IN THE MATTER OF AN ARBITRATION

AND IN THE MATTER OF A GRIEVANCE FILED BY
THE FLIN FLON TEACHERS' ASSOCIATION OF THE
MANITOBA TEACHERS' SOCIETY
DATED SEPTEMBER 29, 2003

BETWEEN:

THE FLIN FLON TEACHERS' ASSOCIATION OF THE
MANITOBA TEACHERS' SOCIETY,

(hereinafter referred to as the "Association"),

and -

THE FLIN FLON SCHOOL DIVISION NO. 46,

(hereinafter referred to as the "Division").

AWARD

Board of Arbitration:

A. Blair Graham, Q.C. - Chairperson
Lea Baturin - Nominee of the Association
G.D. Parkinson - Nominee of the Division

Appearances:

Valerie Matthews-Lemieux - on behalf of the Association
Robert Simpson - on behalf of the Division

AWARD

INTRODUCTION

The hearing of this grievance took place on February 21, 2005, in Flin Flon, Manitoba. The parties confirmed at the commencement of the hearing that the Board of Arbitration had been validly appointed and that it had jurisdiction to determine the matters at issue.

This grievance raises issues related to a maternity leave requested by a teacher, Bobbi Lynn Meyer ("Ms. Meyer"). The maternity leave was applied for by Ms. Meyer by letter dated August 5, 2003, addressed to the Superintendent of the Division, and was for the period from September 15, 2003, to January 5, 2004. The request was denied by the Division, but an unpaid leave of absence was granted.

The relevant provisions of the applicable collective agreement between the Division and the Association (the "Collective Agreement") are contained within Article 4.04 entitled "Maternity, Adoptive Leave". They provide:

> "4:04 **Maternity, Adoptive Leave**
>
> Leaves for Maternity or Adoptive purposes shall be in accordance with Employment Standards Code of the Province of Manitoba.
>
> **E.I. Benefit Top-Up**
>
> (a) 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 Unemployment Benefits (SUB) Plan.

(b) In respect of the period of maternity leave, payments made according to the SUB Plan will consist of the following:

1. For the first two weeks, payment equivalent to 90% of her gross salary, and

2. Up to fifteen (15) weeks payment equivalent to the difference between the Employment Insurance Benefit the employee is eligible to receive and 90% of her gross salary...."

The relevant provision in *The Employment Standards Code*, R.S.M., is section 53 which is within Division 9 of the Code, entitled "MATERNITY LEAVE, PARENTAL LEAVE AND COMPASSIONATE CARE LEAVE". Section 53 provides:

"**Eligibility for Maternity Leave**

53. A pregnant employee who has been employed by the same employer for at least seven consecutive months is eligible for maternity leave."

The contentious issue in this grievance is whether Ms. Meyer is eligible for the maternity leave and Employment Insurance top-up benefits provided pursuant to Article 4.04 of the Collective Agreement. Her eligibility depends on whether or not she had been employed by the Division for "at least seven consecutive months" as at September 15, 2003, the date of the commencement of the maternity leave.

THE EVIDENCE

No witnesses were called by either of the parties to these proceedings. The evidence in this case consisted of fourteen exhibits, all introduced by consent of the parties, at the outset of the hearing. The relevant background facts are uncontested. They can be summarized as follows:

1. Commencing in 2001, Ms. Meyer was employed by the Division as a teacher pursuant to a series of contracts referred to as "Form 2A" contracts. The terms and conditions of such contracts are statutorily prescribed pursuant to T*he Public Schools Act*, R.S.M. and the regulations thereunder, and are referred to as "Form 2A contracts" because the form of the contract setting forth its terms and conditions is set forth as a schedule to *The Public Schools Act* and described in that schedule as Form 2A. Such contracts are also commonly referred to as "term contracts". They can be for either full time or part time teaching assignments. They are distinct from Form 2 contracts, which are contracts of indefinite duration.

2. Clause 1 of the Form 2A contract stipulates that:

> "1. The school board hereby employs the teacher, and the teacher hereby accepts employment as a temporary teacher with the school board, such employment to commence on the • day of •, 200•, to be terminated in the manner hereinafter provided."

Clause 5 of the Form 2A contract stipulates that:

> "5. This agreement shall be deemed to be in force from the date of commencement of employment, as set out in clause 1, until terminated when one of the following, whichever comes first, applies: . . .".

The first event listed in clause 5 which operates to terminate the agreement is the expiration of the school year to which the contract applies, which is always a date near the end of June, usually June 30. Other terminating events include:

(i) the return to work of the teacher who was being replaced (if the Form 2A contract was entered into in order to temporarily replace a teacher who would be returning);

(ii) the mutual agreement of the teacher and the division to terminate the contract; and

(iii) the giving of written notice by either the teacher or the division at least one month prior to December 31, terminating the contract on December 31.

3. For various periods between April 2, 2001, and June 30, 2004, Ms. Meyer and the Division entered into no less than five Form 2A contracts, some of which were for full time teaching assignments and some of which were for half-time teaching assignments, teaching various courses in the middle school grades at the McIsaac School Ecole McIsaac. All of the contracts terminated on the last school day in June of the school year to which the contract applied, except one half time contract which terminated earlier in June 2002, upon the return to work of a teacher whom Ms. Meyer had been replacing.

4. In most, if not all, cases, the Division and Ms. Meyer entered into Form 2A contracts relating to the next school year, prior to the expiration of the Form 2A contract relating to the then current school year. For example, on June 25, 2001, the Division and Ms. Meyer entered into a Form 2A contract for the next school year commencing August 27, 2001, prior to the expiration of the contract applying to Ms. Meyer's employment from April 2, 2001, to June 29, 2001. Similarly, on June 23, 2003, the Division and Ms. Meyer entered into a Form 2A contract for the period from September 2, 2003, to June 30, 2004, prior to the expiration of the contract applying to Ms. Meyer's employment from August 26, 2002, to June 30, 2003. In other words, prior to the completion of her teaching duties on June 30, 2003, Ms. Meyer had signed a Form 2A contract for the next ensuing school year (2003 – 2004).

5. By letter dated August 5, 2003, to the Superintendent of the Division, Ms. Meyer requested a maternity leave from September 15, 2003, to January 5, 2004, a period of 16 weeks. By letter dated August 27, 2003, the Superintendent replied, indicating that the matter had been reviewed by the Board of the Division and that her request for maternity leave had been denied. Instead, the Division, at its

discretion, approved an unpaid leave of absence from September 15, 2003, to January 2, 2004, inclusive, pursuant to another provision in the Collective Agreement ("Leave for Other Reasons").

6. The Association filed a grievance on behalf of Ms. Meyer dated September 29, 2003, alleging, *inter alia*, that:

> ". . . the Division misinterpreted and/or misapplied and/or violated the provisions of the collective agreement and in particular Article 4.04, section 80 of *The Labour Relations Act*, and Division 9 of *The Employment Standards Code* by denying Bobbi Lynn Meyer maternity leave benefits pursuant to the collective agreement, thereby preventing her from receiving 90% of her salary for the fall term of the 2003/04 school year. The Association also grieves that Ms Meyer was discriminated against on the basis of pregnancy when she was denied maternity leave and was placed on an unpaid leave of absence."

7. The Division responded by letter dated October 7, 2003, denying the grievance and asserting that both the Collective Agreement and *The Employment Standards Code* were being followed because Ms. Meyer had been hired pursuant to a Form 2A contract for a fixed term and therefore did not qualify for maternity leave or benefits.

THE POSITIONS OF THE PARTIES

The Position of the Association

The various arguments of the Association can be summarized as follows:

1. Ms. Meyer was employed by the Division for at least seven consecutive months having regard to the background facts, the successive contracts, and the dates of those contracts. She was typically hired for the school term commencing in late

August or early September of a particular school year, prior to the expiration of the term ending at the end of June of the preceding school year. In effect, Ms. Meyer had been continually employed by the Division since April 2001, at the time she applied for the maternity leave which was to commence in September 2003.

2. A regulation under *The Public Schools Act* (101/95 as subsequently amended) divides the school year into two terms ending on December 31 and June 30 respectively and stipulates that certain days are to be holidays (including Good Friday, Victoria Day, Thanksgiving Day, and Remembrance Day, when it falls on a weekday), and also stipulates that for all schools there must be a Christmas and spring vacation period. Moreover, no teachers employed in Manitoba, whether pursuant to a Form 2, or a Form 2A contract, work during the summer vacation period (July and August), because the schools do not operate during that period.

3. Given the series of successive contracts between Ms. Meyer and the Division commencing April 2001, her pattern of employment pursuant to such contracts, and the fact that prior to the commencement of her leave on September 15, 2003, she had worked continuously except on those holidays or vacations when schools were not open, Ms. Meyer had been employed by the Division for at least seven consecutive months as at the commencement of her leave on September 15, 2003. She was therefore eligible for maternity leave under *The Employment Standards Code* and the Collective Agreement.

4. By reason of s.6 of *The Interpretation Act*, section 35 of *The Employment Standards Code* is to be given a fair, large and liberal interpretation that best ensures the attainment of its objects. *The Employment Standards Code* sets minimum standards applicable to various aspects of the employment relationship. By reason of various decisions of the Supreme Court of Canada,

such legislation is to be interpreted so as to encourage employers to comply with those minimum requirements and to extend its protections to as many employees as possible. In the result, the provisions of *The Employment Standards Code* relating to eligibility for maternity leave and benefits, are to be construed liberally so as to extend those benefits to as many women as possible. In addition, since the Supreme Court of Canada decision in *Brooks v. Canada Safeway* [1989] 1 SCR 1219, a broad interpretation is also to be given to statutory provisions designed to protect the rights of pregnant women.

5. A decision that Ms. Meyer was not eligible for a maternity leave and the Employment Insurance benefit top-up for the period from September 15, 2003, to January 4, 2004, would severely limit the leave provisions of Division 9 of *The Employment Standards Code* and would therefore not be consistent with the liberal construction to be given to those leave provisions.

6. There is a distinction between teachers who are not employed and teachers who are not working. Teachers, whether employed under Form 2 or 2A contracts, who are not working in non-teaching periods such as during the Christmas, spring, and summer vacation periods, are not unemployed; they are simply not working because the schools are not operating. If it is determined that Ms. Meyer had not been employed for at least seven consecutive months as at the date of commencement of her leave on September 15, 2003, it is possible that she may never qualify for maternity benefits while she continues to be employed pursuant to Form 2A contracts. This would be an unfair result for Ms. Meyer, and other teachers like her, who are employed pursuant to a series of successive Form 2A contracts.

7. It would also be an anomalous result because it will give rise to a situation in which a teacher employed pursuant to a Form 2A contract will have her eligibility, and the extent of her entitlement to maternity benefits, determined by the date

when her leave is to commence, which itself is largely determined by the date of the birth of her baby. Some teachers employed pursuant to Form 2A contracts may qualify for maternity leave and the Employment Insurance top-up benefits for at least part of the their requested leave, and others will not.

The Position of the Division

The various arguments of the Division can be summarized as follows:

1. Ms. Meyer was employed pursuant to a series of statutorily prescribed fixed term contracts. All of those contracts had a fixed commencement date (set forth in clause 1 of the contracts) and were terminated upon the earliest of a series of specified dates or events, but usually on or about June 30 of a particular year. Ms. Meyer was not employed during July and August of 2003, i.e. there was a break in her employment. The contract in effect from August 25, 2002, to June 30, 2003, (exhibit 9) terminated pursuant to its terms on June 30, 2003. Her next contract of employment (exhibit 12), although signed on June 23, 2003, stipulated in clause 1 that the employment thereunder did not commence until September 2, 2003. In the result, Ms. Meyer had not been employed by the Division for at least seven consecutive months on September 15, 2003, when her leave was to commence, and therefore she did not meet the eligibility requirements of s.53 of *The Employment Standards Code*.

2. There is no provision in either the Collective Agreement, or in the Form 2A contract, which provides for the carryover of benefits from one fixed term contract to another fixed term contract. This is in contrast to the situation related to unused sick leave benefits which, pursuant to clause 4.06(c)(v) of the Collective Agreement can be carried over from a fixed term contract (Form 2A) to a contract of indefinite duration (Form 2). Had the parties wanted to provide for such a

carryover of benefits, they could have done so by employing similar language to that found in clause 4.06 of the Collective Agreement.

3. The parties have expressly agreed, pursuant to Article 4.04 of the Collective Agreement, that in order to receive the top-up benefits contemplated by Article 4.04, a teacher must meet the seven consecutive month eligibility requirement of *The Employment Standards Code.* Ms. Meyer did not meet those requirements because she was not employed by the Division in July and August 2003, and had only been employed for approximately two weeks as at the date her leave commenced, namely September 15, 2003.

4. In response to the Association's arguments with respect to a liberal construction of *The Employment Standards Code* provisions, the Division says that a liberal construction of a provision does not permit an arbitrator to disregard the words of the statute or the simple and clear eligibility requirements to which the parties have expressly agreed. Moreover, it is clear that the legislature did not intend to confirm maternity benefits on every female employee employed in the province. The eligibility requirements must be met, and as at August/September 2003 Ms. Meyer did not meet those requirements.

ANALYSIS

Continuity of Employment

The parties have fundamentally different positions with respect to the concept of "continuity of employment".

The Association asserts that Ms. Meyer has been employed by the Division continuously since April 2001.

The Division counters by arguing that she was employed pursuant to a series of term contracts, and that in each year there was a break in her employment during the summer months of July and August. Therefore, on September 15, 2003, when the maternity leave Ms. Meyer had requested was to commence, she had only been employed for approximately two weeks, i.e. since the commencement of the 2003 – 2004 school year. The Division points to the word "consecutive" in s.53 of *The Employment Standards Code*, and relies on dictionary definitions of the word "consecutive" to submit that the seven months referred to in s.53 must "follow continuously", or be in "an uninterrupted sequence" in order for an employee to be eligible for a maternity leave and the Employment Insurance top-up benefits.

The Association attempts to overcome the problem represented by the cessation of teaching activities in July and August in several ways, including by arguing that the months of July and August are "vacations" under the "School Days, Hours and Vacations Regulation" (the "Regulation"). According to the Association, inasmuch as July and August comprise a summer vacation, they do not represent a break in the employment of a teacher employed under a Form 2A contract provided that teacher is employed pursuant to such a contract until June 30 of a particular year, and is also employed pursuant to another such contract effective upon the commencement of the next school year.

In support of this argument, the Association relies on the definition of "school year" in the Regulation as "the period beginning on July 1 and ending on June 30 of the next year", and the fact that the Regulation divides the school year into two terms ending on December 31 and June 30 respectively.

I do not accept the Association's arguments based on the Regulation. Firstly, both holidays and vacations are defined in the Regulation, and neither definition includes the months of July and August. Secondly, the Form 2A contract is a contract for a defined term and has a commencement date and a termination date, and whatever

dates those are, they will always operate so as to exclude July and August from being within the defined term of the contract.

However, although I do not accept the Association's arguments based on the Regulation, the Association has other, better arguments relating to continuity of employment.

In essence, the Association submits that substance should prevail over form. Ms. Meyer was employed by the Division since April 2001 and before completing her teaching duties in June of each school year, she had contracted to resume those duties in September of that same year. Her position, and that of other teachers under Form 2A contracts, is not unlike teachers under Form 2 contracts. Neither set of teachers work during July and August for the basic reason that schools in Manitoba, with some very limited exceptions, do not operate during July and August.

The continuity of employment argument leads inevitably to a consideration of a series of cases involving Employment Insurance and teachers. Those cases dealt with the eligibility of teachers to receive Employment Insurance benefits during July and August.

The case primarily relied upon by the Division is *Ying v. Canada (Attorney General)* [1998] F.C.J. 1615. *Ying* was a case decided by the Federal Court of Appeal, from Manitoba, involving a teacher employed pursuant to a Form 2A contract, in which the teacher's contract expired on June 30, 1996, and her next contract, although signed in June of 1996 did not become effective until August 26, 1996. The Federal Court of Appeal decided that the first contract had terminated before the second had commenced, and there was therefore no continuity of employment. In the result, the teacher was entitled to Employment Insurance benefits during the intervening period, i.e. between July 1, 1996, and August 25, 1996.

The cases primarily relied upon by the Association are *Oliver v. Canada (Attorney General)* [2003] F.C.J. 316 and *Bishop v. Canada (Employment Insurance Commission)* (2002) 292 N.R. 158 (F.C.A.). The *Oliver* case was also decided by the Federal Court of Appeal. It involved 72 Alberta teachers with fixed term probationary contracts terminating on June 30 of a particular year, all of whom were reemployed effective upon the commencement of the next school year in September. Factual findings were made in *Oliver* that the teachers were paid for 12 months, although the fixed term probationary contracts ran from September to June, that the teachers involved suffered no loss of income and received medical and other collateral benefits during the summer months. On the basis of those facts, the Federal Court of Appeal concluded that the claimants had not suffered a genuine severance, nor were they unemployed during July and August. Therefore the claimants were not entitled to Employment Insurance benefit during those months.

There are valid reasons for following either the *Ying* or the *Oliver* decision.

Ying was a Manitoba case, based on the same statutory and contractual framework that is under consideration in this case. *Oliver* was a subsequently decided and carefully reasoned case, that considered the existing jurisprudence, and expressly chose to follow cases such as *Bishop*, and to distinguish *Ying*.

Frankly, I am uncomfortable deciding this case in reliance upon either *Ying* or *Oliver*. Based on a careful reading of those cases, it appears that both decisions may have been based on the courts' assessment of a public policy consideration, namely the circumstances in which it is appropriate for teachers employed on fixed term contracts expiring in June, to receive Employment Insurance benefits at public expense, when assured of employment again in September. Public policy considerations may be quite different when assessing whether teachers are eligible to take a maternity leave and to receive an Employment Insurance benefit top-

up, when the Association and the Division have expressly agreed on a specific contractual provision for the determination of that eligibility.

I therefore decline to decide this case on the basis of adopting the reasoning of one of those cases in preference to the other. I also decline to undertake the difficult, if not impossible task of reconciling those decisions.

There are other cases relied upon by the Association which are not Employment Insurance cases. For example, the case of *Bacchus v. Kitaskinaw Education Authority Inc.* [2000] C.L.A.D. No. 621 involved a teacher, employed by an Education Authority who was attempting to avail himself of the unjust dismissal provisions of the Canada Labour Code (the "CLC"). To do so, Mr. Bacchus was required to fulfill the CLC requirement of 12 consecutive months of continuous employment. Mr. Bacchus had initially been employed as a replacement teacher in January 1997, and while still employed in that capacity, signed a new contract for a regular teaching position for the next school year. The new contract contained a renewal clause. Pursuant to that renewal clause, Mr. Bacchus provided a letter of intent to the Education Authority dated March 16, 1998, advising of his intention to remain employed for the 1998 – 1999 school year commencing in September 1998. The Education Authority wrote to Mr. Bacchus in May 1998 advising him that the Authority had decided to allow his teaching contract to expire on June 30, 1998.

Mr. Bacchus applied for relief under the Unjust Dismissal provisions of the CLC. He argued that notwithstanding the fact that he did not teach in July and August 1997 (because the schools operated by the Authority were not open in those months), he nonetheless had worked for the Authority from January 1997 to June 1998, a period of approximately 18 months, and therefore met the 12 month requirement of the CLC.

The adjudicator agreed, ruling that the two contracts overlapped and that the continuity of employment was not broken by the intervening summer months.

The *Bacchus* case is distinguishable from the present case because it did not deal with a statutorily prescribed form of contract, and because the contract in *Bacchus* contained a renewal provision which the teacher had purported to exercise. However, *Bacchus* does illustrate the disinclination of adjudicators and arbitrators to regard July and August as a break in a teacher's employment relationship, particularly in circumstances where the teacher has entered into a new contract for the fall term prior to finishing teaching in June. *Bacchus* is also illustrative of a liberal interpretation of a statutory provision which sets standards in an employment context.

"Fair, large and liberal construction"

Section 6 of *The Interpretation Act* R.S.M. provides that:

> "Every Act and regulation must be interpreted as being remedial and must be given the fair, large and liberal interpretation that best ensures the attainment of its objects."

The Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* [1992] 1 S.C.R. 986, made the statement that: " . . . employment is of central importance to our society", and then quoted with approval the statement of Dickson C.J. in *Re Public Service Employee Relations Act (Alta.)* [1987] 1 S.C.R. 313, at 368:

> "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."

The Court then went on to construe provisions of *The Ontario Employment Standards Act* taking into account provisions of *The Ontario Interpretation Act* that were

identical to those found in s.6 of the Manitoba act quoted above. The Court's reasoning was that:

> "Accordingly, an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act (referring to *The Ontario Employment Standards Act*), and so extends its protections to as many employees as possible, is to be favoured over one that does not."

Counsel for the Association, relying upon the above-noted reasoning of the Supreme Court, argues that the provisions of Division 9 of *The Employment Standards Code,* and particularly s.53 of the Code, dealing with eligibility for maternity leave, are to be construed so as to provide maternity leave for as many women as possible, including teachers employed pursuant to a succession of Form 2A contracts.

The Association's argument is attractive, combining as it does, a principle of law eloquently articulated by the Supreme Court relating specifically to employment standards legislation, and a statutory requirement to interpret all legislation remedially and liberally to ensure the attainment of its objects.

However, a large and liberal interpretation of a statute does not direct or permit the words of a statute to be distorted or ignored. It is clear by the words of s.53 of *The Employment Standards Code* that the legislature did not intend to provide maternity leave for all women employed in Manitoba. The minimum requirement of seven consecutive months of employment must be met before an employee is eligible for a maternity leave. The question to be resolved is how that eligibility requirement is to be applied to teachers employed pursuant to a series of Form 2A contracts. Such contracts are for a fixed term, which will normally exclude the months of July and August. Such contracts are statutorily prescribed, i.e. they are not negotiated by the parties, nor are they unilaterally imposed by the Division.

Furthermore, it is also necessary to pause and to consider that both the Supreme Court's admonition, and the statutory direction in *The Interpretation Act*, apply to the construction and interpretation of statutes, not the interpretation and construction of a collective agreement between contracting parties. An arbitrator's task is normally to give effect to the mutual intention of the parties to a collective agreement, as that intention is reflected in the words chosen by the parties to express their agreement. The parties are presumed to have intended what they have said; a careful examination of the words the parties to a collective agreement have used to record and reflect their agreement is therefore of the utmost importance.

In this case, the parties have chosen to express their agreement with respect to eligibility for maternity leave by specifically referring to the eligibility provisions in *The Employment Standards Code*. It is therefore reasonable to conclude that those provisions should receive a large and liberal interpretation that best ensures the attainment of the objects of the Code.

Construing the Collective Agreement

The Division and the Association have expressly agreed in Article 4.04 of the Collective Agreement that maternity leaves shall be in accordance with *The Employment Standards Code*. They have further agreed that teachers entitled to maternity leave shall be entitled to receive pay during the period of the leave up to 17 weeks which, in combination with the Employment Insurance benefits being received by the teachers, will equal 90% of their gross salary.

The wording chosen by the parties means that female teachers employed pursuant to Form 2 contracts (which are contracts of indefinite duration) will be entitled to a maternity leave and a top-up of Employment Insurance benefits after seven consecutive months of employment. In other words, most female teachers employed

pursuant to Form 2 contracts will become eligible for a maternity leave and an Employment Insurance top-up benefit part way through their first year of teaching.

The dispute in this case relates to the eligibility of female teachers employed pursuant to a series of Form 2A contracts to receive similar benefits. If the Division's arguments are upheld, female teachers employed pursuant to a series of Form 2A contracts may never be entitled to those benefits, or may only be entitled to them for a period of less than 17 weeks. Therefore, if the Division's arguments are accepted female teachers employed pursuant to Form 2A contracts will be treated differently from teachers employed pursuant to Form 2 contracts, and specifically will have lesser entitlements to maternity leaves and employment insurance top-up benefits than Form 2 teachers.

An arbitrator, when construing a provision which is capable of two interpretations, is entitled to consider the potential results of each interpretation, and to avoid the interpretation which will produce unreasonable or anomalous results.

However, in my opinion it is not unreasonable or anomalous for teachers employed pursuant to two different types of contracts (i.e. a contract of indefinite duration in contrast to a contract for fixed term) to enjoy different benefits. The common law affords many examples of individuals employed pursuant to contracts of indefinite duration enjoying greater entitlements (e.g. notice/severance, and vacation entitlements) than individuals employed pursuant to contracts of fixed terms. Indeed, a difference as to the entitlement to certain benefits between teachers employed pursuant to Form 2 contracts and teachers employed pursuant to Form 2A contracts, is a logical consequence of the legislature's decision to provide for two different types of employment agreements for teachers under *The Public Schools Act*.

However, of greater concern, is the potential differential treatment that may result between female teachers, working for the Division for approximately the same period of time, and employed pursuant to a succession of Form 2A contracts. By way of illustration, it is interesting to consider the hypothetical example of a female teacher who:

i) had begun working for the Division in the spring of 2001;

ii) was employed pursuant to a series of Form 2A contracts up to and including the 2002-2003 school year; and,

iii) became pregnant and requested a maternity leave commencing April 3, 2003.

Such a teacher, according to the Division's argument would be entitled to receive a maternity leave, and Employment Insurance top-up benefits commencing April 3 (by which time she would have been employed for at least seven consecutive months from the beginning of the 2002-2003 school year). The Division would acknowledge that her maternity leave would last until June 30, a period of approximately 13 weeks.

Therefore, according to the Division's interpretation of the maternity leave eligibility requirements, the hypothetical teacher would have a lesser entitlement to maternity leave and Employment Insurance top-up benefits than a Form 2 teacher employed for a period of at least seven consecutive months, but would nonetheless have some entitlement to maternity leave and Employment Insurance top-up benefits. This is in stark contrast to Ms. Meyer, who as a result of the due date of her baby, requested a maternity leave commencing in September 2003, i.e. within the first seven months of her contract for the 2003-2004 school year. Her request was denied because the Division concluded that she had no entitlement to either maternity leave or to an Employment Insurance top-up benefit. The Division, in its discretion, did allow Ms. Meyer an unpaid leave of absence pursuant to another Article of the Collective Agreement.

As noted above, I do not consider the different result as between the hypothetical teacher and Form 2 teachers to be unreasonable or anomalous, but I do find the potential for significantly different results as between two teachers employed pursuant to a succession of Form 2A contracts to be troubling.

Conversely, if I accept the argument of the Association, and find Ms. Meyer to have been employed by the Division since April 2001, a period of approximately 2½ years prior to her requested maternity leave, I must construe Article 4.04 of the Collective Agreement, which incorporates Section 53 of *The Employment Standards Code,* as if the word "consecutive" has not been included. This is problematic because in attempting to determine the intention of the parties to a Collective Agreement, an arbitrator should normally assume that the words chosen by the parties are to be interpreted in their normal and ordinary sense, and that all of the words used were intended by the parties to have meaning. However, by way of counterpoint, the Association is able to point to cases such as *Oliver* and *Bacchus* in which adjudicators have ruled that the months of July and August do not disrupt the continuity of employment of teachers on fixed term contracts who have entered into new contracts for the immediately following school year.

The Association's argument also apparently requires that the apparent "break" in employment which occurs in July and August pursuant to the provisions of a Form 2A contract be overlooked, in spite of the fact that there is no requirement or compulsion on the Division to hire Form 2A teachers who have taught in the Division in one school year for the immediately following school year. However, by way of further counterpoint, the Association submits that substance must prevail over form, particularly in situations where a Form 2A teacher has entered into a new Form 2A contract for the immediately following school year prior to the expiration of the Form 2A contract for the then current year. In this case, the Association contends that Ms. Meyer had established a pattern of employment whereby she was continuously providing her teaching services to the Division over a series of at least three successive school years.

During July and August of 2003, she had already signed a contract whereby she would be providing teaching services to the Division in September 2003. She had done so prior to her previous Form 2A contract expiring at the end of June.

Distilling all of the foregoing down to basic essentials, the Association's most compelling arguments on behalf of Ms. Meyer are that:

1. The reality or substance of her employment with the Division was that she provided her services to the Division from April 2001, to the date of her requested maternity leave, namely September 15, 2003, a period well in excess of seven months. She provided those services continuously, except for those periods when the schools in the Division were not operating and had always contracted to provide services in the following school year prior to the expiration of her contract for the then current year.

2. Pursuant to the provisions of the Collective Agreement, eligibility for maternity leave is determined with reference to the eligibility requirements set forth in *The Employment Standards Code*. Those provisions are to be construed liberally, not restrictively. To do otherwise will lead to differential treatment between teachers employed pursuant to a series of successive Form 2A contracts, depending on when, during the school year, their respective leaves are to commence.

The Division's strongest rebuttal arguments are:

(a) If the parties had mutually intended to provide maternity leave and Employment Insurance top-up benefits to employees employed pursuant to a series of successive Form 2A contracts, but who had been employed for less than seven months pursuant to the most recent of those contracts, they could have used language that would have readily affected that result. For example, they could have provided for a carry over of

maternity leave benefits from one Form 2A contract to another in successive school years, or they could have based the eligibility for maternity leave and Employment Insurance top-up benefits on the total months worked in successive school years immediately preceding the requested maternity leave. They chose neither of those alternatives, but chose instead to incorporate an eligibility requirement of at least seven consecutive months of employment into their Collective Agreement;

(b) A liberal interpretation of the eligibility provisions does not entitle an arbitrator to ignore the words chosen by the parties to express their agreement. Moreover, even if the eligibility provisions in *The Employment Standards Code* are given a liberal interpretation, it is clear that not all working women in Manitoba who are pregnant are eligible to receive a maternity leave. Seven consecutive months of employment is a prerequisite. Furthermore, eligibility should not be interpreted in such a way as to negate the effect of a statutorily prescribed form of contract. The Form 2A contract is a contract, the terms of which are set by statute, whereby teachers employed thereunder agree to accept employment as temporary teachers for fixed terms which will normally not include July or August. The Form 2A contract is distinct from a Form 2 contract, which is a contract of indefinite duration; that distinction must be recognized.

After a lengthy and careful consideration of all of the competing arguments, I have decided that the Association's position on behalf of Ms. Meyer must prevail and that the grievance will be allowed.

The reasoning in cases such as *Oliver*, *Bishop*, and *Bacchus* with respect to the issue of continuity of employment did influence my decision to some extent. However, I was ultimately persuaded to accept the Association's position because of the facts underlying Ms. Meyer's employment relationship with the Division from and

after April 2, 2001. She was employed by the Division pursuant to a series of successive Form 2A contracts extending over two or more consecutive years. In 2003, and in earlier years, she had contracted with the Division to teach immediately upon the commencement of the fall term in September prior to the expiration of her contract for the then current school year at the end of June. In July and August of 2003, she was in a position similar to that of teachers employed pursuant to Form 2 contracts. She was not teaching because schools were not operating, but she had a contract to teach immediately upon the commencement of the fall term in September.

I was also very troubled by the differential treatment that would arise, if the Division's arguments were accepted, between teachers employed pursuant to a series of successive Form 2A contracts depending on the commencement date of their respective leaves. Those leave dates would largely be determined by the birthdates of the respective teachers' babies.

It is worth noting that the words used by the parties in the Collective Agreement with respect to eligibility for maternity leave and Employment Insurance top-up benefits for teachers employed pursuant to Form 2A contracts have presented a significant interpretive challenge to this Board. The parties may wish to pay special attention to this issue in any future collective bargaining to ensure that whatever agreement they reach on that issue is expressed in precise and unambiguous language.

It is also worth noting that this Board has treated this grievance as a grievance filed by the Association on behalf of an individual, namely Ms. Meyer, and not as a policy grievance. This decision is therefore limited to the particular facts of this case, and the relief granted is specific to Ms. Meyer, and the leave which she took from September 15, 2003, to January 4, 2004.

DECISION AND REMEDY

The grievance is allowed.

This Board declares that the Division breached Article 4.04 of the Collective Agreement when it denied Ms. Meyer's request for maternity leave for the period from September 15, 2003, to January 4, 2004.

By way of specific remedy, this Board orders that the Division pay to Ms. Meyer the amounts referred to in sub-paragraph (b) of Article 4.04 of the Collective Agreement for the period of the maternity leave and interest thereon.

The parties will likely be able to agree on the amounts payable to Ms. Meyer, but if they are unable to do so, the Board will retain jurisdiction to resolve that issue and any other issues which may be related to the implementation of this Award.

DATED this 9th day of June, 2005.

A. Blair Graham, Q.C.
Chairperson

I concur with the above Award:

Lea Baturin

I dissent from the above Award, and I am attaching my dissenting reasons:

G.D. Parkinson