YUKON TEACHERS LABOUR RELATIONS BOARD
COMMISSION DES RELATIONS DE TRAVAIL
DU PERSONNEL ENSEIGNANT DU YUKON

P.O. Box 1525, Station I
Ottawa, Ontario K1P 5V
Tel: (613) 990-180
Fax: (613) 990-184

BY PRIORITY POST / BY EMAIL

BY PRIORITY POST / BY EMAIL

Reference No / No de référence
366-YG-31, 35, 42 to 44 and 48, 52 and 54

July 20, 2017

Ms. Jill Mason
President
Yukon Teachers' Association
2064 - 2nd Avenue
Whitehorse YT Y1A 1A9

Mr. David Morgan
Director, Staff Relations
Yukon Public Service Commission
Box 2703
Whitehorse YT Y1A 2C6

Dear Ms. Mason:

Dear Mr. Morgan:

Re: Grievors: **L. Hutchinson, M. Geisler, E. Claes, P. Dawson A.Cunningham, T. Dennis, L. Bateman and B. Gillard**
Before: **Paul Love**
Date of decision: **July 20, 2017**

Enclosed is a copy of the decision concerning the above-cited matters.

Yours truly,

Kaylee Langille
Case Management Officer
(613) 990-9531

Encl.

c.c.: C. Joy
I. Fraser
J. Dawon
D. Hobbis
L. Hutchinson
M. Geisler
E. Claes
P. Dawson
A. Cunningham
T. Dennis
L. Bateman
B. Gillard

KL/hb

Files: 366-YG-31,
35, 42 to 44,
48, 52, and 54

Yukon *Education*
Labour Relations Act

Before an adjudicator

BETWEEN

LINDSAY HUTCHINSON, MATTEUS GEISLER, EMILY CLAES, PRICILLA DAWSON, ALLISON CUNNINGHAM, TRINA DENNIS, LAURA BATEMAN, AND BRUCE GILLARD

Grievors

and

GOVERNMENT OF THE YUKON

Employer

Before: Paul Love, adjudicator

For the Grievors: Christopher J. Foy

For the Employer: Ian H. Fraser

Heard at Whitehorse, Yukon,
June 8 and 9, 2017.

I. Grievances referred to adjudication

[1] The grievors, Lindsay Hutchinson, Matteus Geisler, Emily Claes, Pricilla Dawson, Allison Cunningham, Trina Dennis, Laura Bateman, Bruce Gillard, all of whom were represented by the Yukon Teachers' Association ("the bargaining agent" or YTA) in their grievances, were employed on temporary contracts as teachers with the Government of the Yukon ("the employer") for two or more years. Their grievances concern the employer's extension of their temporary employment status because of "exceptional circumstances". Ms. Dennis and Mr. Geisler became indeterminate employees at some point after they filed their grievances.

[2] Each grievance was referred to adjudication under s. 65(7) of the *Education Labour Relations Act*, RSY 2002, c.62 (*ELRA*), as "... a grievance ... that does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement or arbitral award ...". As such, the grievances were determined on an expedited basis and result in a final and binding decision that is not subject to judicial review, including a review under s. 95(1) of the *ELRA*.

[3] These grievances involve an interpretation of ss. 106 and 109 of the *ELRA*, which provide as follows:

> *106(1) A person employed pursuant to this Act is on probation for two years from the date of the commencement of employment.*
>
> ...
>
> *(3) The probationary period for an employee may be extended for a period of one year by agreement of the bargaining agent, the employee, and the superintendent.*
>
> ...
>
> *(5) An employee who is on probation shall be evaluated during the first year of probation and shall be evaluated in the second year of probation on or before March 31 of that year.*
>
> ...
>
> *(8) When an employee has been employed on a temporary basis in one teaching position for an entire school year and is on probation for the next school year, the temporary*

> *employment period shall be counted in the calculation of the probationary period....*
>
> ...
>
> *109(1) An employee may be employed on a temporary basis during part or all of a school year as may be agreed to by the employee and the superintendent and the employment may be renewed for part or all of the next school year.*
>
> *(2) Despite subsection (1), the period of employment for an employee who is employed on a temporary basis may be renewed for more than 2 consecutive school years by the deputy minister in exceptional circumstances.*
>
> *(3) Any employee who is employed on a temporary basis shall be evaluated at least once in each school year by either the principal or the superintendent....*
>
> [Emphasis added]

[4] The grievors allege that the employer violated s. 109 of the *ELRA*, that there are no "exceptional circumstances" as noted in s. 109(2), and that they are entitled to be treated for all purposes as indeterminate employees. They also argue that their probationary status commenced on the first date of employment under their first contract, per s. 106 of the *ELRA*, and not as of the date on which they achieved indeterminate status. The grievors ask that I find that s. 109 was breached and that I reserve jurisdiction over the implementation of the award.

[5] The employer alleges that the grievors' contracts were renewed by the Deputy Minister, Dr. Judy Arnold ("the Deputy Minister"), in exceptional circumstances. Alternatively, the employer argues that the contracts were illegal.

[6] Mses. Hutchinson, Bateman, and Dennis and Mr. Douglas Rody, a YTA staff relations officer, testified on behalf of the grievors. Lake Apted, the director of human resources, Registrar, Teachers Certification, Department of Education, testified on behalf of the employer. The employer did not call the Deputy Minister to testify. For the grievors who did not testify (Mr. Geisler, Ms. Claes, Ms. Dawson, and Mr. Gillard), the documentary evidence as well as Ms. Apted's testimony permits me to determine their grievances.

II. Summary of the evidence

[7] The parties agreed on the grievors' work history (Exhibit G-2, Tab 1).

[8] Generally, the grievors worked two or more years as teachers, often at the same schools and in the same positions. Evidence was led before me that the grievors' continuing temporary teacher status caused difficulties in that they were not eligible for benefits during the summer months and were subject to substantial uncertainty, which impacted their ability to plan and created uncertainty for students. None of the grievors was cross-examined in a vigorous way, and I accept their testimonies.

[9] Before discussing the evidence of each individual grievor, in my view, it is helpful to set out the more general information that the YTA and the employer provided about the scope of the problem, which is common to all the grievors.

[10] The employer has a policy entitled *Posting and Filling Vacancies, Guideline #2* (Exhibit G-2, Tab 2) that distinguishes between permanent and temporary vacancies as follows:

> ***Permanent Vacancies:***
>
> *Permanent Vacancies are established by the Superintendent when there is a continuing and on-going [sic] need for work and may be full or part-time.*
>
> ***Temporary Vacancies:***
>
> *Temporary positions are established when an assignment is known to be a minimum of 30 instructional days in duration (see Temporary Employee Regulation), to backfill for an employee on leave or to create an assignment for a specific period. They are also established when permanent vacancies occur after the first week of June.*
>
> *Employees employed in temporary positions are members of the YTA bargaining unit and are eligible for all benefits defined in the collective agreement, to the extent of their temporary contract.*
>
> *In general, permanent employees are not eligible for appointment to temporary positions. When a permanent employee applies for a temporary position, and is the successful candidate, the employee will relinquish his/her permanent status by accepting the temporary appointment.*

> *Permanent employees may be temporarily assigned to temporary positions when there is an operational need for a specific skill set in a particular assignment, as determined by the Superintendent. The substantive position, of an employee who is temporarily assigned to a temporary position will be filled on a temporary basis, not exceeding the duration of the temporary position.*

[11] The employer also has a policy, entitled *Posting Positions to Fill Vacancies Guideline #2*, which was published on March 17, 2017 (Exhibit G-2, Tab 11). It has another policy, entitled *Temporary assignments from/to YTA positions Guideline #15*, published on September 20, 2013 (Exhibit G-2, Tab 9), which deals with the situation of a teacher going to work for the YTA. That teacher takes a term or temporary employment position while at the YTA and is offered a return to his or her substantive position at the end of the term.

A. Mr. Rody

[12] Mr. Rody has been employed in several capacities with the YTA since 2011. He is currently an employee relations advisor; he is not a teacher. He provided very helpful background information. He advised that the bargaining unit comprises about 550-600 teachers.

[13] He provided a documentary analysis about the number of teachers that the employer deemed temporary in their third or later years due to exceptional circumstances (Exhibit G-2, Tab 8). In 2012-2013, the employer deemed 22 YTA members temporary in their third or later years due to exceptional circumstances. In 2013-2014, 33 were so deemed. In 2014-2015, it was 27. In 2015-2016, it was 15. In 2016-2017, 12 were so deemed.

[14] Mr. Brody analyzed the numbers of teachers on leaves of absence from 2012-2013 to 2016-2017 and indicated that leaves of absence are a common occurrence among teachers. I have summarized his information, which was provided in documents (Exhibit G-1, Tab 7) and in oral testimony, in this table:

School Year	Teacher Leaves of Absence
2012 - 2013	77
2013 - 2014	92
2014 - 2015	85
2015 - 2016	86
2016 - 2017	69

[15] Mr. Brody testified that temporary teachers are vulnerable employees who are less likely to file grievances about their terms and conditions of employment. They do not have access to benefits during the summer or the layoff or priority-hiring provisions negotiated for indeterminate employees in the collective agreement between the Government of the Yukon and the YTA effective July 1, 2015 to June 30, 2018 ("the collective agreement") (Exhibit G-8). In cross-examination, Mr. Brody conceded that these differences resulted from the parties' collective agreement negotiations.

[16] Mr. Brody testified that the employer relies heavily on temporary contracts in its staffing. He testified that this might impact the ability to recruit and retain employees given that jurisdictions such as British Columbia are looking to expand the number of teachers pursuant to recent wins by the BC Teachers Federation in the Supreme Court of Canada.

B. Ms. Apted

[17] Ms. Apted testified about the employer's staffing process and the process for defining "exceptional circumstances".

[18] She testified that the staffing process starts in November with the deadlines for teachers to submit educational leave requests. She provided the 2016-2017 leave deadlines for YTA members (Exhibit E-1), which impose deadlines for education leave, deferred salary leave, leave without pay, requests for transfer, and returning from leave and for resignations and retirements. For example, in the 2016-2017 school year, the employer received 15 requests for retirement (Exhibit E-2), but she was unable to

testify when they were received.

[19] In late November or early December, the employer looks at projected enrolment and at service and program levels. An allocation formula is applied to allocate "full-time equivalents" to each school. Administrators or principals for each school determine their staffing needs and consider who is going on leave. Principals try to determine whether the schools' needs will be met with existing staff or whether there is a need for temporary staff. This plan must be approved by the district superintendent, and if it is approved, it goes to the assistant deputy minister. Someone has to determine whether the vacancies are permanent or temporary.

[20] Once the number of positions is known, a priority placement process is applied, as set out in the *Staffing Protocol, Guideline #1* (Exhibit G-9). The protocol provides for the following priority groups:

> *Group 1: **Yukon First Nation temporary and indeterminate teachers who request a return to their traditional territory and;***
>
> *Indeterminate teachers with three or more years of continuous service in the same school **and;***
>
> *Indeterminate teachers who are not assigned to a school.*
>
> *Group 2: Yukon First Nations candidates (other than those in an indeterminate position who will be either **group** 1 above or 3 below), and Temporary Teachers with three or more years of continuous service.*
>
> *Group 3: Temporary and indeterminate teachers with a minimum of one school year of continuous service, worked in the preceding or current school year.*
>
> *Group 4: All other applicants.*
>
> [Emphasis in the original]

[21] The vacancies are posted after the priority placement is applied. The postings are issued in late April, May, and June; however, some community-leadership-type postings are issued earlier.

[22] If a teacher accepts a posting, it can have a cascading impact that creates other vacancies. Vacancies may be described as temporary, even if they are permanent, if they arise after the leave deadline.

[23] Ms. Apted testified that temporary teachers have filed many grievances since 2013, which was when the Yukon Teachers Labour Relations Board (the "Board") issued its decision in *Lapierre v. Government of Yukon* (File Nos. 367-YG-17 and 18, 20130710).

[24] She stated that the employer developed *Guideline #18 Temporary Teachers – Vacancies Beyond Two Years and Exceptional Circumstances* (Exhibit G-2, Tab 10; "*Guideline #18*") in an attempt to define "exceptional circumstances" in a fair and transparent way. She testified that the employer consulted with the YTA when preparing it. The bargaining agent never agreed to that approach. It was the subject of a policy grievance filed on April 5, 2017, by the bargaining agent (Exhibit G-2, Tab 12), which has not yet been resolved. In cross-examination, Ms. Apted admitted that the employer no longer uses this guideline but that it was used for staffing for the 2016-2017 school year.

[25] *Guideline #18* defines "exceptional circumstances" in terms of categories as follows:

...

> 1. ***Late Notice of Vacancy:*** *Any notification by an Employee to Yukon Education after May 15 of any school year may result with that position being posted and filled in that year or the next year as a Temporary position. The following year that same position will be posted and filled on a permanent basis. YTA will be advised of the late notice and that the position is to be filled on a temporary basis.*
>
> 2. ***Interim Funding:*** *Specific funding agreements for a limited project, pilot projects and/or programs with a defined time frame will result in positions being filled on a temporary basis. Examples also include positions funded through transition' positions in the staffing allocation formula. Consultation with YTA will take place for positions under this item 2 which will be extending beyond 24 months.*
>
> 3. ***Enrollment Uncertainty:*** *A new position necessary to address an influx of new students may be filled initially on a temporary basis. Consultation with YTA, and provision of relevant information to take place prior to posting and recruitment.*

> 4. ***Temporary Assignments:*** *Where a temporary vacancy is created by a permanent teacher on a temporary assignment, the temporary vacancy may be backfilled on a temporary basis in consultation with YTA.*
>
> 5. ***Temporary Reduction in Hours:*** *A partial vacancy left by a teacher requesting and being granted a temporary reduction in hours will be filled on a temporary basis. This could include the amalgamation of several small reductions in hours in a school to create a larger, temporary FTE. Consultation with YTA, and provisions of relevant information, to take place prior to posting and recruitment.*
>
> 6. ***Leave:*** *Vacancies due to deferred salary leave, extended medical leave, parenthood leave, leave without pay, jury duty leave and LTD will be filled on a temporary basis, as the nature of the vacancy is temporary and the vacancies are unforeseen.*
>
> 7. ***Other Leave:*** *Vacancies due to maternity leave, parental leave, educational leave and all non-medically management LTD will not be considered exceptional circumstances.*
>
> 8. *Notwithstanding 1 to 7 above, circumstances may arise that the Deputy Minister deems to be exceptional circumstances. The Deputy Minister will notify and consult with the YTA of any unforeseen exceptional circumstances that may arise, four weeks prior to posting a temporary position, or if not possible as soon as possible.*
>
> ...
>
> [*Sic* throughout]
>
> [Emphasis in the original]

[26] Ms. Apted testified that one of her staff members would meet with the Deputy Minister and have her sign offer letters, which the staff member had prepared. She had no direct evidence about those meetings for any of the grievors and no direct evidence about what the Deputy Minister considered when signing the offer letters.

[27] She had no evidence about the particulars of any of the exceptional circumstances surrounding any vacancy for any of the grievors except that she was able to reference the item number in *Guideline* #18 in each grievor's offer letter, when it was mentioned in that letter.

[28] In cross-examination, Ms. Apted agreed that leaves of absence were frequent.

[29] I turn now to the evidence about the individual grievors.

C. Ms. Hutchinson; file 366-YG-31

[30] Ms. Hutchinson first substitute-taught for periods, and it is common ground that the parties do not consider substitute teaching temporary employment. Ms. Hutchinson had temporary employment as a teacher at schools in Whitehorse including Takhini Elementary School from March 25 to June 14, 2013; at Jack Hulland Elementary School from August 14, 2013, to June 10, 2014, and from March 9 to June 15, 2015; and at Selkirk Elementary School from August 26, 2015, to January 15, 2016, and from August 24, 2016, to June 20, 2017 (Exhibit G-2, Tab 1).

[31] The employer did not set out any exceptional circumstances in the offer letters for Ms. Hutchinson before the 2016-2017 year.

[32] The Deputy Minister's letter to Ms. Hutchinson for the 2016-2017 school year (Exhibit G-1, Tab 1, page 23) refers to her status as follows:

...

> *Your status is temporary as this position is held by an indeterminate employee on a leave of absence.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to exceptional circumstances pursuant to section 109(2) of the Education Labour Relations Act.*

...

[33] Ms. Hutchinson hopes to become a permanent employee so her life can progress. She was cross-examined only on whether she was a YTA member while she was a substitute teacher.

D. Mr. Geisler; file 366-YG-35

[34] According to the agreed summary of Mr. Geisler's work (Exhibit G-2, Tab 1), he worked as a temporary teacher from February 11 to June 23, 2014; from October 29, 2014, to June 15, 2015; from August 26, 2015, to June 20, 2016; and from August 24,

2016, to June 15, 2017, at F. H. Collins Secondary School. In his letter of appointment from the Deputy Minister dated July 22, 2016 (Exhibit G-1, Tab 2, p. 9), for the first time, his letter of offer contained the following term:

...

> *Your status is [sic] this position is due to an employee being on a temporary assignment.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to exceptional circumstances.*

...

[35] In cross-examination, Ms. Apted provided no information about the circumstances surrounding the letter and admitted that the employer did not disclose any exceptional circumstances for the offer for the term of August 26, 2015 to June 20, 2016, which was Mr. Geisler's third term of temporary employment. Ms. Apted stated that this was because of *Guideline #18*; however, she also admitted that *Guideline #18* was not published until June 20, 2016. Ms. Apted also stated that the Deputy Minister was the only one with authority to decide exceptional circumstances, yet it is clear that Mr. Geisler's offer letter is signed by a superintendent.

[36] By the hearing of this matter Mr. Geisler's status had been converted to indeterminate by the employer.

E. Ms. Claes; file 366-YG-42

[37] Ms. Claes was employed as a temporary teacher from August 25, 2014, to June 15, 2015, at Elijah Smith Elementary School; from August 26, 2015, to June 20, 2016, at Selkirk Elementary School; and from August 24, 2016, to January 2, 2017, and from January 3 to June 30, 2017 at Grey Mountain Elementary School (Exhibit G-2, Tab 1, and Exhibit G-1, Tab 3).

[38] Her offer for the 2016-2017 school year, signed by the Deputy Minister (Exhibit G-3), stated in part as follows:

...

> *Your status is temporary as this position came as a result of an employee's temporary reduction in hours.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to exceptional circumstances pursuant to section 109(2) of the Education Labour Relations Act.*
>
> ...

[39] Ms. Apted conceded in cross-examination that she did not know about the circumstances related to the Ms. Claes' position being temporary as a result of an employee's reduction in hours.

F. Ms. Dawson; file 366-YG-43

[40] Ms. Dawson was employed as a temporary kindergarten teacher at Takhini Elementary School from August 13, 2013, to June 10, 2014; from August 20, 2014, to June 15, 2015; from August 26, 2015, to June 20, 2016; and from September 26, 2016, to June 20, 2017, as an aboriginal language teacher trainee (Exhibit G-2, Tab 1).

[41] Her offer letter of June 8, 2015, from the Deputy Minister (Exhibit G-1, Tab 4, page 8) stated in part as follows: "Your status is temporary due to enrollment [*sic*] uncertainty...".

[42] The employer did not allege any exceptional circumstances before Ms. Dawson's fourth year of employment.

G. Ms. Cunningham; file 366-YG-44

[43] Ms. Cunningham was employed as a temporary teacher at Teslin School from August 27, 2013, to June 10, 2014 and from August 20, 2014, to June 15, 2015; and at Golden Horn Elementary School from August 26, 2015, to June 20, 2016 and from August 24, 2016, to June 20, 2017 (Exhibit G-2, Tab 1).

[44] Her performance was assessed on March 26, 2014 (Exhibit G-1, Tab 5, page 3), and on March 4, 2016 (Exhibit G-1, Tab 5, page 12).

[45] Her letter of offer of June 15, 2015 (Exhibit G-1, Tab 5, page 10), from the Deputy Minister reads in part as follows: "Your status is temporary as this position is held by an indeterminate employee on a leave of absence."

[46] In that letter, the Deputy Minister does not allege that Ms. Cunningham's employment for the 2015-2016 school year is deemed temporary due to exceptional circumstances.

[47] Her letter of offer of July 25, 2016 (Exhibit G-1, Tab 5, page 19), from the Deputy Minister reads in part as follows:

...

> *Your status is temporary due to a late notice of vacancy.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to exceptional circumstances pursuant to section 109(2) of the Education Labour Relations Act.*

...

H. Ms. Dennis; file 366-YG-48

[48] Ms. Dennis worked as a temporary full-time teacher at Selkirk Elementary School from August 25, 2014, to June 15, 2015; from August 26, 2015, to June 20, 2016; and from August 24, 2016 to June 20, 2017 (Exhibit G-2, Tab 1). Only in her letter of offer dated July 22, 2016 (Exhibit G-1, Tab 6, page 7), did the employer allege that her employment was deemed temporary due to exceptional circumstances as an employee was on temporary assignment.

[49] As a teacher, Ms. Dennis works with at-risk children. It is important for continuity that these children know that she will be their teacher the next year. Typically, she has the same students for a four-year period.

[50] Ms. Dennis also gave rebuttal evidence which contradicted Ms. Apted's testimony about the "temporariness" of her position. She testified that she was very surprised when she received her letter of offer of temporary employment for the 2016-2017 school year. She knows the person who had the job before her. She testified in rebuttal that the person she replaced had gone to work for the Ministry of Education and was in a permanent position with it. She believes that there were staff on temporary assignments when she received her letter.

[51] She believes that the July 22, 2016 letter refers to another person in the school who had been on educational leave and who took a place in reading recovery, serving different schools as a consultant.

[52] She substitute-taught in the position from January to June of 2013. She subsequently taught in the same classroom for the next three years. She assumed that because she held the position in 2015-2016, she would become an indeterminate employee. She was surprised when she received the letter deeming her employment temporary due to an employee being on temporary assignment.

[53] As mentioned above, since filing her grievance, Ms. Dennis has now achieved indeterminate status.

I. Ms. Bateman; file 366-YG-52

[54] Ms. Bateman confirmed that she worked as a temporary kindergarten teacher at Christ the King Elementary School for the 2014-2015, 2015-2016, and 2016-2017 school years. She testified that she was evaluated twice in her work as a teacher while on term contracts (Exhibits G-4 and G-5). She stated it is stressful not knowing whether she will have continuing employment, which makes it difficult to plan. She is the sole income earner for her family, and during the summer months when she is not working as a teacher, she does not have medical, dental, or travel insurance benefits. She has to apply for her job each year, including for the upcoming 2017-2018 school year.

[55] Ms. Bateman entered her third year of employment as a result of an offer letter from the Deputy Minister on July 22, 2016 (Exhibit G-1, Tab 7, pages 8 and 9). The offer was for temporary full-time work from August 24 to December 16, 2016, and then half-time work (.5) from January 3 to June 20, 2017. In fact, she worked full-time for the entire 2016-2017 school year.

[56] Ms. Bateman's offer letter from the Deputy Minister stated in part as follows:

...

> *Your status is temporary as this position came as a result of an employee's temporary reduction in hours.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to*

> *exceptional circumstances pursuant to section 109(2) of the Education Labour Relations Act.*
>
> ...

[57] Ms. Bateman has applied again for her position for the 2017-2018 school year. The original posting that she applied for, which was dated May 24, 2017 (Exhibit G-7), was for a permanent kindergarten teacher. The employer reissued the posting on May 30, 2017 (Exhibit G-6), describing the posting as a temporary position.

[58] Ms. Bateman was not cross-examined by the employer. Ms. Apted did not know the circumstances related to the Ms. Bateman's position being temporary as a result of an employee's temporary reduction in hours and that resulted in the Deputy Minister's offer to Ms. Bateman.

J. Mr. Gillard; file 366-YG-54

[59] Mr. Gillard worked as a permanent teacher from August 21, 2003, to September 1, 2010. Ms. Apted explained that he then worked for the YTA. He worked again as a temporary teacher from January 5 to June 15, 2015; from August 26, 2015, to June 20, 2016; and from August 24, 2016, to June 20, 2017 (Exhibit G-2, Tab 1).

[60] His offer for the 2016-2017 school year, signed by the Deputy Minister (Exhibit G-2, Tab 8, page 4), stated in part as follows:

> ...
>
> *Your status is temporary as this position is held by an indeterminate employee on a leave of absence.*
>
> *As your employment extends or will extend beyond two consecutive school years during the term of the assignment, I am deeming your employment to be temporary due to exceptional circumstances pursuant to section 109(2) of the Education Labour Relations Act.*
>
> ...

[61] Ms. Apted admitted in cross-examination that she did not know the circumstances related to Mr. Gillard's position being temporary as a result of the indeterminate employee on leave.

III. Summary of the arguments

A. For the grievors

[62] The YTA supplied a 12-page written argument on behalf of the grievors, which it supplemented by oral argument.

[63] It argues that these grievances deal with the employer unreasonably and unfairly extending the grievors' temporary status and denying them indeterminate status, contrary to the *ELRA*.

[64] According to the YTA, the Board already interpreted s. 109 of the *ELRA* in *Lapierre*, which was upheld by the Supreme Court of Yukon on judicial review. In *Commission scolaire francophone du Yukon no. 23 v. Yukon (Procureure générale)*, 2014 YKCA 4 at para. 210 ("*Commission scolaire*"), the Yukon Court of Appeal also commented on s. 109, as follows:

> *[210] The scheme of the statute is clear. Teachers and other ordinary employees may be employed on a "term" or "temporary" basis, but only for a limited time. Unless there are "exceptional circumstances" they must become permanent employees after two consecutive years....*

[65] The YTA states that once it has been proven that the grievor was employed for part or all of two consecutive years, the onus then shifts to the employer to prove that exceptional circumstances did in fact exist; see *British Columbia School Board No. 39 (Vancouver) v. Vancouver Teachers' Federation*, [1996] B.C.C.A.A.A. No. 567 (QL) at paras. 22 and 24. The YTA submits that no exceptional circumstances apply for any of the grievors that would justify a delay in converting their temporary status to indeterminate.

[66] In the YTA's view, the Board should draw an adverse inference against the employer for its failure to call the Deputy Minister, who was required to decide whether there were exceptional circumstances with respect to each of the grievors. The YTA states that the Deputy Minister cannot blindly sign off on a letter based on *Guideline #18* and that the employer cannot ignore the *ELRA* by offering contracts, some of which are for four successive terms. An employee's acceptance of such a contract is irrelevant as he or she is vulnerable, and the parties cannot contract out of the *ELRA*.

[67] In each case, the employer extended the grievors' temporary status by alleging that there were exceptional circumstances. It alleged that the following exceptional circumstances apply to the grievors:

- an indeterminate employee went on leave of absence: Mses. Cunningham, Claes, Hutchinson, and Bateman and Mr. Gillard;
- an employee's hours were temporarily reduced: Ms. Bateman;
- a late notice of vacancy: Mses. Cunningham and Bateman;
- an enrolment uncertainty: Ms. Dawson; and
- an employee went on a temporary assignment: Mr. Geisler and Ms. Dennis.

[68] The alleged exceptional circumstances that the employer claimed to deny indeterminate status were nothing unusual or extraordinary. Teachers go on leaves of absence, reduce their hours, leave to take on temporary assignments, and provide late notices of vacancies due to retirement or otherwise, and enrolment uncertainty happens annually. These are all part of the regular and normal movement of teachers. The YTA submits that the alleged exceptional circumstances are in fact regular, common, and customary parts of the pattern of staffing schools.

[69] The YTA notes that "exceptional circumstances" are defined as "conditions which are out of the ordinary course of events; unusual or extraordinary circumstances" in *Black's Law Dictionary, 6th ed.*

[70] Section 167 of the *Education Act* (RSY 2002, c.66) specifically sets out that "[e]very teacher has the right to be treated in a fair and reasonable manner ...". The grievors had the right to be treated in a fair and reasonable manner in their conversion from temporary to indeterminate status. In *Crabb v. Government of Yukon* (File No. 367-YG-19, 20130424) at para. 49, the Board stated as follows: "The adjudicative review of unilaterally promulgated employer rules or polices is typically limited to the standard of reasonableness, but in the context at hand, I find the *Education Act* expressly includes the standard of fairness as well."

[71] According to the YTA, the employer's decision on what constitute exceptional circumstances cannot be made in an arbitrary, discriminatory, or bad faith manner and must not be unreasonable or unfair.

[72] In the YTA's view, section 10 of the *Interpretation Act* (RSY 2002, c.125) adds to the employer's already heavy onus by mandating that s. 109 of the *ELRA* be deemed remedial and that it must be given a fair, large, and liberal interpretation in favour of employees.

[73] This is further supported by the importance of work in a person's life. In *Wallace v. United Grain Growers Ltd.*, [1997] 3 S.C.R. 701 at para. 93, citing *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 at p. 368, a majority of the Supreme Court noted as follows:

> *Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.*

[74] The YTA also referred to *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [1999] B.C.C.A.A.A. No. 508 (QL) at para. 86, where Arbitrator Dorsey stated as follows: "There is nothing remarkable or unusual about creating new positions or eliminating existing positions in response to enrolment, grade reconfiguration or opening a new school."

[75] In addition, in the circumstances of Ms. Hutchinson, Ms. Cunningham, and Mr. Geisler, the YTA notes the employer did not allege exceptional circumstances contemporaneously with the third years of their employment. The failure to contemporaneously allege them subverts the intention of the legislature; see *Lapierre*, at paras. 264 and 265.

[76] By purporting to extend the grievors' temporary status through circumstances that were not exceptional, the employer held in abeyance their already crystallized indeterminate status, which led to consequences for the grievors, including but not limited to restricted access to applicable collective agreement rights, limited opportunities for advancement because of lower seniority placement in the staffing protocol, and depriving them of layoff protections.

[77] The YTA submits that a temporary teacher's probationary period commences from the date on which he or she is employed as a temporary teacher, as determined in *Lapierre*, at paras. 232 and 239 to 243.

[78] From the YTA's perspective, the employer's submission in effect asks me to ignore *Lapierre* and to read into s. 106(1) the following added and underlined word: "A person employed pursuant to this Act is on probation for two years from the date of commencement of indeterminate employment."

[79] The employer relies upon the Yukon Court of Appeal's decision in *Commission scolaire* for support. However, the YTA contends the employer's support is misplaced as the Court made a fundamental interpretive mistake when it concluded as follows at paragraph 211: "The language used in s. 105(7) is identical to that used in s. 106(7), and it must therefore be interpreted as having the same meaning. Thus it also provides for permanent, and not term employment."

[80] The Court's use of s. 106 to determine whether a principal could be provided a term contract was premised on the mistaken conclusion that principals are not employees because they are employed in a management capacity. In *Commission scolaire*, at para. 208, the Court of Appeal stated as follows: "The word 'employee' is defined in the statute as excluding persons employed in a 'management capacity;' thus, it does not apply to principals."

[81] The YTA submits that the Court of Appeal neglected to review the *ELRA* definition of "person employed in a managerial capacity", set out at its s. 1, which specifically states that it "... does not include a principal or vice-principal appointed under the *Education Act* ...".

[82] *Lapierre* is to be preferred and is more persuasive in the context of this case. Further, the YTA submits that the employer seeks in this case to relitigate the findings in *Lapierre* about the interpretation of ss. 106 and 109 of the *ELRA*.

[83] The YTA explains that *Lapierre* was not a case under s. 65(7) of the *ELRA* as it arose out of a breach of the collective agreement with respect to layoff rights and termination without just cause. The present case falls under s. 65(7) of the *ELRA* because it "... does not arise either in whole or in part out of the administration or interpretation of a provision of a collective agreement ...". The fact that the

adjudicator in *Lapierre* interpreted s. 109 does not transform the decision into a case under s. 65(7), where paragraph 65(7)(d) specifies the decision "... shall not be referred to in any future decision, shall be final and binding and not subject to any judicial review ...".

[84] The parties never considered *Lapierre* a case under s. 65(7) of the *ELRA*. It was not treated as an expedited matter, and the employer sought judicial review, which was unsuccessful. The YTA at paragraph 40 of their written argument submits "... *it would be contrary to labour relations policy to allow the employer to handcuff your ability to rely on Lapierre after they had it judicially reviewed and were unsuccessful.*"; see *995132 Ontario Ltd. v. 1149056 Ontario Inc.* (2002), 58 O.R. (3d) 457 (ON CA).

[85] The YTA submits that issue estoppel applies in this case to preclude the employer from relitigating *Lapierre*. All the preconditions for the operation of issue estoppel have been met as outlined in the decision of *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460:

...

> *(1) that the same question has been decided in earlier proceedings;*
>
> *(2) that the earlier judicial decision was final; and*
>
> *(3) that the parties to that decision or their privies are the same in both the proceedings.*

...

[86] An overarching labour relations policy applies to make sure that the parties are guided by previous decisions, which ultimately promotes efficient and sound resolutions to workplace disputes. According the YTA, the Board should exercise its discretion and find that the employer is estopped from relitigating *Lapierre*.

[87] The YTA also provides the following authorities in its document brief, which were not referred to in its written or oral argument: *Brandon School Division No. 40 v. Brandon Teachers' Association No. 40 of the Manitoba Teachers' Society*, [2000] M.G.A.D. No. 2 (QL); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [2010] B.C.C.A.A.A. No. 189 (QL); *British Columbia School District No. 39 (Vancouver) v. Vancouver Teachers' Federation*, [1996] B.C.C.A.A.A. No. 87 (QL);

British Columbia School District No. 52 (Prince Rupert) v. Prince Rupert District Teachers' Union, [1996] B.C.C.A.A.A. No. 228 (QL); *Lopushinsky v. Yukon Teachers' Association*, September 25, 1996; *Okanagan Similkameen School District No. 53 v. British Columbia Teachers' Federation*, [2004] B.C.C.A.A.A. No. 276 (QL); and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

[88] The YTA requests the following:

> (a) that a declaration be made stating that the employer breached s. 109 of the *ELRA*;
>
> (b) that an order be made stating that the employer cease and desist from further contraventions of s. 109 of the *ELRA*;
>
> (c) that an order be made stating that when an employee is employed as a temporary teacher during part or all of a school year for two consecutive years, and absent exceptional circumstances per s. 109(2) of the *ELRA*, he or she be granted indeterminate status at the completion of his or her temporary contract in the second consecutive year;
>
> (d) that each grievor be granted indeterminate status and be made whole;
>
> (e) that each grievor's probationary period should be deemed to have commenced, per s. 106(1) of the *ELRA*, at the start of their temporary employment; and
>
> (f) that the Board grant such further and other relief as it deems just.

B. <u>For the employer</u>

[89] The employer supplied a 19-page written argument, which it supplemented by oral argument.

[90] It submits that *Lapierre* does not determine any of the issues in this case, for the following two reasons:

(a) *Lapierre* cannot be referred to in this proceeding because it was an adjudication under s. 65(7) of the *ELRA*; and

(b) the finding in *Lapierre* is inconsistent with the Yukon Court of Appeal's decision in *Commission scolaire.*

[91] Mr. Lapierre's grievance did not rely on any provision of the collective agreement but on provisions of the *ELRA*. Although for some years, temporary employees have been treated by the Yukon government and the YTA as being in the YTA bargaining unit, they are not, as a matter of law, within the scope of any bargaining unit and therefore cannot bring grievances under a collective agreement.

[92] The employer submits that it should not have appealed *Lapierre* to the Court, which did not have jurisdiction to deal with the judicial review application. The parties cannot clothe a court with jurisdiction; see *Rothgiesser v. Rothgiesser* (2000), 46 O.R. (3d) 577 (ON CA) at paras. 34 to 39.

[93] The employer states that nothing in the *ELRA* sets out an automatic right of conversion to indeterminate status. Section 109 is a limitation on the employer's right to make temporary contracts.

[94] Alternatively, the employer argues that if the contracts were renewed without special circumstances then they are illegal contracts and are simply a nullity.

[95] Under ss. 1 and 23 of the Yukon *Financial Administration Act* (RSY 2002, c.87), no person has any authority to bind the Yukon government in contract unless the Yukon management board has so authorized that person. Contracts entered into without that authorization are unenforceable. The statutory provisions read as follows:

1(1) In this Act,

...

"contract" means any agreement or undertaking providing for the expenditure of public money or the giving of any other consideration in exchange for goods and services, and includes purchase orders, service contracts, construction contracts, employment contracts, and any agreement or undertaking providing for the payment of public money or the giving of any consideration ....

...

> *"public officer" means a person who is an employee, casual employee, or part-time employee within the meaning of the* Public Service Act, *and includes a person who is a Minister, a teacher within the meaning of the* Education Act *or an employee under a contract ....*
>
> ...
>
> ***Contracts***
>
> *23(1) The management board may, by directive, authorize public officers to enter into contracts subject to those terms and conditions the management board considers necessary.*
>
> *(2) If the management board has authorized a public officer to enter into contracts, it may by directive authorize the officer to delegate all or part of the officer's authority to another public officer, subject to any terms and conditions the management board considers necessary.*
>
> *(3) Despite any other Act, a contract shall not be entered into, and is not enforceable against the government, unless entered into by a public officer authorized to do so under subsection (1) or (2)....*

[96] Also, the employer notes that there are statutory constraints on employing staff. Section 170 of the *Education Act* deals with the appointment of staff as follows:

> *170(1) The Minister*
>
> *(a) shall appoint a principal for each school and may appoint a principal for more than one school;*
>
> *(b) may appoint teachers to administrative or supervisory positions, including vice-principals; and*
>
> *(c) shall employ teachers, teaching assistants and other technical support staff necessary for the proper functioning of the school.*

[97] According to the employer, subsection 109(1) of the *ELRA* is a clear statutory prohibition against employing persons on a temporary basis beyond two years (in the absence of exceptional circumstances) and is consistent with the approach taken across Canada on government officials' ability to contract in the face of statutory constraints on authority; see *The Queen v. CAE Industries Ltd. and CAE Aircraft Ltd.*, [1986] 1 F.C. 129 at para. 62 (C.A.). Subsection 109(1) does not offer a statutory benefit to temporary employees.

[98] Under the traditional doctrine of illegality, a contract executed in the face of a statutory prohibition or limitation of authority is illegal as to formation and is therefore void from the outset (void *ab initio*), for want of authority; see *Still v. M.N.R.*, [1998] 1 F.C. 549 at para. 23 (C.A.), and *Transport North American Express Inc. v. New Solutions Financial Corp.*, 2004 SCC 7 at para. 20.

[99] The modern approach to contractual illegality incorporates a balancing of interests to determine if the finding of illegality ought to result in a declaration of unenforceability; see *Still*, at para. 37.

[100] The employer submits that whether one applies the traditional or the modern doctrine, a finding of illegality in formation can result in only one of three outcomes, as follows. The contract is either

(a) unenforceable;

(b) enforceable after severing any terms creating the illegality; or

(c) enforceable on its terms.

[101] If the illegality is the result of a discrete provision that can be severed from the contract without altering the core of the agreement, then a court may be able to salvage its legality by that severance. The employer submitted at paragraph 32 of its summary of argument, however, that that remedy is available only in the following instances (see *Transport North American Express Inc.*, at para. 42, and *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6 at paras. 2, 29 to 32, and 41):

> *(a) the illegal provision is independent of the other obligations; and*
>
> *(b) its removal would not fundamentally alter the benefits and burdens of the other obligations, or change the risks assumed by the parties.*

[102] Additionally, the employer submits that severance is not available if it would do the following (see *Still*, at para. 37, and *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152 at para. 48):

> *(a) subvert the purpose and policy of the statutory provisions responsible for the illegality; or*

(b) grant one party an unjustified windfall

[103] In both *Lapierre* decisions, neither the adjudicator nor the judge explicitly made reference to severance as a cure for an underlying illegality in Mr. Lapierre's contract. However, even if one considers the approach taken in *Lapierre* to be implicitly an attempt at severance, it would not have been an appropriate response to the contractual illegality. The employer submitted at paragraph 34 of its' written submission this is because of the following:

> *(a) the temporal length of a contract is not an independent term, but is intimately connected to every other obligation in the contract; and*
>
> *(b) converting a contract of employment with a limited term and a constrained set of benefits into a contract of indeterminate length and a greatly expanded range of benefits:*
>
> *(i) alters the benefits and burdens of the contract;*
>
> *(ii) changes the risks assumed by the parties; and*
>
> *(iii) creates a windfall for one party.*

[104] According to the employer, the judge in *Lapierre* erred in his judicial review decision by taking the phrase "must become permanent employees" to mean that the Court of Appeal in *Commission scolaire*, at para. 210, considered that the *ELRA* somehow provided a mechanism for converting temporary employment to permanent employment at the end of the probationary period.

[105] *Commission scolaire* was decided on February 11, 2014, and the judicial review application in *Lapierre* was decided on July 28, 2014. In the employer's view, the judge in *Lapierre* clearly considered *Commission scolaire*, at paras. 23 and 24, and found it supportive of the adjudicator's reasoning in *Lapierre*.

[106] The employer argues *Lapierre* and *Commission scolaire* ignore the settled law on the range of possible responses to a finding of illegality in contract formation. It adds that it is not apparent on reading those decisions that the employer raised the illegal contract argument in either case.

[107] The employer submitted that there is a shifting burden of proof about exceptional circumstances. It believes it has established exceptional circumstances in this case, by calling Ms. Apted to show that the employer had a process for identifying exceptional circumstances and it applied *Guideline #18*. It relied on the following cases in support of its submission that exceptional circumstances require a contextual analysis and not just an assessment of the frequency of an event's occurrence, as the YTA argued: *R. v. Jordan*, 2016 SCC 27, *WCAT-2008-01511*, 2008 CanLII 25433 (BC WCAT), *R. v. Golub* (1997), 34 O.R. (3d) 743 (ON CA), *1604-02827 (Re)*, 2017 ONSBT 527, and *Edmonton (City) v. Edmonton (Assessment Review Board)*, 2010 ABQB 634, along with Brown and Beatty, *Canadian Labour Arbitration*, 4th edition. The employer relied particularly on *Jordan* and submitted that exceptional circumstances lie outside the employer's control in the sense expressed as follows at paragraph 69:

> *... (1) they are reasonably unforeseen* or *reasonably unavoidable* and *(2) Crown counsel cannot reasonably remedy the delays emanating from those circumstances once they arise.*

[108] The employer submits that leave replacements occur unpredictably and therefore constitutes "exceptional circumstances".

C. **Grievors' reply**

[109] In reply to the employer's argument that s. 109 deals with limits to its contracting authority, the YTA states that it is clear from the Hansard (Exhibit G-12) that the *ELRA* was intended to create a separate statute from the *Education Act* that would deal with labour relations matters and to recognize the rights of the entire bargaining unit, including first-year temporary teachers. Section 109 restricts the employer's rights to use temporary contracts and sets an end to that status after two years, absent exceptional circumstances. Further, the probationary language of s. 106 in the *ELRA* refers to "*A person employed pursuant to this Act is on probation for two years from the date of commencement of employment.*" This is a change from the earlier *Education Act*, S.Y. 1989-90, c. 25, s. 173(1), which referred to "*A teacher employed pursuant to this Act is on probation for two years from the date of commencement of employment.*" A broader approach is now taken by the substitution of the word "person" for "teacher."

[110] The YTA submits that the proper forum to adjudicate temporary teachers' rights is before this Board in the grievance process, rather than before the courts, which is consistent with the approach in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929.

[111] The exceptional circumstances cases put forward by the employer are not helpful, as they do not deal with the context of labour relations. The YTA states that the category approach used by the employer in *Guideline #18* is not a contextual approach that deals with each grievor's situation.

[112] The YTA adds that it is clear that by virtue of s. 5(2) of the *Teaching Profession Act* (RSY 2002, c.215), any person employed as a teacher in a school is an active member of the teacher's association.

[113] The YTA states that an offer of a temporary contract to a teacher in his or her third or later year is not an illegal contract as indeterminate teachers can also accept temporary contracts. If the contract is illegal, it was offered by the employer, and it ought not to be allowed to benefit from its illegal contract. The YTA states that applying the *Still* case still allows full relief to the grievors.

[114] The YTA distinguished *Rothgiesser* on the basis that it dealt with the rules of court.

D. The employer's final reply

[115] The employer notes that there is no authority for an adjudicator to make an order restraining the employer's conduct with respect to offering temporary contracts. That is a matter for the YTA to take up in court.

IV. Reasons

[116] I accept the bargaining agent's argument that while there is an onus to prove the underlying facts necessary to support a grievance, there is no onus on a party to prove issues of statutory or collective agreement interpretation; see *British Columbia School Board No. 39 (Vancouver) v. Vancouver Teachers' Federation*, [1996] B.C.C.A.A.A No. 87 (QL), at para. 53-62.

[117] In response to the grievances, the employer maintains that exceptional circumstances justified the continued temporary employment of the grievors. The YTA's evidence was that there was nothing exceptional about any of the circumstances.

Therefore, in response to the grievors' evidence, the employer had an evidentiary burden to establish that those exceptional circumstances indeed existed.

[118] As set out in *Crabb*, at para. 37, and pursuant to s. 108(1) of the *ELRA*, the full scope of the terms and conditions of a teacher's contract of employment with the employer are composed of a combination of the contractual provisions of the collective agreement (Exhibit G-8) and the provisions of the *ELRA* and the *Education Act* and their regulations.

[119] As argued by the parties, the issues raised in this grievance have been subject to interpretation in *Lapierre*, which was upheld on judicial review in 2014, and subject of further judicial comment in *Commission scolaire.*

[120] I prefer the reasoning in *Lapierre* as that case dealt expressly with the s. 109 issue. *Commission scolaire*, at paras. 210 to 213, dealt with whether principals could be employed on term contracts. That is a different issue than the one dealt with in *Lapierre.* I note that in the *ELRA*, a principal is excluded from the definition of "employee". Teachers can be employed on term contracts, and principals cannot.

[121] It appears from a reading of *Lapierre* and *Commission scolaire* that the employer did not raise the illegal contract argument in either case. In my view, the illegal contract theory — which emanates from the private law of contracts — is of limited assistance when dealing with the labour relations rights of teachers in the Yukon, which are governed by statute and a collective agreement. The employer clearly has the authority to staff schools, as provided in the *Education Act.* The question in this case is whether there were exceptional circumstances that permitted the employer to use temporary contracts as a method of filling vacancies for teachers who have worked all or part of two school years.

[122] I do not accept the employer's arguments that I cannot rely on the *Lapierre* decision; it was upheld on judicial review and is a final decision. It was raised in a reference to adjudication for a layoff and a termination grievance under s. 120 of the *ELRA.* Those grievances were consolidated for the purposes of hearing. During the course of that proceeding, the adjudicator was required to consider whether Mr. Lapierre was a temporary teacher. He determined that Mr. Lapierre was an indeterminate employee; that reasoning was upheld on judicial review. It is not a decision on a grievance referred to adjudication pursuant to s. 65(7) of the *ELRA.*

Therefore, I can rely upon it.

[123] Clearly, temporary teachers are now members of the YTA bargaining unit by virtue of the *Teaching Profession Act*, R.S.Y, 2002, c. 215, s.5(2) "*Any person who is employed as a teacher in a school that is operated by the Minister or by a school board shall, as a condition of employment, be an active member of the teacher's association.*" They have access to adjudication through s. 65(7) of the *ELRA*. *Lapierre* commented on the statutory history of the *ELRA* and *Education Act* in this regard, at paragraphs 221 to 225, and I adopt that reasoning as persuasive.

A. Section 109 – temporary employment

[124] *Lapierre* correctly articulates the proper interpretation of s. 109 of the *ELRA*. I agree with the adjudicator's interpretation of s. 109 as expressed at paragraphs 226 to 267. In my view, there is a sound rationale for s. 109. Under s. 167 of the *Education Act*, every teacher has the right to be treated in a fair and reasonable manner. An employer can address temporary staffing needs with temporary employees or indeterminate employees who are not assigned a position. The purpose of s. 109 of the *ELRA* is to ensure that the employer cannot have a pool of perpetual temporary contractors to address its ordinary staffing needs. Holding an employee in a state of perpetual limbo to convenience the employer in its annual school staffing process is unfair.

[125] I do not accept the employer's argument that s. 109 is simply a limit on the contractual authority of the Yukon government and that any contract that breaches s. 109 is illegal and must be analyzed in terms of illegal contract theory. The *ELRA* was intended to broaden the rights available to temporary teachers; see the Hansard, November 14, 2001 (Exhibit G-12). It is remedial legislation. The *Education Act* requires that teachers must be treated fairly. Further, the section at issue is contained in Part 10 of the *ELRA* — a labour relations statute — which deals generally with terms and conditions of employment.

[126] The employer suggests that a proper remedy for offering term contracts, in breach of s. 109, is for the YTA to apply to the Yukon Supreme Court for a declaration and other relief, including injunctive relief. Temporary contracts are a labour relations issue. Pursuant to s. 65 of the *ELRA*, the Yukon legislature has determined that labour relations issues of this sort — matters that do not arise in whole or part out of a

collective agreement — can be grieved to adjudication before the Board, which, rather than the courts, is the proper forum to resolve this issue; see *Weber.*

[127] In my view, absent exceptional circumstances, any teacher who completes two years of service is an indeterminate employee. This is by simple operation of the law, although the bargaining agent characterized it as the "crystallization of rights and conversion." Any other interpretation results in an absurdity and makes a mockery of the statutory provisions.

B. Exceptional circumstances

[128] The phrase "exceptional circumstances" is not defined in the *ELRA.*

[129] When interpreting the phrase "exceptional circumstances", it is important to take a contextual approach; see *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [1999] B.C.C.A.A.A. No. 508 (QL). In *British Columbia School Board No. 39 (Vancouver) v. Vancouver Teacher's Federation*, [1996] B.C.C.A.A.A. No. 567 (QL), the arbitrator commented on the words "very exceptional circumstances" as follows:

...

> *Whether "very exceptional circumstances" exist will depend on the individual circumstances of a particular case. It would not be appropriate for me to speculate in the abstract as to the precise point at which the employer's onus would be met. It is sufficient to say that the onus is heavy and will not be easily met. The words of the agreement provide that the circumstances must only be exceptional, a strong word on its own, but very exceptional.*

...

[130] It is probably unhelpful to specify a definition of "exceptional circumstances" as it would be clearly fact dependent and contextual. The following definition, from *Black's Law Dictionary*, is a helpful starting point: "conditions which are out of the ordinary course of events; unusual or extraordinary circumstances."

[131] The cases that the employer offered did not arise in a labour relations context and are unhelpful.

[132] I note that the employer is in the business of running a school system, which is a complex task. Multiple variables have to be taken into account in staffing, some of which are uncertain, but the variables are known. There can be service changes. The employer must respond and provide those services to a fluctuating enrolment of students. The employer employs teachers who may become sick, retire, or go on leave. The teachers may request changes to their work. If the employer were permitted to characterize every leave, enrolment fluctuation, or service change as exceptional, since it does not initiate such requests and therefore lacks control, then the word "exceptional" would have no meaning.

[133] In my view, almost all the exceptional circumstances that the employer alleged in *Guideline #18* and applied to the grievors are simply routine school staffing matters. For example, backfilling for a leave of absence or a maternity leave, enrolment uncertainty, or funding uncertainty — whether with budget issues or new money or whether short-term money is available — in my view is not exceptional but is a regular part of operating a school system. The fact that the staffing process of posting and filling vacancies is complex and time consuming does not make it exceptional.

[134] It is the employer who claims exceptional circumstances exist in this case. The person who makes this determination is the Deputy Minister. In her different answers to the grievors during the grievance process, the Deputy Minister alleged that her rights with respect to exceptional circumstances are unfettered because "exceptional circumstances" is a term not defined in the *ELRA*. However, the employer did not make a similar argument at the hearing. It argues that the power can be delegated; however, the evidence from Ms. Apted shows that the power was not delegated. She claims that the Deputy Minister knew about the circumstances surrounding the appointment of the grievors before the signing of each letter. Clearly, Ms. Apted's testimony is not evidence of the circumstances surrounding the appointment of each grievor, as this was not within her knowledge as she was not at the meetings about the offers to the grievors. Rather, it is evidence of a lack of delegation.

[135] The employer did not call the Deputy Minister to testify. There is simply no cogent evidence as to how the Deputy Minister approached the appointment of each individual grievor who reached a third or later year of employment. Ms. Apted's testimony about standard practice was not helpful in establishing the circumstances surrounding the appointment of each grievor or whether exceptional

circumstances existed.

[136] Ms. Hutchinson, Mr. Geisler, and Ms. Cunningham received employment offers in their third years of employment, and no exceptional circumstances were alleged contemporaneously with the offers. For the reasons expressed as follows in *Lapierre* at paragraphs 264 and 265, which with I agree, the deputy minister must make the determination of exceptional circumstances before he or she hires the temporary teacher in his or her third year:

> *[264] Subsection 109(2) of the* ELRA *states that the employees [sic] period of temporary employment "may be renewed ... by the deputy minister in "exceptional circumstances." In my view, the normal and ordinary meaning of this language presupposes that the exceptional circumstances must exist contemporaneously with the renewal of the temporary contract. Otherwise, there would be no legally valid basis for the deputy minister to exercise his or her discretion to extend an employee's temporary employment status for a third consecutive year.*
>
> *[265] It would be illogical to construe subsection 109(2) of the* ELRA *to mean that the deputy minister may exercise his or her discretion at any time after the renewal of an employee's third consecutive school year of temporary employment. Such construction would mean that the deputy minister could with impunity prolong an employee's temporary status indefinitely by claiming the existence of exceptional circumstances during the employee's term of employment. This would make it all to [sic] easy for the employer to subvert the intention of the legislation and justify its decision after the fact. In so doing, the employer would evade the obligations it may have towards employees who have completed the initial two-year period of temporary employment under subsection 109(1). Moreover, the effect of such action would interfere with an employee's expectation and right to end their temporary employment status after two consecutive years.*

[137] As the Deputy Minister did not inform Ms. Hutchinson, Mr. Geisler, and Ms. Cunningham of any exceptional circumstances when the employer offered them contracts in their third years of temporary employment, they became indeterminate employees effective the start of their third years. Further, they should have been entitled to priority placement for their third and subsequent years of employment.

[138] As for Mses. Claes, Dawson, Dennis, and Bateman and Mr. Gillard, the issue is whether there were exceptional circumstances when the employer offered each of them temporary employment in their third years.

[139] On a balance of probabilities, there was insufficient evidence to establish that there were exceptional circumstances. Mentioning the circumstance in the job posting or a hiring letter is not convincing. There was no explanation of any exceptional reason that the position was available. As noted earlier, Ms. Apted had no personal knowledge of the circumstances surrounding the offers made to each of the grievors. The person with the best evidence on this point is the Deputy Minister, who was not called as a witness.

[140] The category approach set out in *Guideline #18* apparently applied by the employer at least as of the postings for the 2016-2017 school year was not convincing either, as it did not address the exceptional circumstances in the appointment of each individual grievor. Detailed evidence, explaining the exceptional circumstances with respect to the appointment of each individual grievor would have been more useful.

[141] The employer argues that each teacher would have known and therefore would have accepted the exceptional circumstances when each one applied for a temporary posting. However, I note that s. 108(2) of the *ELRA* specifically prohibits contracting out of that Act. The legislature has particularly addressed the duration of temporary contracts. It is not open to the parties to make a contrary agreement, as outlined as follows in s. 108:

> *108(1) Despite any agreement to the contrary, the terms and conditions of a contract of employment of an employee shall be*
>
> *(a) the provisions of this Act and regulations ...*
>
> *(b) the terms and conditions, not inconsistent with any Act and regulations, of the collective agreement negotiated under this Act; and*
>
> *(c) the terms and conditions not inconsistent with paragraphs (a) and (b) and agreed to between the employees employed in an attendance area and the superintendent.*
>
> *(2) Any agreement excluding or purporting to exclude the provisions of this section is void.*

C. Section 106 - start of the probation period

[142] The parties asked me to address the impacts on the probation period. Subsection 106(1) of the *ELRA* provides for a two-year probationary period from "... the date of commencement of employment." Ordinarily, employment commences on the first day an employee performs services. I note that the word "employment" is not limited to temporary or indeterminate employment and is a broad term, capable of embracing both. Indeed, while the *ELRA* does not define the term "employment", the term "employee" a s. 1(1) means "... a person who is employed under the provisions of this Act, or who is a member of the bargaining unit, but does not include ...", among others, persons "... employed on a relief, casual or substitute basis ...". A temporary employee pursuant to a contract is not employed on "... a relief, casual or a substitute basis ...".

[143] Subsections 106(1) and 109(1) of the *ELRA* speak to a two-year probation period and for the term position of a temporary employee. During temporary employment, the employee must be evaluated by either the principal or the superintendent (s. 109(3)). The employer argues that a new temporary contract issued for a new school year is not a renewal but is a new contract. If the employer's position is correct and a teacher must serve a probationary period for two years following the start of his or her indeterminate employment, this could result in an employee perpetually in a state of probation as the employer argues that there are in effect no limits on the terms of temporary employees. There is no justification for reading in the word "indeterminate" into s. 106(1). The purpose of a probationary period is to allow the employer an opportunity to determine the suitability of a teacher for permanent employment. Probationary employees do not have a right to grieve their terminations at adjudication before the Board. The evidence in this case showed that temporary employees are assessed during their temporary employment. For example, Ms. Bateman testified that she was assessed twice (Exhibits G-4 and G-5). The exhibits also show that the employer assessed the performances of Ms. Hutchinson (Exhibit G-1, Tab 1, pages 8 to 10), Ms. Cunningham (twice) (Exhibit G-1, Tab 5, pages 3 to 9 and 12 to 16), and Mr. Gillard (Exhibit G-1, Tab 8, pages 15 to 19).

[144] Each of the temporary contracts issued to the grievors provides that they are on probation for the entire term of the contract. Subsection 106(8) provides as follows that temporary employment periods count when calculating the probationary period:

> *106(8) When an employee has been employed on a temporary basis in one teaching position for an entire school year and is on probation for the next school year, the temporary employment period shall be counted in the calculation of the probationary period.*

[145] The adjudicator in *Lapierre* reached a similar conclusion, and the reasoning is contained in paragraphs 226 to 243 of that decision.

V. Issue estoppel and remedy

[146] The issue of the rights of temporary teachers appears to be a matter of ongoing tension between the parties. It should not be. The employer has had very clear direction from the ruling in *Lapierre*, which has been available as guidance for the parties since 2013. The employer seems to want to ignore those findings, despite the fact that the decision was upheld on judicial review.

[147] I agree with the YTA that many of the issues surrounding the interpretation of ss. 106 and 109 of the *ELRA* that were determined in *Lapierre*, were reargued by the employer in this case. That said, the nature of the grievances in *Lapierre* and in the present case differ meaningfully, such that I believe it would be unfair to apply the doctrine of issue estoppel. The grievances in *Lapierre* were with respect to termination, whereas this case ultimately concerns an interpretation of "exceptional circumstances". Making this interpretation required considering "exceptional circumstances" contextually, including how the term fits within the scheme of ss. 106 and 109 of the *ELRA*. Also, as indicated above, the determination of exceptional circumstances required an examination of the facts involving different individual grievors.

[148] Relatedly, the YTA asked me to make certain orders, as follows, which go beyond resolving these grievances:

> ...
>
> *(b) an order the Employer cease and desist from further contraventions of paragraph 109 of the ELRA.*
>
> *(c) an order that when an employee is employed as a temporary teacher during part or all of a school year for two consecutive years and absent exceptional circumstances as per paragraph 109(2) of the ELRA be granted indeterminate status at the completion of the employees' temporary contract in the second consecutive year.*

...

[*Sic* throughout]

[149] My jurisdiction is limited to making a decision that disposes of the grievances before me. I cannot relate the relief claimed above to any jurisdiction under s. 65(7) of the *ELRA*.

[150] I hope that the parties will be guided in their relationship by Board decisions, and I note that it is a waste of scarce resources to relitigate issues settled by adjudication. I note also that the collective agreement (Exhibit G-8) states that the parties are "... determined to establish within the framework provided by the law, an effective working relationship." In my view, "law" also includes the decisions of adjudicators.

[151] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[152] The grievances are upheld.

[153] I declare that the Government of the Yukon has violated s. 109 of the *ELRA* by employing the grievors as temporary employees after their second and subsequent years of employment.

[154] All the grievors who have completed two consecutive school years of employment are entitled to hiring preferences as indeterminate employees.

[155] All the grievors who have completed two consecutive school years of employment are indeterminate employees effective the beginning of their third school year, with all the rights and benefits that flow from that status.

[156] The two-year probationary period under s. 106(1) of the *ELRA* commences on the start of the first day of temporary employment with the employer. Those grievors who have completed two years of employment as temporary employees complete the two-year probationary period under s. 106(1). The grievors have completed their probations.

[157] I reserve jurisdiction over the implementation of this decision for a period of 90 days.

July 20, 2017.

Paul Love,
adjudicator