwise of this policy is not in question; at least it is not my function to pass comment on the policy considerations. The issue is how the Department went about it.

¹Section 59 of the *Teacher Certification Regulations* refers to “the fields of social service related to education, testing services, school library services, or teaching the visually or hearing impaired ..” It appears that librarians are now treated differently. Also at the hearing before me there was no mention of teachers of the visually or hearing impaired. There is also no specific mention in the regulation of speech language pathologists.

[12] The solution that was evidently the Registrar's own idea was simply to stop issuing special certificates. Newly qualified specialists would no longer need to apply for special certificates. They and already-certificated specialists applying for new jobs, would be hired as non-union specialists under individual contracts of employment, some or all of which would be placed in a "Professional Employees Group." That employment would be contracted directly with the regional centres. Over time, it must have been anticipated, the number of specialists in the NSTU bargaining unit would drop and the cohort of non-union specialists would continue to grow.

[13] This change in the working conditions for specialists, and in the composition of the bargaining unit, was to be accomplished without any legislative or regulatory amendments, and was done entirely without the concurrence of the Union. The overarching question in this arbitration is whether all of this constituted a breach or breaches of the collective agreement, and/or of any of the governing regulations or statutes.

[14] As these reasons will make clear, I am of the opinion that the Employer has breached the collective agreement in numerous respects. It is also in violation of some of the regulations and statutes, and the Union is entitled to relief that will, to the extent possible, and notwithstanding how complicated and inconvenient it will be, restore the *status quo ante*.

The grievance

[15] My jurisdiction to arbitrate this matter can be traced to s.29 of the *Teachers' Collective Bargaining Act*, which deems every collective agreement in the education sphere to contain a final settlement provision:

29 (1) Every professional agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, concerning its meaning or violation.

(2) Where a professional agreement does not contain a provision as required by this Section, it shall be deemed to contain the following provision:

Where a difference arises between the parties relating to the interpretation, application or administration of this agreement, including any question as to whether a matter is arbitrable, or where an allegation is made that this agreement has been violated, either of the parties may, after exhausting any grievance procedure established by this agreement, notify the other party in writing of its desire to submit the difference or allegation to arbitration. If the parties fail to agree upon an arbitrator, the appointment shall be made by the Minister of Labour and Advanced Education for Nova Scotia upon the request of either party. The arbitrator shall hear and determine the difference or allegation and shall issue a decision and the decision is final and binding upon the parties and upon any teacher or employer affected by it.

(3) Every party to and every person bound by the agreement, and every person on whose behalf the agreement was entered into, shall comply with the provision for final settlement contained in the agreement.

[16] The Teachers' Provincial Agreement in article 42 sets out the grievance procedure to be followed. There is nothing to suggest that the grievance procedures were not properly followed.

[17] I was consensually appointed by the parties in a letter dated October 22, 2018, to hear and determine this matter. My jurisdiction to deal with all of the issues put to me was not questioned. Hearings were originally scheduled to begin in May 2019 but for various reasons did not actually get underway until

October 15, 2019. Two days were devoted to hearing evidence, and a further day (October 21, 2019) consisted of argument.

[18] The evidentiary phase of the hearing would have taken much longer had the parties not arrived at a Joint Statement of Facts, consisting of some 34 paragraphs and exhibiting a number of documents without the necessity of formal proof. For purposes of this decision, I will be incorporating many of the agreed facts, either verbatim (without specific attribution) or otherwise paraphrased for purpose of the narrative. Where a finding of fact is based upon contested evidence, I will endeavour to say so, although this case did not involve many contested facts.

[19] For the sake of completeness, the Joint Statement of Facts will be reproduced as an Appendix to these reasons.

Definitions

[20] It is useful at the outset to define some of the terms used in this award. In this decision, hereafter:

- a. “the Minister” refers to the Minister of Education and Early Childhood Development. Pursuant to the *Teachers’ Collective Bargaining Act*, the Minister is the employer of teachers employed by an education entity in Nova Scotia in respect of the Teachers’ Provincial Agreement.
- b. “the Deputy Minister” refers to the Deputy Minister of Education and Early Childhood Development.
- c. “the Department” refers to the Department of Education and Early Childhood Development, which is sometimes referred to as “EECD.”

- d. “education entities” are the regional centres of education (sometimes referred to as an RCE) that have replaced school boards in the province.
- e. “the OTC” refers to the Office of Teacher Certification, which is that part of the Department that approves programs and grants teacher certificates and upgrades, including special certificates. The OTC official who made all relevant decisions is its Registrar.
- f. “the Employer” means the Minister, and vice-versa.
- g. “the Union” refers to the Nova Scotia Teachers’ Union.
- h. “the Teachers’ Provincial Agreement” refers to the collective agreement between the Union and the Minister dated the 14th of May 2013, effective August 1, 2015 to July 31, 2019. The education entities also enter into specific collective agreements with the Union, which contain additional terms of employment which, for purposes of this grievance, are not relevant.

The pre-June 2018 public profile respecting special certificates

[21] While the Employer has sought since June 2018 to differentiate between special certificates and (regular) teacher’s certificates, with all of the implications that such a differentiation may produce, it has not always made these distinctions.

[22] The Union introduced into evidence, on consent, internet-based documents which illustrate the way that the Employer itself regarded special certificates prior to the decision to stop issuing them.

[23] In this day and age, it is not surprising that teachers or specialists, whether new or otherwise, would look to the Department’s website for guidance on how to

qualify for, and obtain, jobs. Prior to June 28, 2018, the OTC's website contained information regarding special certificates, which information is no longer available on line because it has been removed. Screen shots of the OTC's website as it appeared in May 2018 (preserved by the Union) include the following information:

Office of Teacher Certification Certificate Types

The teacher certification system in Nova Scotia provides for three types of teachers certificate - regular, special and vocational.

- a Regular Certificate is the type of certificate awarded to a graduate of a pre-service teacher education program designed to prepare the participant as a classroom teacher.
- A Special certificate is the type of certificate awarded to an applicant who is not trained as a teacher but has been trained to provide important educational services - Human Communication Disorders, School Library Services, Social Work and Testing Services.
- A Vocational Certificate is awarded to an applicant who has completed occupational training and experience in the trades and has completed an approved pre-service teacher education program.

[24] A further web page (also now deleted) explaining special certificates read (in part):

Special Certificate

Teacher certification is also provided to applicants who, while not trained as teachers, provide important services to teachers and students in the public schools. In that regard, pursuant to Section 59 of the regulations, the Minister may grant a special certificate of the appropriate class in the fields of testing services, social services related to education and school library services, to a person who does not otherwise qualify for a teacher's certificate and who has completed the minimum qualifications as determined by the Minister in the field for which application is made.

The qualifications currently required are those qualifications required for full professional status by the governing body for that field. Please note that the governing bodies are as follows:

- Testing Services - Nova Scotia Board of Examiners in Psychology
- Social Work - Nova Scotia Association of Social Workers
- Human Communication Disorders - Canadian Association of Speech Language Pathologists and Audiologists
- School Library Services - possession of an approved master's degree in Library Services from a recognized/accredited program

[25] Prior to June 28, 2018, the OTC's website contained downloadable forms, including the Application Package for Special Certificates. A screenshot of the webpage on July 14, 2017, featuring links to the downloadable Application Package, and a copy of the Application Package for Special Certificates that could be downloaded at that time, were preserved by the Union and provided as exhibits.

[26] Before June 2018, the education entities included as a requirement "valid teacher certification" for speech language pathologist, psychologist and social worker positions. A number of examples from various education entities across the province, or their predecessor school boards, were produced. Neither party was able to locate an example of where eligibility for certification was not required.

Post June 2018

[27] As far as the evidence reveals, the Union had no advance knowledge of the changes that the Department was instituting regarding special certificates, but

rather became aware at or about the same time as the information became public. On May 8, 2018, the Employer announced in an online news release that six new school psychologists and speech-language pathologists would be hired by September of 2018, which in itself would not have been controversial. However, on May 24, 2018, Pamela Langille, Executive Staff Officer of Member Services for the Union, and Jeremy Brown, the OTC Registrar, exchanged emails. In his email to Ms. Langille, the Registrar stated that the OTC was at that time refraining from issuing new special certificates.

[28] While I am uncertain as to when this came to the Union's attention, on June 13, 2018, the Employer produced an internal memorandum entitled "EECD Issues Summary," which provides a candid and frank insight into the Department's thinking. A copy of this document was filed as an exhibit. Sections of that document are set out below:

EECD Issues Summary — June 13, 2018

Lead: Education and Early Childhood Development

Certification of School Psychologists and Speech Language Pathologists: EECD has advised the NSTU that professional School Psychologists and Speech Language Pathologists and social workers will no longer be required to obtain certification as "specialist teachers" in order to work in schools. The goal in untying them from the school day and school year, is to expand services to students in "off" times such as during the summer.

....

Messages:

- Every action we take, every decision we make is about student success.
- There's no freeze on hiring. Quite the opposite. This means more flexibility in delivering these professional services to our kids.

- The commission has challenged us to think of different, innovative ways to address student needs. Our actions to support inclusive education will help ensure students and parents have access to the professional services they need, when and where they need them.
 - This change gives speech language pathologists and school psychologists flexibility to better support student needs - for example, addressing gaps in service over the summer and outside of school hours. For example, we can better address the waitlist for student assessments.
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Talking Points:

- It's been the practice in NS to require these professionals to be certified by the department as teachers to work in schools. These are professionals with their own accreditation and should be recognized as such.
 - Teachers and those currently working in these roles in the RCEs are not affected. This change is about students.
 - Our goal is to increase access for students to these professional services.
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Q/A:

Why are you doing this?

To remove a barrier toward providing wrap around service to students.

Is this a hiring freeze?

No. in fact, we are open for business and hiring 190 inclusive education supports, including 6 SLPs and school psychologists, plus 57 rural, high school teachers for September.

What does being certified mean?

It's been the tradition to certify non-teachers, such as psychologists or speech language pathologists, as teachers so they can work in our school system.

We're saying only teachers should be certified as teachers. The other professionals who work school, system have their own accreditation and professional associations and are certified through those avenues.

Does it mean they will come out of the Union?

The province only determines whether or not someone is certified to teach. We don't determine union membership.

.....

[29] As of June 28, 2018, information formerly published on the OTC's website regarding special certificates had been deleted, and the Teacher Certification Application Package for special certificates was no longer available for download.

[30] By then the OTC had put a hold on existing applications for special certificates, and eventually refunded application fees to those who had been applying for special certificates in the usual way. The Joint Book of Documents included email correspondence of June 21, 2018, containing directions from the Registrar to remove information regarding special certificates and special certificate application materials from the OTC website, and to identify emails and applications of applicants in order to inform them that their application fees would be refunded.

[31] In an email dated June 20, 2018, Angela Kidney, Director, Education and Labour Relations for the Department, directed education entities to fill new speech language pathologist and school psychologist positions, and vacancies in existing positions, as "non-NSTU" positions, and to continue to use existing job descriptions for the positions, noting the change in work year. Ms. Kidney also noted that the employees would not be granted certificates from the OTC.

[32] In an email dated June 22, 2018, Ms. Kidney again directed education entities to fill speech language pathologist and school psychologist positions as "non-NSTU" positions. This direction applied to newly created positions as well

as to temporary and permanent vacancies in existing positions, and applied whether or not the successful applicant already held a special certificate.

[33] In or around late June 2018, the education entities began to post speech language pathologist and psychologist positions as "non-union" positions that did not require a special certificate. A number of examples of such postings were provided. A common feature was that they invited applicants with or without special certificates to apply, noting that these were non-union positions.

[34] These steps did not purport to change the status of speech-language pathologists, psychologists, and social workers currently holding permanent (NSTU) positions. In a June 27, 2018 email, Judy Elliot, Director of the Student Services Division for the Province wrote:

The recent changes to the Department of Education and Early Childhood Education's decision to no longer require school psychologists, speech-language pathologists and social workers to obtain a teacher's certificate does not affect the special certification or conditions of employment of those currently working within our Regional Centres for Education or CSAP. This change pertains only to those entering the workforce as non-teaching professionals moving forward.

[35] In its "Careers at HRCE Applicant Guide," published in 2019, the Halifax Regional Centre for Education included the following text:

Important information regarding School Psychologist, School Social Workers and Speech Language Pathologist positions

Given recent changes made by the Department of Education and Early Childhood Development, applicants to School Psychologist, School Social Worker and Speech Language Pathologist positions who do not currently hold a specialist or regular licence issued by the Department of Education and Early Childhood Development will be hired as members of the non-union Professional Employees Group (PEG) and will be 12 month employees, subject to the terms and conditions of employment for PEG

employees as determined by the Halifax Regional Centre for Education. ... Applicants who do not currently hold a specialist licence are invited to apply to the positions currently posted and invited to watch for postings in the coming week(s).

[36] In preparation for the arbitration hearing, the Employer provided to the Union lists for each education entity of speech-language pathologists, psychologists, and social workers treated as non-union by the Employer, as well as those who maintain union positions. These lists were filed as part of the agreed facts. According to counsel for the Employer, the total number of such professionals would currently be in the range of about 200, and the number of those who are in non-union positions would be about 60.

[37] Since June of 2018, education entities have also hired individuals, who the Employer treats as non-union, to fill in for permanent speech-language pathologists and psychologists who have special certificates and who continue to be treated by the Employer as bargaining unit employees represented by NSTU.

[38] The speech language pathologists, psychologists and social workers hired by education entities into "non-union" positions since June of 2018 have not been treated by the Minister or the education entities as covered by the Teachers' Provincial Agreement or a local collective agreement.

Historical collective agreements

[39] The earliest available collective agreement between the Province of Nova Scotia and the NSTU, is one signed December 16, 1975. Several articles thereof were highlighted for me:

Article 15 Reclassification of Certificates

- 15.01 Restructuring of the classifications of Teachers' Certificates, Vocational Teachers' Certificates or Permits shall not occur unless the restructuring is mutually agreeable to the Union and the Employer.
- 15.02 Changes in the requirements for Teachers' Certificates, Vocational Teachers' Certificates or Permits shall not occur unless the changes in the requirements are mutually agreeable to the Union and the Employer.

Article 16 Teacher Certification

- 16.01 A teacher shall apply to the Minister of Education or delegated official for certification or change therein.
- 16.02 An application made under 16.01 shall be supported by an official transcript or transcripts or acceptable documentation issued directly from the appropriate institution(s).
- 16.03 Documentation as per 16.02 shall be submitted within a reasonable time after receipt.
- 16.04 For salary purposes the classification or permit or certificate shall be effective on the date the teacher qualified for the classification or as of the first day of the school year in which the teacher applied for the classification and submitted all of the required documentation, whichever is the later.

Article 20 School Year

- 20.01 The academic school year begins on the first day of August in each year and ends on the thirty-first (31st) day of July next following.
- 20.02 The school year shall consist of one hundred ninety-five (195) school days.

[40] The current Teachers' Provincial Agreement contains an Article 15 unchanged since 1975.

[41] Article 16 carries forward without change 16.01, 16.02 and 16.03. Article 16.04 now reads:

16.04 A certificate shall be issued only after receipt by the Registrar of official documentation. The initial certificate or new certificate shall be issued within thirty (30) days of receipt by the Registrar of the required official documentation. Notwithstanding this, if, for unforeseen circumstances, a certificate cannot be issued in thirty (30) days the Union shall be informed in writing.

[42] Articles 20.01 and 20.02 are also unchanged since 1975, though renumbered as 25.01 and 25.02. Article 25 goes on to contain a great deal of details that were not present in 1975, which are unimportant for present purposes.

Union witnesses

[43] The Union called two witnesses who were directly affected by the Employer's actions. It is understood that these witnesses were simply representative of situations occurring more widely, and had no special status in this arbitration. The grievance before me is a policy grievance.

Heather Boucher

[44] Heather Boucher is a school psychologist who has worked in the school system since 2013. She has been a member of the NSTU from 2015 when she applied for and received her special certificate. Since then she has worked under a couple of term contracts, including a job sharing contract for the 2016-17 school year. For 2017-18 she took a full-time (195 days) contract based out of Porter's Lake Elementary School, servicing six schools in that region.

[45] In December 2017 she went off on a maternity leave, and made a point to come back before the end of the 2017-18 school year in order to maintain her so-called “Term II²” status on the seniority list when bidding on jobs, as provided in Article 10.14 of the collective agreement between the Union and the Regional Centre, here the Halifax Regional Centre for Education “(HRCE”).

[46] In June 2018 Ms. Boucher waited for postings to be offered, as usual, and ended up applying for six of them. She noted for the first time that the postings invited *“applicants who do not currently hold a specialist or regular licence issued by the Department of Education and Early Childhood Development [to apply] as there are non-union positions available.”*

[47] Ms. Boucher testified that, having Term II status, she would have been in line for the first available permanent contract. Instead, she was met with communication from the HRCE to the effect that the awarding of positions was suspended pending the Department’s “finalizing terms and conditions of employment.” It was not until mid-July that she received an offer for the permanent position of Psychologist for the site office location of Porter’s Lake. Her offer letter was introduced as an exhibit. Some of the pertinent terms (for my purposes) of the written offer are set out below, highlighting (in a few instances) how different these terms were from what Ms. Boucher could have expected from a Union position:

²Teachers who have at least two (2) full time one-hundred percent (100%) term contracts of one hundred seventy-five (175) days or more in consecutive years of service with the Regional Centre in the immediately preceding school years.

<p>On behalf of the Halifax Regional Centre for Education, I am pleased to offer you the permanent position of Psychologist for the site office location of Porter's Lake, reporting to the Principal, commencing September 4, 2018.</p>	
<p>You are being placed at Step 3 of 9 incremental steps, with a salary of \$75,405.05 per annum. Where applicable, you will advance to the next step on the salary scale on the anniversary of your hire date. Any cost of living salary increases that may be provided, and their effective dates, are determined by the Centre and are conditional upon an employee meeting the requirements and expectations of the position. Your regular workweek will consist of 35 hours (excluding lunch), Monday through Friday. Your exact schedule will be confirmed by your supervisor.</p>	<p><i>The salary offered was actually higher than Ms. Boucher would have received under the collective agreement, reflecting the 12-month nature of the employment (as opposed to 10-month)</i></p>
<p>As a member of the Professional Employee Group (PEG), you are entitled to a comprehensive benefit package which features the following:</p>	
<ul style="list-style-type: none">• As a permanent employee, you will be enrolled in the Halifax Regional Municipality (HRM) Pension Plan. You are currently required to contribute 12.21% of your basic earnings to the pension plan each year and the Halifax Regional Centre for Education will match this contribution. Details regarding the pension plan will be provided to you in your forthcoming benefits enrollment package.	<p><i>This is a different pension plan, though not necessarily a worse one. The status of Ms. Boucher's NSTU pension contributions accumulated during previous years was not made clear.</i></p>
<ul style="list-style-type: none">• Health, dental, long-term disability, life insurance, accidental death & dismemberment, and emergency travel insurance with premiums cost shared between the employee and employer (35% employee/65% employer). In addition, you will be eligible to access a \$100.00 annual Health Spending Account each April, pro-rated in your first year.	<p><i>The NSTU plan was 100% funded by the Employer.</i></p>

<ul style="list-style-type: none"> • Three (3) weeks' paid vacation based on an accrual of 1.25 days per month, pro-rated based in your first year based on your hire date. Please note the quota year covers the period from January 1 to December 31 inclusive. 	<p><i>Under the collective agreement regime it appears that vacations are expected to be taken over the summer, with the collective agreement also providing for a number of types of special leave during the school year.</i></p>
<ul style="list-style-type: none"> • Twenty (20) days of paid sick leave per year, pro-rated in your first year. Unused sick days are credited to an accumulative sick leave bank up to a maximum of 230 days. Please note the quota year covers the period from January 1 to December 31 inclusive. 	<p><i>Appears to be similar, though under the collective agreement the 20 days are for a ten-month school year.</i></p>
<ul style="list-style-type: none"> • Opportunity to apply for professional development funds to further your professional growth and development 	<p><i>Ms. Boucher believed that the NSTU Professional Development fund was richer.</i></p>
<p>Detailed information pertaining to the terms and conditions of employment can be found on my HRSB under Document Depot/ Human Resource Services/Professional Employees Group/ PEG Terms and Conditions of Employment.</p>	
<p>Additional general terms of your employment are as follows:</p>	
<ul style="list-style-type: none"> • There will be an initial probationary period of twelve (12) months. 	<p><i>There does not appear to be any automatic probationary period under the collective agreement.</i></p>
<ul style="list-style-type: none"> • If you are a new employee with the HRCE, you will be required to submit a satisfactory Criminal Records Check (available online or from your local Police or RCMP detachment) and complete a Child Abuse Registry Search prior to commencing employment (available at www.myhrsb.ca under New Employee Orientation/First Things First). 	
<ul style="list-style-type: none"> • The terms of this offer are contingent upon your meeting the job expectations on an on-going basis as outlined by your immediate supervisor. 	

<ul style="list-style-type: none">• Termination of this agreement by either party shall be in accordance with the Nova Scotia Labour Standards Code.	<i>This is dramatically different from the just cause and seniority regimes contained in the collective agreement. Also under the collective agreement there are severance pay provisions.</i>
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[48] Ms. Boucher was unhappy with the fact that she would no longer have the support and protection of the Union, and will not have opportunities to participate in NSTU activities.

[49] Ms. Boucher felt that, as someone with a young family, she had no option but to accept the terms and conditions offered.

Natalie Underhill

[50] Natalie Underhill is a speech language pathologist who received her special certificate in the year 2000. It is telling that the letter dated November 20, 2000, which enclosed the certificate, simply referred to it in the body of the letter as “your Nova Scotia Teacher’s Certificate.”

[51] Ms. Underhill worked in the private sector for several years. Over the years 2006 up to 2018 she has worked in the public school system at a number of part-time contracts, all of which included membership in the NSTU. (It was her choice to work part-time, for family reasons). Her last union contract was for a 50% position with the (then) Halifax Regional School Board (“HRSB”).

[52] In June 2018 she started looking for available positions for the 2018-19 school year. Because her seniority dated back to 2006 she was at or near the

top of the “aggregate” list for speech pathologists, which placed her in an advantageous position competing for jobs. On June 16, 2018 she received an offer of a 50% NSTU term position, job-sharing at Caudle Park Elementary, within the HRSB.

[53] A couple of weeks later she was informed that this would be for one year only, and that for 2019-20 she would not be included in the NSTU.

[54] As I understand her evidence, she would have been allowed to stay in the Union had she continued the job-sharing arrangement with an NSTU member, but that potential partnership was no longer available and as such she was only able to apply for non-union jobs. She ended up in essentially the same position at Caudle Park that she had been doing before, except that it was non-union.

[55] Ms. Underhill testified that she was very upset to have lost the NSTU pension and all of the protections of the collective agreement. She was placed in a position where she had to negotiate her specific terms of employment, including the number of weeks of vacation to which she would be entitled. Eventually, she was able to negotiate for one week more than the 4 weeks initially offered, but was unsuccessful in negotiating for a higher salary than what was offered. She too signed a contract, believing that she had no effective choice in the matter. She has been in her non-union role since the start of the 2019-20 school year in September 2019. She says that she received no pay for August 2019, which was different than the previous practice under the collective agreement where salaries are spread out over the calendar year, which was a hardship that she had not anticipated. (Of course, such shortfall would have been made up in later pay periods.)

Employer witnesses

[56] The Employer called as witnesses two employees of the Department: Ms. Ann Power, the Executive Director - Student Services & Equity, and Jeremy Brown, the OTC Registrar/Director of Teacher Certificates.

Ann Power

[57] Ms. Power described the role that the specialists play in the school system.

[58] She testified that even prior to June 2018, most of the social workers working in the Nova Scotia school system were non-NSTU, many of them being part of the “Schools Plus” program which is a collaborative program funded through the Departments of Health and Wellness, EECD, Justice, and Community Services. That program was developed following Justice Merlin Nunn’s report after his public inquiry into the circumstances surrounding the release of a youth offender who soon thereafter caused a fatal car crash while driving a stolen vehicle. Schools Plus also includes a number of school psychologists and mental health workers (but not apparently any speech language pathologists).

[59] As for the specialists working directly in the school system, Ms. Power spoke to some of the perceived problems with the psychologists and speech pathologists only working the 10-month school year. Year-round access to services had been recommended by the March 2018 Report of the Commission on Inclusive Education. Ms. Power also referenced the January 2018 report of consultant Avis Glaze, entitled “Raise the Bar” which (on my reading) appears to advocate for a number of structural changes in the teaching profession including

(as has occurred through legislation) the removal of principals and vice-principals from the NSTU.

[60] Ms. Power was not involved in the labour relations aspects of the move to stop issuing special certificates and hire non-union specialists.

[61] Ms. Power also conceded that the majority of Schools Plus professionals are unionized, just not with NSTU.

Jeremy Brown

[62] Jeremy Brown is the OTC Registrar and has been for several years. He described some of the history of special certificates, which date back to about 1946, and which system was revamped during the 1970's to become much as it was in 2018.

[63] He was central to the discussions in 2018 which led to the stopping of special certificates. He described being instructed by the Deputy Minister to “find a path” to discontinuing special certificates. He stated that it was not his concern as to how the specialists would be employed; rather, he saw it as his job to figure out how not to treat them as teachers, which he believed was a misfit characterization. He included in his recommendation that the Department grandparent the NSTU status of specialists already in the system, so as not to impact those individuals.

[64] As helpful as the evidence of Ms. Power and Mr. Brown were, I observe that neither of them appeared to have any real appreciation of the labour relations issues flowing from the steps that they were helping to initiate. Furthermore, as I

have noted, the merits of the Department's policy are not in issue in this arbitration.

ARGUMENTS

[65] The Union argues that under the applicable regulations and statutes, specialists were "teachers" and they cannot simply be written out of the bargaining unit.

[66] The regulatory and statutory scheme is far from elegant, but the Union's logic goes like this:

[67] Sections 12 and 13(1) of the *Teachers' Collective Bargaining Act* provides that the Union is the exclusive bargaining agent for "*teachers as defined by this Act.*"

Composition of Union

12 (1) Every teacher as defined by this Act shall be a member of the Union for the purpose of this Act.

(2) For the purpose of this Act, the Union shall consist of those persons who are teachers as defined by this Act.

(3) Any manager who, immediately before August 1, 2018, was a member of the Union for the purpose of this Act ceases to be a member on that date.

Agreement by Minister and Union

13 (1) The Union shall be the exclusive bargaining agent for the teachers with the employer.

[68] The *Teachers' Collective Bargaining Act* defines "teacher" as follows:

2. (u) "teacher" means a teacher as defined in the *Education Act* who is employed by an education entity but does not include a manager or the holder of a teaching permit issued by the Minister of Education and Early Childhood Development.

[69] Following the trail back to the *Education Act*, we find the definition of a "teacher" as follows:

3 (zf) "teacher" means a person who

(i) holds a teacher's certificate or a teaching permit issued by the Minister qualifying the person to teach in a public school in the Province, including a vocational teacher's certificate, and

(ii) is employed by an education entity or the Minister in a teaching, supervisory or other professional capacity relating to education;

[70] This logic then leads us to consider what is a teacher's certificate, and under what circumstances the Registrar must issue them, or alternatively whether he may refuse to issue one. We must also consider what it means to "*teach in a public school*" and/or to be "*employed ... in a teaching, supervisory or other professional capacity relating to education.*"

[71] The Union argues that specialists are "teachers" employed in a professional capacity relating to education, and that the scheme for granting certificates is mandatory, in the sense that the Registrar may not simply decide not to process them.

[72] Under the *Teacher Certification Regulations* there is a provision which requires the Registrar to process applications for teaching certificates (not specifically regular or special):

Granting a teacher's certificate for first time

33 (1) Except as provided in subsection (2), if a person who has not previously been granted a teacher's certificate from the Registrar applies for a teacher's certificate, the Registrar must

(a) receive and process the application under the post-July 31, 2000 certification system³; and

(b) subject to the person satisfying the requirements under the post-July 31, 2000 certification system for the class of teacher's certificate applied for, grant a teacher's certificate under the post-July 31, 2000 certification system. (Emphasis added)

[73] The Union highlights the mandatory language, directing the Registrar to issue certificates to applicants who qualify therefor.

[74] This provision, the Union says, informs the language of ss.59(1) and 16(1) of the *Teacher Certification Regulations*:

59 (1) The Registrar may grant a special certificate of the appropriate class of teacher's certificate in the fields of social service related to education, testing services, school library services, or teaching the visually or hearing impaired, to a person who does not otherwise qualify for a teacher's certificate who has completed the minimum qualifications, as determined by the Registrar, in the field for which the application is made.

16 (1) The Registrar may refuse to grant the class of teacher's certificate an applicant applies for if the Registrar has reasonable grounds to believe that the applicant does not meet the requirements specified in these regulations for the certificate...

[75] The Employer's argument is that the Registrar may simply refuse to issue special certificates, because (it says) the language of s.59 is permissive. The

³This references some changes to the classification of certificates made in 2000, which are irrelevant for present purposes.

Union says that, reading the provisions together and considering the overall intent of the provision, no such wide discretion is intended.

[76] The Union says that this refusal to grant special certificates is an impermissible “*change to the requirements for Teachers’ Certificates,*” contrary to Article 15.02 of the Teachers’ Provincial Agreement:

15.02 Changes in the requirements for Teachers’ Certificates, Vocational Teachers’ Certificates or Permits shall not occur unless the changes in the requirements are mutually agreeable to the Union and the Employer.

[77] The Union further argues that the Employer’s exclusion of (some) specialists from the bargaining unit is also a violation of s.12 of the *Teaching Profession Act*:

Union membership

12 (1) Every teacher who has a permanent contract, a probationary contract or a term contract, within the meaning of the *Education Act*, with an education entity in a teaching, supervisory or other professional capacity relating to education shall be an active member of the Union unless the teacher is expelled therefrom or unless the teacher resigns by written notice addressed to the Union at its head office and mailed by prepaid registered post.

[78] Although I do not recall the Union specifically making this argument, the specific language here “*in a teaching, supervisory or other professional capacity relating to education*” would seem to signal that it is speaking not just to classroom teachers, but to a “teacher” employed in another professional capacity (i.e. a specialist), who therefore must also be a member of the Union. That reference echoes the definition of “teacher” in s.3(zf)(ii) of the *Education Act*.

[79] The Union also argues that one of the effects of the Employer's actions is to remove specialists from the Teachers' Pension Plan, contrary to the *Teachers' Pension Act Regulations*, which provides:

3 (1) A person who is a teacher as defined in subclause 3(zf)(i) of the Education Act

(a) who is employed as defined in subclause 3(zf)(ii) of the Education Act; or

(b) who is employed by a participating employer,

shall be a member of, and contribute to, the Plan.

Authorities cited

[80] The Union cited a number of authorities in support of its arguments. I may not mention every one, but only those I believe are important, and which have informed my decision.

[81] *Nova Scotia Teachers' Union v. Nova Scotia (Education)*, 2011 NSSC 426 (CanLII), a decision by Hood J., on judicial review of an arbitration award between these same parties, is put forward for its statements on the approach to interpreting statutes. I will quote from that case later.

[82] *Yee Hong Centre for Geriatric Care v Service Employees International Union, Local 1 Canada*, 2017 CanLII 75993 (ON LA) is cited for the proposition that the Employer bears the onus - and a heavy one, at that - to establish that a bargaining unit member ought now to be excluded:

To repeat, the first issue is whether persons holding the positions of ADRC-SP at three of the Employer's homes (one at each home) have been properly excluded from the bargaining units as "supervisors" or "persons above the rank of supervisor". The onus is on the Employer to prove the basis for the exclusions: see e.g. *York University and York University Staff Association*, [2010] O.L.A.A. No. 197 (Goodfellow) and *Westgate Lodge*, supra.

In this case, the onus is a heavy one. And that is because, for a considerable period of time prior to the creation of the ADRC-SP position, the core duties of the position – the RAI Coordinator functions – were performed by bargaining unit members. From the date of the Union's certification at each facility (August 9, 2010 at Markham, November 18, 2010 at Scarborough-McNicoll and January 25, 2011 at Scarborough-Finch) until the Employer created the ADRC-SP position in April 2014, a period of between three and four years, RAI Coordinator duties were performed within the bargaining units by RNs designated as RAI Coordinators, who were then "promoted" into the ADRC-SP positions.

Depending on the specific facts, what has been referred to as the "historical dimension" has been recognized in the case law as being of considerable significance: see e.g. *York University and York University Staff Association*, dated May 20, 1997 (Tacon). Important to the question is the duration of the prior situation, the degree of connection between the two positions, and employer knowledge: see *York University*, supra (Goodfellow).

[83] In that 1997 *York* case cited (*Re York University and Y.U.S.A.* 1997 O.L.A.A. No.436 (Tacon)) the arbitrator found that the status quo was a "powerful" factor in determining bargaining unit status:

143 Counsel for the university contended that Ranachan's bargaining unit status was not relevant or, in the alternative, not determinative of the legal issues if his position was inappropriately included in the unit, as was also submitted. With respect, I disagree that the status is not relevant. The jurisprudence makes clear that the status quo is a powerful, albeit not dispositive, factor in determining bargaining unit status. Again to quote *Thunder Bay*⁴, supra:

⁴*Corporation of the City of Thunder Bay* [1981] OLRB Rep Aug 112

"Nevertheless, if a person has been included in a bargaining unit for some years, there has not been a significant alteration of his duties and responsibilities, and there is little concrete evidence of the kind of 'mischief' to which [the Act] is directed, is unlikely that this Board will conclude that the individual exercises managerial functions and must now be excluded from the unit. An employer's organizational scheme has a historical dimension which must be considered when the evidence is being weighed".

[84] The Union also cited excerpts from Brown & Beatty's *Canadian Labour Arbitration* in support of the proposition that arbitrators have been vigilant in protecting a union's status as exclusive bargaining agent, and that direct bargaining between the employer and employees (who are or ought to be in the bargaining unit) is prohibited, and that such direct contracts may be declared invalid.

[85] In *Re DFA and Dalhousie University (Baylis)*, (2018) 288 L.A.C. (4th) 44 (N.S. - Kuttner) the arbitrator overturned the bargaining unit exclusion of an academic scientist, who had been treated in the same way as physicians whose exclusions were clearly set out in the certification order. In so doing, he affirmed the importance of collective bargaining rights:

25 I arrive at that conclusion for several reasons. First, the TUA itself stipulates that an arbitrator may treat the provisions of the TUA as part of the Collective Agreement, the terms of which the arbitrator is interpreting. Here, the Legislature has declared that "Every employee has the right to be a member of a trade union and to participate in its activities." That fundamental right has been stripped from individuals such as Dr. Baylis with principal appointments in clinical-medical departments in the Faculty of Medicine, by reason of the 1978 NSLRB certificate. Second, and even more fundamentally, those employee with principal appointments in clinical-medical departments are effectively deprived of their Charter section 2(d) right of freedom of association, which since the decisions of the Supreme Court in *BC Health Services and Saskatchewan Federation of Labour*, encompasses the full gamut of the rights and freedoms

associated with the institutions of trade unionism and collective bargaining. Their right to be a "member" of the Association is no substitute for being a Member of the bargaining unit under the terms of the Collective Agreement. (Footnotes omitted)

[86] The Union also cited a number of Brown & Beatty excerpts stressing the importance of seniority rights, and the necessity of clear language to oust such rights. Seniority has been described as a "hard-fought" right that unions jealously guard on behalf of their members. Often cited are the words of Arbitrator Reville in *U.E., Local 512 v. Tung-Sol of Canada Ltd.* 1964 CarswellOnt 520 at para.4:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right of recall to employment, vacations and vacation pay, and pension rights, to name a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

[87] While some of these same benefits may be available outside of the unionized sector, still the concept of seniority is absent from regimes of common law employment, where "length of service" is a faint shadow of seniority, carrying with it some limited right to increased notice of termination at common law and some benefits under employment legislation, but carrying no weight in terms of providing tenure or preferential access to jobs.

[88] The Union also argues that the Employer action was in bad faith and unreasonable, citing (among other cases) my own 2017 award between these parties in the so-called "Drake University" case, *Re NSTU and Minister of*

Education (Policy Grievance) unreported, June 19, 2017, where I stated (in a different context):

[191] Apart from the estoppel, I find that the Employer has breached the Teachers' Agreement by acting unreasonably and unfairly.

[192] Article 3.01 imposes a specific requirement on the part of the Employer to carry out its responsibilities under the agreement in a reasonable manner:

3.01 This Agreement applies to and is binding upon the Union, the teachers, the Employer, its representatives and the School Boards and those bound by this Agreement shall carry out in a reasonable manner the provisions of this Agreement.

[193] Such an obligation would likely be read into the Agreement by virtue of the Supreme Court of Canada case of *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, [2013] 2 SCR 458, which generally stands for the proposition, as stated in the head-note, that "[t]he scope of management's unilateral rule-making authority under a collective agreement is that any rule or policy unilaterally imposed by an employer and not subsequently agreed to by the union must be consistent with the collective agreement and be reasonable."

[89] The same logic would apply, says the Union, to any unilateral actions by the Employer that have the effect of abridging collective bargaining rights, including seniority rights.

[90] There are other, older cases, cited for the proposition that management rights must be exercised in a reasonable manner.

[91] The Union put forward some arguments surrounding its allegation of bad faith, including reliance on the famous case of *Roncarelli v. Duplessis* [1959] S.C.R. 121. That case affirmed that there are limits on government's exercise of a discretion, and that (at p.140) "*discretion necessarily implies good faith in*

discharging public duty.” It argues that the Registrar’s decision to discontinue granting special certificates was in bad faith.

[92] In support of its argument for an award of general damages, the Union supplied an excerpt from Brown & Beatty, as well as one of my cases from years ago, *Re Dalhousie University and I.B.E.W. Local 625* (2000) L.A.C. (4th) 119, in which I awarded damages for breach of the union security clause, though I note that these damages were not really general damages but were intended to compensate actual losses.

[93] The Union also supplied several cases supporting the proposition that in some instances, a collective agreement negotiated in good faith between the government, as a party, and a union, may prevail over the terms of a statute that is in apparent conflict with the contractual provision: see *Nova Scotia Government Employees Association et al v. Civil Service Commission of Nova Scotia et al* [1981] 1 SCR 211; *Re Nova Scotia Civil Service Commission and N.S.G.E.U.* 1988 CarswellINS 758 (Cotter); *Re N.S.G.E.U. and Department of Human Resources* (July 5, 2001) unreported (Outhouse); *Re Halifax (Regional Municipality) and C.U.P.E., Local 108* 2009 CarswellINS 889 (Veniot). I will bear this principle in mind when I consider the combined effect of all of the contractual, statutory and regulatory language.

Employer arguments

[94] The Employer frames the question somewhat narrowly: is the Registrar obliged to issue a special certificate in the same way as a (regular) teaching certificate? It suggests that the proper interpretation of the language is to the effect that there is a discretion, and if the Registrar chooses to exercise his

discretion in favour of discontinuing to issue special certificates, then there is no violation of the legislation if non-certificate holders are hired to fulfill the roles of specialists.

[95] The Employer argues that the language of 59 (1) of the *Teacher Certification Regulations* - “[t]he Registrar may grant a special certificate of the appropriate class of teacher’s certificate...” - is permissive, and had it been intended to make the granting of a certificate mandatory, the language could have said so.

[96] The Employer argues that the NSTU does not enjoy a monopoly on specialists, as evidenced by the development of the Schools Plus program which now employs many of the social workers in the school system.

[97] Counsel for the Employer spent a considerable part of his argument supporting the merits of having specialists work a 12-month year rather than the 10-month school year. As I have indicated, I find it unnecessary to consider those arguments as I have no role to play in judging the merits of Department policy. The issue, as I have said, is the legality of how the Department went about trying to implement its policy.

[98] As for special certificates generally, the Employer argues that they are a “misfit” or anomaly within the system. It is suggested that the Registrar and/or the OTC has no particular expertise in determining the qualifications of specialists, unlike its highly developed expertise in assessing the credentials of classroom teachers. It is also observed that specialists have no way to increase the level of their certifications, such as by obtaining graduate degrees as classroom teachers may do.

[99] This anomalous status can be further shown by looking at the *Teacher Certification Regulations* which are mostly concerned with classroom teachers, having only a limited number of sections concerned with special certificates.

[100] The Employer argues that it has not acted in bad faith in the exercise of its discretion to stop issuing special certificates.

[101] The Employer agrees that the granting of a certificate to a teacher or specialist triggers union membership, but if no such certificate is granted then the specialist is simply not “swept” into the NSTU system.

[102] The Employer argues that it is an exercise of management rights which permits the Minister to stop issuing special certificates and create a class of non-union specialists. Such specialists are not denied the benefit of collective bargaining, counsel says, because there is nothing to prevent them from organizing and seeking certification with the Labour Board.

[103] The Employer argues that specialists are not “teachers” within the meaning of the *Education Act* or the collective agreement.

[104] The Employer did not offer any cases in support of its arguments, though counsel commented on some of the cases cited by the Union.

Union Reply

[105] The Union offered a number of reply comments, only a couple of which I will mention.

[106] The Registrar, it says, could develop expertise in the area of specialist qualifications. That he chooses not to, does not mean the certificate system is without value.

[107] The Schools Plus program, the Union argues, is separately funded through multiple departments, involves unionized employees, and there is no evidence that the Union has any objection to it.

DISCUSSION

[108] I begin with the question, from which many other questions flow: are specialists “teachers” for the many purposes of the statutes, regulations and collective agreement(s)?

[109] While the language as it appears throughout the statutes, regulations and collective agreements could be clearer, or more coherent, or less circular, I believe that the only credible answer is “yes.” Specialists are a special class of teachers, for whom a special type of “teacher’s certificate” was designed (decades ago) - the “special certificate.” Such specialists have become an integral part of the teachers’ bargaining unit, and their terms and conditions of employment have closely tracked those of classroom teachers.

[110] As I will elaborate upon, I arrive at that conclusion as the best available interpretation of the language, on its own terms, as reinforced by the parties’ longstanding common understanding.

[111] Statutory and contractual interpretation sometimes employs a common fiction, to the effect that all of the words have been used “advisedly” (by people smarter than we are, perhaps?) and that there is a singular objective intention that can be discerned if only one works hard enough at following the logic. What is closer to the reality is that many different drafters of such language (of various abilities and verbal styles) have, over a period of years or decades, had a hand in crafting legislative and contractual schemes that are often full of anomalies and ambiguities, where the larger picture may have been forgotten or overlooked in the exercise of crafting expedient solutions to current problems. Even so, one must construe the language as it appears, arriving at the most reasonable interpretation that the language permits.

[112] As Justice Hood stated in *Nova Scotia Teachers’ Union v. Nova Scotia (Education)*, 2011 NSSC 426 (CanLII):

[22] The leading authorities on statutory interpretations are *Rizzo v. Rizzo Shoes, Ltd.* 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27 and *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 (CanLII). In both decisions, the Supreme Court of Canada quoted the following passage from Driedger’s *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (quoted in para. 21 of *Rizzo* and para 26 of *Bell*)

[23] Furthermore, s. 9(5) of *the Interpretation Act*, R.S.N.S. 1989, c. 235 deals with the interpretation of statutes. It says:

(5) Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters

(a) the occasion and necessity for the enactment;

- (b) the circumstances existing at the time it was passed;
- (c) the mischief to be remedied;
- (d) the object to be attained;
- (e) the former law, including other enactments upon the same or similar subjects
- (f) the consequences of a particular interpretation; and
- (g) the history of legislation on the subject.

[113] In the case here, some people might conclude that there is ambiguity or circularity in the language, but when one factors into the equation the lengthy history of a common understanding, as well as all of the other listed factors, the language is better understood. The statutes and regulations have served for decades describing the bargaining unit and setting out the rights and obligations of teachers (broadly defined), the Union and the Employer.

[114] Construing contracts involves many of the same considerations as construing statutes. In my interpretation of these parties' collective agreement, the broader context may also be considered. As stated by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633:

[47] Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 (CanLII), [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 (CanLII), [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a

whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating. (*Reardon Smith Line*⁵, at p. 574, per Lord Wilberforce)

Are specialists “teachers?”

[115] The history here is to the effect that specialists are “teachers” within the statutory, regulatory and contractual framework that has evolved. Going back at least forty five years, successive collective agreements have been entered into, and renewed, on the strength of a common understanding that specialists were part of the bargaining unit; that specialists were “teachers” or “specialist teachers,” that specialists’ certificates were a type of teacher’s certificate that qualified specialists to “teach” in the school system, in the “other professional roles” for which they were hired.

[116] Just in the limited sampling of the evidence before me, there are many instances where the Department in its own words described specialists as teachers, or described special certificates as “teachers certificates.”

⁵*Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570

“The teacher certification system in Nova Scotia provides for three types of <u>teachers certificate</u> - regular, special and vocational.”	OTC website pre-2018
“ <u>Teacher certification</u> is also provided to applicants who, while not trained as teachers, provide important services to teachers and students in the public schools.”	OTC web page pre-2018 “Special Certificates”
“EECD has advised the NSTU that professional School Psychologists and Speech Language Pathologists and social workers will no longer be required to obtain certification as " <u>specialist teachers</u> " in order to work in schools.”	EECD Issues Summary — June 13, 2018
“It’s been the practice in NS to require these professionals to be certified by the department as <u>teachers</u> to work in schools.”	EECD Issues Summary — June 13, 2018
Enclosed is “your Nova Scotia <u>Teacher’s Certificate</u> ”	cover letter to Natalie Underhill enclosing special certificate

[117] For the Department now to take the position that special certificates were not “teachers certificates,” that the specialists were not working as “specialist teachers” or simply “teachers,” is a total about-face from what had been the common understanding for decades. That common understanding represents the bargaining history and provides a factual context within which to interpret the statutes, regulations and collective agreement language which has served to underpin the relationship.

Statutes, Regulations and collective agreement language

[118] The logic offered by the Union earlier in this decision is, in my opinion, essentially correct. To reiterate:

[119] The Teachers' Provincial Agreement is deemed (by virtue of the *Education Reform (2018) Act*) to contain the following definition:

1.08 "teacher" means a teacher as defined in the *Teachers' Collective Bargaining Act* who is employed under a probationary, permanent or term contract pursuant to Article 20.

[120] Referring then to the *Teachers' Collective Bargaining Act*, that statute states:

2. (u) "teacher" means a teacher as defined in the *Education Act* who is employed by an education entity but does not include a manager or the holder of a teaching permit issued by the Minister of Education and Early Childhood Development;

[121] The *Education Act*, in turn, defines a "teacher" as:

3 (zf) "teacher" means a person who

(i) holds a teacher's certificate or a teaching permit issued by the Minister qualifying the person to teach in a public school in the Province, including a vocational teacher's certificate, and

(ii) is employed by an education entity or the Minister in a teaching, supervisory or other professional capacity relating to education;

[122] At first blush, I can see that the language of 3 (zf)(i) is somewhat circular. It is possible to read s.3 (zf)(i) more restrictively, as only applying to people qualified to "*teach in a public school in the province ...*" This begs the question of what it means to "*teach,*" and what a specialist certificate "*qualifies*" someone to do. However, as the evidence so clearly shows, the Department itself believed that specialists were being treated as "teachers": See the above quoted *EECD Issues Summary*: "*It's been the practice in NS to require these professionals to be certified by the department as teachers to work in schools.*" So the past

practice of the parties has been to treat specialists as “teachers” and the status of specialists in the bargaining unit depended upon such characterization.

[123] Even allowing for some ambiguity, I believe the language is more consistent with what the Union contends. Section 3 (zf)(ii) can best be read as applying to specialists as well as classroom teachers, because it is specialists who work in that “*other professional capacity relating to education.*” If the term “teacher” was only intended to mean classroom teacher, this additional language (“*other professional capacity relating to education*”) would be unnecessary. I hardly think it is controversial that school psychologists, speech language pathologists, and also social workers, are employed in the school system in order to help students get the most out of their education. They work in a “professional capacity related to education.” For purposes of the scheme created by the legislation, they are teachers and (until 2018) were treated as such.

[124] From that status as teachers, other rights and obligations flow. Under the *Teaching Profession Act*, all teachers “shall” be members of the Union:

12 (1) Every teacher who has a permanent contract, a probationary contract or a term contract, within the meaning of the *Education Act*, with an education entity in a teaching, supervisory or other professional capacity relating to education shall be an active member of the Union unless the teacher is expelled therefrom or unless the teacher resigns by written notice addressed to the Union at its head office and mailed by prepaid registered post. (Emphasis added)

[125] As if to remove any doubt, this imperative to be in the NSTU applies equally to teachers employed in an “*other professional capacity.*” This tracks the language of s.3 (zf) of the *Education Act*.

[126] To the same effect, though more tersely expressed, is s.13 (1) of the *Teachers' Collective Bargaining Act*:

13 (1) The Union shall be the exclusive bargaining agent for the teachers with the employer.

[127] The provisions for the Teachers' Pension Plan, as set out in *Teachers' Pension Act Regulations*, add further support to the Union's position. :

3 (1) A person who is a teacher as defined in subclause 3 (zf)(i) of the *Education Act*

(a) who is employed as defined in subclause 3 (zf)(ii) of the *Education Act*; or

(b) who is employed by a participating employer,

shall be a member of, and contribute to, the Plan.

[128] Membership in the pension plan is mandatory for "teachers" who are employed "by an education entity or the Minister in a teaching, supervisory or other professional capacity relating to education." How can specialists be members of the NSTU pension plan, if not also members of the bargaining unit, and vice versa?

The refusal to grant special certificates

[129] The refusal to grant any more special certificates, while objectionable *per se*, is almost beside the point. Eliminating special certificates was merely a means to an end. What was intended, and is most objectionable, was an attack on the integrity of the bargaining unit, and the siphoning off of what used to be union jobs into a new category of individually negotiated, non-union employment

contracts. Such actions, however engineered, are in direct violation of the Union protection provisions of the Teachers' Provincial Agreement as well as the *Teaching Profession Act*, the *Teachers' Collective Bargaining Act*, and the *Teachers' Pension Act Regulations*.

[130] But the refusal to grant special certificates, in itself, was wrong and violated the rights of the Union. In my opinion, the better interpretation of the regulatory scheme respecting special certificates is that the Registrar has a duty to receive applications for special certificates, and assuming everything is in order, he must grant them.

[131] The enabling language of s.59 (1) of the *Teacher Certification Regulations*, when read in the larger context, is not truly permissive, or more accurately, does not involve an unlimited discretion:

59 (1) The Registrar may grant a special certificate of the appropriate class of teacher's certificate in the fields of social service related to education, testing services, school library services, or teaching the visually or hearing impaired, to a person who does not otherwise qualify for a teacher's certificate who has completed the minimum qualifications, as determined by the Registrar, in the field for which the application is made.

[132] The use of the word "may" or "shall" in legislation is not ultimately determinative of the intent, though it is of course something to consider carefully. It is at most a rebuttable presumption. The interpretation must consider other factors.

[133] The concept was discussed in *Court v. Insurance Corp. of British Columbia*, 1995 CanLII 296 (BC SC). That province has an *Interpretation Act* that is similar to ours in Nova Scotia:

4 Plaintiff's counsel noted that although s. 29 of the *Interpretation Act*, R.S.B.C. 1979, c. 206 provides that "may" is to be construed as permissive and empowering, s. 2(1) provides that "Every provision of [the *Interpretation Act*] extends and applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment (my emphasis). Along the same lines, he cited E.A. Driedger's *Construction of Statutes*, 2d ed. (Toronto: Butterworths, 1983) for the proposition that where a statute grants powers to a public body to do that which the public body would otherwise have no power to do, the exercise of that power may be imperative if the purpose and intention of the statute and the context of the provision support it. At pp. 13-14, Driedger writes:

The word may, by itself, only grants permission or power and does not impose a duty; if there is a duty, it arises, not out of the word may, but out of the purpose and text of the statute and the facts of the particular case.

As was said by Lord Cairns in *Julius v. Bishop of Oxford* [(1880), 5 A.C. 214, at p. 222], the words *it shall be lawful* (which is equivalent to may)

are words making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the person or persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom power is reposed, to exercise that power when called upon to do so.

(Emphasis added)

[134] The language here in s.59 (1) of the *Teacher Certification Regulations*, to quote Lord Cairns, "are words making that legal and possible which there would otherwise be no right or authority to do." It grants the OTC the authority to grant special certificates. It would simply not make any sense if it read "the Registrar must or shall grant a special certificate." Of course there is a discretion, in the

sense that the applicant for such certificate must meet the qualifications. The Registrar is not a mere rubber stamp. However, the discretion to refuse the certificate must be a principled one. Understood in its entire context, the provision is imperative in the sense that there is a duty to grant special certificates to qualified applicants.

[135] The discretion to refuse a certificate is more specifically grounded in the language of s.16 (1) of the same Regulation:

16 (1) The Registrar may refuse to grant the class of teacher's certificate an applicant applies for if the Registrar has reasonable grounds to believe that the applicant does not meet the requirements specified in these regulations for the certificate.

[136] It is telling that the language used is that the Registrar "may refuse" to grant a certificate to an unqualified person. I think most people would expect that the Registrar must refuse to grant a certificate to an unqualified person, and would balk at the suggestion that he may grant one anyway, because he has a "discretion." So this is another instance where "may" should be read as mandatory, when the provision is understood in a broader context.

[137] Also relevant to this interpretive exercise are article 16.04 of the Teachers' Provincial Agreement, and s. 33 (1) of the *Teacher Certification Regulations*, which both have a mandatory element:

Teachers' Provincial Agreement

16.04 A certificate shall be issued only after receipt by the Registrar of official documentation. The initial certificate or new certificate shall be issued within thirty (30) days of receipt by the Registrar of the required official documentation. Notwithstanding this, if, for unforeseen

circumstances, a certificate cannot be issued in thirty (30) days the Union shall be informed in writing. (Emphasis added)

Teacher Certification Regulations

33 (1) Except as provided in subsection (2), if a person who has not previously been granted a teacher's certificate from the Registrar applies for a teacher's certificate, the Registrar must

(a) receive and process the application (Emphasis added)

[138] If there is seen to be any conflict between s.59 (1) of the Regulation and the collective agreement, the provisions of the collective agreement take precedence by virtue of the hierarchy set out in article 4.01 of the Teachers' Provincial Agreement:

4.01 Where any provision of this Agreement conflicts with the provisions of any law passed by the Legislature of the Province of Nova Scotia, the latter shall prevail, notwithstanding which in cases of direct conflict between provisions of any Regulations and any provision of this Agreement, the latter shall prevail.

[139] This is not to say that the legislation would necessarily prevail over the collective agreement, because (as the cases cited by the Union establish) it is possible to conclude that the parties have contracted out of a statutory provision. However, I do not find it necessary to resort to such principle here, as I find no conflict between the statutes and the collective agreement.

[140] My conclusion is that, read together, those regulations and parts of the collective agreement to which I have referred, direct the Registrar to consider applications and, where the requirements are met, he is obliged to grant the certificate.

[141] The Registrar may not simply abdicate his duty, particularly when such abdication is in service of a plan whose entire purpose was to circumvent the requirements of the collective agreement, the *Teaching Profession Act* and the *Teachers' Collective Bargaining Act*. Such a refusal to carry out his duty is (I regret to have to say) an unreasonable and bad faith exercise of his powers.

[142] For better or worse, the parties have agreed to the use of teachers certificates as the "ticket" to a teaching job, broadly defined. The have bound themselves in their collective agreement not to make changes to that system, unless by mutual agreement:

15.02 Changes in the requirements for Teachers' Certificates, Vocational Teachers' Certificates or Permits shall not occur unless the changes in the requirements are mutually agreeable to the Union and the Employer.

[143] The decision to stop issuing special certificates - with all of the consequences that flow from that - is a clear example of what the Employer has bound itself not to do.

[144] The parties must have understood the importance of a provision such as 15.02, to the composition of the bargaining unit. The composition of the bargaining unit is not written in stone, but is not simply changeable at the unilateral whim of either party. The Union's authorities on this point are apt. It is a heavy onus on the Employer to prove that the composition of the bargaining unit has changed, or that it never was what the Union contends. The Employer has not met that onus.

[145] The teacher's bargaining unit in its pre-2018 configuration had been in place for decades. Unlike a bargaining unit created in a Labour Board certification, there is no singular easy-to-reference written description available. Rather, one must look to the statutes, regulations and collective agreements, and to the parties' shared understanding, in order to define this bargaining unit.

[146] In general terms, the bargaining unit consists of teachers, including that (perhaps anomalous) special class of teachers known as specialists. For years, everyone knew that and no one questioned it. The integrity of that bargaining unit must be respected. And all affected employees must have restored to them the benefits of collective bargaining that have been legislated and negotiated on their behalf.

Remedies

[147] The Union has sought a considerable list of remedies. Some of those are declaratory in nature. Accordingly:

- A. I declare that the actions of the Employer in discontinuing the granting of special certificates, in failing to process applications for special certificates, in ceasing to require specialists to have special certificates, and in the hiring of specialists (whether they possessed certificates or not) into non-union contracts of employment, were in breach of the Teachers' Provincial Agreement as well as the statutes and regulations recited in this decision.

- B. I declare that it was a breach of the Employer's obligations in failing to include specialist jobs awarded after June 2018 in the NSTU bargaining unit, with all of the rights and obligations that such membership implies including, without limitation, membership in the NSTU pension plan and the accrual of seniority and the responsibility to pay union dues.

[148] More difficult is the question of how to turn back the clock, for those people affected by the Employer's actions. The Employer argued that, in the event I was allowing the grievance, the parties should be left to work out the actions that need to be taken. I think there is some merit to that suggestion, though I will specify that the remedial blueprint should have the following features:

- A. The issuing of special certificates should resume, and any specialists without certificates who have been hired, should be required to apply for certificates within a reasonable time frame. I would leave open (for the time being) the implications should any specialist currently employed as such, be unable to secure a certificate.
- B. All specialists hired since June 2018, who possess special certificates (or who later acquire them) shall be considered part of the NSTU bargaining unit retroactive to the date they became employed in their non-union positions. In the case of those who were NSTU members before accepting non-union jobs, their seniority (if lost) shall be reinstated and added to the time they have worked in the non-union jobs.

- C. A process should be created to transition such employees to bargaining unit status, including retroactive membership in the pension plan and adjustment to any other benefits, including seniority. The Union has stipulated, and it is only fair, that no specialist should be worse off financially after all such adjustments are made. However, if any employee would have earned more in the bargaining unit equivalent job, they should be made whole.

[149] The Union asks that it be reimbursed for all lost union dues, as a result of the diminution of its membership. I believe that such an award is an appropriate result, because employees should not personally have to pay for past union dues while they held the status of non-union employees. The payment should include interest at the prejudgment interest rate that applies in the Supreme Court.

[150] The Union has also asked for an award of general damages, and has suggested the amount of \$10,000.00. The Employer argues that there is no basis for general damages.

[151] I do not think there is any serious question that I have the jurisdiction to award general damages for a breach of a collective agreement: see *Toronto Police Services Board and Toronto Police Association* [2008] O.L.A.A. No. 479 (Tacon). However, as stated in that award:

The redress must be commensurate with the wrong and the purpose of relief is remedial not punitive. Monetary damages may be warranted for non-monetary losses if such is appropriate to ensure the breach of the collective agreement is adequately addressed and other remedies are insufficient.

[152] In my opinion, awarding general damages in this case is unnecessary. I believe that the other relief ordered will be sufficient to address the breach of the collective agreement.

[153] The parties should have a reasonable amount of time to plan for these changes. I will leave it to them to determine what is feasible, but I believe that all necessary steps should have been completed well before the start of the 2020-21 school year.

[154] Recognizing that there are a lot of uncertainties and details to be considered, I will retain jurisdiction to resolve any questions that may arise concerning the implementation of this award, including jurisdiction to make any further awards and give any further directions.



Eric K. Slone, Arbitrator

Joint Statement of Facts

The Parties agree to the following statement of facts and exhibits in a document signed by counsel for the respective parties on September 24, 2019:

1. The Union filed a grievance under Step I on June 6, 2018, after the Parties agreed to waive the informal step of the process ("Grievance"). The Union grieved Articles 3, 4, 5, 15, 16, and other relevant articles of the Teachers' Provincial Agreement, and alleged a breach of ss. 16, 59, and other relevant sections of the Teacher Certification Regulations. A copy of the Step I Grievance letter is attached at Tab 1.
2. The Union referred the Grievance to Step II on June 26, 2018. In addition to the grounds listed in its Step I Grievance letter, the Union alleged a breach of ss. 12 and 13 of the Teachers' Collective Bargaining Act and ss. 6 and 12 of the Teaching Profession Act. A copy of the Step II Grievance letter is attached at Tab 2.
3. The Grievance concerns the following:
 - 1) The decision of the Employer in or around May, 2018 to cease granting Special Certificates under the Teacher Certification Regulations to applicant speech language pathologists, psychologists, and social workers; and
 - 2) The decision of the Employer in or around June 2018 to no longer recognize individuals hired by education entities (meaning a Regional Centre for Education, or the Conseil Scolaire Acadien Provincial) into newly created or vacant speech language pathologist, psychologist, and social worker positions as members of the bargaining unit represented by the Nova Scotia Teachers Union, even if the individuals already hold Special Certificates.
4. Until the decisions noted in paragraph 3 above:
 - (a) If an individual applied for a Special Certificate and provided the required documents and met the criteria set out by the Registrar/Director of Teacher Certification, the Registrar granted the individual a Special Certificate. That is, the Registrar did not refuse to grant a Special Certificate to an individual who qualified for a Special Certificate (unless they also qualified for and received a regular Teacher's Certificate).
 - (b) An individual employed by a school board or education entity as a speech language pathologist, psychologist or social worker, who had a Special Certificate or Teacher's Certificate under the Teacher Certification Regulations or the predecessor regulations, were deemed to be part of the bargaining unit represented by the Nova Scotia Teachers Union and covered by the relevant collective agreements.

5. The Grievance was filed under the Teachers' Provincial Agreement, effective August 1, 2015 to July 31, 2019. A copy of the Teachers' Provincial Agreement is attached at Tab 3.
6. Sections of the Education Reform (2018) Act, SNS 2018, c 1, that modify the Teachers' Professional Agreement are attached at Tab 4.
7. The Teaching Profession Act, RSNS 1989, c 462, as amended by SNS 2018, c 1, ss. 42-47, is attached at Tab 5.
8. The Education Act, SNS 2018, c 1, Sch A is attached at Tab 6.
9. The Teacher Certification Regulations made under s. 98 of the Education Act are attached at Tab 7.
10. The former Governor in Council Education Act Regulations made under s. 146 of the former Education Act, SNS 1995-96, c 1, OIC 97-405, NS Reg. 74/1997, are attached at Tab 8.
11. The former Governor in Council Education Act Regulations made under s. 3 of the former Education Act, RSNS 1967, c 81, OIC 67-615, NS Reg. 70/1967, as amended, are attached at Tab 9.
12. The Teachers' Collective Bargaining Act, RSNS 1989, c 460, as amended by SNS 2018, c 1, is attached at Tab 10.
13. Together the Parties published and distributed a Teacher Certification Handbook, dated August 2001 (the "Handbook"). A copy of the Handbook is attached at Tab 11.
14. The Employer published and distributed School Psychology and Speech Language Pathology Guidelines in 2009 and 2010. Copies of relevant pages of the Guidelines are attached at Tab 12.
15. Prior to June 28, 2018, the Office of Teacher Certification's website contained information regarding Special Certificates. Screenshots of the Office of Teacher Certification's website as it appeared in May 2018 are attached at Tab 13.
16. Prior to June 28, 2018, the Office of Teacher Certification's website contained downloadable forms, including the Application Package for Special Certificates. A screenshot of the webpage on July 14, 2017, featuring links to the downloadable Application Package, and a copy of the Application Package for Special Certificates that could be downloaded at that time, are attached at Tab 14.
17. Before June, 2018, the education entities included as a requirement "valid teacher certification" for speech language pathologist, psychologist and social worker positions in the following examples (neither party has located examples of where this was not required):
 - (a) The Halifax Regional School Board ("HRSB"), predecessor to the Halifax Regional Centre for Education ("HRCE"), published a job description for school

social workers, revised April 22, 2005, which listed "Teacher Certification, Nova Scotia Department of Education" as a required qualification. A copy of this job description is attached at Tab 15.

(b) The HRSB published a job description for school psychologists, revised October 2, 2013, which listed "A valid Nova Scotia Teaching Certificate or Special Certificate from the Nova Scotia Department of Education, Certification Division" as a required qualification. A copy of this job description is attached at Tab 16.

(c) The HRSB published a job description for speech-language pathologists, revised October 2, 2013, which listed "A valid Nova Scotia Teaching Certificate or Special Certificate from the Nova Scotia Department of Education, Certification Division" as a required qualification. A copy of this job description is attached at Tab 17.

(d) On January 30, 2018, the HRSB published online a psychologist job posting with a June 29, 2018 deadline that listed "A valid Nova Scotia Teaching Certificate or Special Certificate from the Nova Scotia Department of Education, Certification Division" as a required qualification. A copy of this job posting is attached at Tab 18.

(e) On January 30, 2018, the HRSB published online a speech-language pathologist job posting with a June 29, 2018 deadline that listed "A valid Nova Scotia Teaching Certificate or Special Certificate from the Nova Scotia Department of Education, Certification Division" as a required qualification. A copy of this job posting is attached at Tab 19.

(f) The Strait Regional Centre for Education published online a speech-language pathologist job posting with a June 11, 2018 deadline that listed "Valid teacher certification (TC 5/ITC or greater) for the Province of Nova Scotia" as a required qualification. A copy of this job posting is attached at Tab 20.

18. On May 8, 2018, the Employer announced in an online news release that six new school psychologists and speech-language pathologists would be hired by September of 2018. A copy of this news release is attached at Tab 21.

19. On May 24, 2018, Pamela Langille, Executive Staff Officer of Member Services for the Union, and Jeremy Brown, Registrar & Director of Teacher Certification, exchanged emails. In his email to Ms. Langille, the Registrar stated that the Office of Teacher Certification was at that time refraining from issuing new Special Certificates. A copy of these emails is attached at Tab 22.

20. On June 13, 2018, the Employer produced an internal memorandum entitled "EECD Issues Summary". A copy of the "EECD Issues Summary" is attached at Tab 23.

21. As of June 28, 2018, information formerly published on the Office of Teacher Certification's website regarding Special Certificates had been deleted, and the Teacher Certification Application Package for Special Certificates was no longer available for download. Screenshots of the Office of Teacher Certification's website as it appeared on June 28, 2018 are attached at Tab 24.

22. In an email dated June 20, 2018 to the Deputy Minister, Jeremy Brown, Director of Teacher Certification for the Department of Education and Early Childhood Development, stated that his office was holding on to five specialist applications, and that, "We will contact each of them to let them know their fee will be refunded, applications will be returned, and how to proceed with applying for jobs." A copy of the June 20, 2018 email is attached at Tab 25.

23. In the Joint Book of Documents, Vol. 2, are the Special Certificate application materials of the five applicants referred to in the June 20, 2018 email from Mr. Brown to the Deputy Minister (Tabs 1-5). Attached at Tab 6 of the Joint Book of Documents, Vol. 2, is email correspondence regarding these five applicants' applications. Attached at Tab 7 of Joint Book of Documents, Vol. 2, is email correspondence of June 21, 2018, containing directions from Mr. Brown to remove information regarding Special Certificates and Special Certificate application materials from the Office of Teacher Certification's website, and to identify emails and applications of applicants in order to inform them that their application fees would be refunded.

24. In an email dated June 20, 2018, Angela Kidney, Director, Education Labour Relations for the Department of Education and Early Childhood Development, directed education entities to fill new speech language pathologist and school psychologist positions, and vacancies in existing positions, as "non-NSTU" positions, and to continue to use existing job descriptions and job positions for the positions, noting the change in work year. Ms. Kidney also noted that the employees would not be granted certificates from the Office of Teacher Certification. A copy of the June 20, 2018 email is attached at Tab 26.

25. In an email dated June 22, 2018, Angela Kidney, Director, Education Labour Relations for the Department of Education and Early Childhood Development, again directed education entities to fill speech language pathologist and school psychologist positions as "non-NSTU" positions. This direction applied to newly created positions as well as to temporary and permanent vacancies in existing positions, and applied whether or not the successful applicant already held a Special Certificate. A copy of the June 22, 2018 email is attached at Tab 27.

26. In or around late June, 2018, the education entities began to post speech language pathologist and psychologist positions as "non-union" positions that did not require a Special Certificate, for example:

(a) The HRCE published online speech-language pathologist, psychologist, and social worker job postings with June 25, 2018 deadlines that did not require a Special Certificate. The job postings stated, "Applicants who do not currently hold a specialist or regular licence issued by the Department of Education and Early Childhood Development are invited to apply as there are non-union positions available. ... Teachers with term rehire rights who currently hold

specialist licences will continue to have preference in hiring until October 15." Copies of a selection of these job postings are attached at Tab 28.

(b) The Chignecto-Central Regional Centre for Education published online a speech-language pathologist job posting and a psychologist job posting with June 26, 2018 deadlines that did not require a Special Certificate. The job postings stated, "NOTE: Teacher Certification is no longer a requirement for this position." Copies of these job postings are attached at Tab 29.

(c) The Strait Regional Centre for Education published online a speech-language pathologist job posting with a July 3, 2018 deadline that did not require a Special Certificate. The job posting stated, "This is a non-NSTU position. Even if a Teacher certificate holder applies, this position will still be outside the NSTU-TPA bargaining unit." A copy of this job posting is attached at Tab 30.

(d) The HRCE also published online two psychologist job postings with July 16 and August 20, 2018 deadlines that did not require a Special Certificate. The job postings stated, "This is a non-union Professional Employee Group (PEG) position...". Copies of these job postings are attached at Tab 31.

(e) The HRCE also published online a job description for school psychologists, revised July 5, 2018, that does not list a Special Certificate as a required qualification. A copy of this job description is attached at Tab 32.

(f) The HRCE also published online a job description for speech-language pathologists, revised July 27, 2018, that does not list a Special Certificate as a required qualification. A copy of this job description is attached at Tab 33.

(g) The HRCE also published online a job description for school social workers, revised July 27, 2018, that does not list a Special Certificate as a required qualification. A copy of this job description is attached at Tab 34.

27. On June 25, 2018, after postings for several of the HRCE positions closed, the HRCE's Director of Human Resources, Tracy O'Kroneg, sent an email to speech-language pathologists, psychologists, and social workers, explaining there would be a delay in filling the positions while the Employer finalized terms and conditions of employment. Ms. O'Kroneg wrote that terms and conditions of employment for speech-language pathologists, psychologists, and social workers currently holding permanent positions would remain the same. A copy of this email is attached at Tab 35.

28. In a June 27, 2018 email, Judy Elliot, Director of the Student Services Division for the Province wrote:

The recent changes to the Department of Education and Early Childhood Education's decision to no longer require school psychologists, speech-language pathologists and social workers to obtain a teacher's certificate does not affect

the special certification or conditions of employment of those currently working within our Regional Centres for Education or CSAP. This change pertains only to those entering the workforce as non-teaching professionals moving forward.

A copy of this email is attached at Tab 36.

29. In its "Careers at HRCE Applicant Guide," published in 2019, the HRCE included the following text:

Important information regarding School Psychologist, School Social Workers and Speech Language Pathologist positions

Given recent changes made by the Department of Education and Early Childhood Development, applicants to School Psychologist, School Social Worker and Speech Language Pathologist positions who do not currently hold a specialist or regular licence issued by the Department of Education and Early Childhood Development will be hired as members of the non-union Professional Employees Group (PEG) and will be 12 month employees, subject to the terms and conditions of employment for PEG employees as determined by the Halifax Regional Centre for Education. ... Applicants who do not currently hold a specialist licence are invited to apply to the positions currently posted and invited to watch for postings in the coming week(s).

A copy of the Careers at HRCE Applicant Guide is attached at Tab 37.

30. The Employer provided to the Union on April 8, 2019 a partial list of the number of speech-language pathologists and psychologists treated as non-union by the Employer, as well as those who maintain union positions. A copy of this list is attached at Tab 38. Some of the individuals treated as non-union by the Employer hold Special Certificates.

31. The Employer provided to the Union on June 25, 2019, lists for each education entity of speech-language pathologists, psychologists, and social workers treated as non-union by the Employer, as well as those who maintain union positions. Copies of these lists are attached at Tab 39.

32. A copy of the Collective Agreement between the Province of Nova Scotia and the NSTU, signed December 16, 1975, is attached at Tab 40.

33. Since June of 2018, education entities have also hired individuals, who the Employer treats as non-union, to fill in for permanent speech-language pathologists and psychologists who have Special Certificates and who continue to be treated by the Employer as bargaining unit employees represented by the NSTU.

34. The speech language pathologists, psychologists and social workers hired by education entities into "non-union" positions since June of 2018 have not been treated as covered by the Teachers' Professional Agreement by the Minister or the education entities.