

**IN THE MATTER OF THE TEACHERS'
COLLECTIVE BARGAINING ACT ("THE ACT")**

**AND IN THE MATTER OF A GRIEVANCE UNDER
ARTICLE 42.03(ii) OF THE TEACHERS'
PROVINCIAL AGREEMENT**

B E T W E E N:

THE NOVA SCOTIA TEACHERS UNION

("the Union")

- and -

**THE MINISTER OF EDUCATION OF THE PROVINCE OF NOVA SCOTIA
(Policy Grievance)**

("the Employer")

ARBITRATION AWARD

BEFORE

Eric K. Slone, sole arbitrator

APPEARANCES

On behalf of the Union: Gail Gatchalian
 Nathan Sutherland
 Counsel
 Pink Larkin

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

Hearings held at Halifax, Nova Scotia on April 4, 5, 6, 7 and 12, 2017
Award released at Halifax, Nova Scotia on June 19, 2017

Introduction

[1] I was appointed by the Minister of Labour by letter dated September 30, 2015 to hear and determine this matter, after the parties were unable to reach a consensus on an Arbitrator. For reasons not shared with me, the hearing was not sought to be scheduled for more than a year, eventually proceeding to a hearing on five days in April 2017.

[2] The parties stipulated at the outset that the hearing would only deal with the question of liability, and that if I found the Employer to have breached the Collective Agreement, the hearing would re-convene to consider remedy. This was a sensible plan, as became clearer to me as the hearing progressed that the Employer actions in question affected a great number of teachers to varying degrees, and that any remedy would have to take into account those individual differences.

[3] The hearing would have taken much longer had the parties not arrived at an Agreed Statement of Facts, consisting of some 46 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.

Definitions

[4] 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, who at all material times was Karen Casey.
- b. "the Department" refers to the Department of Education and Early Childhood Development.
- c. "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.
- d. "the Union" refers to the Nova Scotia Teachers' Union.
- e. "the Teachers' Agreement" refers to the Teachers' Provincial Collective Agreement between the Union and the Department dated May 14, 2013, covering a term between August 1, 2012 and July 31, 2015.
- f. "the GIC Regulations" or "the Regulations" refers to the *Governor in Council Education Act Regulations*¹ made under Section 146 of the *Education Act*.

The Grievance

[5] The matter before me is a policy grievance brought by the Union against the Department, alleging that certain actions taken by the Minister in March 2015 had the effect of breaching the Teachers' Agreement. Specifically, the Minister made the decision, which was communicated by letter to hundreds of individual teachers affected, to withdraw (in part) approval previously given by the Department for these teachers to utilize distance learning courses from Drake University, of Des Moines, Iowa, as part of their Integrated Programs of Studies

¹While there are other Regulations made under the *Education Act*, for other purposes, this is the only relevant set of Regulations to this case and are herein referred to as "the GIC Regulations."

("Integrated Programs") which they had embarked upon as a means of upgrading their certification as teachers.

[6] As I will elaborate upon below, an Integrated Program is one of the ways that the *GIC Regulations* creates pathways to higher teacher certifications with higher pay attached thereto, as set out on the pay grids incorporated into the Teachers' Agreement. One of the other pathways is the completion of a graduate degree, such as (but not limited to) a Masters of Education (M.Ed.).

[7] As a result of the Minister's decision, several hundred teachers who had prior approval to include Drake University courses in their individual plans, were forced to substitute courses offered by certain Atlantic Canada universities, or to abandon their plans to complete an Integrated Program.

[8] The grievance seeks redress on behalf of those teachers who had received approvals for their Integrated Programs, and who were caught partway through completion, unable to conclude the programs as initially submitted and approved.

The statutory, regulatory and collective bargaining regime

[9] Pursuant to the *Teachers' Collective Bargaining Act*, the Minister is the Employer of teachers employed by a School Board in Nova Scotia in respect of the Teachers' Agreement. Institutionally, for the most part, the Minister operates through the Department or a specific delegate such as the OTC, but sometimes - as is the case here - the Minister acts in a direct capacity. For purposes of this grievance, the Minister (or her delegate) and the Department are interchangeable. When I refer to the Minister or the Department, I am referring to

them in their capacity as the Employer which is bound to the Teachers' Agreement.

[10] The teaching profession is probably unique in its complexity in the sense that it is governed by two statutes (the *Education Act* and the *Teacher's Collective Bargaining Act*), several sets of Regulations (including the *GIC Regulations*), and a collective agreement (the Teachers' Agreement), and where the Employer is (for some purposes) the Minister who performs not only the role of an employer but is also a Minister of the Crown with political responsibilities and prerogatives.

[11] With so many documents potentially impacting on rights and responsibilities, it is necessary that there be a hierarchy of rights, in order to address possible conflicts. It has been provided in article 4.01 of the Teachers' Agreement that where there is a conflict between the Agreement and any legislation, the legislation would prevail, but where there is a conflict between the Agreement and the Regulations, the Agreement prevails:

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.

[12] As a practical matter, and with reference to this grievance, this means that the Employer cannot point to anything in the Regulations as a justification for breaching any provision in the Agreement. The Regulations are subordinate to the Agreement, or one could say that the parties have contracted out of the Regulations to the extent, if any, that the Regulations would otherwise appear to be in conflict with the Agreement. To the extent that they are in harmony, the GIC Regulations may be seen as an integral part of the Teachers' Agreement.

Teacher certification

[13] The *Education Act* in s.146 delegates to the Governor in Council the right to make regulations, including regulations pertaining to teacher certification:

146 (1) The Governor in Council may make regulations

(e) respecting the classification of teachers and the granting, cancellation and suspension of teachers' certificates and permits, and requiring the collection and payment of fees respecting initial certificates, duplicate certificates and renewal certificates and higher classes of certificates and statements of professional standing;

[14] Section 28 of the *Education Act* requires that teachers in Nova Scotia must hold a teacher's certificate or permit to teach in public schools. The *GIC Regulations* provide for different classes of teacher's certificate. Since some reforms in or about the year 2000, these are referred to as Initial Teacher's Certificate ("ITC"), and Advanced Teacher's Certificates ("ATC") 1, 2 and 3.

[15] The level of Certificate is a factor in determining how much teachers get paid. Years of service is also a significant factor. Suffice it to say that there is a significant financial incentive for teachers to obtain a higher level of Certificate. Ideally the system benefits from having teachers with greater skills and knowledge, for which it is willing to pay more.

[16] Sections 30E, 30F and 30G of the *GIC Regulations* provide that a person with the academic and professional qualifications required for an Initial Teacher's Certificate, or an ATC 1 or 2, may advance to the next higher level of certification (ATC 1, 2 or 3, as the case may be) by completing one of:

- (i) an approved
 - (A) certificate program,
 - (B) degree program, or
 - (C) integrated program,
- (ii) the Nova Scotia Instructional Leadership Program.

[17] For present purposes, the following definitions in 2(2) of the *GIC Regulations* are important in understanding what those terms mean:

2(2) In Sections 30A to 30R,

(a) "certificate program" means a program of studies concerning public education consisting of, subject to the exclusions in subsections 30C(4) and (5), a minimum of 5 full university courses, any of which may be at the undergraduate or graduate level, or the approved equivalent, that are developed as an in-service experience for teachers, designed by or with a university, including credit courses in either or both

- (i) academic disciplines taught in the public schools or other approved disciplines related to public school education, or

- (ii) professional studies;

(b) "degree program" means, subject to the exclusions in subsection 30C(5), a program of studies to receive

- (i) a graduate diploma,

- (ii) a Masters in

- (A) a teachable subject as defined in the Public School Program, or

- (B) Education, or

- (iii) a doctoral degree from a recognized university;

(c) "discipline" means a course of studies taught in the public schools in the Province;

(d) "endorse" means to acknowledge recognized subject fields of competency in teaching;

(e) "graduate degree" means a Master's or Doctorate Degree;

(f) "graduate diploma" means a diploma received upon completion of an established program of a recognized university consisting of a minimum 5 full university courses at the graduate level, any of which may be in either or both

(i) an academic discipline taught in the public schools or other approved disciplines related to public school education, or

(ii) professional studies;

(g) "integrated program" means an individual program of studies developed by a teacher in consultation with a university, consisting of

(i) any combination of academic and professional courses that are interrelated, and

(ii) a minimum of 5 full courses at a university or community college, or the approved equivalent, including, subject to the exclusions in subsections 30[C](4) and(5), a minimum of 3 full graduate courses, and a maximum of 2 full undergraduate courses;

[18] The parties agree that the concept of an Integrated Program has been around for decades. There is no evidence before me as to the precise thinking behind the creation of Integrated Programs. The Employer speculates that it was created during a time when not all teachers had Bachelor of Education degrees, and could not advance in certification by pursuing a Master's Degree - because a Bachelor's degree would be a prerequisite to any Master's program. The Union disagrees with the notion that this was the primary reason behind the Integrated Program pathway to higher certification.

[19] From my point of view, it does not really matter what the original intent was. The language must be interpreted according to its ordinary meaning.

[20] An Integrated Program is not necessarily sufficient for all upgrades, but is part of the pre-requisites. In order to qualify for the ATC 3 classification, the *GIC Regulations* set out a further requirement that does not apply for ATC 1 or 2; namely, the teacher must have completed certain minimum credit-hours in research methods and/or research literacy, and must have an approved graduate degree from a recognized university.

[21] As noted above, the present grievance involves teachers' use of Integrated Programs to satisfy the requirements of Sections 30E, 30F and 30G of the *GIC Regulations*, in whole or in part, and move from one teacher's certificate classification to the next.

[22] Teachers cannot embark on an Integrated Program without seeking prior approval from the Department, through the OTC. Section 30C(2) of the *GIC Regulations* provides that an Integrated Program must be "approved" by the Minister of Education before a teacher commences an integrated program, if it is to be used to support a change in teacher's certificate classification. That section reads:

30C(2) Before the Minister grants an Advanced Teacher's Certificate 1, 2 or 3 to a person pursuant to the post-July 31, 2000 certification system on condition that the person has completed an integrated program, the Minister

- (a) must have approved the integrated program before the commencement of the integrated program; and

- (b) must not have previously granted a certificate on the condition that the integrated program or any courses in the integrated program have been completed.

[23] The regulations as printed or found on the government website, and elsewhere, are a bit clumsy to read, and one doubts that the Department expected teachers to have the regulations as their only point of reference. Teachers were also made aware of these requirements by postings on the Department's own website, giving a simplified set of instructions. This was also set out in a publication called the Teacher Certification Handbook which was distributed to all teachers in or about 2001. As such, the rules were well known to teachers. In bold print on the website it states:

Individual teachers must request in writing approval of integrated program prior to commencement of the program [see subsection 30C(2)] (contact Registrar - Teacher Certification).

[24] Equally, in the Handbook it prominently states:

For the purposes of the Regulations, for certification upgrading, courses and programs must be approved prior to undertaking studies (contact registrar - teacher Certification). Official notification of approval will be sent to you in writing, not given by telephone.

[25] The evidence is clear that by the early 2000's, there were only a handful of requests to the Department for approval to pursue an Integrated Program. However, the popularity of the Integrated Program sharply increased several years later.

Drake University courses

[26] Drake University ("Drake"), located in Des Moines, Iowa, is and was at all material times a reputable, accredited post-secondary degree granting institution. Apart from its own, on-campus programs, it has also become a major purveyor of distance education programs. Many of the courses offered were not developed at Drake, but were purchased from large educational companies such as California-based Quality Educational Programs, Inc. Those of greatest interest to teachers were concentrated in two areas - physical education and coaching, and classroom management.

[27] Drake makes clear in its promotional material that completion of these courses does not qualify a candidate for a degree. Some of the Drake courses, which carry identifying codes, are eligible for transfer credits to Drake graduate degree programs.

[28] Beginning in or about 2008 in Nova Scotia, the number of requests to pursue an Integrated Program began to show a dramatic increase. Most if not all of these involved courses through Drake University. Between January 2008 and February 2014 the Minister, through OTC, granted approval to approximately 546 teachers who submitted applications for Integrated Programs based on Drake University video correspondence courses.

[29] Perhaps not surprisingly, the increase in Integrated Program applications made it onto the radar of the regulatory system, and in particular a body created under the authority of the *GIC Regulations*, called the Minister's Advisory Council on Teacher Certification ("MACTC"). This body (as its name suggests) has the mandate to make recommendations to the Minister in matters pertaining to

teacher certification. It came to the attention of MACTC that a perception was, rightly or wrongly, held by some people that the Drake courses being used to meet the requirements of an Integrated Program were not sufficiently rigorous. The mention of Drake first shows up in MACTC meeting minutes in April 2011.

[30] Between this meeting of April 5, 2011 and January 28, 2014, the minutes show many references to the subject being discussed, and concerns being raised. All the while, the number of applications continued to grow, and despite concerns, MACTC did not recommend any action beyond further study and consideration.

[31] There is nothing to suggest that ordinary teachers would have been privy to the MACTC proceedings, or its Minutes.

[32] Even so, at no time, insofar as the minutes are concerned, did MACTC express the view that the Integrated Programs involving Drake courses did not meet the requirement of the applicable sections of the *GIC Regulations*. An entry from the minutes of a September 20, 2011 MACTC meeting vividly reveals the thinking of the members. The matter had been brought back on the agenda following some communication from Mike Christie, then counsel for the Halifax Regional School Board:

Mr. Christie's e-mail was tabled by Mr. Osborne and briefly discussed. The only means for Teacher Certification to deny recognition of courses from Drake University (an accredited university) would be to revoke the Integrated Program component of the Regulations. The MACTC has discussed this issue previously and concluded that Integrated Programs do offer an opportunity for teachers to develop individualized study programs and that the concept can be a valid means of increasing one's classification.

[33] Over the next few years, the matter was raised again in MACTC from time to time, but not studied in any depth. It was noted on several occasions in the minutes that all of the information available to the committee was anecdotal.

Drake issue becomes public

[34] In early 2014, the climate surrounding the Drake issue changed. By then, the government had changed and a new Minister was in place. More significantly, the issue came to the attention of the media. The CBC, for one, got hold of the “story” and began asking questions.

[35] The minutes of the January 28, 2014 meeting of the MACTC records what was happening at that time:

Mr. Cantelo informed the members of an on-going information search by the CBC regarding the university and the courses being provided. It is clear from the nature of the questions posed by the CBC reporter that the basic premise of any eventual story will be that teachers are receiving increases in salary scale placement as the result of completing courses that are not academically rigorous. Mr. Cantelo has provided CBC with accurate data relating directly to the questions asked and has corrected inaccurate assumptions made by the CBC reporter.

[36] reference to Mr. Cantelo is Paul Cantelo the-then Registrar of the OTC, who had personally granted most, if not all, of the approvals for Integrated Programs involving Drake courses.

[37] By this time, the Minister (Karen Casey) became more actively involved. Minister Casey made a series of three decisions, the first two of which are not grieved. It was the third decision that resulted in this grievance.

Ministerial decision 1 (the “Moratorium”)

[38] On or about February 19, 2014, the Minister made public her decision to stop granting approvals in the immediate term for integrated programs based on Drake University correspondence courses. This was essentially a Agreement.

[39] As of February 19, 2014, approximately 43 teachers had already completed integrated programs based on Drake University courses and received teacher certificate upgrades. Nothing has been done to interfere with the classification of these teachers, who received the upgrades that they had applied for.

Ministerial decision 2 (no new Integrated Programs involving Drake)

[40] Thereafter, things began to move quickly. In a Ministerial Briefing Note dated February 20, 2014, Mr. Cantelo set out four different options for the Minister’s response to the use of Drake University courses for upgrading purposes. The options were designated “Option A” through “Option D”.

- a. Option A was to retain the status quo;
- b. Option B was to force MACTC to vote on the question of whether or not Drake courses would continue to qualify for integrated programs;
- c. Option C was to abolish integrated programs, and

- d. Option D was to seek legislation requiring teacher upgrades to be approved on the basis of relevancy to current or future assignments.

[41] Mr. Cantelo's recommendation was to adopt option B and negotiate a date after which Drake courses would no longer be approved, allowing those already pre-approved to continue.

[42] Over the next few months, it became the public position of the Minister and the Department that the Drake courses were not suitable for use in Integrated Programs for an increase in teacher certification classification. The Minister's reasons were recorded in MACTC minutes as follows (paraphrasing in part):

- a. These are video correspondence style courses that do not provide any avenue for interaction between the Drake faculty member and the student.
- b. These courses are not prepared by Drake faculty but are, instead, purchased off the shelf from private providers.
- c. As per input from the Inter-university Council on Teacher Education (ICTE), these courses are not eligible for recognition as transfer courses by ICTE member universities, and
- d. The academic content rigour of the video correspondence courses is questionable, at best.

[43] The MACTC Minutes go on to record that:

[t]he Minister has concluded that the Drake University video correspondence courses will not be recognized as approved studies for an increase in teacher certification in Nova Scotia, effective as of February 19, 2014, the date of the announcement of her review into the university and the courses. This decision was conveyed to Ms. Shelley Morse, NSTU President by telephone call on April 15, 2014 to

provide Ms. Morse with advance awareness of the final decision.

[44] The Union was formally notified of this decision by a letter dated May 6, 2014, reassuring the Union that all of the teachers who had received prior approval would be able to complete their programs. The letter reads, in part:

In accordance with procedural fairness, pre-approvals granted on or before February 19th [2014] will be honoured. However, I am seeking your support to encourage your membership, particularly those pre-approved for Drake University Integrated Programs, to consider what is in the best interests of students before submitting them for an increase in teacher certification.

[45] As such, after May 6, 2014, and before further action taken in March 2015 (as will be detailed), teachers who had received pre-approval for their Integrated Programs which included Drake courses, were explicitly reassured by the Employer, in the person of the Minister, and reasonably operated under the assumption that they could complete their programs. What the Minister might have expected in asking them to “consider the best interests of students” before applying for a certification increase is anyone’s guess, but these words can only be interpreted as aspirational, at most.

[46] Equally clearly, anyone who had been contemplating applying but had not taken the step of applying for approval before February 19, 2014, would no longer be able to do so.

[47] As at February 19, 2014, several hundred teachers were partway through their Integrated Programs including Drake courses. As indicated above, the Union did not grieve this decision by the Minister.

Ministerial decision 3 - the “March 3, 2015 decision”

[48] In the months following Ministerial Decision 2, further consideration was given and, one might say, further pressures were brought to bear on the Minister and the Department. This led to a further decision of March 3, 2015. On this date, the Minister made and communicated to the Union, the public and all affected teachers, a decision that Drake University courses would no longer be recognized for the purposes of obtaining teacher's certificate upgrades where course registration occurred after March 3, 2015.

[49] This decision applied to teachers who had obtained pre-approval for integrated programs using Drake University courses before February 19, 2014, and who had been reassured in May 2014 that the Moratorium did not apply to them, and that they could still complete their approved programs.

[50] In a letter also dated March 3, 2015, the Minister informed the President of the Union of the decision. This letter reads:

Based on information we currently have on file at the Department of Education and Early Childhood Development, approximately 499 teachers in Nova Scotia have a pre-approval to complete an Integrated Program using video correspondence from Drake University. I am writing today to provide you with updated information and direction about the pre-approval for those 499 NSTU members.

On February 19th, 2014, the Department of Education and Early Childhood Development announced it would no longer grant pre-approvals for integrated programs of study using Drake University video correspondence courses. This followed a review of the video correspondence courses from Drake University Integrated programs.

Earlier today, I sent a letter to NSTU members who currently hold a pre-approval to inform them that effective March 3, 2015, the Department will no longer recognize Drake University video correspondence courses for an increase in certification where course registration occurs after March 3rd, 2015. In the letter, I asked that they provide the Department with information on where they are with their course of studies with Drake University. Responses from teacher are due to the Department by March 27th, 2015.

This change is in direct response to the recently released Action Plan on Education. A key action in Pillar Four of the action plan, Excellence in Teaching and Leadership, is the establishment of a framework for teaching standards in Nova Scotia. Teacher education and professional development will be based on these standards. The new standards will help improve student success and ensure teachers in Nova Scotia are accessing programs, professional development and continuing education that will positively impact student achievement.

As indicated to you in a letter dated May 6, 2014 about Drake University, funds dedicated to professional development and teacher certification upgrading should be directed toward programming that best meets the needs of Nova Scotia students.

[51] The Minister also communicated her decision to the public in a press release dated March 3, 2015, entitled “Minister Announces Changes to Support Teacher Excellence”, which quoted from the above letter as well as from reasons behind the earlier February 2014 decision.

[52] The Union protested this decision immediately. An exchange of correspondence ensued, clarifying (but not essentially changing) the Minister’s position.

[53] In a letter dated May 6, 2015 to the President of the Union, the Minister set out the conditions upon which teachers would receive recognition for Drake University courses that they had completed and/or were currently enrolled in as of March 3, 2015. Those conditions were:

1. Teachers must submit an official transcript of marks for all courses successfully completed as of March 3, 2015, to the Office of Teacher Certification at the Department no later than June 30, 2015;
2. Teachers must submit written proof of registration for the course, that they were enrolled in as of March 3, 2015, to the Office of Teacher Certification at the Department no later than June 30, 2015;
3. In order to fulfil the remaining requirements of their Integrated Programs, teachers must complete their studies at a recognized university, with pre-approval by the Department; and
4. Teachers who have successfully completed their Integrated Program of Studies may apply for a license increase through the Office of Teacher Certification, as per the standard application procedures and requirements. Upon receipt of their official transcript of marks, the Department will recognize their Integrated Program of Studies toward an increase in classification if they complete the standard application procedure for an increase in license through the Office of Teacher Certification, provide the mandatory documentation, and fulfil all of the requirements for the specific license increase that they are seeking.

[54] In the meantime, on April 16, 2015, this policy grievance had been submitted.

[55] The same day as the press release, March 3, 2015, a letter from the Minister was sent to each teacher who had received pre-approval for integrated

programs based on Drake University courses, and who had not already been granted a certification upgrade. This group comprised some 500 teachers.

[56] This form letter to those teachers described the Minister's decision and directed the teachers to contact the Department of Education, and to provide information regarding the status of their course of studies with Drake University. The letter specified a deadline of March 27, 2015 for such information to be provided.

Decision was controversial within Department

[57] Documents obtained by the Union through the disclosure process, and introduced at the hearing, illustrate that the March 3, 2015 decision was taken over the prior objection of others in the Department. In fact, the withdrawal of approval for Drake courses was actively discussed in the lead up to the earlier (May 2014) decision to cease granting approval for Integrated Programs involving Drake courses. Paul Cantelo cautioned in an April 28, 2014 email that *"it would be ethically questionable"* to remove approvals granted prior to February 19, 2014, when the first Ministerial decision (the Moratorium) was made. He went on to warn that *"we could not win an appeal if we removed an increase in classification retroactively."*

[58] In another email of the next day, Mr. Cantelo suggested that one of the "messages" justifying the May 2014 decision be that *"pre-approval for those who had applied before the department did the review were done in good faith and we are going to honour that."* Also, to answer any critic who might suggest that the decision did not go far enough, i.e. did not revoke pre-approvals, the message would be that approvals at the time were *"granted in good faith and in accordance*

with regulations” and that at no time in the past had the Department ever “retroactively rescinded an increase in certification where pre-approval was granted appropriately.”

[59] The Minister herself, both publicly and in her letter to the Union quoted earlier, adhered closely to that message. She was quoted in the media as saying *“I think in fairness to those people, they saw a set of regulations, they applied under that, they were given approval under that, so we are not going to go back and reverse that.”*

[60] In the above-quoted letter to the Union President dated May 6, 2014, Minister Casey responded to concerns about the February and May 2014 decisions, which were questioned, though not grieved, stating that *“in accordance with procedural fairness, pre-approvals granted before February 19 [2014] will be honoured.”* The Minister went on to invite the Union to work together with the Department to make sure that *“funds dedicated to professional development and teacher certification upgrading be directed to meet the needs of Nova Scotia students.”*

[61] In a press interview published on May 16, 2014, the Minister stated that Drake University is a *“respected, accredited university [that] offers video correspondence courses that are delivered via DVD.”* She also explained to the press that the pre-approvals prior to February 19, 2014 *“were granted in good faith and in accordance with the regulations that existed at the time [and were] final administrative decisions that cannot be revoked or changed.”*

[62] The March 3, 2015 decision, as communicated by the Minister directly to teachers, made no mention of the previously stated view that it would be unfair to

revoke pre-approved plans. The ostensible justification is captured in the Minister's statement in the letters, to the effect that:

"This change is in direct response to my recently released Action Plan on Education, titled the 3 R's: Renew, Refocus, Rebuild. One of the main actions in the Plan is the development and implementation of teaching standards for Nova Scotia. The new standards will help improve student success and ensure teachers in Nova Scotia are accessing programs, professional development and continuing education that will positively impact student achievement. Work on the development of those standards is currently underway"

[63] More will be said later about the referenced Action Plan.

Teachers caught in the middle

[64] The Union called as witnesses six teachers, representing different regions of the Province, all of whom had applied for an Integrated Program involving Drake University courses, which plans had been approved prior to February 19, 2014. All of these teachers were partway through their programs at the time of the Minister's 2015 decision, to differing degrees. All of them had completed one or more of the courses, had registered for and/or were partway through some of the courses, and had some courses on their approved plan but had not yet registered for them.

[65] These teachers are essentially representatives of a class of teachers, which I will refer to as the "affected teachers." The grievance before me is on behalf of the affected teachers.

[66] It is not necessary to name these teachers, who I will refer to as Teachers 1 through 6. It is useful to touch on some of their evidence.

Teacher 1

[67] Teacher 1 is a primary teacher with some 18 years of experience. She already holds a B.Ed. degree plus two graduate degrees - a Masters in Literacy from Mount Saint Vincent and a Masters of Education in ESL from Mount Saint Vincent and St. Mary's. She was particularly interested in differentiated instruction, and applied in 2013 for an Integrated Program involving Drake courses with that specialty at the core. She was looking to advance from ATC 2 to 3. She had first heard of Drake through the grapevine in about 2011, and looked more closely at the courses offered. She was excited by the prospect, and applied for an Integrated Program. Her approval was granted in November 2013. In accordance with the Regulations, she had seven years to complete her Integrated Program.

[68] It was her evidence that Drake was offering courses that were simply not available in Atlantic Canada. Furthermore, she was attracted to the flexibility of distance learning because of personal challenges in her life, including health issues and family commitments. She also noted that the Drake courses were more affordable than courses offered in local universities.

[69] She has found the workload with Drake courses to be comparable to university courses that she has taken. She has also found the courses to be useful in her classroom teaching.

[70] When she learned of the March 2014 letter, she was working on her first course, and understood that because of her pre-approval, she was safe to complete her Integrated Program, and in reliance upon that, she registered for three more Drake courses.

[71] By the time the March 2015 decision was communicated, she had completed, or was in the process of completing, four Drake courses.

[72] It was a difficult and frustrating process to find six new courses to replace the six Drake courses that were no longer eligible. In the end she has registered for two at St. Francis Xavier, two at Acadia and one at Mount Saint Vincent. She has (so far) found these courses to be “barely relevant” to her Integrated Program, but there were no offerings in Atlantic Canada that compared to the Drake courses.

[73] She noted with some frustration that no one from the Department ever asked her to describe her experience with the Drake courses, which experience she described as exceptionally positive. She rejects the notion that these courses lacked academic rigour.

[74] She remains “plugging away” at her Integrated Program, which she believes would have been finished by now had she been able to complete all of the Drake courses.

Teacher 2

[75] Teacher 2 has been a teacher since 1999 and already has two Masters of Education degrees, which had the effect of moving her up to an ATC 2. Hoping

to advance further, she applied for an Integrated Program using Drake courses. By the time of the March 3, 2015 decision, she had completed six Drake courses.

[76] She was one of the few (of which I am aware) who was able to complete her Integrated Program using courses from Atlantic Canada universities, including Acadia and Mount St. Vincent. She has received her ATC 3.

[77] She had a difficult time fulfilling those four courses, because of the need to travel which conflicted with family obligations.

[78] Her experience of the Drake courses was positive. She believed they were rigorous, and she felt that she learned a lot from them. She was able to replicate the "cohort" model in some courses by creating a study group that watched some of the Drake DVD's together. She testified that she put a great deal of time and effort into the Drake courses, more than into the university courses taken later. She described the Drake courses as "rigorous and meritorious."

[79] She also stated that she was able to apply much of what she had learned from the Drake courses directly into her classroom work.

[80] Her reaction to the March 3, 2015 letter from the Minister was a sense of infuriation and disheartenment, as it tended to insult her integrity, as she had deliberately chosen courses that she believed would add value to her classroom teaching.

[81] She described it as difficult to find courses that were equivalent to the Drake courses she could no longer take. One of them was "OK" while the other three she described as mostly useless as well as expensive.

[82] She also said that the whole experience has embarrassed her, as she had actually recommended Drake courses to other teachers.

Teacher 3

[83] Teacher 3 has been a teacher since 1990. She currently teaches Grade 4. In the fall of 2013 she applied for an Integrated Program including Drake courses. She planned to focus on classroom management, to help her deal with the so-called "inclusive classroom," which mixes special needs children into regular classes.

[84] This would have been her first certification upgrade. She had not had opportunities in the past because of her very busy life, and saw this as an opportunity to improve her knowledge base and also achieve some greater financial security.

[85] She found the courses both rigorous and directly applicable to her experience in the classroom.

[86] At the time of the March 3, 2015 decision, she had completed six Drake courses and had registered for three more. She only had to find one course elsewhere, which ended up being (after some delay) a course at Acadia. She was able to finish her Integrated Program and has received her ATC 1, albeit a bit later than had she done her tenth course through Drake.

[87] She did not find the Acadia course to be any more rigorous than the Drake courses.

Teacher 4

[88] Teacher 4 is a 12-year teacher who teaches grade 7 through 9 science, math and social studies, in a school district that is quite diverse, including somewhat impoverished families.

[89] She has volunteered a lot of her time as a coach in community-based sporting programs, and saw some value in seeking a certificate upgrade (to an ATC 1) through an Integrated Program combining elements of classroom management and coaching. She saw this as a good fit, as she sees the value of sports in students' development of discipline and confidence, which translates into other parts of their life, including classroom behaviour.

[90] She described the courses as "a lot of work" and was about halfway through her program when the March 3, 2015 decision "hit like a bombshell."

[91] The courses through local universities did not seem at all relevant. She has five courses from Drake completed, and although she had a sixth course registered, she decided not to continue at this time because she is angry and feels it would be pointless. She does not see any equivalent locally of the classroom management courses that she hoped to take through Drake.

[92] She conceded that there was a financial incentive to pursuing the program. She also conceded that there are a lot of professional development opportunities through the Department and her school board, but the Integrated Program was something much more ambitious.

Teacher 5

[93] Teacher 5 has been in the profession for about 22 years, and teaches yoga and “physically active lifestyle” courses at the high school level. She is not currently qualified to teach physical education. She already has a Masters in Education degree from Mount St. Vincent. She applied for an Integrated Program in April 2013, with the hope of getting an ATC 2.

[94] She put together her Integrated Program based mostly on physical education and coaching courses. She found the work rigorous. She had completed seven courses by the time of the March 3, 2015 decision of the Minister.

[95] She found her three replacement courses through St. Francis Xavier University, which courses she found to be less work than the Drake courses had been. The SFX courses gave very little opportunity for contact with faculty, which had been one of the criticisms of the Drake courses.

[96] She found the process of finding replacement courses very stressful. It took a great deal of negotiation with the Department to arrive at courses that she could take. In the end, she qualified for her certificate upgrade, but it took about a year longer than it would have with Drake courses, as originally approved.

[97] She confirmed, as did the other witnesses, that no one from the Department ever asked for her personal views or experience with the Drake courses, before the decision was made to disqualify Drake courses from Integrated Programs.

[98] She also confirmed that there are many professional development opportunities otherwise available, but these do not lead to certificate upgrades.

Teacher 6

[99] Teacher 6 is a Physical Education teacher with about 14 years of teaching experience. He is active in his community as a coach for several sports. He applied in mid-2013 for an Integrated Program in the coaching area, and was approved on June 10, 2013.

[100] He had heard about Drake courses at a Regional Conference in 2011. He had not previously considered doing a Masters, or taking training to go into administration. The Drake courses interested him because they were very practical and could be done on his own time, allowing him not to give up too many volunteer activities. The courses in coaching were not available through local universities.

[101] He actually found the Drake courses to be more work than he had expected, but he enjoyed them. He strongly disagreed with the notion that these were "bird" courses.

[102] By the time of the March 3, 2015 decision, he had four courses completed. In the end, after looking at options, he simply stalled in his Integrated Program. He did not find anything available that he would want to take. He confessed to being angry and disheartened. He felt that he had started the program for all of the right reasons, yet in the end his integrity and professionalism were being questioned.

Summary of evidence

[103] The net effect of the decisions of February 19, 2014 and May 6, 2014, was nil for these teachers. As stated earlier, these decisions were not grieved.

[104] The net effect of the March 3, 2015 decision was this:

- a. Any completed Drake courses would count toward the integrated plan of study;
- b. Any Drake courses for which registration had occurred, and payment made before March 3, 2015, could be completed and count toward the integrated plan; but
- c. Any Drake courses which had been approved, but for which registration had not occurred before March 3, 2015, would not count toward the integrated plan, and would have to be replaced with approved courses from universities in Atlantic Canada.

[105] Although it is not important for this phase to pin down this number, it appears that 477 teachers found themselves in the situation where their Integrated Program could not be completed, in whole or in part, as approved (i.e. involving Drake University courses).

[106] The six teachers who testified cover a variety of situations. All of them were directly affected by the March 3, 2015 decision. All of them were taken by surprise and had tough decisions to make. Some of them were far enough along that finishing the Integrated Program was not that challenging, though not necessarily as rewarding or inexpensive as they had hoped. For others, the process is ongoing. Some have simply abandoned their plans.

[107] Each of the six teachers who testified described the Drake course work as rigorous, at least insofar as the effort that they were willing to put into the courses. Some of them saw particular value in the flexibility that the courses allowed, in the sense that they did not need to travel to a campus, which might be nowhere near where they lived, and the work could be done at times convenient to them.

[108] I have no doubt that the Union deliberately selected these teachers because it was felt that they would make a good impression, and as far as I am concerned they did make a good impression. Each of them impressed me as bright, motivated and dedicated teachers who believed that a certification upgrade could help them be better teachers. They chose courses that both interested them, and which they believed would add to their knowledge base or skill set. No one denied that the prospect of a pay increase was a significant motivating factor for them.

[109] After receiving the March 3, 2015 letter, each of these teachers did as instructed, writing to the Department to advise of the status of their integrated programs. They were met with letters dated May 6, 2015 from the Minister, setting out what would happen going forward, namely that they were required to provide proof of Drake courses completed or registered for, before March 3, 2015, in which case those courses would count toward their programs. The letters went on to say:

“In order to fulfil the remaining requirements of your Integrated Program, you must complete your studies at a recognized university with written pre-approval by the Department. Please contact the Teacher Certification Division at the Department to discuss acceptable options for completing your Integrated Program.”

[110] Further correspondence gave more information about what would be acceptable as alternate or replacement courses. Such courses had to be:

“... in the same topic or theme as your original Integrated Program using Drake courses. That means that those in the Coaching/Physical Education program must continue to complete Coaching or Physical Education courses while those in the Classroom Management Integrated Program must continue to complete classroom management and instruction types of courses.”

[111] The difficulty with this requirement for some of the teachers who testified, was that there was nothing available in Atlantic Canada that compared to the Drake courses. In the end, in some cases the teachers found courses that were approved, though not really a good substitute for the Drake courses originally selected. In other cases, the teachers have simply stalled in their programs and are not currently progressing to complete their Integrated Plans, though they may still have several years within which to complete them.

[112] An interesting, though not strictly speaking relevant development, concerned the reaction of Drake University to these events. Because of the attack on their reputation, Drake has closed its registration to **any applicants** for correspondence courses from Nova Scotia. What this means is that even if a teacher wished to take one of the courses which had been in their original plan, but for which registration had not occurred before March 3, 2015, **even if only for their own benefit**, they cannot do so.

[113] The replacement courses which the Department deemed eligible included both online and on-campus courses at Acadia University, Cape Breton University,

Mount Saint Vincent University, St. Francis Xavier University, Université Sainte-Anne, and Memorial University. It took some months for the Department to develop its list of courses, and the teachers who testified engaged in significant negotiation with the Department to arrive at an acceptable list of replacement courses. As mentioned, some had not moved forward with their plans as at the time of the hearing.

The Employer's case

[114] The Employer's core argument is that the Drake courses ought never to have been approved for Integrated Programs in the first place, because they do not fit within the requirements of the GIC Regulations. They are not programs of academic studies, and lack the required rigour. The decision to cease allowing Drake courses was taken for the purpose of bringing the practice in line with the Regulations and correcting the error.

[115] The cornerstone of the Employer's case was the testimony of Monica Williams, an educational consultant and currently the Executive Director of the Centre for Learning Excellence, who was tasked by the Department to develop leadership standards for educators. This effort began in 2014.

[116] This also involved a reorganization of the department and the creation of the Centre for Learning Excellence which she now leads. Teacher certification is now included within that Centre.

[117] She became involved with the Drake issue in 2014 at the direct request of the Minister, who had been experiencing a growing level of concern about the appropriateness of many of the Integrated Programs involving Drake courses.

[118] During her work for the Department, Ms. Williams took it upon herself to assess teacher education generally, including the competencies being promoted through graduate education. She became aware of the Integrated Programs question, and was briefed about the history of Integrated Programs. As she understood it, the concept was originated at a time when some teachers only had teaching certificates, rather than degrees, and as such could not qualify for graduate degree programs. The Integrated Program was something that was to be developed by the teacher in collaboration with the university, tailored on an individual basis to meet the teacher's objective. As she learned, the demand for Integrated Programs was very low until about the mid-2000's when it was still only about one or two applications per year.

[119] She learned that there had been a sharp escalation in applications for an Integrated Program starting in about 2008. One of the concerns that she became aware of is that there are limited funds for professional development, and these funds would potentially be exhausted by requests for Integrated Program funding, at the expense of other programs.

[120] She examined a number of Integrated Program applications and found them to be virtually identical, involving the very same courses, and with wording in the application that appeared to have been copied from a standard template. This suggested to her that these programs lacked any individuality.

[121] She investigated the connection between Drake University and the companies that had developed the courses. She noted that many of the courses would not have been recognized by Drake itself for its own graduate programs.

[122] She had serious questions about the rigour of the courses. She did not see them as being legitimate substitutes for graduate level training.

[123] She also questioned whether the subjects being studied were relevant to student needs within Nova Scotia. By way of example, many teachers were taking courses in the coaching stream, yet were not themselves physical education teachers.

[124] According to figures she compiled, by the time of the Agreement some 505 teachers had received approval for certificate upgrades involving Drake courses. She noted that the typical salary increase for a certificate upgrade would be between \$6,000 and \$8,000 annually.

[125] She observed that the Drake phenomenon was leading to an erosion of public confidence in the educational system, in part because of the extensive coverage in the media.

[126] She had a concern that Drake University did not have any admissions process; one simply purchased the courses which had mostly been developed and marketed by commercial companies. This was unlike the situation in universities where students must show that they are qualified, where programs must be applied for, and the necessary prerequisites shown.

[127] She expressed a concern that perhaps the Registrar (in Nova Scotia) was approving Integrated Programs involving Drake courses, without fully appreciating the differences between the Drake courses and other offerings.

[128] She was also concerned that the Drake courses did not have the same research component as do courses through other universities. She believes the written course requirements do not meet the same standards, in that they are not expected to be as lengthy as university graduate-level courses, nor are they true research papers. She did not deny that this course material might be useful as professional development, but it is not in her opinion at a graduate level.

[129] She also had a concern that some of the courses were outdated and did not necessarily reflect educational philosophy in Nova Scotia. For example, one of the courses referenced "Hooked on Phonics," a method of improving literacy that was popular at one time but which was abandoned some years ago in Nova Scotia. This caused her to question whether the Drake courses incorporated the best current philosophy and methods.

[130] She had a concern that because the courses were based on DVD lectures, there was little or no opportunity for interaction with instructors or with peers.

[131] From the course results she had seen, it appeared that everyone (or almost everyone) was receiving perfect or near-perfect scores, which brought into question how rigorous these courses are.

[132] She was a party to the March 3, 2015 decision that (in her words) "went back on" the prior 2014 decisions to allow already-approved Integrated Programs with Drake courses to continue. There were several high-level people involved in giving that opinion to the Minister. She was candid in sharing that not everyone supported this decision, and in particular, Paul Cantelo, who expressed concerns about the ethics of it. Ms. Williams herself supported the decision.

[133] She believed that the context had changed from 2014 to 2015. In particular, in October 2014 a Review Panel chaired by former Lieutenant-Governor Myra Freeman issued its report entitled "Disrupting the Status Quo." Also the government released its Education Action Plan, which made a commitment to work on and improve teaching standards. It was felt by Ms. Williams, and others, that it was not in the spirit of these initiatives, nor in the interest of the Province, to have hundreds of teachers still working their way through Integrated Programs involving "dubious courses."

[134] Ms. Williams noted that the Minister had, in her 2014 correspondence with teachers, expressed the hope that they would consider courses other than Drake courses, in completing their Integrated Programs. It does not appear that many, if any, acted on that request.

[135] The other major concern that Ms. Williams had was financial. Allowing these Integrated Programs to continue would place a significant drain on the professional development funds that are made available to teachers.

[136] Ms. Williams also allowed for the fact that there was media pressure, to which this decision was a response.

[137] Ms. Williams believed that the March 3, 2015 decision was fair, because it did not disrupt the expectations of teachers who had completed, or registered for, Drake courses. She believed that with the cooperation of local universities, flexible options could be made available as substitutes for the Drake courses. All five Nova Scotia universities that have faculties of education, as well as Memorial in Newfoundland, were tapped to make courses available. She admitted that not

all of the course offerings were equivalent to Drake courses, nor necessarily as convenient, but felt that there were reasonable options made available.

[138] She estimated that out of the 500 or so teachers who were partway through their Integrated Programs, approximately 25 or 30 of them have abandoned their Integrated Programs.

[139] On cross-examination, Ms. Williams conceded a few points. The Centre for Learning Excellence was not a new development in 2015, as it was already known to be coming when the 2014 decisions were made. She admitted that the representations made to teachers in 2014, to the effect that they could continue with their Integrated Programs, were “intended to be relied upon.”

[140] She also admitted that she did not review the course materials for the replacement courses, was unaware of the potential for interaction with academic staff, and was not aware of the research requirements for the replacement courses offered by universities such as Acadia. Nor was she aware of the quality of written assignments expected.

[141] She admitted that, as far as she knew, the March 3, 2015 decision (which affected some 500 teachers) was the one and only time the Office of Teacher Certification had ever revoked pre-approval for an Integrated Program.

The Appropriateness of Drake courses

[142] It is not for me to decide whether or not Drake courses are “rigorous” enough to qualify for teacher certification upgrades. The Employer justified its decisions on all of the reasons set out by Ms. Williams, including the basis that

the Drake courses lack many of the hallmarks of graduate level, university courses. It is true that these courses typically offered less contact with academic faculty, and less of an opportunity to benefit from contact with a "cohort," in the sense of a group of students (i.e. teachers) all going through the same program at the same time. But the Employer did not produce any witness qualified to give an expert opinion on the rigours of the Drake courses. With all due respect to Ms. Williams, she was not sought to be qualified as an expert witness, and much of her evidence was anecdotal.

[143] The teachers who testified described their work on the courses as rigorous, but this evidence is also basically anecdotal. The main thing I draw from this testimony is that the teachers involved all appeared to put a significant effort into their course work, and were rewarded with a good learning experience.

[144] I believe it is just common sense that people will get more out of a learning opportunity if they put more effort into it. A course may lack rigour, in the sense that it is easy to pass, yet still provide a rigorous learning experience because the individual took it seriously and put in more than the minimum effort required to pass the course.

[145] It also an important fact that Drake University is an accredited university in the United States, but it is also true that many of the courses offered in their distance learning department were developed by large educational firms and not by Drake itself. Yet, Drake was willing to put its name on these courses and stake some of its academic record on these courses. And who is to say that a course developed by a large educational firm cannot be rigorous? I believe this implication by the Employer simply plays into a prejudice to the effect that education which is delivered for profit is inherently inferior to that which is

developed by public institutions. I do not accept that premise, at least not on the evidence before me.

[146] In the end, the appropriateness of Drake courses, or Integrated Programs generally, is a matter of policy for the Department and, to the extent applicable, for negotiation with the Union. I make no finding about the Drake courses, *per se*, and simply note that this is a controversial subject. Indeed, the grievance does not require that I make any such findings.

THE ARGUMENTS

[147] The Union's arguments are essentially these:

- a. The decision announced March 3, 2015 to revoke pre-approvals involving Drake courses ("the March 3, 2015 decision") was fundamentally unfair, as it broke an explicit promise made by the OTC (when the plans were initially approved), and also broke the May 2014 promise by the Minister that these pre-approved Integrated Programs would be allowed to run their course, as submitted. (As noted, the decisions that affected other teachers who had not yet submitted an Integrated Program, are not the subject of any grievance.)
- b. The March 3, 2015 decision breached the *GIC Regulations*, which are incorporated into the Teachers' Agreement.
- c. The March 3, 2015 decision represented an Employer "rule" that is unenforceable under the so-called "KVP" test, and in particular the

branch of that test that requires a rule to have been brought to the attention of all affected employees before it becomes enforceable.

- d. The March 3, 2015 decision was taken without the consent of the Union, and not even in consultation with the Union, and thus violated Article 15.02 of the Teachers' Agreement, which provides:

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.

By acting as it did, the Employer acted as if it had unilateral authority to change the requirements for teacher certification.

- e. The March 3, 2015 decision was an unreasonable exercise of management functions, contrary to Article 3.01:

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.

- f. The Employer is estopped from taking the position that it did with the March 3, 2015 decision, because of its prior representation to teachers that their Integrated Programs could continue, which representation (the Union says) was relied upon to the detriment of many teachers.

[148] The Employer's defence of the March 3, 2015 decision essentially boils down to this: The decisions by the Registrar to approve the Drake Integrated Programs were essentially a series of mistakes, because these programs did not actually meet the requirements of the Regulations, which had more stringent requirements. The Drake courses are not the equivalent of graduate level courses, missing many of the hallmarks of same, including:

- a. They were not actually part of Drake's graduate programs.
- b. There were no entrance standards.
- c. There was minimal or no research component.
- d. There was a low level of analysis required.
- e. Some of the course content was outdated.
- f. There was minimum interaction with the evaluator or instructor.
- g. There was little or no interaction with a cohort.
- h. The courses did not fit together into a degree program.
- i. The Drake courses would not be recognized as credit toward any degrees at Nova Scotia universities.

[149] In short, the argument goes, the Drake courses lack sufficient rigour to meet the intent of the OIC Regulations, and should never have been approved. The March 3, 2015 decision was a compromise decision that attempted to balance fairness with the need to correct the mistake and comply with the Regulations.

[150] The Minister was motivated to act for a number of reasons, including restoring public trust in the educational system and being able to move forward

with the strategic plans without these Integrated Programs working their way through the system for several more years, soaking up professional development funds and delaying the implementation of other initiatives.

[151] The Employer further argued that the March 3, 2015 decision did not violate the Regulations, but only sought to correct what was an earlier mistake as to the application of the Regulations.

Findings and Decision

[152] Despite the valiant and creative efforts of Mr. Kindred, with respect, he was attempting to defend the indefensible.

[153] From a legal and labour relations standpoint, nothing had changed between 2014 when the Moratorium was instituted, but already-approved programs were exempted, and 2015 when pre-approvals were (partly) revoked.

[154] What the evidence shows, in a nutshell, is that the Department and the Minister developed some new educational policy, as a result of which it became less convenient to keep the promises that had been made to teachers with pre-approved Integrated Programs involving Drake courses. Perhaps also the full financial impact became clearer, and politically it became more embarrassing to attempt to justify allowing these Integrated Programs to continue. But the Minister and the Department did not have a free hand to bypass their labour relations obligations, to the extent that those obligations impacted on what the Minister and the Department wished to do.

[155] I am in general agreement with the Union and find merit in all of its branches of argument. While I will speak to all of the arguments, the argument that is strongest and which most directly answers the Employer's argument, is that of estoppel.

Estoppel

[156] The Employer's argument relies on the premise that the Integrated Programs involving Drake courses should never have been approved in the first place. Mr. Kindred argues that, on close inspection, there were aspects of the Drake courses (and the Integrated Programs that relied on Drake courses) that were not in compliance with the GIC Regulations. He goes on to argue that the Employer can therefore justify its action as merely applying the regulations as they ought to have been applied in the first place.

[157] Assuming for sake of argument that the Drake Integrated Programs did not meet the requirements of the GIC Regulations, which is a premise that I do not necessarily accept, the ability of the Employer to turn back the clock and "correct its error" runs up against two principal roadblocks.

[158] Firstly, the GIC Regulations are subordinate to the Teachers' Agreement. A teacher who has followed the correct procedure as set out in the Teachers' Agreement to proceed toward a certification upgrade, is entitled to rely on their rights as contained in the Teachers' Agreement, even if those rights are arguably in conflict with the Regulations. Put another way, the Employer is obligated to follow the Teachers' Agreement, even if in doing so it falls afoul of the GIC Regulations.

[159] Secondly, and I believe more importantly, the principle of estoppel is founded on the premise that a party may be estopped, or prevented, from relying on its strict legal rights, if it has represented to the other party that it did not intend to be bound by those legal rights, and that representation has been relied upon by the other party to their detriment.

[160] When the Department approved an Integrated Program involving Drake courses, on each occasion it can be said that it was making a representation that the Integrated Program complied with the GIC Regulations. It can also be said that those representations were made with the full understanding and intention that the teacher could rely upon it.

[161] Assuming that the Employer (as represented by the OTC) made an interpretive error in each case, through ignorance or inattention, still the pre-approval of the Integrated Program can be treated as a representation that the Department would not be relying on any other interpretation of the GIC Regulations that might have caused the application for the Integrated Program to be denied.

[162] The modern law of estoppel was well described by Lord Denning in the case of *Combe v. Combe* [1951] 1 All E.R. 767 (C.A.) at p.770:

The principle as I understand it is that where one party has by his words or conduct made to the other a promise or assurance which was intended to effect the legal relations between them and to be acted on accordingly then once the other party has taken him at his word and acted upon it the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no promise or assurance had been made by him but he must accept their legal relations subject to the qualification which

he himself so introduced even though it is not supported in point of law by any consideration but only by his word.

[163] In general, then, a party who represent that they do not intend to rely on their strict legal rights cannot expect to revert to their strict legal rights, or legal position, where events have been set in motion that render it inequitable to allow them to do so. Equity recognizes that a party has the right to revert to their strict legal rights, but only upon notice of an intention to do so, and only to the extent that it does not affect those who have relied to their detriment on the prior representation.

[164] The Employer argues that estoppel cannot operate in such a way that it violates an express provision of a statute, citing the cases of *Compass Group Canada (Beaver) Ltd. v. U.F.C.W., Local 175* 2008 CarswellOnt 7504, a decision of Arbitrator Gail Brent, and *Re G4S Cash Solutions (Canada) Ltd. and Western Canada Council of Teamsters* 2012 CarswellMan 823, a decision of Arbitrator A. Blair Graham. In the latter case the Arbitrator cites a number of other cases, including Supreme Court of Canada authority for that proposition: *St. Ann's Island Shooting & Fishing Club Ltd. v. R.* [1950] S.C.R. 211. In that case, Rand, J. stated, virtually as an afterthought to the main ratio of the decision, which was that the express provisions of the *Indian Act* voided an existing lease to a private club that the Plaintiff was arguing remained in force:

It was argued that the Crown is estopped from challenging the lease, but there can be no estoppel in the face of an express provision of a statute; *Gooderham & Worts Limited v. C.B.C.* [1946 CanLII 350 (UK JCPC), [1947] A.C. 66; [1947] 1 D.L.R. 417. 4,] and *a fortiori* where the legislation is designed to protect the interests of persons who are the special concern of Parliament.

[165] Far be it for me to argue with the Supreme Court of Canada or the Judicial Committee of the Privy Council, but those cases involve very different issues of public policy. Moreover, they predate the significant development of the law of estoppel in the decades to follow.

[166] Accepting the general proposition that an estoppel cannot operate in the face of a statute, this principle is of no application here. The estoppel argued for by the Union does not lead to a violation of any statute. The hierarchy of rights created in the Teachers' Agreement clearly states that statutory provisions would prevail over the Agreement. Regulations, however, are subordinate to the Teachers' Agreement. There is no legal principle that I am aware of, which would prevent parties from contracting out of the provisions of a regulation that conflicted with their collective agreement.

[167] Even so, we are not dealing with any express violation of a Regulation. The estoppel argued for by the Union, concerning the pre-approvals for Integrated Programs, seeks to hold the Employer to its representations that, in its opinion, the Integrated Programs applied for met the requirements of the Department according to its interpretation of the CIC Regulations. That assessment made by the Department is essentially a question of fact, or mixed fact and law. It is a classic type of estoppel, where a party is sought to be held to its statements about its own legal position.

[168] The principle of estoppel has been adopted and accepted by labour arbitrators for many years: see *Brown & Beatty, Canadian Labour Arbitration*, at 2:2211. At 2:2000 the authors note that estoppel can be applied not only as between the parties to the collective agreement, i.e. the Union and Employer, but also as between the Employer and individual employees "within the permitted

range of direct dealings.” I would regard the area of teacher certification as falling within that area of direct dealing. While the Union negotiates the procedure for teachers to obtain certificate upgrades, a teacher must deal directly with the Department through the application and approval process.

[169] The situation at hand is a textbook case for estoppel. In fact, there are two quite separate instances of estoppel on the facts, as there were two separate representations:

- a. **Estoppel 1:** The pre-approval of each individual Integrated Program was a representation to the teacher that his or her Integrated Program met the requirements for a certification upgrade, assuming the program was completed successfully within the seven-year time-frame stipulated.
- b. **Estoppel 2:** The second representation was the information contained in the letter sent to the Union, combined with the public statements of the Minister, in May 2014, to the effect that existing approvals for Integrated Programs involving Drake courses would be honoured, though no such further approvals would be granted.

[170] As described by *Brown & Beatty* (above) and the cases cited therein, there are many different formulations for estoppel, involving as few as three and as many as nine elements. Often in cases of estoppel, there are questions about what was represented. Where the statements are verbal, there may be questions about what precise words were used, and what did they mean. No such challenge exists here. Given that there is no ambiguity in the representations made, I would reduce the elements to these four:

- a. A clear representation
- b. That was intended to be relied upon
- c. That was relied upon
- d. To the other party's detriment.

[171] In my opinion, each of the two separate estoppels arises on the facts of this case.

Estoppel 1

[172] It was represented in no uncertain terms to teachers who applied successfully to start an Integrated Program, that their programs were accepted by the OTC for certificate upgrading purposes.

[173] It cannot be seriously contended that this representation was not intended to be relied upon. Indeed, its entire premise was that this was the green light for the teacher to register and pay for courses and begin the work associated with the courses.

[174] Hundred of teachers relied on the individual representation made to them. They registered and paid for courses. They began the work required for the courses. To varying degrees they organized their lives in order to accommodate this new set of time commitments that they were undertaking.

[175] The detriment arises to varying degrees if these teachers cannot continue with their Integrated Program, as submitted. The evidence before me demonstrated the various kinds of detriment.

[176] In some cases, teachers have abandoned their Integrated Programs entirely. Others have struggled to find replacement courses. Others have finished their Integrated Program later than originally anticipated, thus also delaying their certificate upgrade. Others have taken courses that are more expensive, or which are less convenient and harder to work into their schedules and home lives.

[177] All of these effects have been detrimental. It does not matter that they are not the same for everyone. That fact would only become relevant on the question of remedy, which this Award does not address.

[178] I thus declare that the Employer is estopped from revoking or changing each and every pre-approval for an Integrated Program granted before the 2014 Moratorium. Indeed, the Employer's behaviour in 2014 was entirely consistent with a proper understanding of where it stood legally. Its own advisors, especially Paul Cantelo, were cautioning that it would be unfair to revoke approvals already granted. The February 2014 Moratorium and May 2014 statements to teachers, the Union and the public, were basically the Employer stating ***"from now on, we are going to insist on our legal rights, protecting those who relied to their detriment on our previously stated position."***

[179] It is no wonder that the Union did not grieve these decisions. These were decisions that the Employer was entitled to make, as they recognized the unfairness that would exist if they went any further.

[180] Had things stayed as they were, obviously, we would not be here.

Estoppel 2

[181] The second representation came in 2014, both with the February 19, 2014 Agreement and the May 6, 2014 statements to the media and to the Union.

[182] One need go no further than the Minister's letter of May 6, 2014 to the Union President, which stated "[i]n accordance with procedural fairness, pre-approvals granted on or before February 19th [2014] will be honoured."

[183] Teachers who had submitted Integrated Programs with Drake courses, were reassured that their approvals would be honoured. In practical terms, what that meant was that they could continue to take the one, two or three courses simultaneously that was their preferred pace, leaving some of the courses to be paid for as funds were available and time permitted. They had no reason to be concerned. Nothing would change. There was no urgency to register for courses that they were not ready to take.

[184] Those statements by the Minister were intended to be relied upon. One can hardly think otherwise.

[185] Mr. Kindred cited authority to the effect that the promises made in "political statements" cannot be enforced: *Canadian Taxpayers Federation v. Ontario (Minister of Finance)*, 2004 CanLII 48177 (ON SC) and *Giacomelli v. Canada (Attorney General)* (2010) 317 D.L.R. (4th) 528 (Ont. Div. Ct.).

[186] In my view, the statements made by the Minister to the Union and to the public on May 6, 2014 were not (mere) political statements. While I have no doubt that there was a political element to the decision, the Minister was primarily

acting in the capacity as the Employer, advising each of some 500 teachers individually that the pre-approvals granted for their Integrated Programs would be honoured as written, but also advising the rest of the teaching profession that no further Drake programs would be approved.

[187] This is a far cry from a political promise, made in the throes of a political campaign, to the effect that, if elected, I (or my government) will do such and such. The courts have declined to attempt to hold politicians to their word by force of injunction or judicial declaration, as to do so would be to fetter the statutory parliamentary duties of a legislature.

[188] The statements by the Minister in May 2014 were not political, in any meaningful sense of the word, but were the statements by the most senior person within the structure of the Employer, directed at individual teachers, advising them of how matters stood between them and the Employer. The evidence makes clear that a large number of teachers actually relied on this reassurance and were later totally caught off-guard by the March 3, 2015 decision.

[189] There is also no doubt, on the evidence before me, that many teachers suffered a detriment. This detriment was in addition to that incurred by relying on the original approval of the Integrated Programs. Between May 6, 2014 and March 3, 2015, teachers proceeded further into their Integrated Programs and spent more money. Some teachers may have only actually started their programs in early 2014 and could have bowed out without incurring any cost, had they known in advance that the Drake courses could not be continued.

[190] I accordingly find that the Employer is estopped from doing what it did on March 3, 2015, which was to add a stipulation to its earlier representations

regarding Drake, to the effect that courses not registered for before March 3, 2015 would not be allowed toward the Integrated Program.

Breaches of the Teachers' Agreement, Reasonableness and Fairness

[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.”

[194] It may be important to note that the decision was based, at least in part, on the proposition that rules with disciplinary consequences must be reasonable, and a narrow reading of *Irving Pulp* might suggest that it does not apply to a non-

disciplinary rule, such as that which exists here, but I believe the principle stands for the broader proposition.

[195] In Nova Scotia, there are several cases that pre-date *Irving Pulp* by about twenty years, which have been cited for the proposition that management rights must be exercised reasonably, or justly and not arbitrarily: see *Re NSGEU and Department of Human Resources (Ross)*, a March 3, 1997 decision of Professor Bruce Archibald, and specifically his review of the cases at p.17 of the award, including the Nova Scotia Court of Appeal's oft-cited decision *Nova Scotia Civil Service Commission v. Nova Scotia Government Employees Union*, 1993 CanLII 3230 (NS CA), per Freeman J.A.

[196] In any event, the language of Article 3.01 mandates reasonable action by the Employer in carrying out its functions under the Teachers' Agreement.

[197] The Union alleges that the Employer has violated various articles in the Teachers' Agreement, including Articles 3, 4, 5, 15, 16, 43, and 60. My focus here is on 15 and 16:

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.

16.01 A teacher shall apply to the Minister of Education and Early Childhood Development or delegated official for certification or change therein.

[198] Read together, these two articles enshrine a regime whereby the Minister (acting through the OTC) receives applications for a change in certification. The

OTC applies the GIC Regulations to determine whether a change is justified; i.e. whether the teacher has met the requirements. And those requirements may not be changed without the agreement of the Union. In other words, changes must be negotiated, not unilaterally imposed.

[199] It seems clear that the Minister's decision of March 3, 2015, amounted to a change in the requirements for a Teachers' Certificate. It is equally clear that the Minister imposed this change unilaterally and without any consultation with, let alone agreement of, the Union. That amounted to a breach of the Teachers' Agreement.

[200] The terms of Article 16 essentially bring the GIC Regulations into the Teachers' Agreement, as those regulations provide the detail for how certifications are applied for and granted. The process of granting certifications or approvals for plans such as Integrated Programs, is accordingly a collective agreement function, which must be exercised reasonably and fairly, as per Article 3.01 of the Teachers' Agreement, *Irving Pulp* and other case authority referred to above. Any unreasonable exercise of that power would amount to a breach of the Teachers' Agreement.

[201] Looking at the facts, was it reasonable for the Employer (exercising its functions regarding teacher certifications) to make promises by approving plans, only to take them back a year, two or three years later? Was it reasonable in 2014 to give reassurances that such pre-approved plans would be honoured, only to reverse position ten months later and disqualify those plans? These questions almost answer themselves. No. These actions were not reasonable.

[202] Fairness is a related concept. It might be said that what is unfair is necessarily unreasonable. So looking at it from the point of view of fairness, were these actions fair?

[203] Employer actions may be found to be unfair where the Employer has failed adequately to consider the impact of its actions on its employees. The Union has cited several cases standing for this proposition, including *Re NSGEU and Dept. of Transportation and Infrastructure Renewal* (unreported) August 4, 2009 (Ashley) and *Re CDHA and NSGEU* (unreported) February 20, 2015 (Blackburn). I am unwilling to find that the Employer failed to consider the interests of the affected teachers. I do believe they were aware of the potential impact, and as such decided to take a less extreme action than they might have. But this fact does not answer the question of whether the decision was fair.

[204] No doubt the decision of March 3, 2015 could have been more extreme. It could have cancelled Integrated Programs involving Drake entirely, including courses already registered for, or taken, or even worse, might have invalidated certifications already granted, where based on Drake courses. So, the actual decision of March 3, 2015 can be seen as more measured and far less draconian than the worst case scenarios. But the fact that it could have been worse does not make the decision fair or reasonable.

[205] There is no objective test for what is fair or reasonable; there is a subjective element to it. Reasonable people may differ on such a question, as it is often said. But there are many actions that most intelligent and informed people would agree are unfair or unreasonable, because they do not conform to our expectations of how a party such as this Employer should act. Simply put, it is not fair or reasonable for an Employer to change the rules in the middle of the

game, so to speak. It is not fair or reasonable when it breaks its very explicit promises to its employees.

[206] The OTC is clearly acting in the capacity of the Employer when it considers applications for Integrated Program or certificate upgrades. The OTC is the delegate of the Minister. It has professional staff whose function it is to receive applications and grant approvals. In so doing, it must know and apply the GIC Regulations and the Teachers' Agreement. The OTC is supposed to be the expert on teacher certification. It hits a false note when it argues that it has been wrongly applying the GIC Regulations for years, and now wishes to apply them correctly.

[207] The Union might concede that it would have been within the discretion of the OTC initially to question whether Drake University courses fit the requirements of the OTC Regulations, and had it come to that decision in 2008, teachers would have simply encountered a rule that the Employer was entitled to make, so long as it was in itself reasonable and not in conflict with the Teachers' Agreement.

[208] Employer rules cannot be changed without fair warning to those who might be affected by the rule change. This is part of the so-called KVP test, drawn from the venerable case of *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co.* (1965), 16 L.A.C. 73 (Robinson). The fourth rule in KVP prohibits an employer from relying on a rule that has not previously been brought to their attention: see *Brown & Beatty* at 4:1000.

[209] In the unreported 1989 case arbitrated by Professor Peter Darby, *Re Nova Scotia Nurses Union and Colchester Regional Hospital* (May 25, 1989), the

learned arbitrator ruled that the Employer could not change a policy which had the effect of negatively impacting an employee who was on a leave of absence at the time. At p. 14-15 he writes:

“Finally, in reference to requisite 4, I find that the “rule” was not brought to the attention of [the grievors] before the Employer applied it to them. The uncontested assertion by counsel for the Union - and other assertions of hers were contradicted - is that prior to the educational leaves granted to [the grievors] no nurse had her status changed to regular part time as a consequence of taking such a leave. In my opinion it is unfair and unreasonable to change the rules of the game part way through the game. Here both [grievors] had been on leave for four (4) months before being advised of the new policy.”

[210] The net effect was that the rule was declared inapplicable to the two affected grievors.

[211] The Employer might argue that changed circumstances may justify a change in a rule or policy. The difficulty with that argument is that truly nothing of any significance changed between May 6, 2014 and March 3, 2015. All of the concerns about Drake courses had been raised at MACTC meetings since at least 2011, and were actively being discussed at the highest levels within the Department in the lead up to the February 19, 2014 Moratorium. The potential financial impact on the public purse and on professional development funding, was known, or could have been known. I do not accept the notion that the new frameworks or other education policies promoting excellence in education, did anything to change the fundamentals of the situation. The Department’s own internal discussions, and the Minister’s very public promises in 2014, recognized how unfair it would be to revoke the approvals from teachers who had, in good

faith, relied upon the approvals given to them. How can it be said that what was unfair (by the Employer's own admission) in 2014 suddenly became fair in 2015?

[212] The Employer may argue that there was no real rule change because all of the teachers could still continue their Integrated Programs, just without Drake courses, but the truth is that they could not continue with the Integrated Program that they applied for, and were approved for, and these Integrated Programs did not necessarily make sense when parts of them were taken out, to be replaced with something else.

Conclusion

[213] In the result, for all of the foregoing reasons, the grievance is allowed. The Union has satisfied me that the Employer has violated the Teachers' Agreement by revoking pre-approvals for Integrated Programs (including Drake courses) which were issued before the Moratorium was announced on February 19, 2014. Further, and to the same practical effect, the Employer is estopped from taking the action that it did on March 3, 2015, by virtue of the earlier representations to teachers that their pre-approved plans (including Drake courses) would be allowed to continue and - all other requisites being met - qualify them for certification upgrades.

[214] As stipulated at the outset by the parties, this award deals with liability only, and the question of remedy is reserved. Should the parties be unable to agree on remedy, further hearings may be convened to present evidence and argument which will allow that issue to be fully explored.



Eric K. Slone, Arbitrator