THE UNIVERSITY OF MANITOBA

AN EXAMINATION OF TENURE:
THE STATUS OF TENURED TEACHERS IN MANITOBA

BY

MICHAEL PETER CZUBOKA

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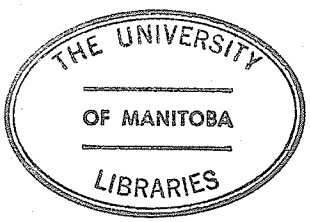

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The author would like to express his special appreciation for the constructive criticism, and perceptive suggestions received from his advisor, Dr. C. Bjarnason. He would also like to thank Professor A. Gregor for his helpful comments as a member of the writer's thesis committee. The author is also grateful to the other committee member, Professor H. E. May, for arousing and stimulating the author's original strong interest in school law. Thanks are also extended to Dennis Ringstrom, whose legal experience helped to explain and demonstrate many fundamental legal principles encountered in the Kaushal v. Agassiz case, and in subsequent legal cases. The author acknowledges the assistance and cooperation, over the past three years, of the superintendents and the Manitoba Association of School Superintendents; of the trustees and the Manitoba Association of School Trustees; of the Manitoba Teachers' Society; and of teachers, principals, secretary-treasurers, and others who were directly involved in the various arbitration hearings and court cases. He further appreciates the courteous help of library officials at the University of Manitoba, the Manitoba Department of Education, the Manitoba Teachers' Society, and others who furnished information and suggestions. The author wishes to sincerely thank Secretary-Treasurer C. L. Cherrey, Assistant Superintendent E. J. Hafichuk, and the Trustees of the Agassiz School Division for their encouragement and support during the Kaushal v. Agassiz case, and during the period when this thesis was being written. And finally, the author wishes to thank Mrs. Mary-Lou Szajewski for her special efforts in typing this thesis manuscript.

ABSTRACT

This thesis defines the nature of "teacher tenure" in Manitoba, and attempts to show how it differs, in some respects, from the features of tenure in some of the other Canadian provinces and the United States. The author concludes that tenure is often misunderstood in Manitoba. He reached this conclusion from information based on the awards and decisions of the arbitration awards and the courts of Manitoba during the period 1965-1975. There is evidence that tenure is not always comprehended by Manitobans at this time. There is also some added confusion, in this regard, because the methods of handling teacher tenure by boards of arbitration and the courts of Manitoba are somewhat different from the other Canadian provinces and the United States. "Due process", for example, is a U.S. concept, and yet many Canadian educators seem to assume that it has equal Canadian connotations. When tenure articles and publications enter Manitoba from other provinces and states, assumptions are sometimes made that all of the ideas in these articles also apply in Manitoba.

The author secured his preliminary documentation from Manitoba's school divisions and superintendents. The writer also conducted informal discussions with Manitoba's superintendents, trustees, principals, teachers, various officials and citizens on the matter of teacher tenure. In addition, some useful conversations were conducted with staff officers of the Manitoba Teachers' Society. The author also interviewed a number of people who had been personally involved in the various arbitration hearings and court cases. And finally, the writer frequently consulted with the legal

counsel of the Agassiz School Division.

In an attempt to discover the general principles which relate to teacher tenure in Manitoba, this thesis studies, in depth, arbitration and court cases on tenure which occurred in Manitoba during the period 1965-1975, with some additional references to the years prior to 1965-1975. The literature on teacher tenure in the U.S. and Canada is reviewed to uncover the basic principles of tenure outside of Manitoba. In many respects, Canada's school systems have developed in a manner similar to that of the U.S. Consequently, the U.S. experience on tenure is highly relevant to the Canadian situation. The author attempts to discuss the interrelationships between the Canadian and U.S. principles as they relate to the concept of teacher tenure. An extensive study of the Manitoba case of Kaushal v. Agassiz School Division is used to examine and analyse many of the tenure issues that arise in both Canada and the U.S. This thesis, therefore, is a quasi-legal study, which concerns itself with a number of concepts developed by precedents and legislation inasmuch as they relate to teacher tenure in Manitoba.

Some significant recommendations with regard to Manitoba's teacher tenure as made by this study are the following:

1. Teachers: In order to avoid "tenure and dismissal difficulties", teachers should immediately seek professional and legal assistance from the M.T.S. and elsewhere; they should request frequent written and formal reports on their teaching effectiveness from their administrators; they should try to improve or maintain their teaching effectiveness throughout their careers; they should go to their principals, superintendents and school boards to discuss grievances whenever necessary; and they should

constantly and periodically upgrade their qualifications.

2. Superintendents and Principals: In order to avoid "tenure and dismissal difficulties", superintendents and principals should maintain accurate and well-documented evidence concerning teacher efficiency; they should obtain competent legal advice whenever a serious tenure problem arises; they should ensure that official transcripts are made of all arbitration hearings; and they should carefully review all of the principles of tenure and dismissal of teachers whenever possible involvements become apparent.

3. School Boards: In order to avoid "tenure and dismissal difficulties", school boards should insist that their senior administrators provide them with accurate information, adequate and acceptable evidence, and explanations of correct dismissal procedures; they should always remember that they must act in "good faith" and without any prejudicial motives; they should insist on hearing the teacher's side of the story by directing him to come to a school board meeting; they should be certain that the reasons for dismissing a teacher are legally and morally acceptable to themselves as well as to arbitration boards and the courts; and they should give "reasons" for dismissals to teachers in writing, by registered mail, and in strict accordance with the time limits and other provisions as outlined in the Public Schools Act.

Some significant recommendations with regard to tenure as made in this study are the following:

1. There should be mandatory retraining for all teachers and administrators to renew their "tenure and permanent certification" at certain fixed intervals such as every five or ten years.

2. All teachers, superintendents, principals and school boards should be extremely careful with regard to the formation of boards of arbitration. These boards must be "judicious, impartial, and above reproach". Great care must be taken in selecting their members.

3. Provincial educational authorities and organizations must be prepared to settle the issue of teacher dismissals due to declining student enrollments. In other words, on what basis should teachers be given preference for retention on staffs? Should seniority, for instance, be the only factor?

4. Teachers are not overwhelmingly in favour of tenure in its present form in Manitoba. A substantial number of teachers, as this study shows, would be prepared to accept tenure in blocks of five or ten years. Serious consideration should therefore be given to changing the present tenure laws. Superintendents, trustees and secretary-treasurers would mainly agree with this recommendation.

5. Some superintendents, principals and school boards do not use proper procedures in the release of both tenured and non-tenured teachers. Teachers often make many technical and legal errors in defending themselves. As a result, the releasing authorities or dismissed teachers encounter many unnecessary difficulties. Information on "tenure and the just and proper release of teachers" is available and should be used in conjunction with the assistance of competent and professional legal advisors.

6. The whole system of carrying out arbitration proceedings with regard to teacher tenure should be studied and compared, in detail, as it is done in other Canadian provinces and U.S. states. Perhaps other

educational jurisdictions have features in their systems which should be used in Manitoba. In any event, it should not be assumed that Manitoba's present method of dealing with teacher tenure cannot be improved upon in some ways.

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CHAPTER I

INTRODUCTION TO TEACHER TENURE IN MANITOBA

A. Introduction

The purpose of this thesis is to study the concept of "teacher tenure" in Manitoba, as well as the means by which "tenured teachers" receive "due process" in arbitration hearings and the courts.

In Manitoba, a teacher is said to obtain "tenure" after serving a probationary period of two years. It is commonly believed or assumed that teachers may be dismissed, without legal recourse, at any time during their first two years of teaching service. After two years of service, teachers are said to "have tenure", and are able to contest any cases of dismissal before arbitration boards and the courts.

"Teacher tenure" may be defined as a body of rights enacted by law, and which ensure that a teacher cannot be dismissed except under the circumstances which the law provides. In other words, school boards, under tenure legislation, cannot fire tenured teachers unless boards comply with the provisions of tenure statutes.

School officials, trustees and teachers generally realize that releasing a tenured teacher can be an embarrassing, complicated, difficult and costly procedure. For these reasons, teachers and school boards appear to be anxious to avoid arbitration hearings and court cases.

Arbitration "hearings" are held by "boards of arbitration". A board of arbitration consists of three persons. In teacher tenure cases, one member is chosen by the school board and another member is chosen by the Manitoba Teachers' Society and/or the teacher involved. These two members then mutually agree upon a chairman, who becomes the third and final member

of the board of arbitration. In the case of a tie, the chairman is required to decide the issue. It is also the duty of the chairman to write up a formal "award" or decision in a case. Boards of arbitration are set up in accordance with Manitoba's Arbitration Act of 1970.

Arbitration hearings are believed to be embarrassing because they delve into the past and uncover the habits, procedures, errors and omissions of teachers, superintendents and school boards. Witnesses are cross-examined under oath, and everything that educators do, or fail to do, is scrutinized in arbitration boards or courts by persons who are frequently alien to the school system. In a sense, tenure cases are like divorce proceedings, inasmuch as everyone's "dirty laundry" is washed in public. Even the "winning" side loses something in the process.

In spite of the above problems, arbitration hearings and court cases are sometimes necessary. Professional educators seem to have an obvious interest in seeing that the teaching profession attempts to exclude incompetent persons. This thesis, therefore, will attempt to show that most teachers are not opposed to the dismissal of tenured colleagues if such releases are carried out by using ethical, legal and clearly understood procedures. Consequently, the general principles discussed here should be of equal importance to all of Manitoba's teachers, principals, superintendents and trustees.

B. Significance of this Study

On the basis of available records, it appears that there has never been any comprehensive study of arbitration hearings and court cases in Manitoba insofar as the release of tenured teachers is concerned. W. R. Gordon wrote a Master of Education thesis at the University of Manitoba

in 1969 on arbitration boards. Gordon, however, studied salary disputes and not teacher dismissals.[1]

There is a great deal of U.S. literature in this regard, but comparatively little from the other Canadian provinces. It should be noted, however, that Canadian "tenured teacher" cases seldom reach the legal arenas. In fact, problems are usually settled before they even reach the arbitration stage. Thus McCurdy says that in "Canada, American cases in particular are often cited inasmuch as tenure cases in Canada rarely reach the courts."[2] He also notes that while "...American court decisions have no binding effect in Canada, they have on occasion been considered in Canadian school cases."[3]

It is therefore believed that an historical review of recent arbitration and court cases on tenure will be of professional value to teachers, principals, superintendents and school boards in Manitoba.

U.S. teacher tenure cases are pertinent in Canada because U.S. school systems are like Canada's school systems. In many respects, the American influence has resulted in similar structural and organizational patterns. As a result, a similar legal relationship exists between teachers and their school boards in the two countries. However, U.S. tenure cases must not be cited as precedents in Canadian courts. American cases may be used for study and comparison but they have no binding effect in Canada, as McCurdy says.

It is, of course, obvious that the U.S., partly because of its much greater population, generates many more court cases on tenure than does

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[1] William Robert Gordon, A Study of the Relationships between the Awards of Boards of Arbitration Appointed to Arbitrate Teacher Salary Disputes in Manitoba and Certain Characteristics of the Arbiters (Unpublished M.Ed. Thesis, University of Manitoba, 1969).

[2] S. G. McCurdy, The Legal Status of the Canadian Teacher (Toronto: The MacMillan Company of Canada, 1968), p. 68.

[3] Ibid., p. 92.

Canada. One annual U.S. publication, for instance, issues a compilation of cases called "The Teacher's Day in Court". A review of five of these publications for the years 1966 to 1970, shows that there were about 172 "tenure" court cases in the U.S. or about 34 each year during this period.[4]

In what way are "arbitration hearings" related to court cases? In Manitoba, arbitration boards are quasi-judicial tribunals that act like courts. Boards of arbitration were originally established because it was felt that they would be cheaper than courts and also effective vehicles for dealing with tenured teacher cases.

It is important to study pertinent court cases, both in Canada and the U.S., because they demonstrate the legal principles upon which tenured teachers can or cannot be dismissed. In accordance with precedents set in the courts, there are certain acceptable reasons for releasing a tenured teacher. Thus, using examples from the U.S. experience, it has been established that tenured teachers may be released for not living up to reasonable conditions of leaves-of-absence; for refusing to cooperate with classroom supervisors; for out-of-school behavior which is socially unacceptable in the community; and for refusing to up-grade teaching qualifications by means of in-service training. Conversely, it seems that tenured teachers may not be released for wearing beards; for being "controversial" persons; for engaging in private homosexual acts; or for refusing to carry out extracurricular duties which are not directly related to the school program.

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[4] The Teacher's Day in Court (Washington, D.C.: National Education Association; "Review of 1966", "Review of 1967", "Review of 1968", "Review of 1969" and "Review of 1970").

At the present time, there appears to be a great deal of confu about the nature of "teacher tenure" in Manitoba, the extent of its existence, and the degree to which it affords protection to Manitoba's teachers.

Information about tenure is obviously important to teachers, and to school boards and school administrators in the Province. It would be clearly advantageous to all concerned if "teacher tenure" were defined and explained in a Manitoba context. This thesis will attempt to accomplish this goal.

It should also be noted that the legal procedures used in Manitoba, with respect to tenured teachers, are different from those of other provinces and the United States. In most of Canada, for example, boards of reference, or boards of arbitration, are binding on both parties. In Manitoba, however, awards made by boards of arbitration are subject to appeal under the provisions of the Arbitration Act. In other words, arbitration awards in Manitoba may go to the Manitoba Court of Appeal for further decisions. Teacher tenure cases also could go to the Supreme Court of Canada, but this as yet has never happened in Manitoba.

There are several other differences in Manitoba's system of providing "due process" to tenured teachers. Therefore, another purpose of this research is to outline the basic steps in tenure disputes and to observe how they differ from other jurisdictions.

C. A Statement of the Problem

This thesis will attempt to deal with the "problem of teacher tenure in Manitoba". The literature on tenure shows that many professional educators, as well as lay persons, do not fully understand the concept of tenure. This writer will try to demonstrate that tenure is a problem

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in Manitoba because it does not appear to have been clearly defined by the Manitoba legislature and courts.

It often appears that difficulties initially occur because many school boards do not even try to dismiss incompetent teachers. Attempts at dismissal, in other cases, seem to be clumsy and ineffective.

By examining, in depth, all of the tenure cases which occured in Manitoba during the past decade, it is hoped that a pattern of problems and solutions will become evident. These cases differ in some respects, but are similar in others. An understanding of the basic principles of tenure, as shown in these cases, should therefore assist trustees, teachers, principals and superintendents in avoiding the kinds of problems which seem to occur.

A teacher with two years of continuous service with a school division has the right to request an "arbitration hearing" in accordance with Section 281 (3) of the Public Schools Act. "The issue before the arbitration board shall be whether or not the reason given by the school board for terminating the agreement constitutes cause for terminating the agreement." If the Arbitration Board rules that a school board does not show sufficient cause, the teacher is reinstated and his contract remains in force.

However, if a school board and a teacher go through the trauma of an arbitration hearing, it is often only a matter of time and salary before they separate. The teacher may be vindicated, and his contract remain in force, but it may be impractical for him to teach under the jurisdiction of a school board that obviously does not want him. On the other hand, there are cases of teachers who have remained with their

school boards for at least several years after winning arbitration cases.[5] This situation will probably be increasingly prevalent as teaching positions become more scarce. In the era of teacher "shortages" teachers moved easily and readily, but at present, with fewer jobs available, they are more likely to remain. Thus tenure assumes a new significance.

The Kopchuk v. St. Boniface School Division case of 1972 helped, in some ways, to clarify and define the nature of teacher "tenure" in Manitoba. Michael Kopchuk, a St. Boniface Industrial Arts teacher, was dismissed because he could not teach in French. A subsequent Arbitration Board and the Manitoba Court of Appeal both decided that St. Boniface was justified in releasing Mr. Kopchuk on the basis of the language of instruction alone.

The Kopchuk case seemed to show that teachers in Manitoba do not have unlimited tenure. Teachers, however, have the right to "due process"; that is, they may appeal to an arbitration hearing after two years of consecutive service with a school division.

The Manitoba Court of Appeal ruled that it was not necessary to prove, in the Kopchuk case, that cause "be construed in the sense of 'good cause' or 'sufficient cause'." Moreover, the Court denied that Mr. Kopchuk had to be released by "...something stemming from the teacher such as misconduct or incompetence or the like on his part..." He was released simply because he could not teach Industrial Arts in French. The judges

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[5]The case of Jenkins v. St. James Assiniboia School Division No. 2 is a case in point. See section "B" of Chapter IV in this regard. The Division tried to release Mr. Jenkins in 1969, but he won his case and, as of 1975, still remains on the staff of the Division.

of the Manitoba Court of Appeal decided that they could not "...by judicial decision grant teachers tenure. That can only be done by agreement or by the legislature and the legislature has not done so."

The Kopchuk decision, however, raised as many problems as it solved. The Court said, for example, that the legislature "has not" granted tenure to teachers in Manitoba. This statement seemed to create additional confusion in the Province.[6]

"Tenure" is a relative thing and will always be subject to some interpretation and change. Judge Roger P. Kerans, in explaining a similar situation in Alberta, has written as follows concerning Alberta's tenure for teachers:

> "Teachers in Alberta understand that they have "tenure". I have the impression that this is thought a good thing, much to be desired and much to be fought for, but perhaps little understood. I understand tenure as some form or another of job security. As perfect job security or absolute tenure is unknown, I believe it would be more correct to talk, not about tenure, but how much tenure."[7]

It is interesting to note that Alberta's tenure is apparently no stronger than Manitoba's as revealed in the Kopchuk case. Thus, in the same lecture, Judge Kerans stated that in Alberta the Board of Reference "...has found that it is reasonable for a school board to terminate a teacher who is simply not needed." Redundant teachers may be dismissed even if they are not at fault in any way.

This thesis will try to outline the general situations that teachers, school boards and superintendents may face when release proceedings take

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[6] Kopchuk v. St. Boniface School Division No. 4 (Manitoba Court of Appeal, December, 1972).

[7] Taken from a lecture presented by Judge Roger P. Kerans for a "Leadership Course for School Principals" at Edmonton, Alberta, in 1972.

place. It would be dangerous, however, to pretend that it is an all-inclusive guide to every situation. Teachers or boards concerned should immediately secure competent "court room" lawyers as soon as the possibility of an arbitration hearing becomes evident.

A fair number of arbitration hearings and court cases related to the release of tenured teachers have occurred in Manitoba in the period 1965-1975. As a result, this study will ask and try to answer a number of relevant and important questions:

(1) How and why did these cases happen?

(2) Could they have been avoided?

(3) How could they have been resolved more effectively?

(4) What problems were not satisfactorily concluded?

(5) What general principles can be established as a result of these experiences?

(6) Are there negative consequences because the morale of other teachers suffers as a result of these cases?

(7) What are the attitudes of Manitoba's superintendents regarding tenure?

D. A Statement of Theoretical Assumptions

It is assumed that an historical description and analysis of recent tenure cases in Manitoba will reveal a pattern, as well as certain general principles, which will be useful in dealing with future problems of a similar nature.

It appears that the concept of "tenure" in Manitoba has never been clearly defined. This thesis will try to establish whether Manitoba teachers have "absolute tenure" or simply the right to "due process"

or "natural justice". If teachers have absolute tenure, then they may be dismissed only for just cause such as incompetence or gross neglect. On the other hand, if teachers have "limited tenure", they may be fired simply because their services are no longer required as a result of declining student enrollments or some other special circumstances.

By studying teacher tenure in the U.S. and the Prairie Provinces, it is assumed that a number of general principles will become evident, and that these can be properly applied to the Manitoba setting.

E. A Statement of Delimitations

This thesis will restrict itself to all arbitration and court tenure cases which occurred in Manitoba during the period 1965-1975. Most of the data for these cases was obtained from the formally written "awards" as prepared by the chairmen of the arbitration boards, or by various judges in the Courts. The author was personally involved in Kaushal v. Agassiz School Division, and was therefore able to provide a great deal of additional detail for this case.

The period of 1965-1975 is considered to be particularly significant because it was during these years that the large "unitary" divisions replaced the small districts. This thesis, therefore, confines itself to a study of teacher tenure in Manitoba during the first decade of the "unitary" era.

A few references will be made to arbitration situations prior to 1965, but these will only be mentioned for purposes of historical comparison. The 1939 case of Wright v. San Antonio School District will be described in some detail in Chapter VII because this case relates directly to the concept of releasing teachers under "emergency" circumstances.

F. A Statement of Limitations

The personal involvement of the author in Kaushal v. Agassiz School Division may inevitably reveal some biases in the discussion of this case. The writer also recognizes that his present position as a superintendent of schools may tend to flavour his writing with some administrative prejudices.

All of the extensive literature on teacher tenure was obviously not included. However, a substantial number of books, articles and other materials were considered from a variety of sources. The author continued to review the literature on tenure until it appeared that no new principles or ideas were being found. It was also necessary to rely heavily on U.S. material.

G. Scope of the Study: Developmental Plan

The second chapter of this thesis will deal with a cross-section of U.S. literature on tenure, together with additional material from the Prairie Provinces. Alberta and Saskatchewan will be studied because they appear to have teaching environments similar to those of Manitoba.

As previously mentioned, the U.S. literature in tenure is, in many ways, relevant to the Canadian experience. The second chapter of this thesis therefore will review a substantial amount of U.S. tenure material. Here the author will, for the most part, mainly cover the more recent work on U.S. tenure. Although this section will not discuss all available U.S. material, it nevertheless will deal with sufficient to consider the basic concepts of teacher tenure.

The third chapter of the study will briefly explain the research procedures and definitions being used.

The fourth chapter will include the following arbitration hearings and court cases: Jenkins v. St. James-Assiniboia; Gavaga v. River East; Weir v. St. Boniface; Skublen v. Lakeshore; Mesman v. Western; Kopchuk v. St. Boniface; and Kowalchuk v. Rolling River.

Chapter V will concentrate on the Manitoba case of Kaushal v. Agassiz This will be a detailed and comprehensive study of a single case from its beginnings and up to the court stage. It will deal with steps to arbitration, the actual arbitration process, arguments before the Manitoba Court of Appeal, and considerations for the Supreme Court.

The sixth chapter will consider aspects of "arbitration and the courts". Items discussed will relate to issues which were raised by the study of cases in the previous chapters. Included will be a study of the attitudes of teachers towards tenure; the attitudes of Manitoba's superintendents towards tenure, relations with the M.T.S. and related problems in communications; the use of reports on teacher efficiency; and stages from arbitration hearings to the courts.

The seventh and concluding chapter will summarize the findings of this thesis. It will also make specific recommendations with regard to the "status of tenured teachers in Manitoba", and will possibly pose questions of significance for Manitoba's educators.

CHAPTER II

A REVIEW OF THE LITERATURE ON TEACHER TENURE

A. The Issue of Teacher Tenure in the United States

Much of the available literature on tenure inevitably comes from the United States. This material, however, is highly relevant to Canadian school systems because they have evolved, in many respects, along American lines. Canadian departments of education, school boards, teachers' associations, school districts and administrative structures have all developed, historically, in a pattern which closely resembles that of the U.S. S. G. McCurdy reinforces this idea of a similarity in his comments upon "The Legal Status of the Teacher Regarding Tenure and Termination of Contract". He says that American cases "...in particular are cited, inasmuch as tenure cases in Canada rarely reach the courts."[1]

The literature on tenure in both countries may be divided into two general categories. One category includes the tenure of university teachers, and the other the tenure of public school teachers. This thesis does not primarily concern itself with the tenure of university teachers or professors, but it should be noted, in passing, that the principles of tenure are similar in both cases. However, one way of distinguishing between the two is to say that university communities have traditionally been involved in the "publish or perish" controversy, an argument which does not greatly pertain to public school teachers.

At the public school level of the debate, Dr. Robert R. Sherman recently wrote "a critical examination" on "What is Tenure?" He says

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[1] S. G. McCurdy, Ibid., p. 68.

that teachers are generally in favour of tenure, while administrators are often opposed to it, perhaps because they themselves rarely have tenure. Sherman explains that "...tenure during the 1970's is under attack. The attack against tenure", he says, "undoubtedly has its impetus in the criticism of higher education, but it has reached the elementary and secondary schools as well and it is an attack against the whole idea of tenure."[2] He admits that tenure has flaws and that some problems are created as a result of it. He maintains, however, that "...the major criticisms of tenure are generally without evidence, and there is no reason to believe that changing from tenure to some other system would benefit education generally, let alone teachers." In any event, says Sherman, "...tenure is not a simple concept or process...But tenure is at least the right to hold a job after competence has been demonstrated, unless it can be proven through due process that the teacher is no longer worthy of that trust."[3] Sherman also maintains that many of the reasons for attacking tenure are not supported by facts.

William B. Castetter, in his Administering the School Personnel Program, devotes a lengthy section to the topic of tenure. Castetter says that "...in its finest intent, tenure is a necessary safeguard to provide continuity of employment for the competent, to prevent unjustified dismissals, and to maintain staff stability and academic security in the interests of carrying out the proper function of the school system."

The salient features of the tenure system, according to Castetter, are

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[2] Robert S. Sherman, What is Tenure? (Washington, D.C.: American Federation of Teachers), p. 2.

[3] Ibid., p. 59.

the following: (1) completing a specified probationary period; (2) automatic tenure at the end of the probationary period; (3) an orderly system for dismissing teachers; (4) giving proper notice of intent to terminate services; (5) a hearing before the local school board; and (6) the right to appeal an adverse decision made by a school board. But these features, says Castetter, or even the general concept of tenure, are not well-understood by the public.

The objectives of tenure, in Castetter's view, are the following: (1) giving teachers security during satisfactory service; (2) protecting teachers against unjust dismissals; (3) encouraging academic freedom; (4) maintaining staff stability; (5) ensuring personal freedom for teachers outside of their schools; and (6) preventing incompetent teachers from obtaining permanent employment.

Castetter says that tenured teachers must always be given a written notice of intent to dismiss, as well as a statement of the charges. A hearing before a school board should: "(1) provide opportunity for the accused teacher to be heard in his own defence; (2) permit the accused to have counsel and to present witnesses; and (3) have a stenographic record prepared in case of appeal."[4]

Lee O. Garber, in an article entitled "Causes and Procedures for Dismissing a Tenure Teacher", mentions the following key points: (1) In dealing with its teachers, a school board must always act in good faith. (2) A school board may dismiss a tenure teacher "for reasons of economy

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[4]William B. Castetter, Administering the School Personnel Program (New York: The MacMillan Company, 1962), p. 339.

or when his services are no longer required because of curricular or program changes." (3) In cases where laws permit school boards to dismiss teachers for "good and just cause", the boards have wide latitude in giving reasons for dismissal, but they may not act arbitrarily or capriciously. (4) On the other hand, where statutes set out a list of specific causes for dismissal, the courts generally hold that boards cannot introduce new or additional causes. (5) The courts usually insist upon a fairly rigid compliance with statutory procedures. In other words, both school boards and teachers may lose cases as a result of legal technicalities.[5]

William S. Elsbree and E. Edmund Reutter, Jr. give a detailed description of tenure in their book on Staff Personnel in the Public Schools. Elsbree and Reutter devote a lengthy section to tenure procedures. In this passage they deal with important topics such as notices of charges, hearings, causes for dismissals, and appeals. They recommend that charges be put into writing and that they be sent by registered mail. They point out that most tenure statutes contain time limitations, which must be strictly followed. Elsbree and Reutter mention that hearings "...provided for tenure teachers must be conducted fairly, according to common law precedents and 'due process', even if the law does not detail the 'procedure'." Accused teachers may have legal counsels at their hearings. Similarly, a superintendent and his school board should have a competent lawyer. The above authors state that there is a wide variety of causes for dismissal among the various jurisdictions. The reasons, they say, typically include

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[5]Lee O. Garber, Causes and Procedures for Dismissing a Tenure Teacher (Washington, D.C.: The Nation's Schools, December, 1956), pp. 73 and 74.

some of the following: "incompetency, immorality, inefficiency, insubordination, neglect of duty, justifiable decrease in number of teaching positions, physical unfitness, failure to obey school laws and board rules, and unprofessional conduct."[6] In another pertinent passage Elsbree and Reutter point out that even the probationary periods often cause problems. Many studies, they point out, have shown that non-renewal of contracts tend to cluster towards the ends of the probationary periods.

T. M. Stinnett, in his book on Professional Problems of Teachers, devotes his tenth chapter to the topic of tenure. Stinnett defines tenure "...as the right of a teacher, after a period of successful probationary experience, to hold his position for as long a time as he renders efficient service."[7] He says that a "continuing contract" gives a kind of rudimentary tenure, inasmuch as it is an agreement that remains in effect for an indefinite period. Actual "tenure", however, means something more than a continuing contract. In Stinnett's terms, tenure means that dismissed teachers are entitled to proper hearings, as well as appeals to the courts. Stinnett's "arguments against tenure" is a more comprehensive section than those found in most other books. He lists his arguments under four main headings: "1. Tenure is unnecessary...2. Tenure Interferes with Authority...3. Poor Teachers Are Blanketed In...(and)...4. Tenure Kills the Incentive to Improve..."

Stinnett, however, dismisses the argument about "tenure being unnecessary"

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[6] William S. Elsbree and E. Edmund Reutter, Jr., Staff Personnel in the Public Schools (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), p. 194.

[7] T. M. Stinnett, Professional Problems of Teachers (New York: The MacMillan Company, 1968), p. 215.

by citing actual cases in which competent teachers were dismissed because of prejudice or favouritism at the local level. He also says that teachers with unpopular political views are sometimes unjustly dismissed. Religion and race can be other factors. Tenure is therefore a necessary protection. In a further argument, Stinnett denies that tenure "interferes with authority". Superintendents still have the powers to dismiss teachers, but they must do so in an orderly, logical and legal way.

"Poor teachers are blanketed in" means that some people feel that tenure works against the welfare of children because it is hard to remove poor teachers after the probationary period. Stinnett agrees. Usually, he says "...it is very difficult to prove inefficiency. There almost has to be over neglect of duty or insubordination...it is virtually impossible to prove inefficiency in classroom activity. So it is commonly conceded that poor teachers are more difficult to remove if they have attained tenure status."[8]

Stinnett acknowledges that the most serious charge against tenure is that it "stills the incentive to improve." In other words, some teachers undoubtedly become lazy once they receive the protection of tenure. Stinnett suggests, however, that the answer to the self-improvement of teachers may be found outside of the area of tenure. Greater professionalism, for example, may be the answer.

James A. Van Zwoll, in his book on School Personnel Administration, describes "Tenure and Job Stability". He explains this heading by saying that an "...objective of tenure provisions is to bring about the stabiliz-

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[8]Ibid., p. 219.

ation of job-holding that permits the school system to capitalize upon the competencies, enhanced by experience, of its employees."[9] Van Zwoll notes that, contrary to expressed fears, tenure laws have not resulted in lower teacher competency. He cites the work of R. W. Holmstedt, for example, who found that tenured teachers made greater professional efforts to improve themselves.[10]

A very significant publication with regard to teacher tenure is M. Chester Nolte's School Law in Action: 101 Key Decisions with Guidelines for School Administrators.[11] Included in this book are ten teacher tenure cases which are considered to be legal landmarks:

1. In Liddicoat v. Kenosha City Board of Education, 117 N.W. 2d 369 (Wisc. 1962), the courts decided that a school board can legally restrict a tenure teacher's leave-of-absence by stipulating, in this case, that he could not engage in gainful employment while on leave.

2. In Kersey v. Maine Consolidated School District No. 10, 394 P. 2d 201 (Ariz. 1964), the Appellate Court decided that teachers may not be dismissed because they became "centres of controversy" in their communities.

3. In Peace v. Millcreek Township School District, 195 A. 2d 104 (Pa. 1963), the Appellate Court decided that school boards have the right to assign teachers to extracurricular activities where the work to be done has some reasonable relationship to the ongoing school program, but where this is not present, the teacher may legally refuse the assignment in question.

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[9] James A. Van Zwoll, School Personnel Administration (New York: Appleton-Century-Crofts, 1964), p. 300.

[10] Ibid., p. 308.

[11] M. Chester Nolte, School Law in Action: 101 Key Decisions with Guidelines for School Administrators (West Nyack, N.Y.: Parker Publishing Company, Inc., 1972), pp. 72-99 inclusive.

4. In Finot v. Pasadena City Board of Education, 58 Cal. Rptr. 520 (Calif. 1967), the Courts decided that male teachers may wear beards, providing they are not "disruptive" or do not disturb the educational process.

5. In Blanchet v. Vermilion Parish School Board, 220 So. 2d 534 (La. 1969), on the other hand, the Louisiana Court of Appeals upheld a school board regulation requiring male teachers to wear neckties. This Louisiana court also stated that tenured teachers may be disciplined or discharged for failure to comply with reasonable school board regulations.

6. In Tichenor v. Orleans Parish School Board, 144 So. 2d 603 (La. 1962), the Courts decided a tenured teacher was "incompetent" and could be dismissed because he refused to allow school board officials into his classroom. This case demonstrated that although incompetency is not clearly defined in the law, it means in relative terms, that a teacher is "unfit, disqualified, unable to teach, lacking in some capacity to teach, or has some other disabling qualities." Each situation must be considered on its own merits.

7. In Morrison v. State Board of Education, 82 Cal. Rptr. 175 (Calif. 1969), the California Supreme Court ruled that homosexual behavior, although not universally condoned, cannot be used as a basis for dismissal of a public school teacher unless there is some evidence that it affects his teaching effectiveness.

8. In Horosko v. Mount Pleasant Township School District, 6 A. 2d 866 (Pa. 1939), the Appellate Court upheld the dismissal of a teacher because she had demonstrated incompetency by conduct which was embarrassing to a school board. Specifically, in this case, the dismissed teacher had acted as a

barmaid in her spare time. Conduct which goes against community mores may therefore form the basis for dismissal on the grounds of incompetency. It should be noted, however, that this case was decided in 1939, and that new standards now prevail.

9. In Rehberg v. Board of Education of Melvindall, 77 N.W. 2d 131 (Mich. 1956), the Michigan Supreme Court held that a school board had not given a dismissal teacher adequate "due process", and therefore reinstated the teacher to his position. School boards must not act hastily, or in an arbitrary or capricious manner. If school boards do not carry out proper "due process", they run the risk of having their decisions set aside by the courts.

10. And finally, Nolte cites the case of Last v. Board of Education, 185 N.E. 2d 282 (Ill. 1962). Here an Appellate Court ruled that a school board has the power to require professional growth for a tenured teacher, so long as the requirements are reasonable. If teachers refuse to take in-service or professional courses, they may be released.

The Encyclopedia of Educational Research, in an article on the "tenure of teachers" observes that an "...anomaly of teacher dismissal in that greater liberality is often displayed by parents and jury members, when cases reach the court stage, toward idiosyncratic teacher behavior than shown by school boards and even the courts."[12] The Encyclopedia further notes that many problems could be overcome if school boards followed appropriate procedures when dismissing teachers. However,

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[12]"Tenure of Teachers", Encyclopedia of Educational Research (New York: 1969), p. 1459.

despite all of the well-documented suggestions and advice, many tenure cases go to court every year in the U.S. The Encyclopedia also says that the teaching profession must do more to inform the public that tenure is "not a crutch for the incompetent", but a right only if earned. It believes that internal policing is required within the teaching profession.

The March 4, 1972 edition of the Saturday Review magazine contains an article by Myron Lieberman entitled: "Why Teachers Will Oppose Tenure Laws". Lieberman, who directs the Teacher Leadership Program of the University of the City of New York, believes that "...negotiated contracts will give better protection."[13] Lieberman suggests that tenure laws should be changed to encourage contractual rather than legislative protection for teachers. Paradoxically, he says, school administrators have the most to fear from the repeal of tenure laws, because they would then not be able to rationalize their failure in firing incompetent teachers.

As of 1972, Lieberman says, only four of the U.S. states were without tenure laws, and thirty-eight of them had tenure on a statewide basis. The main problem, he claims, is that these laws do not give uniformly good protection. Lieberman is particularly concerned about the plight of non-tenured teachers, who have the unlimited right to due process in only eighteen of the states.

The fundamental and very important question, as Lieberman sees it, is whether or not all teachers have the right to due process. If, in fact,

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[13]Myron Lieberman, "Why Teachers Will Oppose Tenure Laws" (Saturday Review Magazine, March 4, 1972), p. 55.

probationary teachers and tenured teachers all have the same basic rights under the U.S. Constitution, then what is the purpose of tenure legislation? Or, as Lieberman puts it, "...would the legislatures have provided tenure after a probationary period if they had known that school boards could not have an unlimited right to terminate teachers before they achieved tenure?"[14]

Lieberman believes, in essence, that tenure laws do not give adequate protection to teachers. He points out that legislatures sometime make the probationary period unreasonably long, as in the case of New York with its five year period. He argues that all teachers under the U.S. Constitution, have the right to due process, and that tenure laws should be modified or repealed. Under these circumstances it should be the task of the teachers' organizations to negotiate for adequate security in their collective agreements.

Richard S. Vacca and J. Stephen O'Brien published an article entitled: "Teacher Tenure: What Does It Mean?" in the March, 1970 edition of the Peabody Journal of Education.[15] They identify the following five "legal tenets" concerning teacher tenure: 1. Tenure does not give teachers a right to permanent positions. 2. School Boards have wide discretionary powers in dismissing tenured teachers for "good cause". 3. Tenure guarantees the teacher's right to procedural due process. 4. Tenured teachers cannot be removed for arbitrary or unreasonable reasons; and 5. In tenure proceedings the burden of proof always rests on the board of education.

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[14] Ibid., p. 56.

[15] S. Richard Vacca and Stephen J. O'Brien, "Teacher Tenure: What Does It Mean?" (Peabody Journal of Education, Nashville, Tennessee, March, 1970).

The Education Yearbook for 1972-73 has published an article on "The Tenure Debate" by Carol H. Shulman. The author deals with tenure at the university level, but discusses some issues pertinent to the public schools. The "deadwood problem" for example, is serious at all levels. It involves "...either an unproductive faculty member...or a teacher whose subject area is no longer in demand."[16]

More recent developments in the United States have shown a definite trend towards the rights of individual citizens and teachers. Thus, Time magazine, on February 26, 1973, published an article entitled "Towards Greater Fairness for All", which was essentially a description of modern trends in "due process". In essence, "due process" means that a citizen gets a fair hearing with:

> "...a right to tell his story and pick whatever holes he can in the opposing version. Often the requirements of that hearing include the right to cross-examine, the right to counsel, and the right to have the decision rendered by a neutral official...Related to the new legal attitude is an increasingly liberal interpretation of an individual's liberty and property."

The above article in Time also mentions that in 1972:

> "...the Supreme Court...indicated that public schools may not summarily dismiss a teacher who has held his job on a seemingly permanent basis, even if he does not have formal tenure. A Brooklyn court has gone further, ruling that though a non-tenured teacher did get a hearing before being dismissed, the dismissal was still illegal because the teacher had been denied a lawyer and a chance to cross-examine hostile witnesses."[17]

On February 24, 1975, Newsweek magazine published an article entitled "Private Lives", which described the present "...welter of confusion and

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[16] Carol H. Shulman, "The Tenure Debate" (Education Yearbook, MacMillan and Co. and Free Press, 1972-73), p. 320.

[17] "Towards Greater Fairness for All" (Time, February 26, 1973), p. 44.

lawsuite over whether or not a teacher may be fired for being any (or possibly even all) of the following: a political activist, an unwed parent, a nude pinup model, a Communist or even an acknowledged prostitute." The article then goes on to describe the exotic life styles of several teachers.

This Newsweek article also cites a federal court decision which ordered two Mississippi school districts to pay $106,000 for a case involving discrimination in the hiring and firing of black teachers. "Private Lives" describes, in some detail, the case of Lou Zivkovich, a male physical education teacher who posed nude in the July, 1974 edition of Playgirl magazine. Most of his students, said Newsweek, "...support Zivkovich, but School Superintendent William Tarr contends that, at least in public, a teacher should be a proper model for students to pattern themselves after. But in the end, Tarr concedes, popular support for Zivkovich will probably get him his job back. 'The kids think he's a neat guy.' "[18]

In commenting upon this case, the California Teachers' Association general counsel, Peter T. Galiano, said that "...we don't believe that this type of conduct is grounds for dismissal. He's in the centerfold, and we're going to defend him."[19] The same article explains that the California Teachers' Association has the most comprehensive group-legal service in the United States.

The March, 1975 edition of Time magazine reported the victory of

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[18]"Private Lives" (Newsweek, February 24, 1975), p. 87.

[19]"A Lawyer for Every Teacher" (Learning Magazine, February, 1975), p. 10.

Zivkovitch. In early March, 1975 a "...state appeals panel admonished his for a 'mistake in judgment', but ruled that he could not be fired. Zivkovich, who received $1,000 plus an expenses-paid weekend in Hawaii for his extracurricular modeling job, called the ruling a 'national victory' for the rights of teachers."[20]

An informative article in the March, 1975 edition of Learning magazine is entitled: "Your (Teachers') Rights If You're Dismissed", by Earl Hoffmann. Here Hoffman defines "due process" as a "...protection provided by the 14th Amendment of the Constitution...(it is) simply the procedures government agencies, including school systems, must follow to guarantee fairness." As defined by the U.S. Supreme Court in Perry v. Sindermann, a landmark 1972 teacher dismissal case, the purpose of a hearing is to assure that a teacher has had a chance to be "informed of the grounds for his non-retention, and challenge their sufficiency."

In another important decision called Board of Regents v. Roth, the U.S. Supreme Court in 1972 held that tenured teachers always have the right to a hearing, and that a non-tenured teacher has such rights when he is "...dismissed during the term of his contract." The Roth decision also said that the following safeguards should be provided in teacher dismissal cases:

> "1. the opportunity to be heard at a meaningful time and in a meaningful manner; 2. timely and adequate notice detailing the reasons for the proposed termination; 3. the opportunity to confront and cross-examine witnesses; 4. the opportunity to present arguments and evidence orally, as well as in writing; 5. the right to retain an attorney; 6. a final decision resting solely on the legal rules and evidence adduced at the hearing;

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[20] "People" (Time, March 17, 1975).

7. a statement of the decision-maker of the reasons for the determination and of the evidence relied on; 8. an impartial decision-maker."[21]

B. The Issue of Teacher Tenure in Alberta, Saskatchewan and Manitoba

In the light of modern emphasis on "due process" and "individual rights", it is interesting to consider the views of the "Manitoba School Trustees Association" in the early 1960's. This organization was the forerunner of the present "Manitoba Association of School Trustees". In a May, 1962 edition of a publication called "Manitoba School Trustees' Association News and Views", the following advice was given:

"TERMINATION OF TEACHERS' CONTRACTS

At this time of the year many school boards are deciding whether they should renew their teacher's contracts. Terminating a contract can be very difficult. In order to avoid unnecessary trouble, (investigations, arbitrations, etc.) as well as ill-will between teachers and trustees, may we recommend that school boards observe the following rules:

-Terminating a teacher's contract should be envisaged only for serious reasons (one good reason is sufficient) when it is in the best interests of the school.

-Complaints from parents should be considered only when given in writing and signed. In this case Sec. 263, sub-sec. (8) should be complied with.

-As much as possible the Board should be unanimous.

-Public support for such a move is desirable, but not essential...trustees may be aware of certain facts that in consideration of the teacher's reputation forbids them from being divulged.

-When the decision is made, but before it is recorded in the minute book, and before it is made public (discretion on the part of each board member is essential at this point) the teacher should be called before the Board, advised of their (sic) decision and requested to resign.

-If the teacher refuses to resign, the decision to terminate the contract should simply be recorded in the minutes as a motion, and without comment, ex: "Moved that Mr. Doe's contract be terminated on the ..... day of ..... 19..."

-The teacher concerned should be officially advised by

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[21] Earl Hoffman, "Your Rights if You're Dismissed" (Learning Magazine, March, 1975), p. 57.

registered mail. The letter should only contain a certified copy of the resolution. Do not include the names of the mover and seconder. It should state, "this hereby constitutes notice of termination of contract."

-Teacher(s) may request the board to give reasons for terminating the agreement. The Public Schools Act does not require boards to give reasons in writing.

-If a teacher has been in the employ of the board two years or less (before the contract is renewed a third time) section 6 of contract (form 6) shall apply. In this case there is no time limit for giving reasons and the teacher is without remedy.

-If reasons have to be given in writing, IT IS STRONGLY RECOMMENDED THAT THE BOARD GET IN TOUCH WITH THE MSTA OFFICE BEFORE PUTTING ANYTHING ON PAPER.

-For further information and assistance do not hesitate to call on the Manitoba School Trustees' Association."[22]

It should be noted, in particular, that the Manitoba Trustees in 1962 apparently felt that a decision on teacher dismissal should be made without the teacher being present or making a case of any kind. When (or after) the decision is made...the teacher should be called before the board, advised of their (sic) decision and requested to resign." The U.S. Supreme Court of 1972 would certainly frown upon this advice. In such a case, the accused teacher would not be heard at a meaningful time and in a meaningful manner; he would not have a counsel; he would not have the opportunity to confront and cross-examine witnesses; he could not present arguments and evidence orally, or in writing; nor be assured that the final decision would be based upon clear and logical legal reasons by an impartial decision-maker.[23] He would be denied due process. It should be remembered, however, that these are U.S. concepts, and do not apply in Canada.

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[22]"News and Views" (Manitoba School Trustees' Association, Volume 2, Number 2, May 1, 1962).

[23]The above is a summary of "safeguards" as outlined by the U.S. Supreme Court in 1972 in Board of Regents v. Roth.

Norman Bernstein is a teachers' professional welfare coordinator in Quebec. Writing in the February, 1973 edition of The Sentinel, he takes a position which is similar to that of Myron Lieberman of the University of the City of New York. "The right to due process", Bernstein says, "...should, in all justice, be accorded to all teachers...The right to one's day in court is enshrined everywhere except in Education Legislation." In other words, all teachers should have the right to due process, whether they have tenure or not.[24]

Tenure has also become an issue in Saskatchewan during the 1970's. D. J. Dibski, in the February-March, 1973 edition of The Administrative Scene, comments upon the "Tombs Report", which put forth the view that matters relating to teacher tenure in Saskatchewan should fall within the context of collective bargaining. This, of course, is also the view of Myron Lieberman, whose position was discussed earlier. Dibski, however, rejects the idea that it "...is really necessary to throw out what we have now and fight the tenure battle all over again." He continues by asking: "Is it not admittedly more sensible to retain the existing statutes, identify points of inadequacy in them and then proceed through legislative amendments to improve the legal provisions governing tenure?"[25]

A month later, in April, 1973, the Canadian Press reported on a Saskatchewan Board of Reference tenure case between Teacher Margaret Gordon and the Moosomin School Unit. Mrs. Gordon had been fired in October, 1971, for distributing copies of the Vancouver underground newspaper,

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[24]Norman Bernstein, "Tenure?" (The Sentinel, February, 1973), p. 5.

[25]D. J. Dibski, "Teacher Tenure" (The Administrative Scene, Newsletter of the Saskatchewan Council of Educational Administration, Volume 5, Number 5, February-March, 1975).

Georgia Straight. However, the Board of Reference found that her action "was not tantamount to gross misconduct", and the Moosomin School Unit was ordered to pay Mrs. Gordon a total of $5,476 in back salary.[26]

Alberta has always been a very active province insofar as teacher tenure is concerned. During 1971-72, for example, there were twenty-one appeals to the Board of Reference. Of these, three were withdrawn by boards. Eight were withdrawn by teachers. A number of others were settled by means of various compromises. In the end, eight cases proceeded to a hearing, of which five were won by boards and three were won by teachers.[27]

Judge Roger P. Kerans, of the Alberta Board of Reference, raised an important issue relating to tenure in an address to a "Leadership Course for School Principals" held in Edmonton in 1972. He noted that the Alberta Board of Reference has "...found that it is reasonable for a school board to terminate a teacher who is simply not needed...The great difficulty in this area is: Who decides when a teacher is not needed? Who decides which teacher shall go when there is a surplus of staff?"[28]

Alberta's Worth Commission makes a recommendation with regard to "permanent certification" which would, in effect, amend present teacher tenure laws. Worth suggests that to "...avoid giving incompetent teachers lifetime exposure to learners, and to encourage all teachers to keep themselves up-to-date, permanent certification should be abolished. Instead, teaching certificates ought to be issued for a certain term, 10 years being

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[26]"Moosomin Must Pay Teacher" (Winnipeg Free Press, April 26, 1973; Canadian Press).

[27]Letter from A.S.T.A. Solicitor, Judy Nemirsky, to Peter Coleman of M.A.S.T., dated September 21, 1972.

[28]Roger P. Kerans, Judge, op. cit.

the proposed period. The present policy, whereby entrants to the teaching force must serve a two year probationary period...should be abandoned..."[29]

C. K. Brown and F. Enns wrote an excellent historical account on "The Development of Teacher Tenure Legislation in Alberta" in 1966. In many respects, the same problems and situations developed in Alberta as in the American States. There are, however, some points in this article which are worthy of special attention. Brown and Enns observe that some Alberta school boards used unethical practices in hiring teachers. Boards, for example, sometimes accepted several teachers for the same position, waited for confirmations from the teachers, and then chose the most desirable candidates.

At about this time a decision in the English courts demonstrated that a teacher dismissal could be reversed by the courts if it could be shown that the school board had acted in bad faith or from corrupt motives. This decision was a version of the British concept on "natural justice". Short v. Poole Corporation (1926) therefore anticipated similar later findings in the U.S. courts. However, the Alberta Teachers' Association neglected to pursue the case and many Alberta school boards continued in their questionable hiring practices.[30]

In the March, 1968 edition of The Alberta School Trustee, school boards were warned that "...a spur-of-the-moment decision to terminate based on parents' or pupils' complaints or a second-hand assessment of

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[29] Walter H. Worth, Worth Report (Edmonton, Alberta: Queen's Printer for Alberta), p. 245.

[30] C. K. Brown and F. Enns, "The Development of Teacher Tenure Legislation in Alberta" (The Alberta Journal of Educational Research, Volume XII, Number 1, Edmonton, Alberta, March, 1966), p. 46.

an official, and lacking sufficient evidence that the board has acted conscientiously in obtaining all of the relevant facts, will not impress an investigator favourably."[31] This same article observes that the "... two most common mistakes of school boards in attempting to terminate teacher contracts are: (1) a failure to review carefully the available evidence and (2) a failure to have proper inquiries made by its qualified officials so as to obtain evidence sufficient to support a termination of a teacher contract.[32] In Alberta and Saskatchewan, the publications of the school trustees and teachers' associations seem to carry on a running battle. A favourite topic, in addition to salary negotiations, is that of teacher tenure and terminations of contracts.

The Manitoba Teacher also takes a fairly militant stand on the above topics. However, the publications of the Manitoba Association of School Trustees rarely challenge the M.T.S. In September, 1971, for instance, the Manitoba Teacher revealed that "...during the past year hundreds of teachers had been assisted with personnel and contract problems. Over 100 had problems serious enough to rate special files...The most common type of contract problem involves the dismissal of a 'tenure' teacher, that is, a teacher who has been employed by a school division for more than two years."[33]

In the May-June, 1971 edition of the Manitoba Teacher, General Secretary Emerson Arnett of the Manitoba Teachers' Society published a

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[31] "Termination of a Teacher's Contract" (The Alberta School Trustee, Volume 38, Number 1, March, 1968), p. 8.

[32] Ibid., p. 9.

[33] "Society Protects Contracts--Tenure Rights of Teachers" (Manitoba Teacher, Volume 50, Number 1, September, 1971).

very informative article called: "Tenure Holds Good Teachers". Arnett points out that an amendment to the Public Schools Act in 1956 provided tenure rights to Manitoba teachers for the first time. Before 1956, school boards could dismiss teachers without giving reasons regardless of how well or how long they had served.

Arnett believes that Winnipeg teachers had a kind of security of tenure because they lived in a relatively impersonal environment. Rural teachers, on the other hand, were subject to gossip, rumour and unfair dismissals. From a historical point of view, Arnett says that in "... the fifteen years since the tenure clause was passed (1956-1971), an average of less than one arbitration case per year has occurred. Of these cases, several have been won by school boards, including the only one to be tried in the 1970-71 school year. In the same period, there must have been literally hundreds of dismissals, a number of which involved tenure teachers..." Another interesting observation by Arnett is that an "...award of a board of arbitration tends to be a sort of certificate of incompetence for the losing party which, in turn, tends to keep tenure cases to a minimum."[34]

In January, 1973, the Manitoba Teacher spoke out in a despondent manner over the decision of the Appeal Court of Manitoba which upheld the release of Michael Kopchuk by the St. Boniface School Division. Mr. Kopchuk was a tenured teacher and was released because he could not teach Industrial Arts in French. In an article entitled "Alas Poor Tenure—

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[34]"Tenure Holds Good Teachers" (Manitoba Teacher, Volume 9, Number 11, May-June, 1971).

Will We Ever Know You Well?", the Manitoba Teacher asked how there could be tenure when, "...according to the Court, there is no 'tenure'?...The Kopchuk affair tells us there is a serious flaw in present 'tenure' legislation."[35]

In actual fact, the Manitoba Court of Appeal seemed to define "tenure" as the right of teachers to hold their positions except for something stemming from themselves such as misconduct or incompetence. But tenure is a relative thing, and this review of the literature, together with the basic principles of tenure, show that, in most jurisdictions, tenured teachers can also be dismissed simply because they are no longer needed. In other words, tenured teachers may be dismissed for causes which are beyond their control. A teacher may be highly competent and efficient, but he can still lose his job through circumstances beyond his power.

A simple illustration of the above idea is to imagine a school division which, for some reason, lost all of its school children. This loss of pupils would not be the fault of the tenured teachers, but they would all nevertheless lose their jobs. During an era of constant expansion of school populations no one seemed to consider the possibility that an eventual decline in numbers would take place. The day is probably coming, however, when many school divisions will have to release some of their tenured teachers simply because their classes of children no longer exist.

In May, 1973, Emerson Arnett published: "The Myth of the Unfireable

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[35]"Alas Poor Tenure--Will We Ever Know You Well?" (Manitoba Teacher, Volume 51, Number 5, January, 1973).

Teacher" in the Manitoba Teacher. Arnett says, in this article, that:

> "...one gets the impression that teacher incompetency is a major problem across the province and that school boards know of many teachers who should be dismissed but cannot do so because of the 'tenure' that teachers have after more than two years on staff. Nothing could be further from the truth than this myth of the unfireable teacher. Any board which believes teachers to be incompetent but does not fire them brings into question its own competence. To adapt an only saying, behind every incompetent teacher is an incompetent school board."

Later in the same article, Arnett seems to fall into the same condition of uncertainty as the Manitoba Court of Appeal. "Let's end this talk about 'tenure' teachers who cannot be fired", he says. Teachers have no tenure (sic). They have only the right to a fair trial before being found guilty."[36]

In summary, therefore, the Manitoba Court of Appeal, in the Kopchuk case, perhaps erroneously, declared that: "We cannot by judicial decision grant teachers tenure. That can only be done by agreement or by the legislature and the legislature has not done so." In fact, Manitoba teachers have a reasonably typical kind of tenure. In this regard, Judge Roger P. Kerans of the Alberta Board of Reference said that: "I understand tenure as some form or another of job security. As perfect job security or absolute tenure is unknown, I believe it would be more correct to talk, not about tenure, but about how much tenure."[37]

At the March, 1975 Annual Convention of the Manitoba Association of School Trustees, the following resolution was proposed by the school boards of the south central region:

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[36]Emerson Arnett, "The Myth of the Unfireable Teacher" (Manitoba Teacher, Volume 51, Number 9, May, 1973).

[37]Roger P. Kerans, Judge, op. cit.

> "Be It Resolved that the Manitoba Association of School Trustees recommend to the Minister of Education that the Public Schools Act be amended to provide tenure to teachers in blocks of 3 to 5 years after their second year of training, with some provisions for appeal from the teacher."

The sponsors of the above resolution explained it by saying that:

> "...the interpretation of the present tenure laws, as they apply to teachers, seem to make it exceedingly difficult to dismiss a teacher once they (sic) have acquired tenure and unlimited tenure rights tend to foster a false sense of security in some teachers. Also, some teachers on unlimited tenure are prone to be less conscientious and consequently some students have to suffer.
>
> Limited tenure would be conducive to a better negotiating atmosphere both in dealing with teacher welfare and educational matters and the review of a teacher's performance from time to time for tenure purposes is beneficial for the employee, employer, and the students."

The M.A.S.T. Resolutions Committee, however, recommended non-concurrence with the above resolution on the grounds that agreement would re-open the entire "tripartite" pact on tenure, strikes and binding arbitration as agreed to by the Government, teachers and school boards in 1956. This resolution was passed in spite of the recommendation of the Resolutions Committee.[38]

It can be safely concluded, in any event, that the subject of "teacher tenure" stirs up many emotions in the minds of teachers in Manitoba, as elsewhere. Thus, in the March, 1975 edition of the Manitoba Teacher, appeared the following humourous, well-written and perhaps partly-true description of the state of teacher tenure in Manitoba:

> "The teachers of Wonderland should be happy and secure because they have tenure. As everybody knows, this means they can't be fired. On the other hand, they can be forced to give up their jobs but that, Dear Reader, is not at all the same

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[38] M.A.S.T. Resolutions (M.A.S.T. Annual Convention, Winnipeg Inn, March, 1975).

thing as being fired. Forcing a teacher to voluntarily resign can be done in a number of ways, including the Tower of Babel Method, the Daniel in the Lions' Den Method, the Patience of Job Method, and the Mess of Potage (sic) Method.

The Tower of Babel Method is the one whereby the administration finds out what language a teacher cannot speak and then insists that he uses that as the language of instruction. Of course, he will not be able to do so and the board, with great reluctance, will have to release him. The Daniel in the Lions' Den Method is the one that puts the teacher in the class with the worst discipline problem in the school. Before long, the board, with great reluctance, will have to release him because of his inability to maintain discipline. The Patience of Job Method demands that an administrator sits in the teacher's room every day, non-stop for a week or two recording every move the teacher makes. On the 'Infinite Number of Monkeys' principle, the teacher is bound to make a mistake some day, and--you guessed it--the board, with great reluctance, will have to release him. Much simpler and more popular is the Mess of Potage (sic) Method. The 'off-with-his-head' fellow simply points out to the teacher that if he resigns of his own free will, he will be given an excellent reference. If he doesn't, one of the other methods will be applied. In Wonderland, most teachers are wonderfully cooperative."[39]

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[39]John Collins, "Education in Wonderland" (Manitoba Teacher, Volume 53, Number 7, March, 1975).

CHAPTER III

RESEARCH PROCEDURES AND DEFINITIONS CONCERNING TEACHER TENURE IN MANITOBA

A. Research Procedures

The "awards" of the arbitration boards and "decisions" of the courts were obtained directly from the various school divisions involved. Although complete background material was not available except in Kaushal v. Agassiz School Division, these awards and decisions were assumed to be historically and legally accurate because they were written with reference to the original evidence. The Chairman of the Arbitration Board in Jenkins v. St. James-Assiniboia, for example, personally heard evidence given by the Solicitor for the Division, the Superintendent of Schools, the Secretary-Treasurer, the Principal of Assiniboine School, and from Joseph J. Jenkins. On the basis of these appearances of witnesses, and on the evidence of various documents such as inspectors' reports, the Chairman wrote up an "award" which exonerated Mr. Jenkins and ruled that his contract was to "...continue in force and effect."

The author of this thesis did additional research, in some cases, because the written awards lacked sufficient details. The formats used by the various writers differed considerably, and some neglected to include essential items of information. In these instances discussions with the parties concerned generally resulted in further data.

A "questionnaire on teacher tenure arbitration hearings" was used to obtain information from Manitoba's school divisions with regard to "potential tenured teacher problems during the past five years." This questionnaire was completed by the superintendents of all school divisions

and districts in Manitoba. It was then used as an instrument to reveal the attitudes of superintendents, as well as their relationships with the Manitoba Teachers' Society in regard to tenured teacher problems.

The author of this thesis also surveyed most of the teachers of the Agassiz School Division to obtain their attitudes towards the concept of tenure.

B. Definitions

The following definitions are of special relevance to this investigation:

1. Arbitration Act: Manitoba's Arbitration Act of 1970 details the legal requirements respecting the holding of boards of arbitration for tenure and other cases. It also provides for redresses via the Manitoba Court of Appeal.

2. Arbitration Boards: Arbitration "hearings" are held by "boards of arbitration". A board of arbitration consists of three persons. In teacher tenure cases, one member is chosen by the school board and another member is chosen by the Manitoba Teachers' Society and/or the teacher involved. These two members then mutually agree upon a chairman, who becomes the third and final member of the board of arbitration. In the case of a tie, the chairman is required to decide the issue by casting the deciding vote. It is also the duty of the chairman to write up a formal "award" or decision in a case.

3. Awards: An award is the decision reached by a board of arbitration with regard to a teacher tenure case which it has considered. The chairman writes the award, but the other two members of the board may submit dissenting written opinions if they wish.

4. Burden of Proof: In arbitration cases it is the school division which must prove that its actions were justified. In the case of Kaushal v. Agassiz School Division, for example, the Chairman of the Arbitration Board noted that: "...the onus is on the Division to prove that it was justified in its actions in this case. It is important to note, however, that the burden of proof on the employer is not the criminal standard of proof 'beyond a reasonable doubt', but is the civil standard of the 'balance of probabilities.' "[1]

5. Common Law: The "common law" of England, the United States and Canada is derived from the ancient, "judge-made" law of England, the Mother Country. The principles of the common law may be applied to teacher tenure. Some authorities in tenure argue, for example, that the right to "due process" should be given to all teachers, and not just those with tenure. The common law outlines the basic relationships of employees with employers. The common law continues to develop year after year. It is based on custom and precedent.

6. Continuing Contract: A "continuing contract" is one which goes on automatically, year after year, without any kind of formal renewal. "Term contracts", on the other hand, are written for specific periods such as three years or five years. A "continuous contract" provides a sort of rudimentary tenure because it basically assumes that a teacher will retain his position unless a serious problem occurs.

7. Court Reporters: Many authorities on tenure recommend that "court

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[1]Kaushal v. Agassiz School Division No. 13 (Arbitration Award, January, 1973), p. 8.

reporters" be present for all arbitration hearings and court cases. Official transcripts of the evidence are expensive, but they facilitate a better review of cases by appeal courts.

8. Court of Queen's Bench: In Manitoba the Court of Queen's Bench consists of a "chief justice" and seven "justices". However, "tenure" or other cases are handled only by single judges. There is no "panel", as in the case of the Court of Appeal.

9. Cross-Examination: Arbitration boards in Manitoba have been dominated by lawyers. Since most arbitrators are lawyers, they agree to conduct arbitration hearings by means of standard court rules. The lawyers or legal counsels for both sides "cross-examine" most witnesses: that is, they try to shake the evidence by aggressively probing the statements given by the witnesses.

10. Decisions: In this thesis the term "decisions" refers to awards made by the Manitoba Courts. The term "awards", on the other hand, is used to describe judgments rendered by boards of arbitration. In general, however, the terms "decisions" and "awards" are inter-changeable.

11. Dissenting Opinion: A "dissenting opinion" is given by an arbitrator or judge in a split-decision by a board of arbitration or an appeal court. This opinion is in written form and is attached to the majority decision or award.

12. Dredging: The term "dredging" was used in 1972 by Fenwick W. English in describing: "Two Reprehensible Personnel Practices in the Evaluation of Teachers". English defined "dredging" as "...Finding oneself without substantiating data for a personnel decision and then proceeding to 'dredge' up facts, rumours, past incidents, hearsay, dateless or vague references

to previous behaviour in order to 'back up' the decision."[2] Some "dredging" may occur when a school division realizes that it must go before an arbitration board to justify its release of a tenured teacher.

13. Due Process: The concept of "due process" was developed in the U.S. but is basically derived from the English common law. In the case of teachers, it means that certain fundamental procedures should be carried out before dismissals are finalized. Teachers have the right to a "fair hearing". They should be told why they are being fired and be given an opportunity to refute these reasons. The chance to confront and cross-examine witnesses, and to be assisted by an attorney are considered to be essential to the concept of "due process". Also please see the definition of "natural justice" as described in this section.

14. Emergency: An "emergency" under paragraph 6(c) of the standard Manitoba Form "6" Contract allows a school board to dismiss a teacher immediately and to pay 30 days wages in lieu of notice. A teacher also may be released under paragraph 6(b), but this dismissal must come at the end of a school term. In 1939 the San Antonio School District unsuccessfully tried to release a teacher under the "emergency" clause of her contract. This case, Wright v. San Antonio School District, is described in part C. of Chapter VII. The case of Skublen v. Lakeshore School Division is explained in part E. of Chapter VII. The term "emergency" was also used in the Skublen case, but it was only considered after the teacher dismissal had actually taken place. Consequently, this thesis

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[2]Fenwick W. English, "Two Reprehensible Personnel Practices in the Evaluation of Teachers" (Journal of Collective Negotiations in the Public Sector, Volume 1, Number 4, November, 1972), p. 364.

will refer only to Wright v. San Antonio and Kaushal v. Agassiz when discussing "emergencies" in relation to paragraph 6(c) of the Form 6 Contract.

15. Evidence: Osborn defines evidence as "...all the legal means, exclusive of mere argument, which:

> "tend to prove or disprove any matter of fact, the truth of which is submitted to judicial investigation.
> (1) Oral. Statements made by witnesses in Court under a legal sanction.
> (2) Documentary. Documents produced for the inspection of the Judge. By the Evidence Act, 1938, a document tending to establish a fact in issue in any civil proceedings is admissible in evidence in lieu of direct oral evidence thereof, if the maker of the statement is dead or unfit or unable to attend the Court or cannot be found.
> (3) Conslusive. Evidence of a fact which the Court must take as full proof of such fact and which excludes all evidence to disprove it.
> (4) Direct. Evidence of a fact actually in issue; evidence of a fact actually perceived by a witness with his own senses.
> (5) Circumstantial. Evidence of a fact not actually in issue, but legally relevant to a fact in issue.
> (6) Real. Evidence supplied by material objects produced for the inspection of the Court.
> (7) Extrinsic. Oral evidence given in connection with written documents.
> (8) Hearsay. Evidence of a fact not actually perceived by a witness with his own senses, but proved by him to have been stated by another person.
> (9) Indirect. Circumstantial or hearsay evidence.
> (10) Original. Evidence which has an independent probative force of its own.
> (11) Derivative. Evidence which derives its force from some other source.
> (12) Parol. Oral, extrinsic evidence.
> (13) Prima facie. Evidence of a fact which the Court must take as proof of such fact, unless disproved by further evidence.
> (14) Primary. Evidence which itself suggests that it is the best evidence, and which is required to be produced if available.
> (15) Secondary. Evidence which itself suggests the existence of better evidence, and which is rejected if primary evidence is available."[3]

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[3]P. G. Osborn, Law Dictionary (London, England: Sweet and Maxwell Limited, 1947), pp. 126 and 127.

This definition is extremely important insofar as boards of arbitration on tenured teachers are concerned. School boards and superintendents must understand the kinds of evidence that they can produce and effectively use at arbitration hearings and in the courts.

16. Examination: Osborn defines the term "examination" as follows:

> "In Court, the evidence of a witness is obtained by oral examination called the examination-in-chief; he is then examined on behalf of the opposite party in order to diminish the effect of his evidence, called the cross-examination. Then he is again examined by the party calling him in order to give him an opportunity of explaining or contradicting any false impression produced by the cross-examination, called the re-examination, which is confined to matters arising out of the cross-examination."[4]

Evidence in arbitration hearings is usually given under oath. Superintendents involved in arbitration hearings must be prepared to undergo all of the above kinds of examinations.

17. Examination-in-Chief: An "examination-in-chief" occurs when a lawyer is questioning a friendly witness to obtain facts which can be recorded as the evidence of a case. Thus, the legal counsel for the school division in a tenure case will usually conduct an "examination-in-chief" on the superintendent of schools. The counsel is not allowed to "lead" the witness into giving answers which the counsel deems to be desirable. Following an examination-in-chief, the witness is normally "cross-examined" by the opposing counsel.

18. Factum: A "factum" is a document written by a lawyer for preliminary presentation to a court. In Manitoba, for instance, lawyers prepare opposing "factums" for consideration by the Court of Appeal. They must

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[4] Ibid., p. 128.

also present themselves before the Court to make oral arguments.

19. Form 6 Contract: A "Form 6" contract is the standard teachers' contract used in Manitoba. It was originally associated with Section 263 of the Public Schools Act, but is now under Section 281. The Act explains: teacher's agreements (281 2); action on termination of agreements (281 3); costs of arbitrations (281 4); delivery of agreements to the minister (281 5); right of teachers to recover salary (281 6); penalties for breach of agreements (281 7); deductions for use of teacher's residence (281 8); teaching month defined (281 9); and hearings by boards before dismissal on account of incompetency or character (281 10).

20. Harassment: The term "harassment" has a special meaning in tenure cases. A superintendent or principal may be accused of "harassment" if he tries to force a tenured teacher to resign by the application of pressure. After a certain point there may be no direct communication between the teacher being "tried" and the superintendent or principal. All contacts are between the division and the Manitoba Teachers' Society.

21. Hearsay Evidence: The term "hearsay" means evidence heard from other persons, and administrators should avoid relying on it in tenure cases. Boards of arbitration and the courts will not allow it to be entered as evidence in a hearing except in certain special circumstances.

22. High Court Setting: Arbitration hearings in Manitoba are often conducted in a "high court" setting because most of the participants are lawyers. Witnesses are sworn in, counsels conduct "examinations-in-chief" and "cross-examinations", and other legal terms and procedures are used. This kind of atmosphere makes Manitoba's arbitration hearings on

tenure similar to cases in the "high courts".

23. Impartiality of Arbitrators: Arbitrators on boards of arbitration are required to be impartial, fair, and judicious in their attitudes and decisions, and must not favour the parties which have nominated them for appointments to boards of arbitration. In the Court of Queen's Bench in June of 1972, Justice A. C. Hamilton made an important ruling in this regard in the case of The Norwood Division Association No. 8 of the M.T.S. and Norwood School Division No. 8. Judge Hamilton referred to Szilard v. Szasz (1955) S.C.R. 3, in which Rand, J., on page 4 said that:

> "From its inception arbitration has been held to be of the nature of judicial determination and to entail incidents appropriate to that fact. The arbitrators are to exercise their function not as the advocates of the parties nominating them,...but with as free, independent and impartial minds as the circumstances permit. In particular they must be untrammelled by such influences as to a fair minded person would raise a reasonable doubt of that impersonal attitude which each party is entitled to."

Justice Hamilton concluded his opinion by stating that:

> "It would be naive to think that parties to an arbitration may not nominate persons who they hope will be open to the persuasion of a particular point of view, however in my opinion the line must be drawn between the appointment of someone hoped to be sympathetic to a view and the appointment of a person who has gained some special knowledge of the particular issue between the particular parties to the dispute. A knowledge of similar issues in other disputes is not a bar but it is the knowledge gained from and the relationship to the particular party making the appointment that creates the bar."

24. Legal Counsel: In the decade of 1965-1975 all arbitration hearings on teacher tenure in Manitoba were attended to by legal counsels for both sides. Lawyers F. D. Allen and K. Foster represented the Manitoba Teachers' Society in all cases after 1969. A number of different lawyers

acted on behalf of the various school divisions involved. There is, however, no legal requirement to use professional lawyers in arbitration hearings. Competent and experienced "court room" lawyers are desirable because arbitration hearings are usually conducted in "high court" fashion. It should be remembered that cases may also eventually end up in the Manitoba Court of Appeal or even the Supreme Court.

25. Manitoba Court of Appeal: This court is composed of a "chief justice" and four "justices". On teacher tenure cases the Court of Appeal sits as a panel of three judges. One of the three justices on the panel writes up the formal decision. The opposing counsels present preliminary written arguments called "factums", and then make oral presentations before the three-justice panel. The justices probe the arguments of the counsels by questioning them in a manner which resembles "cross-examination".

26. M.T.S.: The initials "M.T.S." refer to the Manitoba Teachers' Society. Most of Manitoba's teachers belong to this organization. New teachers become members automatically, but have the privilege of "writing themselves out" each year if they wish. The M.T.S. staff officers who deal with teachers tenure and related cases are the "Director of Personnel Services", and two "Assistant Directors of Personnel Services". The M.T.S. has the reputation of being a highly efficient and powerful teachers' organization. In 1974 the M.T.S. had a membership of about 12,200 teachers and a total budget of $1,666,525. A substantial portion of this budget is used for the protection of the rights and employment status of tenured and non-tenured teachers.

27. Natural Justice: The British and Canadian concept of "natural justice" is related to that of "due process" in the United States. Canadian courts

use the term "natural justice" rather than "due process" because Canadian law is based directly on British law. To some extent, the terms "natural justice" and "due process" may be used interchangeably, although they do not mean exactly the same thing. In this thesis, however, the author will use the term "due process" fairly frequently because it has become common term in Canada, at least insofar as non-legal usage is concerned. Sweet and Maxwell describe the British concept of "natural justice" as follows:

> "The rules and procedure to be followed by any person or body charged with the duty of adjudicating upon disputes between, or the rights of, others; e.g., a Government Department, or the committee of a club. The chief rules are to act fairly, in good faith, without bias, and in a judicial temper; to give each party the opportunity of adequately stating his case, and correcting or contradicting any relevant statement prejudicial to his case, and not to hear one side behind the back of the other. Also, relevant documents which are looked at by the tribunal should be disclosed to the parties interested."[5]

This definition makes it clear that "natural justice" and "due process" are related concepts. Reference should also be made to the definition of "due process" as it appears elsewhere in this section.

28. Philisophical Argument for Tenure: The concept of tenure is complex and seems to be rooted deeply in the nature of man. William B. Castetter explains the philisophical basis of tenure as follows:

> "In the course of making a living, man is exposed to many kinds of insecurities. The threat of losing one's position, status, power, and relative freedom of action or speech has existed down through the ages in all types of organizations. In order to ease the menaces to his work security, man has invented and struggled ceaselessly to put into operation a variety of protective arrangements. The scope of modern provisions for lessening

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[5] Ibid., p. 216.

> the work-related anxieties of individuals employed in the field of education can be illustrated by examining protections accorded the classroom teacher. These include continuing employment (tenure); post-employment financial security (retirement); protection from arbitrary treatment (grievance procedures); position and financial security in the event of illness or temporary disability (collateral benefits); and the support of unions or teachers associations to maintain and to extend ways of continuing individual security within the school system. Indeed, the craving for security by individuals in the second half of the twentieth century has become so intense that for many its attainment appears to be an end rather than a means to larger purposes. Although complete security against economic hazards and organizational tyrants is impossible, the school system is obligated to make arrangements to protect its personnel from threats which affect both their productivity and self-realization."[6]

29. Probationary Teacher: A "probationary teacher" is one who has not acquired tenure. In Manitoba a teacher obtains "tenure" after two years of successful teaching. During his first two years of teaching, a teacher is said to be on "probation".

30. Public Domain: The official awards of arbitration boards and decisions rendered by the courts are said to be in the "public domain". Often these "public documents" contain information which is embarrassing to school divisions and teachers. Newspapers publish a lot of the details. This kind of public exposure adds to the reluctance of school divisions and teachers to become involved in tenure disputes.

31. Reason for Termination: Section 281(3) of the Public Schools Act says that a school board must give a tenured teacher "...a reason for terminating the agreement..." within seven days of receiving the request. The teacher then has the right to challenge the sufficiency of this

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[6]William B. Castetter, The Personnel Function in Educational Administration (New York: The MacMillan Company, 1971), p. 300.

"reason" by going before a board of arbitration. The Public Schools Act also says that the "...issue before the arbitration board shall be whether or not the reason given by the (school) board for terminating the agreement..." is a valid reason.

32. Relationship of Manitoba's School Superintendents with M.A.S.T., M.A.S.B.O. and the M.T.S.: Section B. of Chapter VI of this thesis describes the attitudes of Manitoba's school superintendents towards tenure and the general relationships of the superintendents with the M.T.S. The survey which measured these attitudes showed a generally positive liaison between the M.T.S. and most superintendents, in spite of obvious conflicts and tensions over issues regarding the release of allegedly incompetent teachers. One superintendent, for example, said that "...I found the...(M.T.S.)... to be quite fair in my dealings with...(it)..." Another superintendent said that "...I have not hesitated to discuss concerns about teachers who were not performing to expectations with the professional development branch of the M.T.S. or with the General Secretary. I have found these discussions very helpful..." Many superintendents, however, definitely feel that the M.T.S. uses a lot of "pressure" to protect "marginal" teachers. Superintendents in Manitoba are not regular members of the M.T.S., but they appear to have a good relationship with it. In discussing the matter of tenure with a large number of superintendents and teachers, the author became firmly convinced that there is a great deal of mutual respect between the M.T.S. and the superintendents. This relatively harmonious relationship and a system of good communications undoubtedly helps to reduce the number of arbitration hearings and court cases with regard to teacher tenure in Manitoba. The superintendents also have a very active

organization called the "Manitoba Association of School Superintendents", and the M.T.S. and "M.A.S.S." often work together to solve many educational problems. There are also close contacts with the "Manitoba Association of School Trustees" and the "Manitoba Association of School Business Officials". School superintendents, trustees and secretary-treasurers tend to have similar opinions about the issue of teacher tenure.

33. Sandbagging: The term "sandbagging" was used in 1972 by Fenwick W. English in: "Two Reprehensible Personnel Practices in the Evaluation of Teachers". English defined "sandbagging" as "...finding oneself without substantiating data for a decision, or corroborating evidence and then in a short period of time calling in every type of supervisory personnel available to converge on the (accused) person to substantiate your decision."[7] Some "sandbagging" may occur after a school division realizes that it must go before an arbitration board to justify its release of a tenured teacher.

34. Supreme Court: The Supreme Court is the final court of appeal in Canada. Teacher tenure cases must be of fundamental and major national significance before the Supreme Court will consider them. The Manitoba Teachers' Society considered the possibility in Kaushal v. Agassiz, but ultimately decided against it.

35. Teacher Tenure: In Manitoba a teacher acquires "tenure" after two full years of satisfactory teaching. Tenure gives teachers the right to "due process"; that is, tenured teachers in Manitoba have the right to request formal and valid "reasons" for their terminations to boards of

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[7]Fenwick W. English, op. cit.

arbitration. This definition will be developed extensively in the chapters that follow, and has also been dealt with on page one in the "Introduction" to this thesis.

CHAPTER IV

ARBITRATION HEARINGS AND COURT CASES IN MANITOBA: 1965-1975

A. General Background

There were no arbitration hearings or court cases on teacher tenure in Manitoba during the period 1965 to 1969. During these years the unitary divisions were being organized, and many school boards and their executive officers were not totally familiar with their new roles. This was, in addition, a period of rather severe teacher shortages, when superintendents were having difficulties in obtaining teachers. The student and teacher population was still expanding. Teachers were recruited in Great Britain in substantial numbers. Many unqualified persons were given permission to teach on "letters of authority". Under these conditions, it is understandable that teacher tenure was not much of an issue, and that there were no teacher tenure arbitration hearings from 1965 to 1969. Tenure was undoubtedly easier to obtain during this period of teacher shortages.

B. Jenkins v. St. James-Assiniboia School Division No. 2

The first arbitration hearing during the period 1965 to 1975 occurred in the St. James-Assiniboia School Division No. 2 in 1969. During the month of May, 1969, Superintendent R. A. MacIntosh, on behalf of the Division, advised Teacher J. Jenkins that he had "...refused to teach students and that the students had made unsatisfactory progress...and... that he was unable to maintain adequate discipline..."[1] Mr. MacIntosh obtained his information for his assessment of Mr. Jenkins from Principal

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[1] Jenkins v. St. James-Assiniboia School Division No. 2 (Arbitration Award, July, 1969), p. 5.

D. T. McKinnon of Assiniboine School. He also formed his opinion on the basis of an interview with Mr. Jenkins.

The official "award", or account of the case, described the subsequent events as follows:

> "On May 7th, 1969 Mr. MacIntosh wrote to Mr. Jenkins and in effect gave him notice of a hearing to be held by the School Board for 7:45, May 13th, 1969 in the counsel chambers at 2000 Portage Avenue. On May 22nd, 1969 Mr. MacIntosh again wrote to Mr. Jenkins...at which time he advised him that the Board for the Division had unanimously decided to terminate his contract. As a result of this a request was made that the Board give their reasons in writing pursuant to the provisions of Section 263 (2A) of The Public Schools Act. This request was complied with by the Board through the Superintendent of Schools, Mr. MacIntosh in a letter directed to Mr. Howard J. Loewen, Director of Public Relations Manitoba Teachers' Society dated June 6th, 1969...Thereafter Mr. Jenkins required the matter be arbitrated pursuant to the provisions of Section 263 of The Public Schools Act and the Board as constituted above was appointed, the Chairman being appointed effective June 27th, 1969. Accordingly to comply with the provisions of the Act it was necessary that the Board meet, hear the necessary representations and evidence and made its decision by July 27th, 1969."[2]

The Chairman of the Arbitration Board was Frank D. Allen, a lawyer. Another lawyer, James Smith, represented the School Division. Mr. Aubrey Asper, a teacher, was the representative of Joseph J. Jenkins.

Mr. Neal J. MacKay acted as solicitor for the Division. The counsel for Mr. Jenkins was Mr. Leon Mitchell. Mr. MacKay called the following witnesses on behalf of the Division: Superintendent R. A. MacIntosh; Secretary-Treasurer T. C. MacGregor, Trustee G. Jewison; and Principal D. T. McKinnon. Mr. Mitchell called upon the following persons to give

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[2] Ibid., pp. 3 and 4. It should be noted that the former Section 263 of The Public Schools Act has been changed to become Section 281.

evidence on behalf of Mr. Jenkins: Assistant General Secretary of the Manitoba Teachers' Society, Robert Gordon; and Mr. Jenkins personally.

On July 11, 1969, the Arbitration Board was unanimous in finding as follows:

> "Neither of the reasons given were in themselves sufficient grounds for terminating Mr. Jenkins' contract and could only be considered as grounds if those matters complained of...had been substantiated by the evidence. After further discussion the Board was unanimous in finding that the allegations that Mr. Jenkins had refused to teach students and that the students made unsatisfactory progress had not been proven and that the allegation that he was unable to maintain adequate discipline had not been adequately proven. Accordingly the finding of the Board is that the reasons given for terminating the agreement does not constitute cause for terminating the agreement and the Board therefore directs that the agreement shall continue in force and effect."[3]

In retrospect, this arbitration hearing appears to be particularly important because it seemed to establish precedents and patterns for future arbitration hearings in Manitoba. The following observations should be made in this regard:

1. Chairman Frank Allen subsequently became a "permanent" legal counsel for the Manitoba Teachers' Society on tenure cases. In the eleven tenure or related cases which took place from 1970 to 1975, Mr. Allen represented the Manitoba Teachers' Society a total of nine times. The Manitoba Teachers' Society was represented by Mr. K. Foster, a lawyer from Mr. Allen's firm, on the other two occasions.

2. As the Principal of Assiniboine School, Mr. McKinnon sincerely believed that Mr. Jenkins should have been released because of alleged

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[3] Ibid., p. 5.

inadequacies in Mr. Jenkins' teaching. The Arbitration Board, however, would not accept Mr. McKinnon's professional opinion. It became apparent that only detailed and documented written evidence would be acceptable. This case also seemed to show that releasing teachers for "general reasons" is a difficult process, and that reasons for release must be very specific in order to be acceptable.

3. A question directed to the Division at this hearing was: why Mr. Jenkins was permitted to teach for several years before being confronted with his alleged inadequacies. In other words, why was he given tenure? Couldn't the Division have assessed his abilities during the two year probationary period? Similar queries are posed at all or most arbitration hearings.

4. Two of the arbitration board members were lawyers, and the third member was a teacher. Henceforth, all arbitration boards would be dominated by members of the legal profession.

5. The St. James-Assiniboia School Division had tried to release Mr. J. Jenkins because he allegedly failed "to teach students", made "unsatisfactory progress" with students, and was unable to maintain "adequate discipline". The Arbitration Board, however, was unwilling to accept the evidence given by the Principal and Superintendent. Proving teacher incompetence on the basis of the above factors was therefore demonstrated to be a difficult process. A principal's and/or superintendent's opinion was not acceptable without further substantiating documentary evidence.

C. Gavaga v. River East School Division No. 9

The next arbitration hearing during the period 1965-1975 occurred in the River East School Division No. 9 in 1970. On the day prior to the

Easter break in 1970, Mrs. O. Gavaga requested an interview with Assistant Superintendent J. T. Potter and informed him that she was "...unable to continue as a teacher in the Occupational Entrance Course Program." Mrs. Gavaga stated that "...classroom management had become very difficult. The pupils were disinterested in learning and in general had a poor attitude. She claimed that these kinds of conditions had an adverse effect on her. An assessment of her teaching confirmed this." She requested a transfer to an elementary school, but was advised that this was not possible. The Division then proceeded to release her.

In considering its decision, the Board of Arbitration looked in particular at paragraph 4 of the Form 6 Contract. It read as follows:

> "The teacher agrees with the district to teach diligently and faithfully and to conduct the work assigned by and under the authority of the said district during the period of this engagement, according to the law and regulations in that behalf in effect in the Province of Manitoba, and to perform such duties and to teach such subjects as may from time to time be assigned in accordance with the statutes and the regulations of the Department of Education, of the said Province."

As a result of this paragraph of the Form 6 Contract, the Board of Arbitration unanimously upheld the position of the River East School Division. Chairman B. Hewak and Messieurs A. S. Dewar and C. Huband said that the Division was not "obligated to provide other employment for her." Mrs. Gavaga had turned down the occupational entrance assignment given to her, and had thereby given the Division sufficient grounds to release her. The Board of Arbitration said, however, "...that the award of this Board should not be construed as a finding of incompetence on the part of Oral S. Gavaga as an elementary teacher. This was not an issue before the Board."

The following observations should be made with respect to this case:

1. The arbitrators were all lawyers.

2. Mr. V. Simonsen was the legal counsel for the Division, and Mr. Frank Allen for the Manitoba Teachers' Society.

3. This Board of Arbitration confirmed the fact that a division has the right to assign teachers to any programs or grades it wishes, and that a refusal to accept these kinds of assignments is sufficient cause for dismissal. Teachers do not have the right to be transferred to other programs or grades upon their own requests.

D. Weir v. St. Boniface School Division No. 4

Gary D. Weir was a tenured teacher with the St. Boniface School Division. In November of 1971 two girls in Mr. Weir's class complained about "suggestive comments" that Mr. Weir was alleged to have made in their presence. This matter was reported to Principal Gilbert Van Humbeck, and he, in turn, referred it to Superintendent O. F. Fillion. Mr. Fillion investigated the case and advised Mr. Weir that he had the following three choices: "(1) resign; (2) appear before the Division Board to answer the charges; or (3) failing that, be discharged."[4]

At first Mr. Weir agreed to resign, but then decided against it. He also, for some reason, decided not to appear before the school board. Mr. Weir requested the assistance of the Manitoba Teachers' Society and arbitration proceedings commenced. Mr. Weir's contract was terminated

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[4]Weir v. St. Boniface School Division No. 4 (Arbitration Award, February, 1972), p. 5.

on November 22, 1971. On November 26, 1971, John Enns of the Manitoba Teachers' Society asked the Division to give official reasons for the release of Mr. Weir. Secretary-Treasurer A. A. Frechette replied on December 1, 1971, and partly explained the firing as follows:

> "The reason for discharge was Mr. Weir's conduct before his class in making improper, offensive and suggestive comments to his students, this following a reprimand by his principal for similar conduct in the last school year."

In accordance with Section 281 of The Public Schools Act, an arbitration board was formed and hearings were held on January 17, 1972 and January 31, 1972. All members of the board were lawyers. The Chairman was Mr. W. DeGraves; Mr. C. K. Tallin represented the St. Boniface School Division; and Mr. M. Myers was the arbitrator on behalf of Mr. Weir and the Manitoba Teachers' Society.

During the hearing two girls gave evidence to the effect that Mr. Weir had made "offensive and suggestive comments" to them. Mr. Weir, in his defence, brought forward student witnesses who denied the allegations made by the two complaining girls. The issue then became a matter of credibility between opposing witnesses. Mr. C. K. Tallin, the Division's arbitrator, felt that the charges against Mr. Weir had been sufficiently proven. Manitoba Teachers' Society arbitrator, M. Myers, on the other hand, believed that the case against Mr. Weir had not been proven. In accordance with the Arbitration Act, this meant that Chairman W. DeGraves, had to make the final decision.

Chairman W. DeGraves, in writing his award, agreed with Mr. M. Myers and supported the position of Teacher G. Weir. In his concluding comments, Mr. DeGraves said that:

> "...the teacher did not choose to submit to a hearing before the Division Board. I would have thought that it would have been prudent and good sense on his part to appear before the Division Board...However...I find that the reason given for terminating the agreement does not constitute cause and I hereby direct and award that the agreement be reinstated and continued in full force and effect..."[5]

The following observations should be made with regard to this case:

1. Difficulties resulted in using non-adult student witnesses in this arbitration hearing. In this case, for example, the defence counsel was able to find student witnesses who refuted the evidence given by the accusing students. This matter was also noted in Kaushal v. Agassiz School Division No. 13.

2. All of the arbitrators were lawyers.

3. The Chairman of this Arbitration Board said that it would have been "prudent" for Mr. Weir to appear before the Division Board, but he did not feel that it was an absolute requirement. It might be reasonable to assume, however, that Superintendent Fillion's directive to Mr. Weir to "appear before the Division Board to answer the charges" was in fact a directive or order which Mr. Weir failed to carry out, and that this was in itself sufficient cause for dismissal. The Manitoba Court of Appeal, in Kaushal v. Agassiz School Division No. 13, later stated that "refusing to discuss...actions with the board" was a cause for dismissal.[6] It should be noted, however, that the St. Boniface School Division did not give Mr. Weir's failure "to appear before the Division Board" as a reason for dismissing him. If it had released him for this reason, the decision of

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[5] Ibid., p. 7.

[6] Kaushal v. Agassiz School Division No. 13 (Decision of the Manitoba Court of Appeal, June, 1973), p. 11.

the Arbitration Board might have been different. As previously noted, tenure cases are often won or lost on technical grounds rather than on "logical circumstances". It seems possible that Mr. Weir would have been dismissed if the St. Boniface School Board had given, as an official reason for his dismissal, his refusal to appear before it to answer the charges against him.

4. Teacher representative Mel Myers, who supported the position of Teacher G. Weir, subsequently became a frequent appointee of the Manitoba Teachers' Society as a representative on arbitration boards for salary and tenure cases.

5. Many divisions are simply unaware of the circumstances of previous arbitrations, whereas the Manitoba Teachers' Society has a competent and well-trained staff which is specialized in this area, and which has the advantage of continuity of experience. Using the same legal counsel for all or most cases is also an obvious advantage.

The St. Boniface School Division made a second attempt to dismiss Mr. G. Weir in May of 1972. On May 17, 1972, Acting Superintendent G. R. Green wrote to Mr. Weir and told him that his contract would be terminated as of June 30, 1972. After receiving this letter, Mr. Weir, in accordance with Section 281 (3) of The Public Schools Act, requested reasons for his dismissal from the School Board. In his reply, Mr. Green said that:

> "My letter of May 17th gave reason for termination of your contract as of June 30, 1972; that reason being the termination of the Junior High O.E.C. Program in which you were employed."

A new Arbitration Board was formed to deal with this second attempt

at dismissing Mr. Weir. The Chairman was Arthur A. Rich; Brother J. H. Bruns represented the Division; and Mr. M. Myers the Manitoba Teachers' Society and Mr. Weir. This Arbitration Board, like the previous one, was not unanimous in its findings. Brother Bruns felt that there was sufficient reason for dismissing Mr. Weir, but Mr. Myers disagreed. The ultimate decision was then left to Chairman A. Rich, who was found in favour of Mr. Weir. Mr. Rich explained his decision as follows:

> "...facts disclose that a number of other O.E.C. teachers whose classes were done away with by the phasing out of the O.E.C. program, had been placed in teaching positions by the School Division. One had resigned and the other, Mr. Weir, had his contract terminated...It was evident to me that the School Division did not want Mr. Weir on its staff. It was also evident that there were openings in the School Division for Mr. Weir had the School Division wished to continue to employ him. A new school will be opened in the fall employing sixty teachers. Positions were also open in the elementary section of the School Division whereby Mr. Weir could have received employment as a physical education teacher...It was argued by counsel for the School Division that the reason given for the termination, the disappearance of the job of Mr. Weir (being an O.E.C. teacher), constituted a valid reason for the termination...Is that the real cause for termination? I do not think so. The facts indicate that the real cause and the only cause for the termination was as a result of the earlier termination of November, 1971. The previous board of arbitration reinstated Mr. Weir to his position as a teacher in the School Division. The School Division refused to use him as a classroom teacher. The School Division placed other O.E.C. teachers in other positions in various schools but found no position for Mr. Weir, although it was apparent that positions were available...Some effort was made to show that Mr. Weir did not have the proper background or training for a teaching position in the School Division. Evidence was introduced to show that he had a restricted certificate and thus, a position for him was not available by reason of this restriction. However, the reason advanced by the School Division for termination was the phasing out of the O.E.C. program, not the restricted certificate or lack of qualification or lack of competence. I do not think that the matter of the restrictive certificate has any relevance to this proceeding...I would therefore find the reason given for the termination of the agreement does not constitute cause for terminating the agreement and I direct that the agreement be continued in force and effect."[7]

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[7] Weir v. St. Boniface School Division No. 4 (Arbitration Award, July, 1972), p. 4.

This second arbitration hearing involving Mr. Weir appeared to establish or confirm the following general principles regarding the dismissal of tenured teachers:

1. If teachers are dismissed from their positions, the official reasons given must be proven at the arbitration hearing. Additional reasons are of little or no value unless they are officially mentioned in the dismissal letter sent to the teacher, and unless they can be proven to the satisfaction of the arbitrators. In this case, for instance, Mr. Weir's alleged lack of "background or training" was considered to be irrelevant.

2. In the case of Gavaga v. River East, as discussed earlier, the teacher had refused to teach a particular program, and this had been considered as sufficient grounds for dismissal. In this instance, however, the Division had phased out a program and had not offered to place the teacher into other positions which were available. These circumstances, therefore, would seem to establish a tenured teacher's right to other positions in a Division if his own teaching program goes out of existence. Teachers, however, cannot refuse specific assignments given to them by their boards.

3. A further principle, as mentioned previously, is that school boards cannot add additional reasons for dismissal after the official reasons have already been given in writing. In this second Weir hearing, for instance, the reason given for dismissal was the "phasing out of the O.E.C. program". The St. Boniface Division, during the arbitration hearing, also tried to say that Mr. Weir had a "restricted certificate" and was not qualified to teach. This may or may not have been true, but it could

not be used as an acceptable reason because of the technical formalities under which arbitration boards operate.

4. As previously mentioned, arbitration boards in Manitoba during the period 1965-1975 have been dominated by membership from the legal profession. This has resulted in a fairly strict adherence to the kind of procedures which are normally followed in the courts.

Following this second arbitration hearing involving Mr. Weir, the St. Boniface School Division decided to take the matter to the Manitoba Court of Appeal. The Court, however, upheld the award of the Arbitration Board, and dismissed the Division's appeal. The Court said that without "...the benefit of the transcript of the Board proceedings (it) was not entitled to assume that the Chairman's findings of fact and conclusion were not supported by the evidence."[8] This observation of the Court leads to the conclusion that all arbitration hearings should be accurately recorded by court reporters. Otherwise, appeals to the courts are very difficult.

E. Skublen v. Lakeshore School Division No. 23

Julius Skublen was not a tenured teacher with the Lakeshore School Division, but his case is being discussed in this thesis because of a number of important principles which emerged from it. In other words, the legal concepts as developed in this case are applicable to all teachers, whether they have tenure or not.

Julius Skublen was hired as a teaching principal at Moosehorn School

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[8]Weir v. St. Boniface School Division No. 4 (Decision of the Manitoba Court of Appeal, November, 1972), p. 7.

and began teaching on September 2, 1969. On January 16, 1970, he was asked to resign but refused to do so. Mr. Skublen was then given a letter of immediate dismissal, together with one month's salary in lieu of notice. On January 19, 1970, he requested reasons for his dismissal. No reasons were given, nor was he invited to appear before the Board of Trustees to state his position or defend himself.

Mr. Skublen then took his case to the Manitoba Teachers' Society and was represented by Counsel Frank Allen. The Lakeshore School Division had Hugh Parker as its counsel. The case went to the Court of Queen's Bench and was handled by Mr. Justice A. C. Hamilton. He observed that:

> "...evidence before me was scanty in that plaintiff (Mr. Skublen) did not take the stand nor did any member of the Board of Trustees ...According to its minutes, the Board, on January 13th, decided to seek plaintiff's resignation but there is little evidence on which to determine the reasons for that decision..."[9]

The Board subsequently took the position that an emergency existed, and that it could therefore release Mr. Skublen under 6(c) of the Form 6 Contract. Justice Hamilton disagreed with this conclusion.

The following points should be made in assessing this case:

1. As a non-tenured teacher, Mr. Skublen could have been released at the end of the school term, but not on the basis of thirty days due to an "emergency". The School Division was not able to show that any kind of emergency ever existed.

2. Mr. Skublen was not given adequate reasons for his dismissal.

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[9] Skublen v. Lakeshore School Division No. 23 (Court of Queen's Bench, June, 1972), p. 2. The Lakeshore School Division originally made no reference to 6(c) or the "emergency" clause of the Form 6 Contract when it released Mr. Skublen.

He was simply told that he was not "competent".

3. Plaintiff was not invited to the School Board to plead his case.

4. The Division correctly claimed that the reason for dismissal does not have to be in writing. Mr. Justice Hamilton felt, however, that "...if the reasons...are given in writing, it would assist the Board to prove its allegation that reasons were in fact given."[10]

5. The Board claimed that it had given reasons to Mr. Skublen by means of discussions with the Manitoba Teachers' Society. Mr. Justice Hamilton, however, stated that discussions "...with the Manitoba Teachers' Society do not constitute giving reasons to an employed teacher."

6. One important conclusion, therefore, is that a school board may release a non-tenured teacher at the end of a school term: that is by advising him that his services are no longer required by the end of November or May. A board may give a non-tenured teacher some kind of a reason for dismissing him, but this reason does not have to be proven or accepted by an arbitration board. Even non-tenured teachers, however, have the right to discuss grievances with their boards.

7. A second important conclusion is that boards cannot release tenured or non-tenured teachers during the course of a school year unless they can prove that an "emergency" has taken place. An emergency might exist, for example, if a teacher lost total control of himself and injured some students in his classes. In this case the board would be justified,

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[10] Ibid., p. 6.

under paragraph 6(c) of the Form 6 Contract, in releasing the teacher immediately and giving him thirty days pay in lieu of notice.

F. Mesman v. Western School Division No. 47

Mr. M. C. Mesman entered the service of the Western School Division in 1969 and obtained tenure as a teacher in 1971. However, in letters sent on May 5th and May 16th, 1972, the Division advised Mr. Mesman that it wished to terminate his contract in spite of his tenured status. The reasons given for termination by the Division seemed rather vague and were "...based on Mr. Mesman's performance while under contract with the School Division in carrying out directions by the administration." The Division also stated that the "...Board of Trustees found Mr. Mesman's handling of the Board's program unsatisfactory."[11] Mr. Mesman challenged his dismissal and the reasons given and arbitration proceedings commenced.

The Counsel for the Western School Division was Mr. D. Kennedy; Mr. Mesman and the Manitoba Teachers' Society were represented by Mr. K. Foster, a legal colleague of Mr. Frank Allen. Mr. L. Mitchell was the Chairman of the Arbitration Board; Mr. J. Duncan was the Division's appointee; and Mr. D. McKinnon was the arbitration appointee for Mr. Mesman and the Manitoba Teachers' Society.

Superintendent R. Bend, in giving evidence before the Arbitration Board, indicated that the giving of tenure to Mr. Mesman in 1971 was a marginal matter. He said that Board of Trustees probably had some doubts about Mr. Mesman because of a "...speech Mr. Mesman made to the Boundaries Commission, which he and some others in the community thought was in bad

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[11] Mesman v. Western School Division No. 47 (Arbitration Award, August, 1972), p. 2.

taste..."[12] In addition, it was stated by Mr. Bend that "...at various times he and the Division Board had received complaints about Mr. Mesman from the parents, such as the girls did not respect him or there was not proper discipline in the physical education classes...(but)...these complaints were never told to Mr. Mesman." In spite of these alleged problems, Mr. Mesman was given tenure.

The incident which provoked the attempted dismissal of Mr. Mesman took place at Thompson, Manitoba. Some students from the Western School Division were invited to come to Thompson to participate in a sports tournament. Three teachers were assigned as chaperones for this trip, including Mr. Mesman. While at Thompson, the boys and girls were billeted in separate quarters, but one evening the girls visited the boys in their quarters with the permission of Mr. Mesman and Miss Yule, one of the other chaperones. The third chaperone, Mrs. Shore, discovered this visit and later reported the matter to the Board. Because of this incident, the Board decided to release Mr. Mesman from his position as a teacher.

In reviewing the case, however, Chairman L. Mitchell observed that "...the part played by Miss Yule at Thompson must be considered every bit as damaging as that played by Mr. Mesman..."; and yet, Miss Yule was not released or punished in any way.[13] The Board of Arbitration said, moreover, that there was no evidence "...of impropriety within the room during the thirty to forty minutes that the male and female students were together."[14] The Arbitration Board therefore unanimously found that the

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[12] Ibid., p. 3.
[13] Ibid., p. 18.
[14] Ibid., p. 19.

reasons stated in the letter sent Mr. Mesman did not "...constitute cause for terminating the agreement."[15] Mr. Mesman was vindicated and his contract remained in force.

The following points should be made in this case:

1. As previously mentioned, a teacher cannot be released for reasons which are not stated in his official letter of dismissal. The unacceptable things that Mr. Mesman was alleged to have done prior to obtaining tenure were irrelevant. Letters of dismissal must be very carefully worded.

2. Miss Yule appeared to be at least equally responsible, along with Mr. Mesman, for the incident in the students' quarters at Thompson. In spite of this, there was no apparent attempt to dismiss her. The Arbitration Board therefore felt that there would be no equality of justice if Mr. Mesman was fired and Miss Yule remained on staff.

3. Superintendent R. Bend, in giving his evidence, stated that there had been previous complaints about Mr. Mesman, but that these had probably never been communicated to him. It is essential, in this respect, that school boards always discuss complaints with their teachers, and that teachers be given the opportunity to correct whatever faults are alleged to exist. Teachers, moreover, have the right to appear before their school boards to express grievances or to deny charges against them.

4. There must be an accurate and well-documented record of a teacher's professional problems, and this evidence must be available and directly related to the reasons given for any eventual dismissal.

5. Teachers must be fully informed about the alleged problems they

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[15] Ibid., p. 20.

are having. This information must be given frequently, and over a reasonable period of time so that improvements are possible.

6. Vague complaints by parents or similar kinds of "hearsay" evidence is of little value in dismissing a teacher.

G. Kopchuk v. St. Boniface School Division No. 4

Michael Kopchuk was a tenured Industrial Arts teacher with seven years of experience with the St. Boniface School Division. On May 24, 1972, Acting Superintendent G. Green wrote to Mr. Kopchuk and advised him that, as of September, 1972, he would be required to teach Industrial Arts in French. On May 26, 1972, Mr. Kopchuk replied to the Division in writing, advising Mr. Green that he "...was not sufficiently fluent in French...but that he would do his utmost to become sufficiently fluent..." by September.[16] Nevertheless, on May 29, 1972, the Division wrote to Mr. Kopchuk and told him that his contract was being terminated. Mr. Kopchuk requested an official reason for his termination and was advised, in part, that:

> "You are not prepared to teach the Industrial Arts course at Louis Riel and Provencher in the French language and the program for the next year required that French be the language of instruction for that course."[17]

The critical factor in this case was the provision in The Public Schools Act which gives school divisions the authority to teach the curriculum in the French language. In other words, the St. Boniface School Division had the legal authority to insist that Industrial Arts be taught in French. This meant that Michael Kopchuk, through no fault of his own,

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[16] Kopchuk v. St. Boniface School Division No. 4 (Arbitration Award, September, 1972), p. 2.

[17] Ibid., p. 3.

was no longer qualified to teach Industrial Arts in the St. Boniface Division. An additional complication was that he was a specialist teacher, apparently unqualified to accept assignments in other subject areas. It should be remembered, in this respect, that Mrs. O. Gavaga had requested a transfer from a River East O.E.C. program to an elementary grade, and had been released because she admitted not being able to carry out her O.E.C. assignment adequately. The St. Boniface School Division, on the other hand, had unsuccessfully tried to release Gary Weir because it was phasing out the O.E.C. program and tried to get him to leave with it.

In considering and comparing the Gavaga, Weir and Kopchuk cases, therefore, the following observations should be made:

1. A teacher cannot refuse to accept a teaching assignment such as an O.E.C. program and has to take whatever subjects or grades are allocated by the division to him. A teacher does not have the right to a transfer except by mutual agreement with the division. The Gavaga case is an example.

2. On the other hand, if a division eliminated a program such as the O.E.C., any teachers who were in that program are entitled to be assigned to other areas in the system as long as they are qualified to teach other subjects or grades. The Weir case is an example of this principle.

3. If a division creates a completely new program, such as Industrial Arts in the French language, and at the same time phases out the English version of that program, then unqualified teachers may be legitimately released. The Kopchuk case is an example. The St. Boniface School Division

would probably have been obligated to offer Mr. Kopchuk a position in some other area had he been qualified to teach in subjects other than Industrial Arts.

The Chairman for the Kopchuk arbitration hearing was Lawyer Donald G. Baizley. The arbitrator appointed by the Division was Lawyer W. Perry Schulman. Another lawyer, W. Scott Wright, was the arbitrator who represented Mr. Kopchuk and the Manitoba Teachers' Society. The counsel for the Division was Mr. A. S. Dewar; and for the teacher it was Mr. F. D. Allen.

The issue before all arbitration boards in tenure cases in Manitoba is essentially very simple. Section 281 (3)(d) of the Public Schools Act says that the "...issue before the Arbitration Board shall be whether or not the reason given by the Board for terminating an agreement constitutes cause for terminating the agreement." In this case, however, Chairman, Donald G. Baizley, felt compelled to comment upon his opinion of the unfairness of the law as it seemed to apply to Mr. Kopchuk. The Arbitration Board unanimously agreed that the Division was legally correct in releasing Mr. Kopchuk, but Mr. Baizley also observed that:

> "The decision of the Board has been difficult. One cannot help but be sympathetic to the plight of a teacher who, having taught for seven years in the Division in English, is advised in May that he must teach his course in French in September in order to maintain employment with the Division. It would have been preferable for the Division to have given reasonable notice of the French language requirement in order that the teacher could acquire this further qualification, or alternately, use the period as a transitional one in establishing himself elsewhere."

Frank Allen, the counsel for Mr. Kopchuk, argued that a Division cannot release a teacher "...unless there is some action on the part of the teacher which is inconsistent with the interests of the Division." In other words,

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Frank Allen, the counsel for Mr. Kopchuk, argued that a Division cannot release a teacher "...unless there is some action on the part of the teacher which is inconsistent with the interests of the Division." In other words,

he said that tenured teachers could only be released due to incompetence or related circumstances. The Board of Arbitration, however, agreed with the Division's submission that:

> "...the word cause is to be considered in the broader context of the Division's duties and responsibilities to manage the educational affairs of the District. A school division is not obliged to guarantee employment to a teacher until his retirement age."[18]

The Board of Arbitration also made a very important observation with regard to the possible drop in school enrollments. During the 1960's no one seemed to consider the possibility that school populations might eventually decline. Constant expansion seemed to be a permanent characteristic of all school divisions. However, during the 1970's school enrollments began to drop, and this phenomenon undoubtedly prompted the Kopchuk Board of Arbitration to observe that:

> "Surely, it would be open to a Division to terminate teachers' contracts where a drop in enrollment has reduced the number of teachers required. In that circumstance, some teachers' contracts could be terminated in accordance with the Section, albeit that such teachers had not acted in a manner inconsistent with the interests of the Division."[19]

In the last paragraph of his award, Chairman Baizley re-emphasized the difficulty that he had in being fair to Mr. Kopchuk. The Board of Arbitration was restricted in its mandate, but Mr. Baizley concluded his remarks by saying that:

> "Quite frankly...were it open to this Board to consider this matter on a broader basis, this Board would have been forced to conclude that the teacher had been treated unfairly in this situation. In our opinion it is neither reasonable nor equitable to place a teacher with the long service and other-

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[18] Ibid., p. 4.
[19] Ibid., p. 6.

> wise unquestioned qualifications of Mr. Kopchuk in the position of having to learn a second language, namely French, in such a short period of time in order to retain his employment. Unhappily, however, the Section does not leave it open to the Board to rule on these matters."[20]

Perry W. Schulman, the Division's arbitrator in this case, wrote a dissenting opinion even though he agreed with the basic finding of the Board of Arbitration. Mr. Schulman claimed that the Chairman had no right to "...assess blame for what has transpired..." Mr. Schulman's view was that it was not proper for the Arbitration Board to "...make any findings in relation to an assessment of the conduct of the parties."[21]

Michael Kopchuk and the Manitoba Teachers' Society appealed the award of the Arbitration Board to the Manitoba Court of Appeal. The Court, reviewing the case, took the position that the issue was a "narrow one", related only to the meaning of "cause" in Section 281 (3)(d) of the Public Schools Act. The Court supported the position of the Board of Arbitration, and expanded on its reasoning as follows:

> "It is conceded by Mr. Allen, counsel for Mr. Kopchuk, that the School Division had authority under the Public Schools Act to require the curriculum to be taught in the French language. Indeed, it might be added, it had the duty of so doing. Section 258 (8) of the Act provides that where there are twenty-eight or more pupils in an elementary grade, or twenty-three or more pupils in a secondary grade...whose parents desire them to be instructed...(in French)...the Board...shall...provide for the use of French as the language of instruction in the class."[22]

The Court of Appeal also concluded that Counsel Frank Allen had, in effect, asked the Court to interpret the Public Schools Act in such a

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[20] Ibid., p. 7.
[21] Ibid., p. 8.
[22] Kopchuk v. St. Boniface School Division No. 4 (Decision of the Manitoba Court of Appeal, December, 1972), p. 6.

way that:

> "...it would have given...teachers tenure in the broadest sense, assuring continued employment to retirement age in the absence of proven incompetence or wilful misconduct. We cannot read into the Act words which are not there. We cannot by judicial decision grant tenure to teachers. That can only be done by agreement or by the legislature and the legislature has not done so. If it had been the intention of the legislature that the employment of a teacher could only be terminated on the ground of incompetence or misconduct, it would readily have said so."

The Court of Appeal, by saying that it could not "...by judicial decision grant tenure to teachers..." really seemed to be referring to the concept of "absolute tenure". In actual fact, Manitoba teachers have a reasonably typical kind of tenure. What the Court appeared to mean was that teachers could be released because of the phasing out of their courses, or simply because of a reduction in school enrollments. If a school division, for example, lost one-half of its students, for some reason, it would probably have to release about one-half of the teachers. The teachers who lost their jobs under these circumstances might be very competent, and would obviously not have any control over the reduction of the school population. Nevertheless, the school division, for reasons of economy, would be completely justified in releasing its "extra" teachers.

Some critical questions remain to be answered in this situation of "limited" tenure as interpreted by the Manitoba Court of Appeal. If some teachers must be released for reasons of economy or because of curriculum changes, which shall be the first to go? Should tenured teachers always be given preference to non-tenured teachers? Is seniority a factor to be considered? What if a school division feels that some non-tenured teachers are superior and should be retained rather than the others?

H. Kowalchuk v. Rolling River School Division No. 39

Olga Kowalchuk was a tenured teacher who began her employment with

the Rolling River School Division No. 39 in 1964. On March 23, 1972, Mrs. Kowalchuk was advised by the Assistant Superintendent that "...owing to decreasing enrolment in junior high classes her services would not be required in the next school year."[23] This information was confirmed by a letter the following day.

On April 5, 1972, Mrs. Kowalchuk replied to the Assistant Superintendent. She acknowledged his letter of March 24, 1972, but said that she found "...the reasons given for the termination to be unacceptable..." and requested that the "matter be submitted to a board of arbitration."[24] It should be noted, however, that a total of twelve days had elapsed between the sending of the Division's letter on March 23, 1972, and Mrs. Kowalchuk's reply on April 5, 1972. This interval of twelve days was clearly not in accordance with Section 281 (3) of the Public Schools Act which states:

> "Where an agreement between a teacher and a board of trustees of a district or division is terminated by one of the parties thereto, and the other party, within seven days of receiving the notice that the agreement is terminated, requests the party terminating the agreement to give a reason for terminating the agreement, the party terminating the agreement shall, within seven days of receiving the request, give to the other party the reason for terminating the agreement; and, if the agreement has been in effect for more than two years and is terminated by the board of trustees of the district or division,
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> (a) the teacher, by notice in writing served on the board within seven days of the date the reason for terminating the agreement was given, may require that the matter of termination of the agreement be submitted to an arbitration board composed of one representative appointed by the board, and a third person, who shall be chairman of the board of arbitration, mutually acceptable

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[23] Kowalchuk v. Rolling River School Division No. 39 (Decision of the Court of Queen's Bench, March, 1974), p. 3.

[24] Ibid., p. 3.

to, and chosen by, the two persons so appointed, none of whom shall be a member or employee of the board, and, if one of the parties to the agreement is a division, none of whom shall be a member or employee of the division or a district within the division;

(b) each party shall appoint its representative to the board of arbitration within ten days of the serving of the notice by the second party under clause (a);

(c) where the members of the arbitration board appointed by the parties cannot agree on a decision, the chairman shall make the decision, and his decision shall be deemed to be a decision of the arbitration board;

(d) the issue before the arbitration board shall be whether or not the reason given by the board for terminating the agreement constitutes cause for terminating the agreement;

(e) where, after the completion of hearings, the arbitration board finds that the reason given for terminating the agreement does not constitute cause for terminating the agreement, it shall direct that the agreement be continued in force and effect, and, subject to appeal as provided in The Arbitration Act, the decision and direction of the arbitration board is binding upon the parties; and

(f) the arbitration board shall, within thirty days after its appointment, make its decision and shall immediately forward a copy thereof to each of the parties and to the minister."

Mrs. Kowalchuk's lateness in replying to her letter of termination therefore clearly violated the provisions of Section 281 (3). Instead of requesting a "reason for terminating the agreement" within seven days, she took twelve days. As previously noted, tenure decisions are often lost on technicalities, and this was clearly a major factor in the Kowalchuk case. After it became clear that an arbitration board could not settle the issue, Mrs. Kowalchuk took the matter to the Court of Queen's Bench. Mr. K. Foster was the counsel for Mrs. Kowalchuk and the Manitoba Teachers' Society; Mr. D. Kennedy represented the Division; and the case was heard by Chief Justice J. Dewar.

The case in the Court of Queen's Bench began on July 27, 1972. In her submission, plaintiff argued that she had been wrongfully dismissed and she sought damages as well as a declaration that her contract was "valid and subsisting".[25] Plaintiff no longer claimed that she had any claim for relief under Section 281 (3) of the Public Schools Act. In support of Mrs. Kowalchuk's claim, Mr. K. Foster contended that her release had not been specifically authorized by the Board of Trustees and that this made her firing invalid. Plaintiff also claimed that she had the right to seek redress in the Courts even if her right to arbitration no longer existed.

Chief Justice A. J. Dewar upheld the position of the Division and dismissed Mrs. Kowalchuk's arguments. In summing up his decision, Chief Justice Dewar said that:

> "...the contractual provision respecting termination, defendant's letter of March 24, 1972 effectively terminated plaintiff's employment as of June 30, 1972. Plaintiff had a statutory right to question the reason, which she was dilatory in asserting and did not pursue. Had the matter gone to arbitration the award would have been final and binding, subject only to appeal to the Court of Appeal. The right is a statutory one, as is the remedy. Failure to rely on or take advantage of the statutory provisions does not permit plaintiff the alternative of questioning the reason for termination in this Court in this action, where the sole issue is whether or not the contract was lawfully terminated in accordance with the terms permitting termination. I find it was."[26]

The following points should be noted in the Kowalchuk case:

1. Teachers and school divisions who are involved in dismissal cases should seek immediate legal and other professional assistance to

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[25] Ibid., p. 7.
[26] Ibid., pp. 10 and 11.

ensure that they are following the exact provisions of the law. Cases are frequently lost due to legal technicalities, such as not giving notice within a specified time period.

2. Only boards of arbitration have the authority to decide as to "whether or not the reason given by the board for terminating the agreement constitutes cause for terminating the agreement." As mentioned in this decision, a plaintiff does not have "...the alternative of questioning the reason for termination" in the Court of Queen's Bench or any other court. A teacher's only recourse is to a board of arbitration.

CHAPTER V

KAUSHAL V. AGASSIZ SCHOOL DIVISION NO. 13: 1972-1973

A. The Arbitration Hearing

Mrs. K. Kaushal was a Biology teacher at the Beausejour Senior School. She was hired in 1967, gained tenure, and continued to teach until she was released by the Agassiz School Division in 1972.

In June of 1972 an allegedly serious problem developed with regard to Mrs. Kaushal's testing procedures and her evaluation of her students. In his report to the Board of Trustees, the Superintendent of Schools described the situation as follows:

> "The following events led to the crisis surrounding Mrs. Kaushal's position as a teacher:
>
> (1) Her Biology courses during 1971-72 were badly organized and were not properly taught. Her students were dissatisfied, restless and cynical about their "grades". For that reason they felt they were justified in "cheating".
>
> (2) Some students obtained copies of the final tests prior to the testing period. Weaker students copied the answers of stronger students and took "prepared answers" into the examination room with them. As a result, many students were confident that they would obtain very high marks on these tests.
>
> (3) Mrs. Kaushal, for some reason, decided that certain students would have to write supplementals in October, 1972. She says, on page 2 of her report, that: "After the third term some students started missing the classes and did not work hard enough for the last tests. As a result, some students failed it." It is clear, however, that these "last tests" were not properly marked. Mrs. Kaushal was apparently trying to punish certain students for "not working hard enough". She assigned low marks to them on an arbitrary basis because she wanted to show them that they could not get away with ignoring her warnings "to work hard", etc. She was apparently not aware of the wide-scale cheating that was going on: this indicates that she did not check the final tests very closely.
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> (4) When several students received an "incomplete" standing in Biology in June, 1972, they complained to Mr. Dyne. They

wanted to know what their marks were, but Mr. Dyne and Mrs. Kaushal would not tell them. She also refused to let them see their final papers - something which had been done all year and which was standard procedure. It was also during this period, at the end of June, 1972, that Mrs. Kaushal destroyed all of her papers: she did this with Mr. Dyne's permission. The students and their parents then came to me to solve their problem. The decision to destroy papers at this time, and under these circumstances was, in my opinion an act that simply, for a "professional teacher", defies explanation. Mrs. Kaushal should not ask Mr. Dyne to take the blame for her actions.

(5) On June 28, 1972, I met with Mrs. Kaushal, Principal R. Dyne and Assistant Principal D. Fisher to discuss the matter.

(6) Mrs. Kaushal stated that she had withheld Biology marks for certain students because they had not worked very hard in the last term. I told Mr. Dyne and Mrs. Kaushal that they could not "change the rules of the game after it was over", and said that they must issue marks. Also, in Mr. Fisher's presence, I told them that they could not make students write supplementals in October if they had a "pass" mark in June. In my opinion, some action should have been taken long before June in order to bring "non-working" students into line. I had no sympathy for "lazy" students, but felt that they could not be "punished" in this way. In any event, there is no "prerequisite" in Grade XII Biology.

(7) I left on my holidays immediately afterwards and felt that the matter had been settled. At that time, of course, I was not aware of all of the complications concerning this incident.

(8) After my departure Mr. Dyne and Mrs. Kaushal sent a letter to all of the students that have received an "incomplete" standing. Marks were given, but my instructions were either forgotten or ignored regarding supplementals: Mr. Dyne and Mrs. Kaushal qualified the letter by saying that if "... (student) takes Biology at the XII level next term he will have to write a test on the last section of the Biology course in October."

(9) Mrs. Kaushal's insistence that certain students write in October was vindictive and directly contrary to my instructions. It also made a number of parents very angry and they came as a delegation to the school board. This delegation complained about Mrs. Kaushal's poor teaching and her questionable evaluation procedures.

(10) In the meantime, a number of parents and students wanted "re-

reads" in Biology. The Biology papers, of course, no longer existed and when I returned in August I had to spend a great deal of time in trying to solve a very complex and distressing problem. By this time Mrs. Kaushal's professional status had been completely destroyed in the eyes of the public. In consultation with Assistant Principal D. Fisher and Principal R. Ledoux, I decided to award "passes" to certain "marginal" students that had previously failed. This had to be done because the final test papers had been destroyed and we could not give regular "re-reads".

(11) Following the delegation of parents to the Board on August 14, 1972, the Trustees passed the following resolution:

'In view of the complaints received in connection with Mrs. K. Kaushal's teaching and methods of grading in the 1971-72 school year, that the Board of Trustees request a full report from Mrs. K. Kaushal, with all test results and methods of calculation;

And, furthermore, that we ask Mrs. K. Kaushal to present the Superintendent with all final June examination papers in Biology XI.' "

In the Spring of 1972, and previous to these developments in June, Mrs. Kaushal had requested and received a leave-of-absence for the month of September, 1972, for the purpose of giving birth to a child. It was agreed that Mrs. Kaushal would not have to return to work until October 2, 1972.

After returning from his vacation in August, 1972, the Superintendent began an extensive investigation of the difficulties that had resulted as a result of the June "testing crisis". He prepared a lengthy report, submitted it to the Board of Trustees, and gave a copy of it to Mrs. Kaushal. He requested a written explanation and rebuttal from Mrs. Kaushal, and eventually received one which he considered to be inadequate. Mrs. Kaushal was subsequently invited to two meetings of the Board of Trustees, but did not appear at either one. Consequently, at the regularly scheduled meeting of the Agassiz Board of Trustees on October 2, 1972, Mrs. Kaushal was dismissed under the "emergency" section, or 6(c) of the Form 6 Contract.

The Board thereby contended that the actions of Mrs. Kaushal constituted an "emergency" sufficient to terminate her position with one month of salary in lieu of notice.

The firing of Mrs. Kaushal under the 6(c) or "emergency" clause was an unusual occurrence, since a similar step had not been taken in Manitoba since 1939.[1] The Board of Trustees, however, unanimously felt justified in taking this extreme step. The Trustees knew that it would probably be easier to release Mrs. Kaushal under Section 6(b) of the Form 6 Contract, but decided that 6(c) was the proper choice.

After receiving her letter of dismissal, Mrs. Kaushal requested and received official reasons for termination. These were summarized as follows:

"1. '...it has determined that you have not carried out your duties in a competent or acceptable manner.'
2. '...you chose not to meet with the Board.'
3. '...you have displayed a lack of professional judgment.'
4. '...an insensitivity to the needs of the students.'
5. '...an inability to communicate with your classes.'
6. '...other peripheral weaknesses vital to your teaching competence.'"

The teacher then decided to request an arbitration hearing.

The counsel for Mrs. Kaushal and the Manitoba Teachers' Society was Mr. Frank Allen; for the Agassiz School Division it was Mr. Dennis Ringstrom. Mr. H. B. Parker was the arbitrator appointed by the Division, and Mr. Mel Myers for Mrs. Kaushal and the Manitoba Teachers' Society.

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[1]Section C of Chapter VII describes the case of Wright v. San Antonio School District. The San Antonio School District, in 1939, unsuccessfully tried to release a teacher under Section 6(c), or the "emergency" clause of the Form 6 Contract. The Agassiz School Division, in 1972, was the first school division or district in Manitoba to ever successfully release a teacher under the "emergency" clause. The term "emergency" was also alluded to in the case of Skublen v. Lakeshore School Division, but not in a direct sense.

Mr. Jack Chapman was the Chairman of the Arbitration Board. All were lawyers and agreed to conduct the hearing under court rules. All witnesses, for example, were sworn before giving evidence and some witnesses were subpoened.

The arbitration hearing lasted for seven days and heard 25 witnesses. A total of 45 exhibits were entered as evidence in the case, including report cards, note books, as well as letters and documents of various kinds. Many of the witnesses were students of Mrs. Kaushal. The result of the arbitration hearing was that Chairman Jack Chapman and Arbitrator Mel Myers found in favour of Mrs. Kaushal; and Arbitrator H. B. Parker dissented in favour of the Agassiz School Division. Mr. Chapman's written award was 54 pages long, and the "dissent" of Mr. H. B. Parker was nine pages long.

It seems necessary, at this point, to quote rather extensively from the written award in order to accurately follow the conclusions of the arbitrators. Chairman Jack Chapman dismissed each of the charges against Mrs. Kaushal one by one and in the following manner:

> "Having taught in the Division for some 5 years previously it appears only reasonable that she should have been told if something was wrong. The Arbitration Board therefore holds that there was no emergency with respect to her competence or acceptability in performing her duties as a teacher...Section 281 (10) of the Public Schools Act reads as follows:
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> > "Where complaint is made to the board of a district respecting the competency or character of a teacher, the board shall not terminate its agreement with the teacher unless it has communicated the complaint to him and given him an opportunity to appear before the board in person or by his representative and to answer the complaint."
>
> This section makes it mandatory for the teacher to be given an opportunity to answer any complaint, but does not make it mandatory for the teacher to appear. It is clear from the evidence of

Mr. Bouvier, Mrs. Hatland and Mr. Czuboka, that her failure to appear was one of the factors which the Board considered in determining that there was an emergency. The evidence of Mr. Kaushal is that Mrs. Kaushal felt that the matter had already been determined...Possibly it would have been prudent for Mrs. Kaushal to attend at the Division Board but as above stated, there was no statutory requirement for her to do so. The Arbitration Board holds that her failure to appear cannot be deemed to constitute an emergency...The Division Board also claimed that Mrs. Kaushal displayed a lack of professional judgment. During the hearing this statement was clarified and the Arbitration Board is satisfied that it refers to the failure of Mrs. Kaushal to issue marks and to require supplementals when the reports first came out, and to the destruction of the papers respecting the test in the last term...There is no question that Mrs. Kaushal did not retain the final tests. In previous years when one final examination was written the papers were kept for one year at the school. With continuous evaluation there was no longer one single final examination. It had been the usual practise of Mrs. Kaushal to allow the students to see their term paper and to allow them to review their mistakes. Mrs. Kaushal may have been imprudent in destroying the papers, but as the school term was over and as she would be away the following September on approved leave, and as she had received permission from Mr. Dyne to destroy them, her actions do not seem so unreasonable as to constitute an emergency...In considering the evidence with respect to Mrs. Kaushal displaying a lack of professional judgment, the Arbitration Board is not satisfied that this has been substantiated. The very nature of the term "judgment" in this context, allows for some element of discretion on her part. The Arbitration Board may or may not agree with the manner in which she exercised this discretion, but it cannot be said that she displayed such a lack of professional judgment to the extent that an emergency arose...All of the student witnesses have stated that there was a communication problem between Mrs. Kaushal and themselves. The Arbitration Board is satisfied that one existed, but that same was related and restricted only to the accent of Mrs. Kaushal and was one which, according to the preponderance of evidence, was easily overcome after a short period of becoming used to it...The Arbitration Board is satisfied that at the meeting on June 28th/29th, Mr. Czuboka instructed Mr. Dyne to write letters and Mrs. Kaushal to issue final marks. It is clear that the next day Mrs. Kaushal went back to Mr. Dyne and again put forth her viewpoint. Her arguments were obviously effective and Mr. Dyne sent out Exhibit 10 and Mrs. Kaushal issued marks. However, it must be noted that she was following the authorized chain of authority. She went to her immediate superior who was the Principal, and the Arbitration Board cannot find fault with a professional person defending their (sic) point of view. A final decision was one made, not only with the concurrence of the Principal, but by him...The Arbitration Board is of the opinion that if Mr. Czuboka's instructions were not complied with, then the

> final responsibility for such noncompliance must rest with Mr. Dyne and not with Mrs. Kaushal...In the course of argument, Mr. Ringstrom invited the Arbitration Board to note that Mrs. Kaushal had chosen not to give evidence on her own behalf. Mr. Allen in his argument stated that the reason for this was that the whole matter had been extremely difficult for Mrs. Kaushal, that her statements...were clear and explained her position, and that the evidence of those witnesses called on her behalf substantiated her statements. He also submitted that the onus was on the Division Board to prove the emergency and not on Mrs. Kaushal to disprove same. Although Mrs. Kaushal's testimony may have been of some assistance, the Arbitration Board does not draw any adverse conclusions from her choosing not to give evidence ...In view of all of the above and after considering the evidence, the Arbitration Board is of the opinion that the reasons given for termination have not been proven and do not constitute cause for terminating the agreement. Accordingly, the Arbitration Board holds that the Division Board has not proved the existence of an emergency and therefore the Arbitration Board orders that the agreement between Mrs. Kaushal and the Agassiz School Division No. 13 be continued in force."[2]

As previously mentioned, Arbitrator H. B. Parker dissented from the decision made by Chairman Jack Chapman. Mr. Parker agreed with the evidence as described by Mr. Chapman, and said that:

> "I do not propose to review the evidence as has been admirably done by the Chairman, but rather deal with...the reasons for the dismissal...Dealing with the reasons item by item, the evidence discloses:...By 1972 an ongoing pattern of complaints about the teaching of Mrs. Kaushal were being received by the Administration. Mr. Dyne, the Principal of the Beausejour Senior School had been released in January, 1972 by the Division Board, such release to take effect at the end of the school term - June 1972. In other words, from January to June Mr. Dyne was during this period a 'caretaker principal'. The Division Board advertised for a replacement for Mr. Dyne and Mr. Czuboka interviewed certain candidates, including the successful appointee, Mr. Robert E. Ledoux. In cross-examination, Mr. Ledoux disclosed that he was advised in April or May there were several on the staff of the Beausejour Senior School whom he should take a close look at when he assumed his duties and that Mrs. Kaushal was one of those. On June 29th, because Mrs. Kaushal had not issued final marks to certain of her students, a furor developed and the Superintendent of the Division

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[2] Kaushal v. Agassiz School Division No. 13 (Arbitration Award, January, 1973), pp. 47-53 inclusive.

> attended personally at the Beausejour Senior School for the purpose of giving an order or directive to Mrs. Kaushal to give final marks to those students. This unusual procedure in a system which employed over 200 teachers indicated the grave concern about the situation, and the fact that the 'caretaker principal' and the vice-principal were both brought in to hear the order, so that there could be no misunderstanding, should have clearly indicated to Mrs. Kaushal that at best she had made a mistake - an error in judgment - but one that could and would be rectified... The next day, Mrs. Kaushal, in defiance of the order of the Superintendent, persuaded the 'caretaker principal' to overstep his authority (which he admitted he did) and write the letters which subsequently went out to the students in question. Mrs. Kaushal did not go to Mr. D. L. Fisher, the Vice-Principal who had been present when the order was given and who represented the on-going authority in the school, because Mr. Dyne's employment ceased as at June 30."
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> On the basis of the above reasoning, Mr. Parker concluded that:
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> "...Mrs. Kaushal refused to conform to policy and in fact defied that authority and created a crisis out of a festering sore and an incident through pure obdurateness. I find that the Division Board did not want a crisis situation and tried to avoid it but it had no alternative when its authority was challenged. I find that there was a crisis within the meaning of paragraph 6(c) of the Teachers' Contract and the Division Board had no alternative but to act as it did."[3]

B. Arguments before the Court of Appeal

After receiving the adverse decision of the Board of Arbitration, the Agassiz School Division immediately referred the case to the Manitoba Court of Appeal. The Board of Arbitration issued its award during the last week of January, 1973, and the Court of Appeal heard the case on May 24, 1973. In the meantime, a great deal of cooperative preparation took place between the offices of Superintendent M. P. Czuboka and Mr. D. Ringstrom, the Division's legal counsel.

Counsel D. Ringstrom, in accordance with standard court procedure,

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[3]Kaushal v. Agassiz School Division No. 13 (Arbitration Award, January, 1973, dissent of Arbitrator H. B. Parker), pp. 2-9 inclusive.

prepared a 34 page "Factum of the Appellant" on behalf of the Agassiz School Division. This Factum was distributed to the Court of Appeal and opposing Counsel Frank Allen prior to May 24, 1973. Mr. Allen, after receiving a copy of Mr. Ringstrom's Factum, then prepared a similar 23 page document of his own in order to refute the alleged facts as described by Mr. Ringstrom. These two documents then served as the basis for arguments before the panel of three judges in the Court of Appeal. The two lawyers and three judges were the only official persons present during the court hearing on May 24, 1973. There was, however, a small gallery of spectators. Each lawyer was required to make a verbal presentation to the Court, and both were subsequently questioned in extensive detail by the judges. In effect, the judges appeared to be trying to clarify the points made in the two Factums, and to establish the information contained in the award of the Board of Arbitration.

Counsel Dennis Ringstrom, on behalf of the Agassiz School Division, alleged in his Factum that the Board of Arbitration, in issuing its award, had been erroneous in the following ways:

> "1. The learned Chairman of the Arbitration Board, and the learned member concurring to his decision (hereinafter referred to as the Board) erred in failing to consider if an "Emergency" existed on the 2nd of October, 1972 within the true context of Section 6(c) of the contract of employment, namely by considering if the situation constituted "an emergency affecting the welfare of the district or of the teacher."
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> 2. The learned Board erred in not holding that the failure of the Respondent to give the Appellant Board a reasonable explanation of her actions caused or constituted to the creation of an Emergency on the 2nd of October, 1972.
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> 3. The learned Board erred in holding that the Respondent did not contravene the Board policy by issuing the form of reports to the students in June, 1972 and that same did not cause or contribute to an Emergency.

4. The learned Board erred in not holding that the Respondent acted contrary to school practice by destroying the fourth term examination papers in June, 1972 and that this caused or contributed to an Emergency.

5. The learned Board erred in not holding that the Respondent must assume responsibility for her disobeyance of the Superintendent in June of 1972 and that this caused or contributed to an Emergency.

6. The learned Board erred in not finding that the Respondent showed a lack of professional judgment in her handling of the June examination papers and marks and that this caused or contributed to an Emergency.

7. The learned Board erred in not holding that the Respondent had revealed incompetence as a professional teacher and that same caused or contributed to an Emergency.

8. The learned Board erred in not finding that there was a communication problem between the Respondent and her classes and that this caused or contributed to an Emergency.

9. The learned Board erred in not holding that the Respondent was not responsible for wide-spread cheating in examinations in her classes and this caused or contributed to the Emergency.

10. The learned Board erred in not finding that the marks awarded by the Respondent in the June examinations of 1972 were incredible and that this caused or contributed to an Emergency.

11. The learned Board erred in not considering the accumulative effect of all of the above in determining if an Emergency had been created by the Respondent's actions on the 2nd of October, 1972 'affecting the welfare of the district.'"[4]

Mr. Frank Allen, in his presentation to the Court, seemed to base his case mainly upon the "finding of facts" as determined by lower courts. He maintained that "...Courts of Appeal have consistently held that they will not interfere with the findings of fact of a lower tribunal..." Mr. Allen concluded his argument to the Court by saying that:

"The applicant has been described as callous, indifferent, a manipulator, incompetent, and indirectly has been called a

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[4]D. Ringstrom, "Factum on Behalf of the Agassiz School Division", presented to the Manitoba Court of Appeal in May, 1973, pp. 8, 9 and 10.

liar. This is all done on the basis of a hearsay report by Mr. Czuboka. These allegations are made against a teacher who for some years taught in Saskatchewan and came away with a good, not great but good, recommendation, it was certainly good enough that the respondent chose to hire her. There is no suggestion that that recommendation was manipulated or obtained by fraud. These things are said about a teacher against whom there were no complaints until Easter of 1972 and even these complaints we were told came as a result of allegations of poor course planning and a language problem. Unfortunately, we were not told who made the complaints. Some we are told came through school trustees but the trustees named were not called and evidently they were complaints made to the trustees. Certainly none were considered sufficiently important for the superintendent to even speak to the teacher in question. He spoke, he tells us, to the principal but bear in mind that this is the same principal who was being relieved of his duties in a matter of a month or two and whose report on Mrs. Kaushal's competence from time to time we are told can not be trusted...Suddenly this teacher who had gone as many years without complaint and then complaints, I would suggest, of a relatively minor nature and whose performance according to reports of Mr. Dyne were in keeping with her performance in the Province of Saskatchewan, in other words with what could be expected of her, becomes an insensitive, incompetent and callous monster. This I submit is hard to accept and the Chairman of the Arbitration Board did not accept it...It is submitted that the Chairman's findings of fact were justified by the evidence and his conclusions from those findings of fact equally justified. He found that there was not cause for her dismissal and certainly the reasons given did not constitute an emergency. I would submit that the appeal be dismissed with costs."[5]

Mr. Ringstrom, however, apparently convinced the Court of Appeal on the merits of the Division's case by the following argument:

> "The Appellant submits that the learned Board erred when considering if an emergency existed on the 2nd of October, 1972 by failing to use as its standard, the effect of the Respondent's actions "on the welfare of the district." It is submitted that the learned Board merely considered the Respondent's actions on the basis of an ordinary employer-employee relationship without considering the overall situation as it affected the students, other teachers, the public at large and the members of the Board, which is clearly the intent of the contract when it uses the words "affecting the welfare of the district." It is submitted

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[5]F. Allen, "Factum on Behalf of Mrs. K. Kaushal", presented to the Manitoba Court of Appeal in May, 1973, pp. 21, 22 and 23.

that to properly consider this matter, each act or default on the part of the Respondent must be looked at as it affected any one of the above groups and the decision as to whether an emergency had been created must be carefully considered in that context. The learned Board has obviously considered each default proven by the Appellant and has excused the Respondent for same considering her to have been an ordinary, unskilled employee, rather than a professional teacher obliged to perform her duties commensurate with her salary, responsibilities and standing in the community...It is clear, it is submitted, that if the welfare of the district is considered, that the actions of the Respondent were serious and inexcusable and created a clear emergency within the meaning of the contract. Her standing with the students, fellow teachers, administration staff and the Board itself had deteriorated to where she could not be relied on by her superiors to carry out her duties acceptably nor relied on by her students to act equitably and impartially. It is submitted, that the Appellant could do nothing else when considering the welfare of the district but dismiss the Respondent under Section 6(c) of the contract...The learned Board has held that although there is an obligation under The Public Schools Act on a School Board to give a teacher a Hearing, there is no obligation on a teacher to explain her actions to a School Board...It is submitted that the learned Board has erred in this in that there is nothing in the provisions of The Public Schools Act, or the contract of employment in question, changing the common law which is that an employee is obliged to report to his employer and explain his actions...Further to the above, the Appellant Board was also faced with a teacher who apparently was prepared to disregard Board policy and control from the Superintendent's office. The School Board policy of continuous evaluation was not being followed. A direct order of the Superintendent had been given to her and she had manipulated Mr. Dyne to overcome it. The Respondent was fully aware of the seriousness of the situation from the discussions which took place between her and the Superintendent, her husband and the Superintendent, and her husband, the Representative of the Manitoba Teachers' Society and the Superintendent. She had been advised by the Superintendent that the School Board had to receive a complete explanation. She had received the Superintendent's complete report and the content of it had been discussed in the above meetings, so that the seriousness of the situation was well known to her. With this background she received the letters from the Superintendent advising her of meetings of the Appellant Board so that an explanation could be given to the Appellant Board at her convenience...The Appellant Board met on October 2nd, to consider the entire matter which of course, was known to the Respondent and the representative from the Manitoba Teachers' Society. No explanation was forthcoming from the Respondent at that time nor has any explanation as yet been given... Added to that, the Respondent had been instructed not to attend at the Beausejour Senior School until the Board had met to consider the matter on October 2nd. At that meeting the Board was presented with a letter from the Manitoba Teachers' Society advising that the

> Respondent would be attending the school and the information given to the Board was that she had attended the school on October 2nd demanding that she be allowed to teach. The Appellant Board therefore concluded, and it is submitted reasonably so, that the Respondent did not recognize the authority of the Appellant Board nor of the Superintendent, and could not be relied on to do so in the future...It is respectfully submitted that considering the interest of students, the interest of the parents within the division and the responsibility placed on a School Board under The Public Schools Act, the Appellant Board could not do otherwise than dismiss the Respondent under Clause 6(c) of the contract in that a clear emergency existed."[6]

C. Decision of the Court of Appeal

The Manitoba Court of Appeal ruled unanimously in favour of the Agassiz School Division. The case was of considerable legal significance, and because of the extremely important nature of its decision, a number of lengthy sections must be quoted in the text of this thesis.

The Court observed that:

> "The Division Board quite properly relied on the report of its superintendent as to the activities of Mrs. Kaushal and the complaints of various people in the district. The Board then gave notice to Mrs. Kaushal of a meeting which she was invited to attend to explain all the matters raised about her as a teacher. She declined to attend. The Board then came to the conclusion that the situation, viewed as a whole, constituted "an emergency affecting the welfare of the district", and terminated the employment of the teacher, Mrs. Kaushal...It is unfortunate that no court reporter was present at the hearings of the arbitration as to the basic factual evidence, the harm is not irreparable. What has to be determined is whether or not the language used in The Public Schools Act, supra, and in The Arbitration Act, supra, can properly be interpreted in law by the Division Board as constituting "an emergency affecting the welfare of the district" ...it was the end of the school year when the Board of the School Division became aware of the fact that certain students had not been given any marks for their 4th and final "continuous evaluation test". It was disclosed that the students involved were unable to have their papers re-read or examined because Mrs. Kaushal had destroyed them. Realizing that such inequitable practices by the teacher, Mrs. Kaushal, would cause great dis-

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[6]D. Ringstrom, op. cit., pp. 11-34 inclusive.

> ruption amongst the students, and of course, their parents, the Board was justified in considering this "an emergency affecting the welfare of the district". This is not an interpretation of the word "emergency" in the narrow sense of "jamming one's foot on the brake when an infant runs in front of an automobile"-but in the wider and more liberal interpretation, namely, the recognition of a critical situation demanding that someone should do something quickly...It certainly was, as far as the Board was concerned, a sudden, unexpected critical situation calling for prompt action...The destruction of the test papers cannot be lightly dismissed by the teacher as an unfortunate error...In considering the concept of the education system as a whole, it is quite clear that the responsibility for the welfare of the district or its school division rests at the top with the Board. The evidence discloses that there are some 200 teachers in the Division (which is a very large school division). The Board of 12 members, which is required to take the responsibility for the welfare of the district, is entitled to rely on the report of its superintendent when that superintendent has made a careful and wide-ranging investigation. A great many insignificant antagonisms or likes or dislikes were recounted in the evidence. But when the matter of the destroyed test papers, and the lack of marks, or promotion of students, came to light, and Mrs. Kaushal refused to give any explanation, or appear before the Board to discuss the matter...the Board was perfectly justified in releasing her..."Welfare of the district", as that expression is used in The Public Schools Act, supra, is the responsibility of the Board. This event having occurred in the summer just prior to a new term certainly constituted "an emergency" requiring the quickest attention possible; and therefore "constitutes cause for terminating the agreement" as required by section 281 of the Act...The whole purpose of the system of education in this Province is to make the Board responsible for the welfare of the district and that responsibility cannot be frustrated by one recalcitrant teacher out of 200 in the district, when she flagrantly disobeys instructions and refuses to discuss her actions with the Board."[7]

D. Consideration for the Supreme Court of Canada

Following the unanimous decision by the Manitoba Court of Appeal on behalf of the Agassiz School Division, the Manitoba Teachers' Society considered the possibility of appealing to the Supreme Court of Canada. However, after considering the matter, the Society decided against any

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[7] Kaushal v. Agassiz School Division No. 13 (Decision of the Manitoba Court of Appeal, June, 1973), pp. 3-11 inclusive.

appeal. In a press release issued in July, 1973, the Manitoba Teachers' Society explained its situation as follows:

> "Harvey Kingdom, president of the Manitoba Teachers' Society, has announced that the Society will not take the recent decision of the Manitoba court of appeal against Agassiz School Division teacher Mrs. Kasturan Kaushal to the supreme court of Canada. The Society's decision is based on the fact that there is no automatic right to appeal cases to the supreme court. The court must agree that a case is of sufficiently broad significance before it is heard. As well, Mr. Kingdom said, 'the Society believes that because the case is based chiefly on the interpretation of facts rather than on points of law, there is no reasonable guarantee that taking it to the supreme court will see the Manitoba appeal court decision reversed.'"[8]

It should be noted, in the above press release, that the Society said that it believed that "...the case (was) based chiefly on the interpretation of facts rather than on points of law." This version, of course, conflicted with the decision of the Appeal Court of Manitoba, which unanimously agreed that the Agassiz Board "was perfectly justified in"... releasing Mrs. Kaushal because of the facts of the case.

E. Observations and Conclusions from the Kaushal Case

The following important observations and conclusions should be made with regard to the developments in this case:

1. When making reports about a teacher's performance, carefully documented and dated evidence should be maintained. It is difficult to substantiate facts from memory.

2. Arbitration hearings conducted by counsels and arbitrators who are lawyers are expensive. On the other hand, it seems much more likely that "justice will be done" if it is carried out in a traditional

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[8]Press Release of the M.T.S. (Lac du Bonnet Springfield Leader, July 31, 1973).

and time-tested fashion by lawyers. Boards of Arbitration should be conducted mainly by persons from the legal profession.

3. School Boards must be prepared to explain why they are "suddenly dismissing a teacher" for incompetence, or some related reason, if the teacher has had several years of experience in a division. In other words, why wasn't the incompetence discovered earlier?

4. Teachers are obligated to come to their school boards to explain their actions if they are called upon to do so. The Kaushal Arbitration Board said that there was no statutory requirement for a teacher to appear before a Board, but the Court of Appeal completely rejected this. A teacher, said the Court, is required to explain his actions to his school board when called upon to do so.

5. The official letter of dismissal sent to a teacher is a critical factor. The reasons stated must later be proven by evidence. Cases can be won or lost on the basis of legal technicalities. In the Kaushal case, the letter written was probably too vague, and probably tried to incorporate too many general reasons for dismissal rather than a few specific ones.

6. Members of arbitration boards should be carefully screened for their suitability. They should not be allowed to represent a particular side on a more-or-less permanent basis because, under these circumstances, they inevitably lose their impartiality. Arbitration board members should also have had no previous personal or professional contacts with the school boards or teachers upon whose behalf they are called upon to act as arbitrators.

7. School boards and teachers should obtain competent legal counsels as soon as the possibility of an arbitration hearing becomes evident.

8. There are serious problems in using student witnesses in arbitration hearings. Defense counsels, for instance, can often find other students who will refute the evidence of the accusing student witnesses. It should also be noted that arbitration boards seem to arbitrarily accept the evidence of students on an intuitive basis. During the Kaushal hearing, for example, Chairman J. Chapman, considered the evidence of three of the students and said that "their evidence was substantially lacking in credibility..."[9] The Chairman apparently made this decision by his general impressions because he had supposedly had no knowledge of the backgrounds of these students. The Superintendent, on the other hand, had direct contact with these students and knew them as honest young citizens in their communities. However, it was the Chairman's opinion which obviously counted in the final analysis.

The use of students as witnesses in an arbitration case can also have an unsettling effect on a community. As previously mentioned, there were two opposing groups of witnesses in the Kaushal case. Chairman J. Chapman seemed to be aware of this problem and in his written award commented that:

> "A substantial number of witnesses are still students in the Beausejour Senior School, and others reside in the school division area. The Arbitration Board fully appreciates the difficulties and the embarrassment that some of the witnesses might have faced in testifying before the Board, and the Board wishes to thank the witnesses for their appearance and their testimony. As stated during the hearings, it is sincerely hoped, and the Arbitration Board has been so assured, that no punitive action will be taken against any witness who testified."[10]

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[9] Kaushal v. Agassiz School Division No. 13 (Arbitration Award, January, 1973), p. 22.

[10] Ibid., p. 53.

Under these circumstances, the Superintendent felt obliged to write the following letter to each of the students who testified on Mrs. Kaushal's behalf:

> "I am writing to you about the recent arbitration hearing between Mrs. K. Kaushal and the Agassiz School Division... Although you gave evidence which opposed the position taken by the Agassiz School Division, and several other witnesses, I want you to know that this is, in my opinion, your right under our "democratic" system. It is, moreover, my sincere hope that this matter will not make you feel alienated, in any way, towards the Beausejour Senior School or the Agassiz School Division...Good luck in all of your future endeavours."

Arbitrator H. Parker also commented upon the use of students as witnesses in this hearing. He said that:

> "I do not want to review in depth the evidence given by the students, other than affirm that I believe their evidence was subjectively honest. I feel that their evidence was somewhat inhibited by the physical presence of Mrs. Kaushal and Mr. Czuboka. There was a remarkable similarity in their evidence as to the methodology of Mrs. Kaushal varying in a broad and subjective sense on whether the witness was 'pro' or 'con'. Some had less communication problems than others; some had better rapport than others. It was unfortunate that the students had to be called but I presume there was almost no alternative."[11]

It should be noted, in this regard, that Mr. Parker believed that all of the witnesses were honest and believable. Chairman J. Chapman, on the other hand, rejected the evidence of three of the most critical and important divisional witnesses because he felt that they were "biased" and that their "...evidence was substantially lacking in credibility." As previously mentioned, this assessment of the student witnesses seemed to be based entirely on intuition on the part of the arbitrators. The evidence given by these three students was in some ways critical in proving the charges being made, by the Division, and undoubtedly had an effect upon

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[11] Ibid., pp. 6 and 7.

the Chairman's final decision against the Division.

9. The Court of Appeal commented upon the lack of an official transcript for the case. Only notes were available. Although court reporters and transcripts are expensive, they should always be provided in arbitration hearings.

10. For the first time since 1939, the term "emergency" under 6(c) of Section 281 of The Public Schools Act was interpreted by a Court in Manitoba. The Appeal Court, in this case, said that an "emergency" is the "...recognition of a critical situation demanding that someone should do something quickly..." The Manitoba Court of Appeal therefore gave a liberal interpretation to the term "emergency", and showed that this clause could probably now be used effectively on many occasions by Manitoba school boards.

In conclusion, therefore, it can be stated that the Manitoba Court of Appeal, in a unanimous decision, stated that the Agassiz Board of Trustees was "perfectly justified in releasing" Mrs. K. Kaushal, a tenured teacher previously employed at the Beausejour Senior School.

The Court's decision set a very important precedent in Manitoba because, until then, no Manitoba School Board had ever successfully released a teacher in the courts under the "emergency" section of a teacher's contract. In 1939 the San Antonio School District attempted to dismiss a teacher by declaring an "emergency", but the district lost the case.[12] In the intervening 34 years, it seems that school boards did not attempt to dismiss

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[12]The San Antonio case is discussed in Section C of Chapter VII. Reference is also made to the term "emergency" in the case of Skublen v. Lakeshore School Division in Section E of Chapter IV.

teachers under the "emergency" clause. There were, in any event, no "emergency" cases taken to the courts of Manitoba. The decision in favour of the Agassiz School Division therefore set an important precedent in Manitoba, and perhaps in all of Canada.

In summary, the Agassiz Division Board had appealed a previous decision of an arbitration board, which had ruled 2-1 in favour of Mrs. Kaushal. The Manitoba Court of Appeal unanimously reversed the arbitration board's ruling by stating that:

> "...whole purpose of the system of education in this Province is to make the Board responsible for the welfare of the district and that responsibility cannot be frustrated by one recalcitrant teacher out of 200 in the district, when she flagrantly disobeys instructions and refuses to discuss her actions with the Board."[13]

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[13] Kaushal v. Agassiz School Division No. 13 (Decision of the Manitoba Court of Appeal, June, 1973), p. 11.

ARBITRATION AND COURT CASES IN MANITOBA: TEACHER DISMISSALS AND ATTEMPTED DISMISSALS: (1965 - 1975) by Michael P. Czuboka

SCHOOL DIVISION INVOLVED	MONTH & YEAR OF AWARD	NAME OF TEACHER INVOLVED	ARBITRATION BOARD MEMBERS OR JUDGES	LAWYERS FOR DIVISIONS AND TEACHERS/M.T.S.	RESULTS
St. James-Assiniboia No. 2	July, 1969	J.J. Jenkins	F.D. Allen (Chair.) J. Smith (Div.) A. Asper (MTS)	N.G. MacKay (Div.) L. Mitchell (MTS)	Award to Teacher: unanimously
River East No. 9	Nov., 1970	O.S. Gavaga	B. Hewak (Chair.) A.S. Dewar (Div.) C. Huband (MTS)	V. Simonsen (Div.) F.D. Allen (MTS)	Award to School Div.: unanimously
St. Boniface No. 4	Feb., 1972	G.D. Weir	W. DeGraves (Chair.) C.K. Tallin (Div.) M. Myers (MTS)	A.S. Dewar (Div.) F.D. Allen (MTS)	Award to Teacher: not unanimously
St. Boniface No. 4	July, 1972	G.D. Weir	A.A. Rich (Chair.) Bro. Bruns (Div.) M. Myers (MTS)	A.S. Dewar (Div.) F.D. Allen (MTS)	Award to Teacher: not unanimously
St. Boniface No. 4	Nov., 1972	G.D. Weir	Manitoba Court of Appeal	A.S. Dewar (Div.) F.D. Allen (MTS)	Award to Teacher: unanimously
Lakeshore No. 23	June, 1972	J. Skublen	Court of Queen's Bench: Hamilton J.	H.B. Parker (Div.) F.D. Allen (MTS)	Award to Teacher: unanimously
Western No. 47	Aug., 1972	H.C. Mesman	L. Mitchell (Chair.) J. Duncan (Div.) D. McKinnon (MTS)	D. Kennedy (Div.) K. Foster (MTS)	Award to Teacher: unanimously
St. Boniface No. 4	Sept., 1972	M. Kopchuk	D.G. Baizley (Chair.) P.W. Shulman (Div.) W.S. Wright (MTS)	A.S. Dewar (Div.) F.D. Allen (MTS)	Award to School Div.: unanimously
St. Boniface No. 4	Dec., 1972	M. Kopchuk	Manitoba Court of Appeal	A.S. Dewar (Div.) F.D. Allen (MTS)	Award to School Div.: unanimously
Agassiz No. 13	Jan., 1973	K. Kaushal	J. Chapman (Chair.) H.B. Parker (Div.) M. Myers (MTS)	D. Ringstrom (Div.) F.D. Allen (MTS)	Award to Teacher: not unanimously
Agassiz No. 13	June, 1973	K. Kaushal	Manitoba Court of Appeal	D. Ringstrom (Div.) F.D. Allen (MTS)	Award to School Div.: unanimously
Rolling River No. 39	Mar., 1974	O. Kowalchuk	Court of Queen's Bench J. Dewar	D. Kennedy (Div.) K. Foster (MTS)	Award to School Div.: unanimously

CHAPTER VI

THE RELEASE OF TENURED TEACHERS: ARBITRATION BOARDS AND THE COURTS

A. The Attitudes of Agassiz Teachers Towards Tenure and Legal Proceedings

During the interval between January, 1975 and June, 1975 the author surveyed 169 out of 182 teachers of the Agassiz School Division to determine their general attitudes towards tenure, and also their specific reactions to the Kaushal dismissal case which had occurred about two years earlier.

A total of four multiple choice questions was given on the topic of teacher tenure. These were incorporated into a general questionnaire, and the teachers answered the questions with complete anonymity.

The questions which were given to the 169 teachers are reproduced below. The percentages shown were calculated from the total responses of all the teachers. The first section reflects the answers of all 169 teachers of the Agassiz School Division; the second section only those of the Beausejour Senior School. It was felt that the teachers of the Beausejour Senior School, where Mrs. Kaushal taught, before being dismissed, might have different attitudes from the teachers of the other nine schools in the Division.

The following percentage results were obtained by this questionnaire:

SECTION I: OPINIONS ON TENURE OF AGASSIZ TEACHERS:
(169 teachers out of 182)

1. "In 1972 the Agassiz School Division dismissed a 'tenured teacher'. An arbitration hearing and a court case followed. The ultimate result was that the Agassiz School Division won the case in the Manitoba Court of Appeal. In other words, the original teacher dismissal was upheld." In regard to this case:
   (a) I believe that it has had no bad effect on the morale of most teachers in the Agassiz Division.....22.18%
   (b) I think that it has had a negative effect on the morale of most teachers in the Agassiz Division.....16.56%
   (c) The matter is seldom or never discussed by teachers in the Agassiz Division.....32.27%
   (d) I know very little or nothing about this case.....28.99%

2. Emerson Arnett, the General Secretary of the Manitoba Teachers' Society, wrote as follows in the Manitoba Teacher in May, 1973: "...it is the responsibility of every board to terminate the services of any teacher, who after reasonable assistance, fails to perform satisfactorily." In regard to the above statement:
   (a) I agree with Emerson Arnett.....46.74%
   (b) I do not agree with Emerson Arnett..... 2.95%
   (c) No one knows what Emerson Arnett meant by the term "perform satisfactorily". Therefore I cannot comment on this statement.....46.75%
   (d) I don't know..... 3.56%

3. "In Manitoba teachers are said to have 'tenure' after two years of satisfactory service." In this regard:
   (a) I believe that the two year system is satisfactory and should be retained 49.40%
   (b) The two year system is inadequate. Tenure should be subject to review at certain fixed intervals, such as after 5 years or 10 years of teaching service.....37.52%
   (c) "Tenure" should be granted after only one year of satisfactory service..... 4.16%
   (d) I have no strong or definite feelings about this matter.... 8.92%

4. In the Agassiz School Division, formal reports on "tenured" teachers are submitted by the Principals to the Superintendent once every two years. In regard to these formal reports on tenured teachers:
   (a) I accept them as simply a means of receiving "feedback" from the administration. These reports are not a threat to my status as a tenured teacher.....55.02%
   (b) I am suspicious of these formal reports. I sometimes think that they may be used against me in some kind of an arbitration hearing or court case.....10.65%
   (c) I am not really suspicious of these reports. However, I don't think that they do much good.....22.50%
   (d) I'm not sure; or don't know.....11.83%

(The totals for each question equal 100%)

SECTION II: OPINIONS ON TENURE BY THE TEACHERS OF THE BEAUSEJOUR SENIOR SCHOOL: (44 teachers out of 47)

1. "In 1972 the Agassiz School Division dismissed a 'tenured teacher'. An arbitration hearing and a court case followed. The ultimate result was that the Agassiz School Division won the case in the Manitoba Court of Appeal. In other words, the original teacher dismissal was upheld." In regard to this case:
   (a) I believe that it has had no bad effect on the morale of most teachers in the Agassiz Division.....11.30%
   (b) I think that it has had a negative effect on the morale of most teachers in the Agassiz Division.....32.90%
   (c) The matter is seldom or never discussed by teachers in the Agassiz Division.....32.81%
   (d) I know very little or nothing about this case.....22.99%

2. Emerson Arnett, the General Secretary of the Manitoba Teachers' Society, wrote as follows in the Manitoba Teacher in May, 1973: "...it is the responsibility of every board to terminate the services of any teacher, who after reasonable assistance, fails to perform satisfactorily." In regard to the above statement:
   (a) I agree with Emerson Arnett.....47.40%
   (b) I do not agree with Emerson Arnett..... 2.60%
   (c) No one knows what Emerson Arnett meant by the term "perform satisfactorily". Therefore I cannot comment on this statement.....50.00%
   (d) I don't know..... 0.00%

3. "In Manitoba teachers are said to have 'tenure' after two years of satisfactory service." In this regard:
   (a) I believe that the two year system is satisfactory and should be retained.....56.81%
   (b) The two year system is inadequate. Tenure should be subject to review at certain fixed intervals, such as after 5 years or 10 years of teaching service.....29.54%
   (c) "Tenure" should be granted after only one year of satisfactory service.....11.10%
   (d) I have no strong or definite feelings about this matter.... 2.55%

4. In the Agassiz School Division, formal reports on "tenured" teachers are submitted by the Principals to the Superintendent once every two years. In regard to these formal reports on tenured teachers:
   (a) I accept them as simply a means of receiving "feedback" from the administration. These reports are not a threat to my status as a tenured teacher.....50.00%
   (b) I am suspicious of these formal reports. I sometimes think that they may be used against me in some kind of an arbitration hearing or court case.....13.60%
   (c) I am not really suspicious of these reports. However, I don't think that they do much good.....27.30%
   (d) I'm not sure; or don't know..... 9.10%

(The totals for each question equal 100%)

The following general conclusions can be drawn from the survey described above:

1. Agassiz teachers, in general, were not overly concerned about the Kaushal case. Only about 16% felt that it had a bad effect on "teacher morale". At the Beausejour Senior School, however, about one-third of the teachers believed that the case had a negative effect. More than one-half of the Division's teachers said that they either never discuss the case, or

have never even heard of it. And yet, in 1973 there was a lot of media reporting on the case. The Winnipeg Free Press, Winnipeg Tribune, radio and television all gave extensive coverage.

2. About one-half of the Agassiz teachers agree with Emerson Arnett's statement that incompetent teachers should be released.

3. Except in the category of "teacher morale" the Beausejour Senior teachers answered the questions in a pattern which closely resembled the other schools.

4. Only about one-half of Agassiz's teachers think that Manitoba teachers should have tenure after two years as under the present system. About one-third of the teachers would be willing to accept tenure in blocks of five or ten years. Only about 5% feel that tenure should be awarded after one year of satisfactory service.

5. About one-half of Agassiz's teachers accept formal teacher reports as routine methods of giving "feedback" to teachers. About 10% of the teachers are "suspicious" of these reports, and feel they may eventually be used in legal proceedings against them. Almost one-quarter of all teachers do not believe that formal reports are of much value.

B. The Attitudes of Manitoba's Superintendents Towards Tenure and Problems Related to Tenure

The author contacted the superintendents of all school divisions and districts in Manitoba as a means of obtaining their attitudes towards teacher tenure and related negotiations with the Manitoba Teachers' Society. The following questionnaire was sent out in this regard:

QUESTIONNAIRE ON TEACHER TENURE ARBITRATION HEARINGS:
(Please mail...in the enclosed stamped envelope)
1. School Division or District:_____
2. Person completing form:_____
3. How many potential "tenured teacher" problems have you discussed

with the Manitoba Teachers' Society during the past five years?_____
How many were solved by negotiations with the Society?_____

4. How many arbitration hearings re: tenured teachers have you had in the past five years?_____ Please list the names of the members of each arbitration board

Teacher Nominee	Trustee Nominee	Chairman
_____	_____	_____
_____	_____	_____
_____	_____	_____

5. Do you believe that the Manitoba Teachers' Society has ever put "pressure" on you, as a Superintendent, to prevent tenured teachers from being fired? _____ How often?_____

The results of the above questionnaire were then summarized by the author as follows:

MANITOBA SCHOOL DIVISIONS: ARBITRATION HEARINGS AND DISCUSSIONS WITH THE MANITOBA TEACHERS' SOCIETY REGARDING THE RELEASE OF TENURED TEACHERS: 1969 - 1974:

DIV. OR DISTRICT NUMBER	DIVISION NAME	ARBI-TRATION HEARINGS	PRESS-URE	DISCUSS-IONS WITH M.T.S.	SATISFACTORILY SOLVED BY DISCUSSIONS
1	Winnipeg	0	0	0	0
2	St.James-Assiniboine	1	0	0	0
3	Assiniboine South	0	0	0	0
4	St. Boniface	2	2	2	0
5	Fort Garry	0	0	0	0
6	St. Vital	0	4	4	0
8	Norwood	0	3	3	1
9	River East	1	0	3	2
10	Seven Oaks	0	0	1	1
11	Lord Selkirk	0	2	2	1
12	Transcona-Springfield	0	6	6	6
13	Agassiz	1	1	1	0
14	Seine River	1	2	2	1
15	Hanover	0	0	0	0
16	Boundary	0	0	0	0
17	Red River	0	1	2	0
19	Morris-MacDonald	0	0	0	0
20	White-Horse Plain	0	0	0	0
21	Interlake	0	0	0	0
22	Evergreen	0	0	2	1
23	Lakeshore	0	1	0	0
24	Portage la Prairie	0	0	0	0
25	Midland	0	0	2	2
27	Pembina Valley	0	0	0	0
28	Mountain	0	0	0	0
29	Tiger Hills	0	0	0	0
30	Pine Creek	0	0	0	0
31	Beautiful Plains	0	0	1	0
32	Turtle River	0	0	1	1

cont'd...

DIV. OR DISTRICT NUMBER	DIVISION NAME	ARBI-TRATION HEARINGS	PRESS-URE	DISCUSS-IONS WITH M.T.S.	SATISFACTORILY SOLVED BY DISCUSSIONS
33	Dauphin-Ochre	0	2	3	2
34	Duck Mountain	0	0	0	0
35	Swan Valley	0	1	1	0
36	Intermountain	0	0	0	0
37	Pelly Trail	0	0	0	0
38	Birdtail River	0	1	3	2
39	Rolling River	0	1	1	0
40	Brandon	0	0	0	0
41	Fort la Bosse	0	0	0	0
42	Souris Valley	0	0	0	0
43	Antler River	0	1	1	0
44	Turtle Mountain	0	0	0	0
45	Kelsey	0	0	0	0
46	Flin Flon	0	0	0	0
47	Western	1	0	1	0
48	Frontier	0	0	0	0
2355	Mystery Lake	0	0	0	0
2408	Whiteshell	0	0	0	0
2316	Shilo	0	0	0	0
	TOTALS:	7	28	42	20

NOTES:

(1) The years 1969-1974 were chosen because this includes the last half of the period during which Manitoba has had "unitary" school divisions. There were no arbitration hearings in the period 1965-1968.

(2) "Pressure" as recorded in this chart indicates the number of times that Superintendents believed that pressure was applied by the Manitoba Teachers' Society to prevent "tenured teachers" from being fired.

(3) The Winnipeg School Division has released a number of tenured teachers following discussions with the Winnipeg Teachers' Association. Totals are unavailable for this study.

(4) It should be emphasized that "pressure", "discussions with the Manitoba Teachers' Society" and "solved by discussion" are only rough estimates as reported by Manitoba's school superintendents.

(5) It should be noted that this chart deals with arbitration hearings only, and not court cases.

(6) This survey, it should be noted, only covers the five year period from 1969 to 1974. It was felt that accurate information could not be obtained from 1965 to 1968.

C. Reports on Teacher Efficiency: Visits by Administrators

Superintendents usually realize that they will have difficulty in proving that teachers are incompetent unless the evidence that superintendents

can produce is "direct" and not based mainly on "hearsay". This means that a substantial number of well-documented visits by principals and superintendents may be necessary to the classrooms of the teachers who are alleged to be incompetent.

It is not the purpose of this thesis to study the extremely complex, difficult and controversial theories and practices associated with the evaluation of teachers. Nevertheless, there are two important concepts which should be considered in the assessment of tenured teachers for the purpose of dismissing them.

These concepts may be referred to as "sandbagging" and "dredging". The term "sandbagging" was used in 1972 by Fenwick W. English in: "Two Reprehensible Personnel Practices in the Evaluation of Teachers". English defined "sandbagging" as "...finding oneself without substantiating data for a decision, or corraborating evidence and then in a short period of time calling in every type of supervisory personnel available to converge on the (accused) person to substantiate your decision." Some "sandbagging" may occur after a school division realizes that it must go before an arbitration board to justify its release of a tenured teacher. The term "dredging" was used in 1972 by Fenwick W. English in the same article. English defined "dredging" as "...Finding oneself without substantiating data for a personnel decision and then proceeding to 'dredge' up facts, rumours, past incidents, hearsay, dateless or vague references to previous behaviour in order to 'back up' the decision."[1] Needless to say,

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[1]Fenwick W. English, "Two Reprehensible Personnel Practices in the Evaluation of Teachers" (Journal of Collective Negotiations in the Public Sector, Volume 1, Number 4, November, 1972), p. 364.

both of these practices are indeed "reprehensible" and should be avoided by all school administrators.

Because of the apparent complexities in releasing tenured teachers, many Manitoba superintendents have had difficulties in dealing with this issue. But as the U.S. authors Elsbree and Reutter point out, this is not a problem which is peculiar to Manitoba. Elsbree and Reutter believe that "modifications are needed so that the unfit can be removed expeditiously. Theoretically, of course, this is possible, but discharge is made overly difficult in several ways." Their account of a typical sequence of events related to teacher dismissal is very informative. It describes dismissal difficulties as follows:

> "The advocated procedure is lengthy, time-consuming, and often expensive for the school district. Evidence must be carefully formulated and documented, since the burden of proof is on the party preferring charges. Technicalities of procedure must be observed, or the case may fall on a procedural defect rather than on a substantive point. If in the past the administrator had tried to be helpful to a weak teacher and had tried not to discourage him by putting in writing warnings and instances of unsatisfactory work, he might well find his former kindness a detriment, for lack of written adverse ratings and the like has frequently prevented a dismissal from taking place. Evidence to substantiate unfitness would often involve others in the school system. The staff typically would be divided before the trial, not unlikely due to partial or even false information. The accused or his friends may stir up sympathy for him on bases irrelevant to the case. The community is likely to be divided into factions more by emotion than by reason. The teacher, by design or otherwise, frequently becomes a symbol of the underdog - an individual accused by a powerful administrative hierarchy. The issue tends to become almost a personal one between the teacher and the superintendent, and, in a real sense, the superintendent is as much on trial as the teacher. Regardless of the outcome of the case the types of reactions just described would damage the school system. Administrative leaders, consequently, are reluctant to bring about such a situation, which could have worse repercussions than retaining an unsatisfactory teacher...Professional associations aid in resolving the dilemma when they maintain an objective attitude. Too frequently, however, they almost automatically take the

position of defending the teacher, rather than defending the school system which may be better off without the teacher."[2]

D. Stages from Arbitration Hearings to the Courts

The following sequence may occur in the process of releasing a tenured teacher in Manitoba:

1. A situation develops which causes a school board to question a teacher's position - i.e., incompetence, gross midconduct, etc.

2. The superintendent writes a report and submits it to his school board.

3. The teacher realizes the situation is serious and obtains the help of the Manitoba Teachers' Society and legal counsel.

4. The school board believes that it has sufficient cause and fires the teacher either at the end of the term or with 30 days notice in the case of an "emergency".

5. The teacher asks for the reason for termination in writing and considers it to be insufficient.

6. The teacher demands that the matter be submitted to a board of arbitration composed of three persons: one representative appointed by the teacher; one representative appointed by the board; and a chairman mutually agreeable to the above two persons.

7. An arbitration hearing is carried out, probably in "high court" fashion if the arbitrators are lawyers. Usually the arbitrators are all lawyers.

8. The chairman of the arbitration board issues a written decision.

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[2]William S. Elsbree and E. Edmund Reutter, Jr., Staff Personnel in the Public Schools (Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1964), pp. 204 and 205.

9. One of the board members disagrees with the decision and writes a dissenting opinion.

10. The case is taken to the Manitoba Court of Appeal by the losing party.

11. The losing party in step 10, above, may then take the case to the Supreme Court of Canada.

The above, of course, assumes that all or most possible stages will be carried out. Most cases, or potential cases, reach conclusions at various points along the way.

Each of the above "eleven steps" will be examined in greater detail, below.

1. A situation develops which causes a school board to question a teacher's position.

Any number of "reasons" may arise which seem to justify a tenured teacher's dismissal, but how acceptable are they and how difficult to prove?

Some reasons for dismissal are straightforward and obvious. A teacher, for instance, can be dismissed immediately if he or she purposely and seriously injures a child in a classroom or is guilty of rape. On the other hand, what is "incompetence"? What evidence will an arbitration board accept in a formal hearing? The statutes of Manitoba do not give a list of legally acceptable reasons for releasing teachers from their contracts. This is left to the discretion of school boards, boards of arbitration, and the courts.

2. A superintendent writes a report and submits it to the school board.

It is, of course, absolutely essential that a superintendent give his report to the school board members. School trustees must have access to all

information if they are to make logical decisions in dismissal cases. Of equal importance is the ability of school board members to later testify that they did, in fact, have all the necessary information in making their decision.

The superintendent's report must have certain characteristics that may later be of value in a formal arbitration hearing. "Hearsay" evidence, for instance, will not be as valuable as events actually witnessed by the superintendent himself. These must be thoroughly documented.

3. The teacher realizes the situation is serious and obtains the help of the Manitoba Teachers' Society and legal counsel.

Before this happens, however, the Society investigates the matter to determine what action should be taken.

A staff officer of the M.T.S. usually visits the superintendent to determine if the problem can be resolved. Information may be gathered from the school and other sources. Pressure may be applied by the M.T.S. staff officer to the superintendent in an effort to prevent a dismissal of the teacher. It is generally assumed, of course, that the superintendent will be able to sway his Board of Trustees in whatever direction he wants. This may be a false assumption.

The M.T.S. also may appoint an impartial committee to investigate the details of the case. This committee, after a series of interviews, is then able to make a recommendation to the Society with regard to the giving or withholding of support to the teacher involved.

At this stage, any conversations between the superintendent and teacher in question become very sensitive. The superintendent may be accused of putting pressure on the teacher to resign. "Harassment" may

be alleged if the superintendent makes too many attempts to contact the teacher. In fact, after a certain point practically all communication is between the superintendent and an M.T.S. staff officer.

The school division, by this time, should have a competent legal counsel at its disposal. The counsel should be used in the preparation of all letters and documents related to dismissal, inasmuch as their structure may be crucial in the final outcome of an arbitration hearing or subsequent referral to the Manitoba Court of Appeal or Supreme Court.

4. The school board believes that it has sufficient cause and fires the teacher either at the end of the term or with 30 days notice in the case of an "emergency".

A school board may fire a teacher either under paragraph 6(b) or 6(c) of the Form 6 Contract.

Paragraph 6(b) is the simplest and the one which is used most often. Under paragraph 6(b) a teacher is released prior to November 30th or May 31st. If the board wants the teacher out of the school immediately, it may pay his salary until the end of the term and simply tell him to stay at home in the meantime.

Paragraph 6(c), the "emergency" clause, is more difficult to prove and is therefore infrequently used by school boards. Under paragraph 6(c) a teacher is released immediately and is given 30 days pay in lieu of notice.

Paragraph 6(c) refers to "...an emergency affecting the welfare of the district or the teacher." This clause has only been interpreted twice by the courts of Manitoba. In 1939 the term "emergency" was dealt with in the case of Wright v. San Antonio School District. The Manitoba

Court of Appeal, in 1973, interpreted an "emergency" in Kaushal v. Agassiz School Division. A brief reference was also made to an alleged "emergency" in the case of Skublen v. Lakeshore School Division No. 23.

5. The teacher asks for the reason for termination in writing and considers it to be insufficient.

Superintendents and school boards must be extremely careful in preparing letters of dismissal. A competent "court-room lawyer" with school division experience should have been engaged by the school board prior to the actual dismissal, and he should now be asked to help prepare the letter.

The letter should outline the reasons for dismissal in clear and unambiguous terms. The reasons given should, of course, coincide with the situation as described in the reports previously prepared to describe the teacher's problems. Reasons that may be difficult to prove should not be included. One good reason for dismissal may be sufficient, but several are obviously better if they can be later substantiated by evidence.

6. The teacher demands that the matter be submitted to a board of arbitration composed of three persons: one representative appointed by the teacher; one representative appointed by the board; and a chairman mutually agreeable to the above two persons.

School boards and superintendents may have difficulty in choosing an appropriate representative to an arbitration board. This is because the disposition of potential candidates is often unknown. Although arbitrators are supposed to be impartial, the opposing sides naturally tend to choose persons who will at least be favourably disposed towards "management" or "labour", whatever the case may be.

7. An arbitration hearing is carried out, probably in "high court"

fashion because the arbitrators are usually lawyers.

Superintendents must be very careful in preparing reports and documents for a case because they may be used in a "high court" setting.

It would be very helpful if a superintendent was familiar with the characteristics of a "high court" arbitration hearing.

8. The chairman of the arbitration board issues a written decision.

It is the chairman's duty to write up the case as he sees it, and to summarize the findings of the arbitration board. Essentially, the arbitration board's duty is to determine whether or not a school board was justified in dismissing a teacher.

9. One of the board members may disagree with the decision and write a dissenting opinion.

The chairman, of course, is the member who decides the issue in cases of disagreement between the other two arbitration board members.

The dissenting opinion is attached to the main body of the arbitration board's report, and remains a part of the permanent record. A dissenting opinion may therefore be the source of some satisfaction to a losing party, even though a case is lost. This dissenting opinion also may be of significance in the event of an appeal.

10. The case may be taken to the Manitoba Court of Appeal by the losing party.

The Manitoba Court of Appeal will normally only deal with evidence already established by an arbitration hearing. It will not, for example, recall witnesses to try to determine new facts. Cases rarely reach the Court of Appeal.

11. The case, if necessary, is taken to the Supreme Court of Canada.

This has never happened in Manitoba. The Manitoba Teachers' Society considered the possibility in Kaushal v. Agassiz, but ultimately decided against it. Cases must be of fundamental and major significance before the Supreme Court will consider them.

CHAPTER VII

CONCLUSIONS AND RECOMMENDATIONS

A. A Definition of Teacher Tenure in Manitoba

As previously mentioned, a teacher acquires tenure after two full years of satisfactory teaching with a school division in Manitoba. If he moves to a new division, however, he must re-establish his tenure all over again by undergoing another two year probationary period. Tenure gives teachers the right to "due process" and "natural justice" as defined earlier in this thesis. In effect, this means that a teacher has the right to have the reasons for his dismissal validated or invalidated by an impartial panel of three arbitrators. If an arbitration board finds that the reasons given for dismissal are not valid, then the board has the power to declare that the teacher's contract "shall be continued in force." The St. James-Assiniboia School Division, for example, tried to release a teacher in 1969 and an arbitration board ruled against the Division, stating that the contract between the teacher and Division "...shall continue in force and effect." As of 1975 this teacher is still teaching in the St. James-Assiniboia School Division.[1]

The Kopchuk v. St. Boniface School Division case, as discussed earlier, was considered by the Manitoba Court of Appeal in 1972. As a result of the decision against Teacher M. Kopchuk, the Manitoba Teachers' Society became very concerned about the limited kind of tenure which seemed to exist in Manitoba. This concern on the part of the M.T.S. apparently prompted the following resolution to be passed at the Annual Convention of the Manitoba

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[1]This information was obtained from Principal D. McKinnon in a conversation with him by the author on June 13, 1975.

Teachers' Society in 1975:

> "BE IT RESOLVED that the Provincial Executive undertake a study of the implications of dismissal of teachers for reasons other than those related to teaching functions; and
> BE IT FURTHER RESOLVED that the Provincial Executive request the Minister of Education to introduce legislation to amend the Public Schools Act to protect teachers against dismissal for reasons other than teacher incompetency or behavior directly related to the teaching process; and
> BE IT FURTHER RESOLVED that in specific cases where teachers without tenure are being released from their contracts for reasons other than teacher competency, such as dismissal due to pregnancy, that the Provincial Executive initiate appeal action through appropriate agencies such as the Human Rights Commission, the Minister of Education and the courts.
> BE IT RESOLVED that the Manitoba Teachers' Society urge the Minister of Education to amend the Public Schools Act to provide the right to due process to all teachers."[2]

It should be noted, in the above resolution, that the M.T.S. is recommending the right to "due process" to all teachers, including those who do not have tenure. It is also suggesting that teachers should, in effect, have permanent tenure if they continue to provide competent teaching service. This is an appealing and seemingly just proposal, except that, as discussed earlier in this thesis, it does not allow for measures of economy, as in the case of a division which, for some reason, lost all of its students and therefore no longer required any teachers. It is also contrary to the ruling of the Manitoba Court of Appeal in the Kopchuk case.

Another problem which remains concerns the concept of "seniority". If, for instance, a division lost one-half of its pupils, and for obvious reasons of efficiency had to release one-half of its teachers, which "half" would have to go? Would tenured teachers be retained simply because of their seniority? Would outstanding non-tenured teachers be released regardless of their abilities? And, furthermore, if all of a division's teachers

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[2]"To be Resolved": Resolutions Passed at the Annual M.T.S. Convention in March-April, 1975 (Manitoba Teacher, Volume 3, Number 8, April, 1975).

had tenure, under what circumstances or rules would necessary cut-backs in staff be made? Who would make these decisions?

B. The General Characteristics of Arbitration Boards in Manitoba

There have been seven boards of arbitration in Manitoba during the period 1965-1975. There were, of course, also related court cases, but this section will deal with arbitrations only.

The following chart reveals the lawyer-dominated composition of the arbitration boards:

TENURE ARBITRATION BOARDS IN MANITOBA
(1965-1975)

1. Jenkins v. St. James-Assiniboia (July, 1969):
   - F. D. Allen - lawyer. (Chairman)
   - J. Smith - lawyer.
   - A. Asper - teacher.

2. Gavaga v. River East (October, 1970):
   - B. Hewak - lawyer. (Chairman)
   - A. S. Dewar - lawyer.
   - C. Huband - lawyer.

3. Weir v. St. Boniface (January, 1972):
   - W. DeGraves - lawyer. (Chairman)
   - C. K. Tallin - lawyer.
   - M. Myers - lawyer.

4. Weir v. St. Boniface (July, 1972):
   - A. A. Rich - lawyer. (Chairman)
   - Brother J. H. Bruns - teacher.
   - M. Myers - lawyer.

5. Mesman v. Western (August, 1972):
   - L. Mitchell - lawyer. (Chairman)
   - J. Duncan - lawyer.
   - D. McKinnon - teacher.

6. Kopchuk v. St. Boniface (September, 1972):
   - D. G. Baizley - lawyer. (Chairman)
   - W. S. Wright - lawyer.
   - W. P. Shulman - lawyer.

7. Kaushal v. Agassiz (December, 1972):
   - J. Chapman - lawyer. (Chairman)
   - M. Myers - lawyer.
   - H. B. Parker - lawyer.

The above chart shows that a total of 21 arbitrators served on boards of arbitration concerning tenure during the period 1965-1975. Three of these arbitrators were teachers, and the other 18 were lawyers. The terms "teachers" and "lawyers" are used only to designate general professional categories. Brother Bruns, for example, was actually a retired school superintendent; some of the lawyers later became judges.

The following conclusions can be made from the lawyer-dominated character of the arbitration boards:

1. Arbitration hearings are held in a "high court" manner. This adherence to court procedures probably results in much fairer hearings which generally results in "justice being done" for all concerned.

2. Lawyers, however, are not familiar with the details of school systems. As a result, they sometimes tend to interpret school regulations and customs in a legalistic and rigid manner.

3. Arbitration hearings are expensive. The Kaushal v. Agassiz case probably cost the Agassiz School Division and the M.T.S., collectively, a total of about $30,000.00.

C. Procedures in the Just Dismissal of Teachers

A study of teacher dismissal cases in the early years of Manitoba's educational system frequently reveals an appalling lack of fundamental justice. Teachers were often hired on a "tender basis", with the teacher accepting the lowest salary being given the job. There were, moreover, often grave miscarriages of justice, and particularly when innocent and efficient teachers were arbitrarily released on erroneous or hearsay evidence, or simply because someone didn't like them.

In a few cases, however, the aggrieved teachers took their school

boards to the courts and were vindicated. One such case was Wright v. San Antonio School District, which will be described in some detail to reveal the nature of the status of teachers in the early years. This case is also significant because it is the only other direct instance, besides Kaushal v. Agassiz, in which a Manitoba school board tried to release a teacher for an "emergency" under section 6(c) of the Form 6 Contract. In essence, the San Antonio School District of Manitoba in 1939 tried to dismiss Teacher Wright on the basis of an "emergency" under section 6(c) of the Form 6 Contract. Judge C. C. J. Stacpoole, however, was unimpressed with the way in which the school board handled the matter. He summarized the case as follows:

> "In the statement of defence, the defendant (the school board) alleged that several of the parents of children attending the plaintiff's (teacher's) classes had petitioned the trustee not to re-engage her; that this amounted to an emergency affecting the welfare of the school district...The evidence pretty well disclosed the situation that existed during Miss Wright's incumbency as a teacher. During the first year, dating from September 1, 1936, there was no complaint as far as the Court knows, and no suggestion has been made that her services were not quite satisfactory, not only to the parents but also to the school inspector, Mr. Plewes, who on more than one occasion, I think he said, attended at the school in which she was teaching, and formed his own opinion as to her fitness for the post. Then during the second year, apparently, whilst she was there, no complaint was made against her that came to her ears, at any rate as being unfit to occupy the position. The first intimation she received was a letter from the official trustee Mr. Kennedy of July 8, 1938, and that without disclosing any of the grounds upon which her contract was terminated. Nor did she on written request get any information as to those grounds, as Mr. Kennedy considered that he received those complaints in a confidential capacity, and was not justified in passing on the names to Miss Wright. Of course, I think, and I think possibly counsel on each side will agree with me, that when accusations are made surely it is only the part of justice that the person accused should be able to face the accusers and discuss the matter. Otherwise it is like giving a judgment without hearing the other side at all; and, as Mr. Plewes says, when such situations have previously arisen they have sometimes been resolved in an

amicable manner. Perhaps this situation could have been, if there had been an opportunity given to Miss Wright, but as I say, there was not...Then when we come to the petition upon the basis of which Miss Wright's services were terminated, it is only signed by seven people, six of whom are of the female sex, and one I presume is a male, L. Barabach. They constitute between them a parentship of, I think, nine children out of, to take the number being taught by Miss Wright at its very lowest, thirty, so we may well conclude there are at least fourteen other mothers who did not see fit to sign this petition, and have not had an opportunity of expressing their ideas as to the fitness of the teacher at all; they may be eminently satisfied, as far as I know...Not one of the other ladies appeared to give evidence; and I think it might almost be judicially noticed that signatures to a petition, as long as they do not touch our pockets, are the easiest things to obtain in this country. It is unfortunate that people should be prepared to sign their names to petitions which will so dangerously affect the reputation of a professional teacher, and not come before the Court to substantiate the ground upon which they felt that it was incumbent to have her removed. That petition carries exceedingly little weight with me, and I think it should have carried very little with Mr. Kennedy, although he might have a different idea of an emergency to that which I hold. I can quite understand that he, holding probably a gratuitous position as official trustee, certainly did not want a lot of these interfering women buzzing about his ears and making life miserable for him, and he thought the easiest thing to do was to do as some of these dissatisfied women wanted him to do, change the teacher. But as for an emergency I cannot see it. If there had been an opportunity given Miss Wright to attend, and there had been a request in this small, closely-populated community for those who complained to attend, and those who have not charged Miss Wright also to attend, I am inclined to think that the majority would have been in favour of keeping this teacher on. The petitioners had no complaint with her the year before, made no complaint until she had left after the first half of the second year had gone. I cannot regard this as an emergency such as is set out in the contract and sec. 192 of the Act...If the teacher had lost her mind, or suddenly become violent, or, as Mr. MacInnes suggests with a male teacher - we won't consider it with a female teacher - attended the school in a drunken condition, or one of many things that simply cannot be tolerated at any time at all, it would have been a different matter. But no such thing occurred here at all, and I think it is most unfortunate that Miss Wright's reputation should have suffered by any such action as this. Had it not been that she naturally would require a recommendation on being re-engaged elsewhere, it would not have been so important. She might have gone out and said, "Well, if they are not satisfied with me, I will leave;" but when it actually affects her character and her means of living, she has no remedy but to come into Court and try and vindicate herself,

> and in this I think she has thoroughly succeeded...There should be judgment, I think, for $720 and costs. This is one year's salary, less $130 which Miss Wright has succeeded in earning since her dismissal."[3]

The case of Wright v. San Antonio School District is also significant because it illustrates the fundamental principles involved in the British and Canadian concepts of "natural justice", as defined earlier. Judge Stacpoole, writing in 1939, made no mention of the U.S. concept of "due process", but he did believe that Miss Wright was entitled to similar rights. She was not told "...of the grounds upon which her contract was terminated." Nor, as Judge Stacpoole noted, was the "...person accused (Miss Wright)...able to face the accusers and discuss the matter." Miss Wright was denied the right to "due process" and "natural justice".

The Agassiz School Division, in 1975, has tried to provide "just dismissal procedures" for its teachers so that some of the problems of the past can be avoided. The following document, although subject to amendment, was accepted as policy in 1975 by the Agassiz Board of Trustees and the teachers of the Division:

AGASSIZ SCHOOL DIVISION NO. 13

PROCEDURES FOR DEALING WITH PROFESSIONAL DIFFICULTIES EXPERIENCED BY TEACHERS IN THE SCHOOLS:

1. If a teacher feels that he/she has been unjustly treated at any stage of these proceedings he/she should seek the assistance of the Manitoba Teachers' Society.

2. If the teaching problem of a teacher is, in the opinion of his/her principal, creating an unsatisfactory situation in his/her school, the principal should try, initially, to resolve the matter within his/her school.

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[3] Wright v. San Antonio School District (Decision of Judge Stacpoole in a Manitoba County Court, Western Weekly Reports, 1939), pp. 283-286 inclusive.

3. The following remedial steps, among others, may be tried in assisting teachers having teaching difficulties: (i) asking a successful teacher to give help to his/her colleague; (ii) arranging for in-service sessions or visits to other classes or schools; (iii) advising the teacher of all the resources within the system which are available to him/her.

4. The professional teaching staff should be involved directly in assisting a teacher with professional problems. This might involve, for example, the local association of the Manitoba Teachers' Society. It is understood that teachers are professionally responsible for disciplining themselves.

5. Principals should always distinguish between "minor" and "major" problems when having discussions with teachers. It should be understood that "minor" problems, in regard to these "procedures", are commonplace and are only being mentioned for purposes of "feedback". On the other hand, "major" problems, in regard to these "procedures" are potentially serious and could eventually lead to a teacher being placed on "probation". It should be understood that the terms "major" and "minor" are the interpretations of the principals and are intended to inform teachers about how serious a matter is being viewed by the principals.

6. Principals should always clearly explain, to their teachers, the meaning of the terms "minor" and "major" as defined in paragraph 5, above.

7. If, after allowing a reasonable time for the teacher to effect improvement, the principal feels that satisfactory progress has not been made, the principal will notify the Superintendent.

8. The Superintendent will investigate the matter and will make a decision. The Superintendent will not automatically assume that the teacher is at fault. He may make recommendations to both the principal and the teacher, and shall try to deal with the problem in an impartial and judicious manner. If the teacher is, in fact, considered to be at fault and cannot improve, the teacher will be placed on "probation".

9. The Superintendent or Assistant Superintendent then will hold a conference with the teacher and his/her principal. The teacher will be advised that he/she is on "probation" and that the situation must improve. Further help and advice will be offered at this time.

10. A registered and confidential letter will be sent to the teacher by the Superintendent, advising the teacher that he/she has been placed on "probation". Being on "probation" means that a teacher will have his/her teaching contract terminated by the Division unless adequate improvements can be made within a reasonable period of time; for example, within one or two school terms.

11. If the termination of the teacher's contract seems imminent, the teacher normally may be given the opportunity to resign.

12. All teachers may take their personal grievances to the Superintendent at any time, if they cannot resolve them with their principals. The Superintendent will act in an impartial and judicial manner.

13. In general, it is understood that teachers are entitled to and/or have these rights: (i) a clear statement from the administrator of the difficulties being encountered; (ii) sympathetic and helpful supervision by the administration; (iii) a reasonable period, such as one or two school terms, to work out his/her difficulties; (iv) advice as early as possible if it appears that termination of contract could result.

14. These procedures do not apply to termination under Section 6(c) of the Form 6 Contract, which allows teachers to be released because of "emergency" circumstances under Section 281 (c) of the Public Schools Act.

15. Non-tenured and tenured teachers have the right to "due process" and may appear at any time as delegates before the Board of Trustees to present personal grievances, and to have these grievances considered in conjunction with their continued employment and status as teachers in the Division. Teachers appearing as delegates are entitled to bring witnesses, counsels and other persons with them to assist them in presenting their cases, including staff officers of the Manitoba Teachers' Society. Only tenured teachers, however, have the right to appeal to boards of arbitration. Nevertheless, the Agassiz Board of Trustees will consider the grievances of non-tenured and tenured teachers in an impartial and judicious manner, and will not deny a "hearing" or the right to "due process" to any teacher. The school board will, in effect, give non-tenured teachers a certain amount of "due process". Tenured teachers will have the advantage of presenting their cases to externally appointed arbitration boards.

D. Conclusions and Recommendations for Teachers

The following recommendations are respectfully submitted for the consideration of teachers who wish to avoid the possibility of being dismissed:

1. Teachers should immediately seek the assistance of the Manitoba Teachers' Society in Winnipeg as well as their local M.T.S. Association.

2. Tenured teachers have the right to an arbitration hearing even if the M.T.S. decides that it will not support their cases. A well-qualified lawyer should be secured immediately.

3. Teachers should insist upon fairly frequent, written reports

from their principals or superintendents to keep them informed about their progress as teachers. One report per year seems to be a reasonable number. Favourable written reports can be used as evidence to support a teacher's cause in an arbitration hearing.

4. If teachers are advised that they are being released, they should ask their school boards for formal "reasons" immediately. A teacher may lose a case simply because he did not follow the technical procedures as outlined in the statutes. Timing is very significant and immediate consultation with the Manitoba Teachers' Society is of critical importance.

5. A teacher must remember that he must remain efficient and productive throughout his teaching career. There is evidence to show that some teachers take their positions for granted once they have secured tenure. Tenured teachers cannot afford to become complacent.

6. Teachers should always appear before their school boards to explain their views on their own dismissal cases. A failure to appear before a school board may be in itself sufficient grounds for dismissal.

7. In Manitoba there are no "lists" or specific statutory reasons for dismissing a teacher. However, teachers have been dismissed for refusing to transfer to other programs or schools; for general incompetence in carrying out teaching and school duties; for refusing to carry out legitimate orders given by the school board or administration; for being unable to maintain control and discipline; for unprofessional or immoral conduct; and for refusing to improve themselves professionally; as well as other reasons. It should also be remembered that teachers may lose their jobs simply because of a decline in student population.

8. The last half-year of the two year tenure-gaining period is the most critical for non-tenured teachers. Studies have shown that non-renewal of contracts tend to occur mainly at the end of the two year probationary period. In order to secure tenure, teachers should work very hard, and consult frequently with their administrators, to ensure that their progress is satisfactory during the final six months of the two year period. Administrators should be asked for written reports.

9. Teachers should constantly try to improve their academic and professional qualifications. Courses taken twenty years ago are probably of little value today. Arbitration boards are impressed by hard-working and progressive teachers who are continually improving their professional status.

10. Teachers should become as flexible as possible in the number of subjects that they are capable of teaching. In the years to come, many subjects may become obsolete, and highly-specialized or inflexible teachers will likely be the first to lose their jobs. If a teacher, for example, can teach Latin, and nothing else, and all his students suddenly decide that they no longer wish to take Latin, then what becomes of the Latin teacher? He will probably be the first to go whenever the staff is reduced. Teachers must accept whatever assignments are given to them.

11. In spite of the fact that teachers now have more freedom to live more individual and unusual life styles than they once did, they should still try to avoid offending the customs and mores of the communities in which they teach.

E. Conclusions and Recommendations for Superintendents and Principals

The following recommendations are respectfully submitted for the consideration of superintendents and principals who must deal with the dismissal of teachers:

1. Accurate and well-documented written evidence must be produced to prove the incompetence of teachers.

2. A competent, trial-qualified lawyer, with some school law experience, should be retained as soon as an arbitration hearing becomes a possibility.

3. Court reporters should always be secured for arbitration hearings. They will produce official transcripts of the hearings, and this will allow more accurate appeals to the courts later, if necessary.

4. Once arbitration proceedings are in progress, the superintendent should usually communicate with the teacher only through a staff officer of the M.T.S. If a superintendent tries to contact a teacher too often, this may be interpreted as "harassment".

5. The preparation of official evidence should be done with the direct assistance of the division's legal counsel. Boards of arbitration, it should be remembered, are dominated by members of the legal profession, and they will tend to reject material prepared by persons without legal training.

6. Of particular importance is the official letter giving "reasons" for dismissal. The division's lawyer should assist with this, because the case essentially revolves around the reasons stated in this letter.

7. Charges against a teacher should be put in writing and sent by registered mail.

8. Superintendents should remember that, in effect, they will themselves be "on trial" at arbitration hearings, almost as much as the teachers. Superintendents must therefore prepare their cases with extreme care.

9. In tenure arbitration cases, superintendents should understand that the burden of proof rests on the school board.

10. One good reason is sufficient to dismiss a teacher, as long as it can be proved. Reasons which are difficult or impossible to prove should not be included in letters giving official reasons for dismissal.

11. "Sandbagging" and "dredging", as previously defined, should be avoided as unethical practices.

12. Complaints about a teacher should be received in writing, and the complaining persons should be asked to sign their names. Otherwise, if written documentary evidence does not exist, the potential witnesses may later change their minds and refuse to appear at an arbitration hearing. This can put the superintendent and school board in a very embarrassing situation.

13. Arbitration boards will often ask why allegedly "incompetent" teachers were allowed to secure tenure, and then perhaps teach for several years. This is a difficult question to answer.

F. Conclusions and Recommendations for School Boards

The following recommendations are respectfully submitted for the consideration of school boards who must deal with the dismissal of teachers:

1. At least two or three trustees must be prepared to give evidence at the arbitration hearing. These trustee witnesses must be ready to explain why the teacher was released. The chairman is usually one of the

witnesses.

2. The board of trustees must be very certain that it knows the reasons for the firing, and must be convinced that justice is being done.

3. The board should direct the teacher to appear before it to explain his position. If he refuses to appear, that in itself will probably be sufficient grounds for dismissal. The teacher should be allowed to bring his lawyer and M.T.S. staff officers with him, as well as any witnesses that he may have.

4. The board should try to be unanimous in making its decision. Dissention among board members in dismissal cases can create very serious difficulties.

5. Trustees should avoid discussing a dismissal case in public. The community may well be split on the merits of the case, and trustee comments will likely worsen the situation.

6. Even very incompetent teachers are bound to receive sympathy from some people in the community. Trustees should not be distracted by isolated comments from certain individuals.

7. A school board must always act in "good faith". Any evidence of manipulation or "bad faith" could result in the loss of the case.

8. Trustees must be sensitive to the reasons for complaints against teachers. It is obviously morally wrong, for instance, to try to dismiss a teacher for racial, political or religious reasons. Even more subtle elements may be introduced, however, if a teacher is not liked for some reasons of a personal nature. It is the moral responsibility of a school board to ensure that teachers are only discharged for reasons of economy, incompetence or related reasons.

9. "Marginal" teachers may be given the opportunity to resign, but boards have a responsibility to see that immoral or totally incompetent teachers are never allowed to teach again. In these serious cases "resignations" should not be accepted and dismissal with the risk of arbitration and/or court proceedings should be insisted upon.

10. In Alberta, the school trustees believe that the two most common mistakes of school boards in attempting to terminate teachers contracts are: "a failure to review carefully the available evidence and a failure to have proper inquiries made by its qualified officials so as to obtain evidence sufficient to support a termination of a teacher contract."[4]

11. As Justice A. C. Hamilton pointed out in Skublen v. Lakeshore, discussions with the M.T.S. do not constitute giving reasons. This should always be done in writing and by registered mail. The concepts of "natural justice" and "due process" must always be applied.

G. Conclusions and Recommendations Regarding Boards of Arbitration

The following recommendations are respectfully submitted for the consideration of persons who either: (a) choose arbitrators for boards of arbitration; or (b) serve on boards of arbitration:

1. The formal awards as written up by the chairmen should follow a specific format, and should be constructed with extreme care. In some cases, the existing awards leave out important items of information such as dates, names of arbitrators, and the correctly spelled names of witnesses and other persons involved.

2. Members of the board of arbitration should not be subject to

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[4]"Termination of a Teacher's Contract" (Alberta School Trustee, Volume 38, Number 1, March, 1968), p. 8.

criticism for alleged conflict of interests. This may happen if the same arbitrators are allowed to serve on a more-or-less permanent basis to represent either the M.T.S. on one hand, or school divisions on the other hand. Persons who are frequently appointed as arbitrators for the same side must inevitably have extreme difficulty in maintaining impartial attitudes. This situation also creates an atmosphere of suspicion. If "due process" is to prevail, arbitrators should be considered and selected for their capacity to be "impartial" to all concerned. They must be "above reproach".

3. Arbitrators should be required to sign sworn affadavits to show that they have never had any prejudicial personal or professional dealings with the side which they are being asked to represent. They must, as much as possible, be completely impartial and have no conflict of interests.

4. All witnesses should be sworn before giving evidence.

5. Witnesses should be subpoened if necessary.

6. Witnesses should be excluded from the hearings prior to their giving testimony.

7. Student witnesses should be used only in cases of absolute necessity. The problems encountered in the Kaushal v. Agassiz and the Weir v. St. Boniface cases should be taken into consideration.

8. The structures used for providing "arbitration" in the other Canadian provinces should be carefully studied so that Manitoba's system, if necessary, can be revised to meet the demands of the modern school system and society.

H. Final Conclusions About the Concept of Tenure in Manitoba

In the author's opinion, the establishment of teacher tenure in

Manitoba has unquestionably had mainly positive consequences for Manitoba's school system. This thesis has tried to present all sides of the issue, but the evidence, on balance, appears to weigh heavily in favour of retaining some kind of a system of teacher tenure. In an interview in the June, 1975 edition of the Manitoba Teacher, retiring General Secretary Emerson Arnett of the M.T.S. clearly identified and summarized a number of essential issues concerning the topic of teacher tenure in Manitoba.

The matter was presented in the June, 1975 edition of the Manitoba Teacher as follows:

Question: "Many associate the transfer of the teachers' collective bargaining rights from the Labour Relations Act to the Public Schools Act with a trade-off — giving teachers tenure in exchange for giving up the right to strike. How accurate is that?"

Mr. Arnett: "It's true that the current state of teachers bargaining under the provisions of the Public Schools Act is a direct result of a compromise worked out and agreed to by teachers and trustees and presented in 1955 in a joint brief to the provincial government. The upshot was the transfer from one act to another with provisions that took from teachers the right to strike but gave them security of tenure for which the Society had fought many years. It also gave teachers the right to have their Society fees deducted at source if they wished...I cannot stress enough the importance of tenure and what it has done to improve education in Manitoba, especially in the rural area. As a former rural teacher, I know first hand the pressure to which teachers in rural areas were sometimes subjected. A simple complaint about a flaw in the caretaking could cost a teacher his job. I knew teachers who made it a practice never to stay in one school or area longer than two or three years out of fear they might lose their jobs by unwittingly offending someone in the community. For many teachers, Winnipeg was the mecca that offered the greatest degree of security, higher salaries and better pension provisions because in the city teachers were freer to fight for better conditions. The tenure legislation helped stop the flow of teachers from the rural to the urban parts and lessened the disparity in the quality of education and teaching between the rural and urban areas...The present tenure

> legislation still has a few weaknesses -- especially in wording -- and it could be further improved by revisions that would grant teachers tenure from the day they started teaching. However, on the whole, it has served teachers in this province well."[5]

The author of this thesis essentially agrees with Emerson Arnett. The present system of teacher tenure in Manitoba should remain basically unchanged, except that teachers, principals, superintendents and other educational administrators should be required to renew themselves, professionally, at intervals of perhaps every five or ten years. Educators should be periodically and automatically sent on "study sabbaticals" and these should be mandatory requirements for the renewal of "tenure" and "permanent certification". Such a system would probably be extremely beneficial to the children of Manitoba's school system. Simply removing tenure, in the opinion of the author, would be detrimental to the school system.

The other extremely important matter to be settled is the issue of teacher dismissals due to declining pupil enrollments. Should teachers be given preference for retention on staffs on the basis of seniority, or should other factors also be considered? This complex question will have to be resolved very quickly if student populations continue to decline at the present predicted rates.

In conclusion, it should be stated that teacher tenure has been an essentially beneficial factor for the whole of Manitoba's school system. Teachers outwardly seem to derive all of the benefits of tenure, but this is a superficial belief which does not stand up under careful study and

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[5] Miep van Raalte, "Education: A Never Ending Challenge" (Manitoba Teacher, Volume 53, Number 10, June, 1975).

logical analysis. There are a number of areas in which tenure legislation should be improved, but the simple abolition of tenure would create more problems than it would solve. School boards have the resources, power, and expertise to release teachers justly and efficiently in cases of necessity. It is, moreover, the moral responsibility of school boards to dismiss incompetent tenured and non-tenured teachers, and boards must never hesitate to do so whenever it is clearly in the best interests of the students of the school system. Teachers, on the other hand, have the right to protect themselves against possible injustices such as those that have sometimes occurred in the past. History has shown that tenure is a sound judicial principle which is thoroughly in keeping with the concept of "natural justice" and "due process" as developed in our culture over the centuries.

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