IN THE MATTER OF: The Labour Relations Act

AND IN THE MATTER OF A CERTAIN ARBITRATION PROCEEDING

BETWEEN:

BRANDON TEACHERS' ASSOCIATION
(hereinafter referred to as the "Association"),

ASSOCIATION,

- and -

BRANDON SCHOOL DIVISION
(hereinafter referred to as the "Division"),

DIVISION.

Re: Thompson-Zelmer & Schutt

BOARD OF ARBITRATION:

R.J.M. Adkins - Chairperson
Mel Myers, Q.C. - Nominee of the Association
Gerald Parkinson - Nominee of the Division

APPEARANCES:

Valerie Matthews-Lemieux - On behalf of the Association
David Swayze - On behalf of the Division

AWARD

At all relevant times, the grievors, Mandi Becking DeKelver, Coralie Bower Church, Janelle Henwood, Kim Shutte, Becky Simard, Lori Simard and Trudy Thompson-Zelmer were teachers in the employ of the Division and members of the Association and the Manitoba Teachers' Society.

The relevant Collective Agreement between the Association and the Division was effective from July 1, 2003 to June 30, 2007 and is currently under negotiation.

Each of the grievors filed grievances on the basis that the Division misinterpreted and/or misapplied and/or violated the provisions of the Collective Agreement, in particular Articles 1 (Obligation to Act Fairly) and 14 (Paternity/Parental Leave), Section 80 of *The Labour Relations Act*, Division 9 of *The Employment Standards Act* and Sections 9, 14 and 56 of the *Human Rights Code,* by refusing to top-up her salary while on parental leave in the same manner as adoptive mothers and adoptive fathers.

In each case, the grievor states that as a biological mother, she is being treated in a manner that discriminates against her on the basis of sex, gender determined characteristics other than sex, and family status. In each case the grievor requests the following relief:

1. a Declaration that the Division misinterpreted and/or misapplied and/or violated the provisions of the Collective Agreement, *The Labour Relations Act*, *The Employment Standards Act* and *The Human Rights Code;*

2. an Order that she be paid all salary top-up and benefits during the parental leave, including interest on same; and

3. any other remedies that are just and reasonable in the circumstances.

Article 1 of the Collective Agreement provides:

> 1.01 In administering this Agreement, the Division shall act reasonably, fairly, in good faith, and in a manner consistent with the Agreement as a whole.

Article 14 of the Collective Agreement provides:

> 14.01 Every female teacher shall be entitled to maternity leave and every teacher shall be entitled to adoptive leave in accordance with this article.
>
> 14.02 Every teacher shall be entitled to unpaid parental leave.
>
> 14.03 Except as otherwise provided herein, the Manitoba Employment Standards Code will apply.
>
> 14.04 The teacher and the Division may mutually agree to extend the length of the leave if the teacher so desires. Any such arrangements shall be confirmed in writing by the Division.
>
> 14.05 A teacher taking maternity leave pursuant to this article shall be entitled to receive pay for the period of leave

up to seventeen (17) weeks in the amount of ninety percent (90%) of the salary being received at the time leave was taken, this pay to include any benefits received from Human Resources Development Canada to a Supplemental Employment Benefits (SEB) Plan. The implementation of this clause is subject to the successful arrangement of a Supplemental Employment Benefits (SEB) Plan with Human Resources Development Canada.

14.06 In respect of the period of maternity leave, payments made according to the SEB Plan will consist of the following:

a) For the first two weeks, payment equivalent to ninety percent (90%) of her gross salary, and

b) Up to fifteen (15) additional weeks payment equivalent to the difference between the Employment Insurance benefit the employee is eligible to receive and ninety percent (90%) of her gross salary.

14.07 A teacher taking adoptive leave pursuant to this article shall be entitled to receive pay for the period of leave up to ten (10) weeks in the amount of ninety percent (90%) of the salary being received at the time the leave was taken, this pay to include any benefits received from Human Resources Development Canada to a Supplemental Employment Benefits (SEB) Plan. The implementation of this clause is subject to the successful arrangement of a Supplemental Employment Benefits (SEB) Plan with Human Resources Development Canada.

14.08 In respect of the period of adoptive leave, payments made according to the SEB Plan will consist of the following:

a) For the first two weeks, payment equivalent to ninety (90%) of his/her gross salary; and

b) Up to eight (8) additional weeks, payment equivalent to the difference between the Employment Insurance benefit the employee is eligible to receive and ninety percent (90%) of his/her gross salary.

14.09 Where maternity leave expires during a school term, the teacher shall be entitled to return to the same or comparable position at the commencement of the next ensuing term immediately following the expiration of such

> leave and, in the interim, shall be entitled to return to such position as the Superintendent may, in his/her discretion, decide, provided that she shall, in either event, be entitled to not less than the same salary and benefits received by her prior to the commencement of maternity leave.
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> 14.10 For the purposes of this section, "term" means either the months of September to December or January to June, as the case may be.
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> 14.11 A teacher shall have the right to two days leave where the spouse has given birth to a child or where they have adopted a child as long as that leave is taken within two weeks preceding or following the adoption or birth of that child on the understanding that the teacher taking the leave shall have deducted from their salary the cost of any substitute teacher required to take their place.

In particular, the grievors allege that Articles 14.07 and 14.08 and the Division's application of them by paying only biological fathers and adopted mothers and fathers parental leave top-up, contravene Section 9 and 24 of *The Human Rights Code* by discriminating against biological mothers on the basis of their sex, including circumstances related to pregnancy and family status.

Considerable evidence was led in relation to the effects of pregnancy, labour and post childbirth concerns on biological mothers. By agreement the evidence of the witnesses was to apply to each of the grievances. Four of the grievors testified in detail about what they experienced during their pregnancies, labour and following childbirth. I do not propose to recite in detail the evidence of each of the grievors, but have set out below some relevant descriptive excerpts of their evidence in connection with their pregnancy, labour and delivery, post-delivery and recovery and breast feeding.

- One mother testified that "my son was starving when he came out and demanding to be fed. He nursed full time for ten (10) months, every two (2) or three (3) hours for seven (7) of those months. I wasn't using a bottle until nine (9) months and I found it was very difficult breast feeding because I had a toddler and needed to be up at 7 o'clock in the morning regardless of how much sleep I had. My sleep was broken and I suffered from post-partum depression. I had an exam at ten (10) weeks at which time the Doctor approved me for having intercourse but it was painful for me for an additional three (3) months. I had six (6) weeks of constipation and I suffered from haemorrhoids for about eight (8) weeks. Engorgement of my breasts was a significant issue".

- Another mother testified that "I wasn't sick throughout the pregnancy. I felt pretty tired, but that was to be expected, particularly because I was

teaching at two (2) different schools. I had a regular delivery. I had an epidural and an episiotomy and there was some post-partum depression. I suffered bleeding post-delivery for about two (2) to three (3) months and was very uncomfortable. I had significant cramping for at least three (3) months, maybe longer. It was five (5) months before I again began to have intercourse and even then it was painful. My son was up every two (2) hours for breastfeeding. I was very tired, I wasn't eating properly and I was stressed and frustrated. I hadn't really expected having a baby would take such a toll. I couldn't get three (3) straight hours of sleep. My son was ten (10) months old before I was able to sleep for even five (5) hours at a time. My husband was going to school, working full-time and having to study afterwards till midnight. He would try to be helpful but most of the obligation fell on me. I found that I was stressed and irritable. Mentally I felt things didn't go well for me."

- Another mother who had two children testified that "Prior to my pregnancy I was working three-quarter (3/4) time. I went on leave before delivery because I wasn't feeling the baby. I had my son almost five (5) weeks early and he weighed only 5 pounds 10 ounces. During my first trimester I was nauseous and tired. During my second trimester I was not as nauseous or tired but in my third trimester the baby was born prematurely and I wasn't ready. I had a normal vaginal delivery with an epidural and an episiotomy. I was induced in Brandon after my water broke. My son was in intensive care for twelve (12) days and I had to go home before my son was discharged. ... I suffered from post-partum depression and had a great deal of difficulty with the stitches from my episiotomy. I had haemorrhoids and had to be up to feed my son every three (3) hours. Initially there was excitement but ultimately I was left in tears".

- One mother "stopped nursing at eight (8) months because one of my breasts became blocked up. My breasts were extremely sore and became raw. Although I breastfed for eight (8) months, it was not exclusive. My baby actually brought up an awful lot. I found I was very concerned about my baby throwing up. I was exhausted and I burst into tears.

- One of the mothers who testified had a caesarean section. She testified that "I had an emergency c-section. After being in labour for 19 hours, the doctor basically said that the baby was stuck and they had to take him out. I had very hard labour before the caesarean and I was two (2) weeks late at that time. I was sick throughout my labour. The surgery was pretty awful and I ended up six (6) nights and almost seven (7) days in hospital. I suffered post-partum depression and did not have a normal recovery. My stomach was stapled as a consequence of the caesarean. I found it very difficult to get up and down and needed my husband to assist me. I couldn't drive and I couldn't get my son into the car seat. I was very weak.

> I suffered from fatigue and my son was awake a lot. Full recovery took several months and it was very difficult to cope with the added responsibilities and the effects of the surgery. ... I decided I would go back to work in November and was on anti-depressants for six (6) months afterwards. I feel my age, fatigue, and heartburn problems all contributed to my post-partum depression. I had no prior history of depression and it seemed to resolve after about six (6) months".

The evidence established that the biological mothers who testified experienced a range of health related and other concerns. The severity of those concerns varied from mother to mother and not all concerns were universally experienced. In addition, other factors such as: the length of the labour, the need for an episiotomy; the need for a caesarean section; family supports; the existence of other children in the family; the general health of the mother; the health of the new born child, including whether or not the child was carried full-term and his or her sucking reflex; the financial status of the family; the occurrence of infections and the susceptibility of the mother and child to infections; and the ability to adjust to disrupted sleep patterns; all affected the experience of the biological mothers who testified.

The significant physical and emotional impacts suffered by the biological mothers who testified generally included:

During Pregnancy

- nausea and vomiting brought on by nausea, backaches, tiredness, sleep disruption, haemorrhoids, heartburn (sometimes so extreme it would lead to vomiting), constipation and dizziness. There was some evidence of stress and anxiety, in one case leading to heart palpitations and the need for medication.

During Labour and Child Birth

- labour pain that was so significant that in most cases an epidural was administered, the pain associated with an episiotomy and in one case the need for a caesarean section where the mother testified that "the surgery was pretty awful and I ended up six (6) nights and almost seven (7) days in hospital".

During Post Delivery and Recovery

- varying degrees of depression, exhaustion, pain and subsequently itching from stitches related to episiotomies, in the case of the caesarean section, great pain that interfered with her picking up her child and driving and irritation from her staples, bleeding which continued for eight or more weeks, cramping which continued to

twelve weeks and longer, continuing problems with haemorrhoids, and pain during intercourse.

Related to Breast Feeding

- anxiety over trying to establish breast feeding, sleep interruption and fatigue, pain from breast engorgement, pain associated with sucking, concern and anxiety related to the occurrence of thrush, concern and anxiety related to a baby's poor sucking reflex, and pain and frustration from having a blockage of the breast.

Under cross examination, the biological mothers acknowledged that they had sufficient leave and that financial issues were only one of the factors that influenced how much leave they would take. They also confirmed that they were able to return to their jobs if they chose to after the leave. Each of them suffered some financial impact as a consequence of having a child, but none of them suggested that they made the wrong choice.

Significant expert evidence, both in the form of reports and testimony, was introduced in relation to maternity including: the normal time that it took for biological mothers to recover physically; the frequency and duration of post-partum depression; the importance of breast feeding and the difficulties associated with establishing and maintaining breast feeding for a year. There was also expert evidence adduced about how pregnant women had been faced with discrimination over the years as well as evidence concerning societal changes in relation to pregnancy and motherhood and the development of legislative programs to ensure that mothers in the labour force were able to obtain leave from their jobs and some financial support to accommodate child bearing.

As part of the expert evidence we received medical evidence from physiologists and physicians including:

1. A report from Dr. Michael Lamb, a professor of physiology and social and sciences at Cambridge University;
2. A report from Dr. Donna Schaffer Lero, a psychologist holding the Jarislowsky chair in family in work at the University of Guelph;
3. A report from Doctor M.J. Seager, an obstetrician and gynaecologist who is currently the Chief Medical Officer at Victoria General Hospital; and
4. A report from Dr. Margaret L. Morris, an obstetrician and gynaecologist who is currently a professor of medicine in the Department of Obstetrics, Genecology and Reproductive Sciences at the University of Manitoba.

In addition, there were materials filed from the Canadian Maternity Experiences Survey and the Public Health Agency of Canada.

Each of the medical experts provided extensive and impressive curriculum vitae and there is no question about their qualifications to provide the opinion evidence that they gave at the hearings.

For purposes of these proceedings, the most significant differences between the evidence of the medical experts related to the period of time during which physical problems, associated with pregnancy and childbirth, would resolve after delivery and the frequency of depression in mothers following childbirth.

In her report, Dr. Morris states "Traditional teaching is that it takes six weeks to recover completely from the effects of labour and delivery, as well as c/s when this happens." And subsequently in the report she states:

> although the physical problems are usually resolved by six weeks, concerning issues remain. Factors that are known to prolong post-partum recovery include pre-existing disease, low socio-economic status, maternal age extremes, single parent status, labour and delivery complications and having a newborn with neo-natal complications. The issue of ability to establish breastfeeding is also important with the best estimates in the literature being at least six weeks, with higher rates of success if it is longer.

Later in her report Dr. Morris further states that "Post-partum depression is a significant concern occurring in up to 20% of pregnant women and when this does occur, in itself is a medical reason not to return to work."

Dr. Seager reviewed Dr. Morris' report before preparing her own report. In her report Dr. Seager states:

> A period of maternity leave following birth is important, as it allows mothers to care for themselves and their newborn with the assurance of being able to return to work. Six weeks is traditionally thought as the time for reproductive organs to return to their non-pregnant state. This is only a single indicator of post-partum recovery. I cannot agree with Dr. Morris that "the physical problems are usually resolved by six weeks". In fact, I do not see women until eight weeks post-partum as one of the simple indicators of resolution of the pregnant state, the stopping of bleeding has often not yet occurred.

With respect to post-partum depression, Dr. Seager indicates:

> More than 70% of new mothers will feel a little depressed. Depression is felt due to changing hormone levels. Some women develop a serious depression, while others have a serious post-partum psychosis. Based on my practice and my review of the literature, I agree with Dr. Morris that for

a large number of women, post-partum depression is a significant concern and is a reason why a woman could not return to work.

In her report, Dr. Morris references a study undertaken by Patricia McGovern PhD., et al, Medical Care, Volume 35, May 1997. On page 6 of the McGovern report, the authors state:

> In conclusion, study findings suggest diminished levels of well being for employed women, at approximately seven months after childbirth, a much longer period than the traditional six weeks recovery from childbirth. This traditional perspective on post-partum recovery period is based on the time required for reproductive organs to return to the non-pregnant state and contrasts with the broader definition of well being as used in this study. The conventional view of a six week post-partum recovery may not fit all women, particularly employed women, who may lack the flexibility to adapt their job demands or schedules to accommodate needs for rest and recuperation throughout the post-partum year. Most women only return to their physicians for a six week post-partum check up; yet, findings from this study and others suggest the timing of this visit does not meet the woman's needs for education and counsel regarding problems encountered throughout the year after childbirth. An extended follow up may be needed to enhance maternal well being.
>
> Although it may be controversial to suggest that working women are subject to disability beyond six weeks after childbirth, some women's experience of employment and motherhood may aggravate their post-partum recovery. Employers and medical care providers, as well as women and their families, need to develop a greater appreciation for the nature of women's jobs and the relationship between work and health for child bearing women. All parties affected should then work together to resolve conflicting demands on time and resources that affect maternal well being.

Both Dr. Seager and Dr. Morris provided *viva voce* evidence and were subject to cross examination. The two issues that counsel directed their testimony to were the number of weeks it takes for a mother to recover from the physical effects of pregnancy and childbirth and the frequency of post-partum depression.

Having read the reports, including the McGovern study, and having heard the *viva voce* evidence, these experts agreed far more than they disagreed. The major area of disagreement related to when biological mothers should first see their doctors following childbirth. Dr. Seager's practise was to see post-partum mothers eight weeks after childbirth because, in her experience, many mothers continued to have problems with bleeding past the six week post delivery period. Dr. Morris testified that waiting until eight weeks for the first post delivery check up was not appropriate timing. In her experience bleeding beyond six weeks was not normal and was a potential sign of

complications. Accordingly, Dr. Morris advocated seeing the mothers after six weeks and if there is continued bleeding the cause should be investigated, not left for another two weeks.

With respect to the frequency of post-partum depression, my sense from the testimony was that the difference between the physicians was more an issue of terminology than substance. Dr. Seager's report indicates that more than 70% of new mothers will feel a little depressed. She goes on to say that some of these women develop a serious depression, while others have a serious post-partum psychosis. Dr. Morris, relying on her experience and the data from the McGovern study, indicates that post-partum depression is a significant concern occurring in up to 20% of pregnant women and when this does occur, it in itself is a medical reason not to return to work.

The material from the Public Health Agency Canada included an article entitled "Post-Partum Depression, Previous Depression and Support". It was authored by Beverly Chalmers and Kathy Kimak and it identifies three major categories of postpartum conditions: the post-partum blues (or baby blues), post-partum depression and post-partum psychosis. The post-partum blues occur in up to 80% of women and usually resolve within two weeks. Post-partum depression occurs in 10% to 20% of women, has its onset in the first year after birth and can last months or even years. Post-partum psychosis is rare, occurring in about 0.2% of women, but requires immediate medical care.

In their *viva voce* testimony there was discussion about DSM4 standards and when depression is significant enough to represent a medical problem requiring treatment. Based on the reports, the findings of the study and the testimony, I am satisfied that post-partum depression becomes a significant concern in about 20% of mothers, although significantly more than 20% suffer from varying degrees of depression following childbirth.

I have not reproduced all of the expert medical evidence in this award since most of it is found in the reports that were filed as exhibits. I have however reviewed the medical evidence, the reports, the study and the direct evidence of the grievors, and it all indicates that, regardless of whether a biological mother's reproductive organs normally return to the non-pregnant state within a six week period following childbirth, there are physical, mental and emotional issues associated with pregnancy and childbirth that normally continue unresolved well beyond that six week period.

The legislative context for this hearing includes the *Employment Insurance Act*, *The Employment Standards Code* and *The Human Rights Code* (the "*Code*"). There is an extensive bargaining history and arbitrators' decisions with respect to these issues. Again, I have reviewed the legislation, the bargaining history and the arbitrators' decisions. Based on that review I am satisfied that in negotiating the Collective Agreement, neither party intended to contravene the *Code* and I have approached this decision on that basis.

The *Code* defines discrimination as follows:

Discrimination" defined

9(1) In this Code, **"discrimination"** means

(a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit; or

(b) differential treatment of an individual or group on the basis of any characteristic referred to in subsection (2); or

(c) differential treatment of an individual or group on the basis of the individual's or group's actual or presumed association with another individual or group whose identity or membership is determined by any characteristic referred to in subsection (2); or

(d) failure to make reasonable accommodation for the special needs of any individual or group, if those special needs are based upon any characteristic referred to in subsection (2).

Applicable characteristics

9(2) The applicable characteristics for the purposes of clauses (1) (b) to (d) are

(a) ancestry, including colour and perceived race;

(b) nationality or national origin;

(c) ethnic background or origin;

(d) religion or creed, or religious belief, religious association or religious activity;

(e) age;

(f) sex, including pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;

(g) gender-determined characteristics or circumstances other than those included in clause (f);

(h) sexual orientation;

(i) marital or family status;

(j) source of income;

(k) political belief, political association or political activity;

(l) physical or mental disability or related characteristics or circumstances, including reliance on a dog guide or other animal assistant, a wheelchair, or any other remedial appliance or device.

However, under section 11, the *Code* permits affirmative action and excludes it from the definition of discrimination as follows:

> **Affirmative action, etc. permitted**
>
> 11 Notwithstanding any other provision of this Code, it is not discrimination, a contravention of this Code, or an offence under this Code
>
> (a) to make reasonable accommodation for the special needs of an individual or group, if those special needs are based upon any characteristic referred to in subsection 9(2); or
>
> (b) to plan, advertise, adopt or implement an affirmative action program or other special program that
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> (i) has as its object the amelioration of conditions of disadvantaged individuals or groups, including those who are disadvantaged because of any characteristic referred to in subsection 9(2), and
>
> (ii) achieves or is reasonably likely to achieve that object.

With respect to employment there are specific relevant provisions in the *Code*, namely:

> **Discrimination in employment**
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> 14(1) No person shall discriminate with respect to any aspect of an employment or occupation, unless the discrimination is based upon bona fide and reasonable requirements or qualifications for the employment or occupation.
>
> **"Any aspect", etc. defined**
>
> 14(2) In subsection (1), **"any aspect of an employment or occupation"** includes
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> (a) the opportunity to participate, or continue to participate, in the employment or occupation;
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> (b) the customs, practices and conditions of the employment or occupation;
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> (c) training, advancement or promotion;
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> (d) seniority;
>
> (e) any form of remuneration or other compensation received directly or indirectly in respect of the employment or occupation, including salary, commissions, vacation pay, termination wages, bonuses, reasonable value for board, rent, housing and lodging, payments in

kind, and employer contributions to pension funds or plans, long-term disability plans and health insurance plans; and

(f) any other benefit, term or condition of the employment or occupation.

Section 56 of the *Code* provides:

Contract compliance

56(1) Every contract entered into, before or after this section comes into force, by the government, a Crown agency or a local authority is hereby deemed to contain as terms of the contract

(a) a stipulation that no party to the contract shall contravene this Code in carrying out any term of the contract; and

(b) such provision for an affirmative action program or other special program related to the implementation of the contract as may be required by regulations made under the authority of this Code.

Discretion to repudiate

56(2) Where a complaint is adjudicated or a prosecution conducted under this Code and the adjudicator or justice decides, or it is necessarily implicit in the decision of the adjudicator or justice, that the deemed term referred to in clause (1)(a) has been breached by any party to the contract except, as the case may be, the government, Crown agency or local authority, the government, Crown agency or local authority may repudiate the contract and thereafter no party is bound by its terms.

In relation to the relevant legislation, the test for discrimination under s. 15(1) of the *Charter*, based on Supreme Court of Canada jurisprudence in *R. v. Kapp* 2008 Carswell 1312, 2008 SCC 41, at p. 17, is as follows:

> The template in *Andrews*, as further developed in a series of cases culminating in *Law v. Canada (minister of Employment and Immigration)* [1999] S.C.R. 497 (S.C.C.) established in essence a two part test for showing discrimination under s. 15(1): (1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereo typing? These were divided in *Law* into three steps, but in our view the test is, in substance, the same.

It should also be noted that the distinction between benefits for women who prove their pregnancy and parental benefits has been judicially considered and found to withstand Charter scrutiny. In Schafer v. Canada, 35 O.R. (3d) 1, at p. 22, found that

> To summarize, it is not necessarily discriminatory for governments to treat biological mothers differently from other parents, including adoptive parents. In order to cope with the physiological changes that occur during childbearing, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period. Indeed, such leave provisions may be necessary in order to ensure the equality of women generally, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination: se Brooks v. Canada Safeway Ltd. Allen v. Canada Safeway Ltd. [1989] S.C.R. 1219, 45 C.R.R. 115.

and later, on p. 22, that "...the purpose of pregnancy leave benefit is not to provide income support to parents who care for their children. It is to provide a flexible system of income support to women who need time away from work because of pregnancy and childbirth.

Accordingly, the relevant issues are:

1) Have the grievors established a prima facie case that biological mothers are denied benefits available to other teachers based on a prohibited distinction under the *Code*?

2) If so, is there a statutory defence under the *Code* for the discrimination?

3) If not, then has the Division reasonably accommodated the grievors to the point of undue hardship?

4) If not, then what is the appropriate remedy?

The Association takes the position that the provisions for 17 weeks of top-up for maternity leave under the Collective Agreement are only available for biological mothers and are related to the maternity leave provisions under *The Employment Standards Code* and the employment insurance benefits for pregnancy under the Federal *Employment Insurance Act*. Further the Association says that this maternity top-up benefit is solely in place as an accommodation for the effects of pregnancy and childbirth and does not relate to parenting.

The Association then says that the provisions under Article 14.07 of the Collective Agreement providing top-up for adoptive leave are in fact related to the provisions for parental leave under *The Employment Standards Code* and the parental benefits for pregnancy under the Federal *Employment Insurance Act*. The Association points out that the grievors are entitled to the parental leave and parental benefits under the applicable legislation and they are being discriminated against when the Division denies them top-up under Article 14.07.

The Division maintains that the grievors, all of whom are female teachers, received their maternity leave and the top-up to which they are entitled under the Collective Agreement and accordingly can have no complaint in that regard. In addition, as teachers, when and if they adopt a child they will be entitled to, and will receive adoptive leave and top-up provided for that adoptive leave, and as such are not being discriminated against in relation to that benefit. Finally, as a teacher, the grievors are entitled to the benefit of unpaid parental leave under the Collective Agreement, which leave they took, to the extent that they wanted.

The Division says that the Collective Agreement does not discriminate against the grievors. It says that the top-up provisions under Articles 14.05 and 14.07 are a separate benefit not just from the leave benefits under the Collective Agreement, but also from the leave provided under *The Employment Standards Code* and the income benefits under the Federal *Employment Insurance Act.*

The Division says that, in reality, this is an arbitration to secure top-up benefits which are supposed to be arrived at through negotiations. The Division takes the position that under the Collective Agreement, bargained with the Association, there is a top-up for maternity leave and for adoptive leave, but that parental leave itself is unpaid. The School Division indicates that each group of teachers is entitled to top-up but the amount varies depending on the particular group. Biological mothers are entitled to 17 weeks of top-up, while adoptive parents, male or female and biological fathers are entitled to 10 weeks of top-up.

The Division acknowledged that there is a settlement with respect to biological fathers, but noted that the Collective Agreement is now in negotiation and has not yet been amended to reflect the new language. As a consequence the Division is not certain how that change, extending top-up to biological fathers, will be reflected in the language of the Collective Agreement, however, biological fathers would be entitled to the top-up at the same time that they are receiving statutory leave.

The Division indicates that biological mothers receive 17 weeks of top-up leave, which is an arbitrary time accepted statutorily, and there is no reason why biological mothers should receive an additional ten weeks of parental top-up or a total of 27 weeks of top-up. From the Division's perspective, other than the maternity aspects, which clearly are only felt by the biological mothers, the other stresses of adding a child to a family are common amongst the adoptive parents, biological fathers and biological mothers. The Division says that the 17 weeks of top-up provided to biological mothers is effectively intended to cover both maternity and parenting. Accordingly, the Division sees no disadvantage to biological mothers who are not receiving additional parental leave. The Division's position is that biological mothers are already compensated.

With respect to undue hardship, the Division maintains that when you look at the costs it is not just the financial wherewithal of the Division that is relevant. You also need to think of the costs to students and the hardship that cutting back programs to

cover these costs would create because of the programs being sacrificed. The School Division takes the position that bringing these types of arbitrations effectively undermines the collective bargaining process. It is really an effort by the Association to try to achieve that which it could not achieve through bargaining.

In response, the Association argues that the issue is not related to the availability of parental or maternity leave or the top-up for the maternity leave. The issue is that:

> a) Since the adoptive leave top-up contemplated in the Collective Agreement is expressly tied and subject to "...the successful arrangement of a Supplemental Employment Benefits (SEB) Plan with Human Resources Development Canada" which Federal unemployment benefit is available to both biological and adoptive parents, the income top-up for adoptive parents should be available to the grievors and other biological parents who qualify for unemployment benefits for parental leave. The Association argues that this position is bolstered because the Division has already agreed to extend the top-up benefit for adoptive parents to biological fathers.
>
> b) Alternatively, the Association argues that by implementing the Collective Agreement so that biological fathers receive the benefit of the income top-up for adoptive parents, while denying those same top-up benefits to biological mothers, the Division is unlawfully discriminating against the grievors.

As noted previously there is a difference of view about the period of time that it takes for a biological mother to physically recover from pregnancy and childbirth. In her report Dr. Morris cites the McGovern study, which was attached to her report. The McGovern study references the 6 week recovery from childbirth as the traditional perspective on postpartum recovery, based on the time required for productive organs to return to the non-pregnant state.

After referencing the McGovern study, Dr. Morris states in her report that "Although the physical problems are usually resolved by 6 weeks, concerning issues remain". From her *viva voce* evidence, I understand that when Dr. Morris says that the physical problems are usually resolved by 6 weeks, she is meaning only that the reproductive organs will normally have returned to their non-pregnant state in that period. I do not believe that Dr. Morris is intending to contradict or dispute the evidence of Dr. Seager to the effect that many physical issues, such as tender breasts, vaginal pain, pain with intercourse, cramping, difficulty with bowel movements, haemorrhoids

and trouble with urination, are all common complaints for approximately 12 weeks after birth.

The Division provides seventeen weeks of top-up to biological mothers. It says that seven weeks of this top-up are to address the effects of pregnancy and childbirth and the other ten are provided effectively as parental leave. As a consequence it maintains that the grievors have effectively, if not expressly, received seven weeks of maternity leave income benefit top-up and the equivalent of ten weeks of parental leave income benefit top-up.

The Association says that the return of the reproductive organs to their non-pregnant state does not resolve all of the physical effects of pregnancy and child birth and that the total time to resolve all of the physical, emotional and mental effects as well as the other unique incidents of biological motherhood, such as breast feeding, is considerably longer that seven weeks. The Association maintains that the Collective Agreement only provides biological mothers with top-up to the Federal income benefits for maternity leave and, contrary to the position of the Division does not provide any top-up of the Federal income benefit for parental leave. Accordingly, the Association argues that biological mothers are denied the top-up benefits available to adoptive parents and biological fathers and that is discriminatory and in contravention of The Human Rights Code.

In my view, Articles 14.05 and 14.06 of the Collective Agreement in their language, by their relationship to the Federal unemployment benefits related to pregnancy and by their application by the Division only to biological mothers, provide a top-up to the Federal unemployment benefits related to pregnancy leave, not to parental leave. The top-up benefits under Article 14.05 and 14.06 of the Collective Agreement are the same as the Federal unemployment benefits related to maternity or pregnancy. They are not shareable and they are not available without proof of pregnancy. They are provided to address unique issues faced by working mothers when they become pregnant. As stated by Chief Justice Dickson in *Brooks* v. *Canada Safeway Ltd.*, [1989] S.C.J. No. 42, at para 40:

> ...Combining paid work with motherhood and accommodating the childbearing needs of working women are ever-increasing imperatives. That those who bear children and benefit society as a whole thereby should not be economically or socially disadvantaged seems to bespeak the obvious. It is only women who bear children; no man can became pregnant. As I argued earlier, it is unfair to impose all the costs of pregnancy upon one half of the population. ... The capacity to become pregnant is unique to the female gender . .

In addition, the Collective Agreement expressly addresses parental leave and says that every teacher is entitled to receive parental leave and that parental leave is unpaid.

This provision of the Collective Agreement is directly contrary to the interpretation that the Division is advocating. Accordingly I am not prepared to accept the interpretation suggested by the Division that the maternity top-up benefits under Articles 14.05 and 14.06 of the Collective Agreement include parental top-up benefits.

I also find that by not extending the parental top-up benefits to the grievors and other biological mothers, when top-up for parental leave is being provided to other parents, the Division has discriminated against that group of biological mothers on the basis of "sex, including pregnancy, ... or circumstances related to pregnancy", which is an applicable characteristic under section 9(2) of *The Human Rights Code* and in contravention of that Code. Having made that determination, the onus then falls on the Division to establish that it has a statutory defence under the Code or that the distinction does not create a disadvantage by perpetuating prejudice or stereo typing.

The main thrust of the Division's case relates to its contention that it provides the equivalent of parental leave top-up to biological mothers through the maternity top-up. It did not raise any issue of a statutory defence from the Code. Evidence relating to the issue of perpetuating prejudice or stereo typing was led by the Association. It related to the long history of work related discrimination against women generally and pregnant women and mothers in particular. Society has come a long way since pregnant women were forced to give up their jobs and where males filling the same position were paid more because it was assumed they were the bread winners and women did not need the same income.

Much has been done under legislation and, in the teaching profession, through collective bargaining to accommodate the effects of pregnancy and child bearing in the work place. However, it is clear from the evidence that even with these accommodations in place the grievors lost income, were often forced to assume additional debt and in some cases were unable to maintain their pension benefits.

In the absence of any top-up benefits for adoptive parents or biological fathers, the provision of the maternity top-up may well be a reasonable accommodation for the special needs of biological mothers related to pregnancy and child bearing. But those parental top-up benefits do exist under the Collective Agreement and are being paid to others, but not to biological mothers. Denying such existing parental top-up benefits to biological mothers, based on the fact that they are entitled to receive maternity benefits as a consequence of pregnancy and childbirth, does disadvantage and prejudice those mothers.

I want to be clear that I am not finding that a failure to have top-up benefits for parental leave would be a contravention of the *Code*. That issue is not before this Board and I am not addressing it in any way. All I am saying is that where top-up benefits are provided for parental leave to adoptive parents, and biological fathers, denying them to biological mothers contravenes the *Code*.

The next question that needs to be considered is whether or not extending these parental top-up benefits to the grievors and in future to biological mothers will create an undue hardship for the Division.

Considerable evidence was called on this point and the position advanced by the Division was that extending these benefits will have a direct impact on the services it is able to provide and it will create an undue hardship for its students. Clear examples were given about how services related to costs and how the additional costs of extending these top-up benefits could affect the Division's ability to continue existing programs. One particular program, English as an Additional Language (EAL), was reviewed in detail.

EAL was a good example because the need for the program arose in response to demographic changes in the community resulting from an influx of immigrants. It was a program where the Division had increased funding but was still concerned that the resources available were not what were really required to meet the needs of the community and students. From the evidence it was clear that if money was not an issue then more resources would have been directed to this program. Of course, money is always an issue even for elected boards with powers of taxation.

With respect to the question of undue hardship, considerable financial data and evidence was tendered. The witnesses called on these points included:

- Michael Bell, who is employed by the Manitoba Teachers' Society and provides support in relation to financial issues for teachers' associations during bargaining. He has a Bachelor of Arts in Commerce and a Master of Arts in Economics.
- G. F. Barnes, who is the Secretary-Treasurer for the Division. He has an Accredited Accountants Designation and extensive experience in public sector finance.
- Dr. Lynda Ross, a psychologist, who is a trustee for the Division.

The materials filed in relation to the financial ability of the Division to accommodate an extension of this top-up benefit to biological mothers, without undue hardship included:

- A letter dated September 14, 2009 from the Division setting out Mr. Barnes calculation of the anticipated costs of extending this service.
- A listing of maternity and parental leaves in the Division from October 1997 to March 2010.
- A report dated September 24, 2009, from the Manitoba Teachers' Society entitled an "Analysis of Brandon School Division's Fiscal Capacity".
- A report dated October 16, 2009 entitled "Brandon School Division Financial Analysis" which incorporated materials from the FRAME Report and included;

  - An analysis, by school division, of operating revenue: 2008/2009 budget.
  - A listing, by school divisions, of student support and equalization support from the 2008/2009 budget.
  - A listing of Budget Increases for Brandon School Division from 2001/2002 to 2009/2010.
  - A listing of mill rate increases, by school division, from 2003 to 2008.
  - Local taxes per pupil, listed by school division, for the 2008/2009 year.
  - A listing, by school division, of the Education Tax as a Percentage of Average Household Income.
  - A listing, by school division, of the Education Tax as a Percentage of Dwelling Value.
  - A listing, by school division, of the Gross Education Tax as a Percentage of Average Household Income.
- A critique dated October 6, 2009, prepared by Michael Bell, commenting on the "Brandon School Division Financial Analysis".
- A letter dated October 19, 2009 from Mr. Barnes updating and commenting on the "Brandon School Division Financial Analysis" report.
- A letter and attached supporting materials from the Manitoba Teachers' Society dated November 20, 2009 setting out a review undertaken by Michael Bell of the EAL program offered in the Division, including the number of EAL students and categorical funding for the EAL program and a comparison with other school divisions.

The Division has two main sources of income, namely, the Provincial Department of Education through a number of grants and programs and the taxpayers of the District. The annual budget for the Division for 2019/2010 is $63,619,700.00. The added cost of extending these benefits is estimated by the Division, based on an assumed number of pregnancies, to be approximately $153,285.00, which is 0.24% of the Division's annual budget.

In 2008/2009, the total portioned assessment for Brandon was $1,333,111,920.00 and accordingly in that fiscal year each mill represented $1,333,111.00 in tax revenue. Assuming the portioned assessment did not change for fiscal 2009/2010, the added cost would be equivalent to 11% of one mill of added tax. However, as the Division correctly points out it still represents $153,285.00 that will not be available for program services or other expenditures.

There is no doubt that the Division is constantly forced to weigh all kinds of costs and benefits in an effort to reasonably meet the needs of its students, parents, teachers, administrators and society as a whole. It is charged with responsibility to ensure that students receive a good education which, at a minimum, meets the standards set by the Department of Education. It is also responsible to the electorate to do so in a way that is fiscally responsible, so that the associated tax burden is not undue or unfair. This

balancing is not an easy task and it is clear from all the financial information presented, that the Division takes its responsibilities in that regard very seriously.

As I commented during the hearing, the financial material filed was impressive and shows that the Division has been doing a good job of meeting its mandate while retaining a competitive mill rate. This is important because taxation is a factor that influences investment and, if taxation is not competitive with neighbouring areas, over the long term the assessment base will not grow as quickly and may even deteriorate. Of course having good schools and an educated population, which requires qualified and motivated teachers, is also a factor that can influence investment and the assessment base. It is always a question of maintaining an appropriate balance.

I am cognizant that if, as a consequence of this decision, the Division is forced to compensate the grievors for denying them these benefits and in future, at least until there is a new collective agreement, to extend the benefits to biological mothers the estimated cost is significant and, unlike extending benefits in negotiations, there are no trade offs that can be sought from the Association in return. This simply becomes an added and unexpected cost to the Division that must be balanced by increased taxes or cuts in services or other expenditures.

The question nonetheless continues to be, will an award requiring the Division to compensate the grievors and, in future until a new collective agreement is negotiated, extend the top-up benefit to biological mothers, create an undue hardship? The courts have been relatively clear that an added financial expenditure representing a small part of the overall budget would not amount to an undue hardship. Rather, a hardship would be considered undue if it threatened the continued viability of the party. In considering this question I am mindful that the term of the Collective Agreement has expired and a new agreement is currently under negotiation. I am also aware that every other school division in Manitoba has now concluded collective agreements that provide both maternity and parental top-up to biological mothers. In all of the circumstances in my view, the impact of an award requiring the Division to compensate the grievors and, in future, to extend the top-up benefit to biological mothers, does not create an undue hardship within the meaning of the existing jurisprudence.

The Association requested that as part of the award the board re-write or amend the Collective Agreement to change the words adoptive leave to parental leave. Whether or not this board has jurisdiction to amend the language of the Collective Agreement, I would be very reluctant in a proceeding such as this to make such an award. This is a matter which should be part of the give and take of that bargaining process where it is up to the parties to agree on the words that meet their respective interests. The language of a collective agreement should be bargained, or perhaps addressed through an interest arbitration, not imposed by an arbitration board addressing a specific grievance.

Alternatively, from the perspective of the Division, it was suggested that the proper remedy would be to strike down the adoptive leave provisions on the basis that

they are discriminatory and effectively amend the Collective Agreement to remove the reference to top-up for adoptive leave. If there was no adoptive or parental top-up benefit provided to adoptive parents or biological fathers, then biological mothers would not be excluded and there would be no contravention of the Code.

In considering this alternative it was suggested that Arbitrator Peltz, who initially awarded adoptive leave in an interest arbitration, expressed that by doing so he was not intending to create a second tier of benefits and was concerned that this not create human rights issues. What Arbitrator Peltz awarded in February 2001 and clarified in March 2001 did not involve either the Division or the Association and pre-dates the Collective Agreement by more than two years. His decision however appears to have been persuasive in collective bargaining in Manitoba and the concept of adoptive leave was included in the Collective Agreement. The concerns raised by Arbitrator Peltz have materialized and been addressed through arbitrations and subsequent collective bargaining.

In this regard I note in particular the decision of Arbitrator Werier in the Chapman case, which involved the Louis Riel School Division and a claim of discrimination by a biological father who was denied parental leave that was available to adoptive fathers. In that decision Arbitrator Werier set out the bargaining history and relevant case law in detail. The board in that case came to the conclusion that the provision for adoptive leave was discriminatory under the provisions of the *Code*. The board did not strike down the clause, but sent it back to the parties for further bargaining. When bargaining failed to resolve the matter it came back to the board. In the subsequent decision Arbitrator Werier reviewed the relevant decisions and ultimately in an award dated December 13, 2006 ordered that:

> ... a provision for top-up benefits for biological parents be inserted in the agreement alongside the provision for adoptive parents. Both these provisions however are to be limited in duration to the life of the existing agreement, but will not survive the expiry date of the agreement which was June 30, 2006.

Although striking down a provision that contravenes the Code is a potential remedy, at least as to the future, I am not persuaded that it is an appropriate remedy in this case given the limited representation on what is a defined and finite issue. That may be an alternative in the next round of bargaining or in a future interest arbitration, where all of the relevant facts and interests are represented, but it is not a remedy that I think is appropriately imposed by an arbitration board addressing a grievance.

The grievors are seeking payment of the top-up they were denied during their parental leave. They are also seeking interest on these amounts. I recognize that each of the grievors will have suffered some additional costs because this benefit has been delayed, but the actual affect on each of the grievors will be different and there is really no evidence about the applicable rate that might appropriately be imposed.

In any event, I do not believe that the Division has in anyway acted in bad faith or knowingly withheld or delayed payment of a benefit without reasonable explanation. In addition, the Collective Agreement that gave rise to this ambiguity and confusion is one that was negotiated between and signed off by both the Division and the Association and expressly provided that every teacher shall be entitled to "unpaid" parental leave. In the circumstances I do not think it would be reasonable to impose interest on the payment to the grievors.

Accordingly, the Board orders that under Article 14.07 and 14.08 of the Collective Agreement the Division pay the grievors an amount of income top-up which, combined with employment insurance benefits for parental leave received by the grievors, would be equivalent to 90% of their gross salary for the ten week period. This award does not apply to teachers who did not file grievances and is not retroactive.

Dated the 25 day of March, 2010.

R.J.M. Adkins - Chairman

I concur with the above Award

Mel Myers - Nominee on behalf of the Association