

ARBITRATION AWARD

BETWEEN:

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 879
(hereinafter called the "Union")

AND:

HER MAJESTY THE QUEEN IN RIGHT OF NEWFOUNDLAND
AND LABRADOR AND THE ST. JOHN'S NURSING
HOME BOARD
(hereinafter called the "Employer")

GRIEVANCE:

Group Grievance - Remembrance Day

COUNSEL:

For the Union

Lionel G. Clarke

For the Employer

Chantelle MacDonald Newhook

ARBITRATOR:

James C. Oakley

The Arbitration hearing was held at St. John's on March 13, 2007. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The requirements of the grievance procedure were waived.
4. The Arbitrator would remain seized of the matter following publication of the Award in the event there was a question of interpretation or compensation arising from the Award.
5. The facts were not in dispute and were established by the consent exhibits and agreed facts as stated by counsel.

The following exhibits were entered at the hearing:

- Consent 1 - Employer's Book of Documents
- Consent 2 - Grievance Form dated November 13, 2002
- Consent 3 - Letter dated November 25, 2002 from the Union to the Administrator, Glenbrook Lodge, advising that the Union was submitting the grievance to arbitration
- Consent 4 - Collective Agreement between Her Majesty the Queen in Right of Newfoundland (represented by Treasury Board) and Newfoundland and Labrador Health Boards Association and Canadian Union of Public Employees and its Locals 488, 641, 879, 990, 1568, 1581, 1644, 2574, signed August 15, 2001, expires March 31, 2004
- Consent 5 - Collective Agreement between Her Majesty the Queen in Right of Newfoundland (represented by Treasury Board) and Newfoundland Hospital Association and Canadian Union of Public Employees, signed July 15, 1986, expires March 31, 1988, Article 20
- Consent 6 - Collective Agreement between Newfoundland Hospital and Nursing Home Association and Her Majesty the Queen in Right of Newfoundland (represented by Treasury Board) and Canadian Union of Public Employees, signed October 19, 1990, expires March 31, 1993, Article 20
- Consent 7 - Collective Agreement between Her Majesty the Queen in Right of Newfoundland (represented by Treasury Board) and Newfoundland and Labrador Health Care Association and Canadian Union of Public Employees, signed December 4, 1998, expires March 31, 2001, Article 20
- Consent 8 - *An Act to amend the Labour Standards Act, SNL 2001, c. 33*

Consent 9 - List of Government holidays for 2007

Nature of the Grievance

The Union grieves that the Employer violated Article 20.08 when it did not recognize a statutory holiday on November 11, 2002, following the addition of Remembrance Day to the list of holidays in the *Labour Standards Act*, RSNL 1990, c. L-2. The Employer denies any violation of the Collective Agreement.

Collective Agreement

The relevant articles of the Collective Agreement are as follows:

Article 20 Holidays

20.01 (a) Holidays

(i) Employees shall receive one (1) day's paid leave for each of the nine (9) holidays as follows:

- | | |
|---------------------------|---------------------------|
| (a) New Year's Day | (f) Labour Day |
| (b) Good Friday | (g) Thanksgiving Day |
| (c) Commonwealth Day | (h) Christmas Day |
| (d) Memorial Day | (i) Boxing Day |
| (e) Orangemen's Day | |

(ii) Employees shall receive seven point five (7.5) working hours paid leave for each of the nine (9) holidays as follows:

- (a) New Year's Day
 (b) Good Friday

- (c) Commonwealth Day
- (d) Memorial Day
- (e) Orangemen's Day
- (f) Labour Day
- (g) Thanksgiving Day
- (h) Christmas Day
- (i) Boxing Day

20.02 Compensation for Holiday Falling on Saturday

For the purpose of this Agreement when any of the aforementioned holiday falls on a Saturday and is not proclaimed as being observed on some other day, shift workers shall observe the day proclaimed as a holiday for calculation of benefits under Article 20 - Holidays. All other employees shall observe the following Monday as the holiday.

20.03 Compensation for Holidays Falling on Sunday

For the purpose of this Agreement, when any of the above noted holidays falls on a Sunday and is not proclaimed as being observed on some other day, shift workers shall observe the day proclaimed as a holiday for calculation of benefits under Article 20 - Holidays. All other employees shall observe the following Monday (or Tuesday, where the preceding Clause already applied to Monday) as the holiday.

20.04 Pay for Scheduled Work on Holidays

Employees who are scheduled to work on a designated holiday (clause 20.01) shall be paid at the rate of time and one-half (1 ½) and will be granted another day off within sixty days. If such time off cannot be granted within sixty (60) calendar days, then the employee will receive one day's regular pay in lieu or with mutual agreement between the employee and his/her supervisor the employee may receive time off in lieu.

20.05 Compensation for Holidays Falling on Scheduled Day Off

When any of the aforementioned holidays (clause 20.01) fall on employee's scheduled day off, the employee shall receive another day off with pay to be taken within sixty (60) calendar days. If such time off cannot be granted within sixty (60) calendar days, the employee will be paid one day's regular pay in lieu.

...
20.08 New Holidays

Should any new holidays not routinely scheduled, be specifically proclaimed by the provincial authorities, it shall be granted to employee's within the scope of this Agreement.

...

Legislation

The relevant sections of the *Labour Standards Act*, RSNL 1990, c. L-2 (the "LSA" or "*Labour Standards Act*") are as follows:

Meaning of "public holiday"

14. (1) In this Part, "public holiday" means
 - (a) New Year's Day;
 - (b) Good Friday;
 - (b.1) Remembrance Day;
 - (c) Memorial Day;
 - (d) Labour Day;
 - (e) Christmas Day; and
 - (f) other days that may be proclaimed by the Lieutenant-Governor in Council as a public holiday for the purpose of this *Act*.
- (2) A collective agreement within the meaning of the *Labour Relations Act* may make provision for holidays that differ from the public holidays described in subsection (1) and the holiday set out in the collective agreement shall be considered to be a public holiday for the purposes of applying this Part in respect of employers and employees bound by the collective agreement.
- (3) A provision in the collective agreement is void if it reduces or tends to reduce the number of public holidays in a year that an employee would be entitled to under this Part.

Public holidays

15. (1) An employer shall not require an employee to work under a contract of service on a public holiday.
- (2) An employer shall pay to an employee the wages to which the employee would be entitled for work performed during a public holiday notwithstanding that no work is performed by the employee during that public holiday.
- (3) The wages to which an employee is entitled under subsection (2) shall be calculated by multiplying the employee's hourly rate of pay by the average number of hours worked in a day by the employee in the 3 weeks immediately preceding the holiday.

The relevant sections of the *Interpretation Act*, RSNL 1990, c. I-19 are as follows:

Date of operation

7. Where an Act or an order in council, order, warrant, scheme, letters patent, rule, regulation or by-law made, granted or issued under a power conferred by an Act is expressed to come into operation on a particular day or on a date fixed by proclamation or otherwise, it shall be construed as coming into operation immediately on the expiration of the previous day, and where it is expressed to expire, lapse or otherwise cease to have effect on a particular day it shall be construed as ceasing to have effect immediately on the commencement of the following day.

...

Rule of construction

16. Every Act and every regulation and every provision of an Act or regulation shall be considered remedial and shall receive the liberal construction and interpretation that best ensures the attainment of the objects of the Act, regulation, or provision according to its true meaning.

Proclamations

18. Where the Lieutenant-Governor is authorized to do an act by proclamation, the proclamation means a proclamation issued under an order of the Lieutenant-Governor in Council but it is not necessary to mention in the

proclamation that it is issued under such an order.

- ...
 27. (1) In an Act or regulation the expression
- (u) "proclamation" means a proclamation under the Great Seal;

The relevant section of the *Shops Closing Act*, RSNL, 1990 c. S-15 is as follows:

Holidays

4. (1) For the purpose of this Act, the following days are holidays:
- (a) in all areas of the province,
- (i) Easter Sunday,
 - (ii) Labour Day,
 - (iii) Thanksgiving Day,
 - (iv) Remembrance Day (November 11),
 - (v) Christmas Day,
 - (vi) Boxing Day,
 - (vii) New Year's Day,
 - (viii) Good Friday,
 - (ix) Victoria Day, and
 - (x) Memorial Day or Canada Day (July 1);
- (b) in all areas of the province a day that may be proclaimed by the Lieutenant-Governor in Council to be observed as a public holiday, or as a day of general mourning;
- (c) in a particular municipality, other than the City of St. John's and the Town of Harbour Grace, 1 day in each year, which the council of that municipality may fix as a public holiday;
- (d) in the City of St. John's, the day in each year ultimately determined, in the manner prescribed by custom, for the St. John's Annual Regatta; and
- (e) in the Town of Harbour Grace, the day in each year ultimately determined, in the manner prescribed by custom, for the Harbour Grace Annual Regatta.
- (2) Victoria Day shall be celebrated in the province on the 1st Monday immediately preceding May 25.

- (3) Labour Day shall be celebrated in the province on the 1st Monday in September.
- (4) [Rep. by 2001 c13 s1]
- (5) Thanksgiving Day shall be celebrated on the Monday in October that is proclaimed by the Lieutenant-Governor in Council for the observation of that day.
- (6) [Rep. by 2001 c42 s41]

Agreed Facts

The members of the Canadian Union of Public Employees, Local 879 are employed at the S.A. Glenbrook Lodge, represented by the St. John's Nursing Home Board. Glenbrook Lodge did not recognize a holiday for Remembrance Day on November 11, 2002. The Union filed a grievance dated November 13, 2002 which stated "Employer violated Article 20.08 of the Collective Agreement when they refused to pay their employees the statutory holiday for Remembrance Day (November 11th)". The grievance requested that all employees be given full redress.

The Collective Agreement in effect at the time the grievance was signed on August 15, 2001 with an expiry date of March 31, 2004. Article 20.01 of the Collective Agreement lists 9 holidays for which employees shall receive one day's paid leave. The list of holidays does not include Remembrance Day. The Union relied on Article 20.08 headed "New Holidays" to support its claim that "Remembrance Day" was a "new holiday". The relevant articles of prior Collective Agreements had the same list of holidays and the same language in Article 20.08. The Collective Agreement signed

July 15, 1986, with expiry date March 31, 1988, contained language identical to Articles 20.01 (a) (i) and 20.08. The Collective Agreement signed October 19, 1990, with expiry date March 31, 1993, contained language identical to Articles 20.01 (a) (i) and 20.08. The Collective Agreement signed December 4, 1998, with expiry date March 31, 2003, contained language identical to Articles 20.01 (a) (i) and 20.08, and added the language identical to Article 20.01 (a) (ii).

The *Labour Standards Act* was amended by *An Act to Amend the Labour Standards Act*, SNL 2001, c. 33 as follows:

5. Subsection 14 (1) of the *Act* is amended by adding immediately after paragraph (b) the following:
 - (b.1) Remembrance Day;

Following the amendment, there were a total of 6 “public holidays” listed in Section 14 of the *Labour Standards Act*. The 5 holidays listed before the amendment, New Year’s Day, Good Friday, Memorial Day, Labour Day, and Christmas Day, were all included in the list of holidays in Article 20.01. Remembrance Day was not included in the list of holidays in Article 20.01.

An Act to Amend the Labour Standards Act, SNL 2001, c. 33, was assented to December 13, 2001. Section 44 stated that the *Act* would come into force on a day to be proclaimed by the Lieutenant Governor in Council. The said *Act* came into force on July 1, 2002 by proclamation published in the *Newfoundland and Labrador Gazette*. Therefore, Remembrance Day was added to the list of

holidays in the *Labour Standards Act* prior to November 11, 2002.

Sections 14 (2) and (3) of the *Labour Standards Act* state that a collective agreement can have different holidays so long as it does not have fewer holidays than the number required by the *LSA*. The parties agreed to a list of 9 holidays, which is more than the 6 holidays required by the *LSA*.

Union Submission

The Union submitted that Remembrance Day was a new holiday under Article 20.08. It was not “routinely scheduled” within the meaning of Article 20.08 because it was not included in the list of holidays in Article 20.01. “Routinely scheduled” meant scheduled by the Employer and did not mean scheduled by Government legislation. The Union referred to dictionary definitions of “routine” and “schedule” and submitted that “routinely scheduled” meant a repeated sequence of events or a plan of work. A holiday could be routinely scheduled on the same date every year or it could be routinely scheduled on a date that varied from year to year, such as Good Friday. There are 9 holidays scheduled on a particular day each year as agreed by the parties in Article 20.01. The Union negotiates for improved benefits, which includes more holidays. The Union anticipated various means under Article 20.08 by which members might receive additional holidays. One of those means would be an amendment to the *Labour Standards Act* to add a new holiday to the list of holidays in the statute. Article 20.08 is a residual provision that is contingent on any action that Government may take. Any new holiday added after August 15, 2001, the date of the signing of the Collective Agreement, would trigger the operation of Article 20.08. The Collective Agreement was

a collective agreement within the meaning of the *Labour Standards Act*. The same definition of collective agreement applied whether it was under the *Labour Relations Act*, RSNL 1990, c. L-1 or the *Public Service Collective Bargaining Act*, RSNL 1990, c. P-42. The parties could not contract out of the minimum standards in the *Labour Standards Act*. The Collective Agreement was drafted by laypersons not legislative draftspersons. The reference to a holiday that is “proclaimed by Provincial authorities” should be interpreted broadly as any public pronouncement by a Government authority. The dictionary definition of “proclaimed” meant announced or declared publicly by someone in authority. The definition of proclamation in the *Interpretation Act* did not limit the meaning in Article 20.08. The bringing into force of the amendment to the *Labour Standards Act* to add Remembrance Day was a proclamation. This was not an issue of a “floater” holiday or a comparison of the benefits in the Collective Agreement with the benefits under the *Labour Standards Act*. The effect of the Union’s position was that Remembrance Day becomes the 10th day on the list of holidays in Article 20.01. In support of its position, the Union referred to *CUPE, Local 1289 and City of St. John’s* [1999] Nfld. L.A.A. No. 3 (Oakley) (the “*City of St. John’s*” case) and *CUPE, Local 37 and Office Professional Employees International Union, Local 379* (1973) 4 L.A.C. (2d) 225 (Smith). The Union requested that the grievance be allowed, that compensation be awarded to the affected employees, and that the parties be directed to add Remembrance Day to the list of holidays in the Collective Agreement.

Employer Submission

The Employer submitted that Article 20.08 applied to days that are not routinely scheduled. Remembrance Day was added to the list of holidays in the *Labour Standards Act* and thereby

became one of the 6 holidays in the *LSA* that was routinely scheduled. The meaning of a holiday that is specifically “proclaimed” may be determined by reference to the *Labour Standards Act*. Section 14 (1) (f) refers to a proclamation of a holiday. In that context, a proclamation refers to a one time special occasion. A day that is proclaimed under the *Labour Standards Act* is not meant to be a permanent holiday. When Remembrance Day was added as a holiday in the *Labour Standards Act*, it was not a proclaimed holiday, but became a permanent holiday added to the list of holidays. By Section 14 (2) of the *Labour Standards Act*, unions and employers may negotiate collective agreements providing for different public holidays so long as the minimum standards are met. The parties can contract out of the *LSA* provided the entire scope of benefits meets or exceeds the benefits in the *LSA*. The Employer reviewed case authorities with respect to whether the provisions in a collective agreement met or exceeded minimum statutory requirements. In that regard, it was necessary to consider the totality of the benefits (see *Queen’s University v. Fraser* (1985) 19 D.L.R. (4th) 240 (Ont. C.J. Div.) and *National Steel Car Ltd. and U.S.W.A., Local 7135* (1990) 10 L.A.C. (4th) 353 (Marszewski) (“*National Steel*”). In *National Steel* the legislation was amended to add another holiday, but employees were not entitled to the holiday because the collective agreement provided greater overall benefits when compared to the benefits in the legislation. In this case the parties have selected 9 paid holidays. The parties could have selected Remembrance Day as one of the days on the list of holidays. However, the parties selected other days and agreed to benefits that exceeded the benefits in the legislation. The Collective Agreement benefit for holidays exceeded the minimum standards provided in the *Labour Standards Act*. The *Labour Standards Act* should be interpreted as remedial legislation by reason of Section 16 of the *Interpretation Act*. The Employer submitted that its position was supported by the *City of St. John’s* case, because in that case the

collective agreement referred to a holiday that was “declared” and did not refer to a holiday that was “proclaimed”. “Proclaimed” had a narrower meaning than “declared”. There was no holiday “proclaimed” for Remembrance Day within the meaning of Article 20.08. The Employer requested that the grievance be denied.

Considerations

The parties dispute whether Remembrance Day should be added to the list of holidays in the Collective Agreement. The dispute concerns the interpretation of Article 20.08 of the Collective Agreement.

When interpreting the Collective Agreement, the Arbitrator will consider the principles of interpretation discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, in particular, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150).

The authors of the Brown and Beatty text also discuss the use of statutes as an aid to interpretation (paragraph 2:2110) and the incorporation of a statute in a collective agreement by reference to the statute (paragraph 2:2120). There is authority for an arbitrator to interpret and apply a statute (See *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929). However, the case was not presented as a dispute

about whether the Employer violated the *Labour Standards Act* or whether the Union is entitled to a remedy based on enforcement of the statute.

The *Labour Standards Act* states in section 14 (2) and (3) that a collective agreement may provide for different holidays than the public holidays listed in the *LSA* provided the collective agreement does not reduce the total number of holidays. There has been no reduction of the number of holidays in the Collective Agreement to a number less than the 6 holidays required by the *Labour Standards Act*. As noted above, the issue does not arise as to whether the Union is entitled to a remedy based on enforcement of the *Labour Standards Act*. As a result, the case authorities, such as the *National Steel* case, that compares the totality of benefits provided in the collective agreement with the totality of benefits provided under employment standards legislation, are not applicable in this case.

The issue before the Arbitrator is the interpretation of Article 20.08, which states the Employer shall grant “new holidays . . . specifically proclaimed by the provincial authorities”. The parties have provided for the granting of a “new holiday” in the event that certain action is taken by the “provincial authorities”. In these circumstances, the issues to consider include use of a statute as an aid to interpretation and the incorporation of a statute by reference.

By amendment to the *Labour Standards Act* effective July 1, 2002, Remembrance Day was added to the list of public holidays. Remembrance Day is not included in the list of holidays in Article 20.01 (a) of the Collective Agreement which lists a total of 9 holidays. Having regard to Article 20.08, the Arbitrator will consider (1) whether Remembrance Day is a “new holiday not routinely scheduled”

and (2) whether Remembrance Day is a holiday “specifically proclaimed by the provincial authorities”.

Was Remembrance Day a new holiday not routinely scheduled? The ordinary meaning of “routinely scheduled” is an event that occurs regularly. This is consistent with dictionary definitions. The *Concise Oxford Dictionary* defines “routine” as “a regular course or procedure, an unvarying performance of certain acts” and defines “schedule” as “a list or plan of intended events, times, etc.”. The ordinary meaning is applicable within the context of holidays. The holidays listed in Article 20.01 are events that occur regularly. For example, New Years Day is an event that occurs regularly on January 1st every year, Labour Day is an event that occurs regularly on the first Monday in September every year. Some holidays occur regularly on a specific date, while other holidays occur regularly on dates determined by custom. Remembrance Day is an event that occurs regularly on November 11th every year. When Remembrance Day was added to the list of public holidays in Section 14 of the *Labour Standards Act*, it became an event that was routinely scheduled on that day every year. The Union submitted that “routinely scheduled” referred to actions by the Employer, not actions by the provincial authorities. However, Article 20.08 does not include the words “by the Employer” after the words “routinely scheduled”. Also, had the parties intended “routinely scheduled” to mean any holiday not included in the list of holidays in Article 20.01, then the parties could have used language to that effect. For example, the parties could have stated “any new holidays not listed in Article 20.01”. Within the context of Article 20.08 and Article 20 in its entirety, “routinely scheduled” is a reference to the routine scheduling of holidays by provincial authorities. When Remembrance Day was added to the list of holidays in the *Labour Standards Act*, it became a holiday regularly scheduled every year. Therefore, Remembrance Day became a

routinely scheduled holiday within the meaning of Article 20.08.

Was Remembrance Day specifically proclaimed by provincial authorities as a holiday within the meaning of Article 20.08? The Arbitrator refers to relevant statutes as an aid to the interpretation of the meaning of “proclaimed”. By section 14 (1)(f) of the *Labour Standards Act* a public holiday includes “other days that may be proclaimed by the Lieutenant Governor in Council as a public holiday”. There is a similar provision in Section 4 (1)(b) of the *Shops Closing Act*, which states that a holiday includes “a day that may be proclaimed by the Lieutenant Governor in Council to be observed as a public holiday, or as a day of general mourning”. Article 20.08 refers to action by “provincial authorities”. The parties agree that the reference to “provincial authorities” includes the provincial legislature and the provincial Lieutenant Governor in Council. When interpreting Article 20.08, the meaning of “proclamation” in the statutes may be used as an aid to interpret the meaning of “proclamation” in Article 20.08. The statutes provide that a day may be proclaimed as a public holiday by the Lieutenant Governor in Council. A day that is “proclaimed” as a holiday is not a day that is added to the list of holidays, but is a day proclaimed as a holiday for a specific event. The Arbitrator finds that “proclamation” in Article 20.08 means a day proclaimed as a holiday by the Lieutenant Governor in Council under the *Labour Standards Act* or the *Shops Closing Act*. Remembrance Day was not a holiday proclaimed by the Lieutenant Governor in Council within this meaning. Although the amendments to the *Labour Standards Act* came into effect by proclamation, published in the Newfoundland Gazette, the coming into force of legislative amendments does not mean that a day is proclaimed as a holiday within the meaning of Article 20.08.

The award in *CUPE, Local 1289 v. City of St. John's* (1999) Nfld. L.A.A. No. 3 (Oakley) may be distinguished on its facts from the present case. In that case, the collective agreement provided that a holiday would be “any day declared as a holiday by the Provincial Government and/or the City of St. John’s”. There was no reference in that language to a holiday being any day that was “not routinely scheduled”. Also, the collective agreement language referred to a day that was “declared” and not a day “proclaimed”. In the *City of St. John's* case, I considered that the word “proclaimed” had a specific meaning within the context of the *Labour Standards Act* and the *Shops Closing Act*, and because the parties had used the word “declared” they had not intended the provision to have the same meaning as the word “proclaimed”.

In summary, the addition of “Remembrance Day” to the list of holidays in the *Labour Standards Act*, does not have the effect that Remembrance Day is a holiday to be added to the list of holidays in Article 20.01. Remembrance Day was not a “new holiday” within the meaning of Article 20.08 because the effect of amending the *Labour Standards Act* was that Remembrance Day became a “routinely scheduled” holiday, and it was not a holiday that was “specifically proclaimed by the provincial authorities”.

Decision

For the reasons stated in the Award, the grievance is denied.

DATED this 3rd day of May, 2007.

James C. Oakley
Arbitrator