IN THE MATTER OF:

AN ARBITRATION BETWEEN:

FLIN FLON SCHOOL DIVISION No. 46
(hereinafter called the "Division")
- and -
FLIN FLON TEACHERS' ASSOCIATION No. 46
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter called the "Association")

AWARD OF MEDIATOR/ARBITRATOR

On August 11, 1997, Jack M. Chapman, Q.C. was appointed by the Honourable Linda G. McIntosh, the Minister of Education and Training for Manitoba, to act as Mediator/Arbitrator in the above matter. The appointment was made under the authority vested in the Minister by sub-section 131.1(3) of the Public Schools Act (hereinafter called the "Act"). It may suffice to say, at this stage, that the appointment was made under the recent amendments to the Act enacted under Bill 71 of the Manitoba Legislature. Although I will review relevant parts of that legislation in detail further in this award, it is clear that there is an obligation on the Mediator/Arbitrator and on the parties to attempt to mediate the items in dispute. If that mediation fails to resolve the issues, the matter may proceed to binding arbitration.

At the time of the appointment a list of all of the outstanding issues between the parties was provided by the Minister with the direction to deal with all of them. Some of those issues were resolved by the parties. Accordingly, the following is a list of the items which ultimately had to be dealt with.

"**ITEMS FROM CURRENT AGREEMENT IN DISPUTE**

Article 3:00 - Duration of Agreement
Article 4:02 - Compassionate Leave
Article 4:06 - Sick Leave (withdrawn by Division)
Article 7:00 - Security of Tenure (agreed to by both parties)
Article 11:00 - Procedure for Settlement of Disputes (withdrawn)
Article 13:00 - Teacher Certification (withdrawn)
Article 14:01 - Salary Schedule
Article 14:03 - Special Education and Occupational Entrance Classes
Article 14:04 - Two Grades in a Classroom
Article 14:05 - Traveling Allowance
Article 14:06 - Administration Allowances
Article 14:07 - Interest on Back Pay
Article 14:08 - Substitute Teachers (agreed that only item in dispute was wages)

PROPOSED NEW ARTICLES

Association Proposal	Family Medical Leave
Association Proposal	Mainstreaming
Association Proposal	Disruptive Students
Association Proposal	Working Conditions Committee
Association Proposal	Due Process for Principals and Vice-Principals
Association Proposal	Meal Period
Association Proposal	Bus Duty (withdrawn by Association)
Association Proposal	Transfer
Association Proposal	E.R.I.P.
Association Proposal	Memorandum of Agreement Recognition of Seniority

Subsequent to the appointment I communicated with each of the parties with respect to establishing dates and procedures for the mediation aspect of the process. I met with representatives of the parties on September 8, 1997 and a thorough discussion took place. It is common ground that the Association was not "enthusiastic" about the amendments to the legislation and, in particular, to the fact that the same individual would be named as both Mediator and Arbitrator. Although the Association did not object to mediation per se, it held the strong opinion that the parties would be unable to mediate in candor if, ultimately, the individual who heard positions and submissions during mediation would be the same individual who would make a binding decision under arbitration.

I noted to the parties the provisions of section 131.1(4) which provides that the Mediator/Arbitrator was to confer with the parties and endeavor to assist them in concluding a Collective Agreement. This section reads:

"Mediation: A mediator-arbitrator appointed under this section shall confer with the parties and endeavor to assist them to conclude a collective agreement or a renewal or revision of a collective agreement."

Accordingly, and after consultation with the parties, it was agreed that an attempt would be made to finalize an Agreement utilizing the mediation process. A meeting convened on November 5, 1997 in Flin Flon. The mediation process was not successful in resolving any of the issues. However I do wish to note that the parties, at least for the first time in a number of months, met face to face to discuss the issues. Part of that discussion took place in the absence of the Mediator/Arbitrator so as to give the parties the further opportunity to discuss the outstanding issues. The parties decided to proceed to arbitration on all issues. The arbitration was originally scheduled for February 18, 19 and 20, 1998 to be held in Flin Flon. Unfortunately, inclement weather did not permit the parties to attend in Flin Flon at that time and the hearing was re-scheduled for May 12 to 15, 1998 at which time the hearings took place.

It is worthwhile to note that this was the second mediation/arbitration to proceed under the new amendments. The first was heard by Arbitrator Scurfield and it involved the Brandon School Division and Brandon Teachers' Association. The mediation process in that matter was also unsuccessful. Further reference will be made to the award of Arbitrator Scurfield. However, certain issues and principles were common to both the Brandon and Flin Flon hearings.

A number of proposals of the Association caused the Division to challenge the jurisdiction of the Mediator/Arbitrator to deal with some of those proposals. In particular, the Division stressed new section 126(2) of the Act which reads:

"**126(2)** Notwithstanding any other provision of this Act, the following matters shall not be referred for arbitration and shall not be considered by the arbitrator or included in the arbitrator's award:
(a) the selection, appointment, assignment and transfer of teachers and principals;
(b) the method of evaluating the performance of teachers and principals;
(c) the scheduling of recesses and the mid-day break."

The Division alleged that certain new articles proposed by the Association could not be considered by the Arbitrator. Those disputed issues were:

Association Proposal - Mainstreaming
Association Proposal - Disruptive Students
Association Proposal - Working Conditions Committee
Association Proposal - Due Process for Principals and Vice-Principals
Association Proposal - Meal Periods
Association Proposal - Transfer
Association Proposal - ERIP

I will deal with each of those specific articles further in this award.

With respect to the legal nature of the challenge, the parties were represented by counsel. The Division was represented by Mr. R.A. Simpson, and the Association by Ms. Valerie Matthews-LeMieux. Counsel attended at the hearings in Flin Flon on May 12 at which time arguments on the "jurisdiction" issues were heard. Counsel did not take part in the hearings relating to the "merits" of each matter which took place on May 13 and 14.

With respect to the arguments and submissions on the "merits", the Division was represented by Mr. Craig Wallis and the Association was represented by Ms. Judy Balabas, Mr. Henry Shyka and Mr. Tom Paci. Various officials of the Division and some members of the Division Board attended the hearings. A number of officers and members of the Association were also in attendance.

On January 30, 1998, the Division wrote to the Association in response to a query from the Association requesting the Division to relate which of the Associations' proposals the Division viewed as being within section 126(2) of the Act. The Division, in its reply, said:

"While more than one of the Section 126 items may relate to any single association proposal, the primary sections of 126 which are pertinent would be as follows:

	PROPOSAL	**SECTION OF 126**
a)	Mainstreaming	selection, appointment and
b)	Disruptive Students	assignment; size of classes
c)	Meal Period	selection, appointment and assignment
d)	Bus Duty Supervision	scheduling of the mid-day break
e)	Due Process for Principals	selection, appointment and assignment; transfer
f)	Transfer	selection, appointment and assignment, transfer
g)	Working Conditions Committee	all sections of 126(2)
h)	Early Retirement Incentive Plan	does not come within Section 97(1) definition of Dispute and is therefore not a working condition; further as this proposal relates directly to termination of teachers is excluded from definition of dispute under Section 97.

Item h above relates to Section 97(1) which defines dispute as:

"dispute means a controversy or difference or apprehended controversy or difference between a school board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms and conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the school board, or the teacher or teachers that are not specifically set out in this Act or The Education Administration Act or in the regulations made under wither of those Acts: but does not include a controversy or difference arising out of the termination or threatened termination of the contract of a teacher by reason of alleged conduct unbecoming a teacher on the part of a teacher;"

It should be noted that this arbitration involves a Collective Agreement for the period commencing on January 1, 1997, the previous Agreement having expired on December 31, 1996.

Prior to the hearings commencing, counsel filed extremely comprehensive briefs relating to their positions in connection with the jurisdiction issue which included various arbitral and judicial precedents as well as numerous references to text writers, the records of various legislative proceedings, news releases, bulletins and miscellaneous other documents. The Association filed Affidavits of Thomas Ulrich and Walter John Pindera. The Affidavit of Craig Stephen Wallis was filed by the Division. The Affidavits have been carefully considered and further reference may be made to specific portions but I do not propose to recite the contents in full. The Affidavit of Mr. Pindera is some 16 pages and has 11 exhibits attached to it, many of which are multi-paged. The Affidavit of Mr. Ulrich, although only 5 pages has some 18 exhibits attached, many of which are multi-paged. The Affidavit of Mr. Wallis is 14 pages and has 14 exhibits attached, many of which are also multi-paged. Some of the exhibits are common to more than one Affidavit.

The Affidavit of Mr. Pindera relates primarily to the development of collective bargaining between teachers in Manitoba and the various School Divisions and, very thoroughly, sets out the historical aspect of how teachers acquired bargaining rights, initially under the Labour Relations Act, and subsequently under the Public Schools Act.

Mr. Ulrich's Affidavit primarily deals with the history of what transpired with respect to the recent amendments to the Act and MTS's reaction to them.

The Affidavits of Mr. Ulrich and Mr. Pindera, inter alla, show the reaction of MTS to the provisions of Bill 71. Clearly the reaction was negative.

The Affidavit of Mr. Wallis relates not only to the history of the collective bargaining with an emphasis on interest arbitration, but also to the enactment's in Bill 71. In noting the Affidavits, I emphasize that I do not do justice to the extremely thorough and comprehensive research of each of those deponents.

BACKGROUND RESPECTING JURISDICTION ISSUES

Notwithstanding the comprehensive material filed, I feel it appropriate and relevant for the purpose of this award to comment briefly on the history of the bargaining between the parties since World War II. That matter is set out very thoroughly in the various Affidavits. Shortly after World War II teachers received the right to bargain collectively. The Manitoba Teachers' Federation, which had existed since 1919, was replaced by the Manitoba Teachers' Society (MTS) created by Provincial Statute in 1942. There were various predecessor Associations of School Boards. In 1948 the Labour Relations Act was enacted which allowed bargaining agents to gain bargaining rights by way of application for certification. Teachers were covered under that legislation from 1948 until 1956. There were a multitude of School Districts and between 1948 and 1956 certifications were obtained in approximate 213 School Districts but only 121 Collective Agreements were finalized. According to paragraph 19, there were some 1679 School Districts in Manitoba employing 6,080 teachers and the signed Collective Agreements covered approximately 3,350 of those teachers. It is important to note that during that time, and while under the Labour Relations Act, the parties had the right to strike/lockout. In fact, no strikes/lockouts took place.

There were negotiations between the MTS and predecessor organizations of the Manitoba Association of School Trustees (MAST) and representations were jointly made to the Legislature that collective bargaining for teachers be removed from the ambit of the Labour Relations Act and be placed under the Public Schools Act and that the right to strike/lockout be removed and be replaced by compulsory binding arbitration. Ultimately amendments were made to the Act to provide for collective bargaining for teachers along with the introduction of a system of compulsory interest arbitration and the right to strike/lockout was removed. The legislation, inter alla, provided that conciliation was to take place prior to any matter proceeding to arbitration. This occurred in approximately 1957 and by 1966 there were some 386 Collective Agreement covering 91 % of the teachers in Manitoba. When the major consolidation of School Districts in Manitoba took place in approximately 1967, the number of districts was substantially reduced. Over a period of time, further consolidations took place with the result that there are now some 59 Collective Agreements covering all of the public school teachers in Manitoba.

By far the vast majority of disputes relating to the terms of Collective Agreements were resolved either by negotiation or by conciliation. However a number of contracts were arbitrated and some of those arbitrated decisions were challenged in court, primarily on issues related to the jurisdiction of arbitrators to impose articles in Collective Agreements respecting certain "working conditions". It may suffice to say that arbitrators had accepted a number of items which they considered as being within the definition of "dispute" set forth in section 97(1) of the Act (supra). Over a period of time some arbitration boards

imposed articles dealing with such diverse subjects as lay-offs, lunch hours, class size, contact time and other similar matters. Some arbitral decisions were quashed and some were upheld by the Courts. It is not necessary for me to recite those decisions which are well known to the parties and have been referred to in the Affidavits. For example, see paragraphs 11, 16, 17, 18, and 19 of Mr. Wallis' Affidavit.

It is fair to say that the Divisions were concerned with some of the various "working condition" articles which had been imposed, primarily for two reasons. Firstly, the Divisions were of the view that arbitrators had "trespassed" in areas that were within the jurisdiction, knowledge and expertise of the Division and were imposing conditions of employment outside of their arbitral jurisdiction. Secondly, the new articles came with a price tag and therefore caused additional cost to the Divisions which, in the view of the Divisions, was a factor not recognized by arbitrators. This necessitated additional cost "at a time when a percentage of government funding was being decreased and substantial pressures were being placed upon School Boards to maintain a level of taxation". (Article 19 - Affidavit of Craig Wallis). It is also to be noted that the Provincial Government, in the early l990s, enacted legislation limiting the amount of taxes which could be raised through the Special Levy.

In 1993 the legislature initiated a report on Education Reform. A Collective Bargaining Review Committee was established consisting of representatives of MAST, MTS and the Government. This committee met initially in the Spring of 1995 and there were a number of subsequent meetings. The issue of the amount of control in the hands of arbitrators was noted. Manitoba Education, in a discussion document (Exhibit H to the Affidavit of Craig Wallis) entitled "Enhancing Accountability, Ensuring Quality", dated January, 1996, noted at page 14:

> "Based on the background and framework outlined above, there does appear to be merit to MAST's views that the current system places too much control in the hands of arbitrators, limiting trustees' ability to be accountable to local taxpayers and potentially hindering their efforts to deliver quality educational services to students in their community."

Although section 126(2), designated certain items which were to be excluded from an arbitrator's jurisdiction, the legislation did not restrict the right of other matters to be arbitrated. However it imposed certain mandatory factors which an arbitrator was required to consider in financial matters. These were set out in section 129(3) which reads:

> "The arbitrator shall, in respect of matters that might reasonably be expected to have a financial effect on the school division or school district, consider the following factors:

a) the school division's or school district's ability to pay, as determined by its current revenues, including the funding received from the government and the Government of Canada, and its taxation revenue;

b) the nature and type of services that the school division or school district may have to reduce in light of the decision or award, if the current revenues of the school division or school district are not increased;

c) the current economic situation in Manitoba and in the school division or school district;

d) a comparison between the terms and conditions of employment of the teachers in the school division or school district and those of comparable employees in the public and private sectors, with primary consideration given to comparable employees in the school division or school district or in the region of the province in which the school division or school district is located;

e) the need of the school division or school district to recruit and retain qualified teachers."

Additionally, section 129(2) mandated that the arbitrator was to explain his/her reasoning as to how the requirements of sub-section (3) had been applied. That section reads:

"The award shall set out the arbitrator's decision as to the way in which the matters in dispute between the parties are to be settled, which shall include the arbitrator's reasoning as to how the requirements of subsection (3) have been applied."

It is to be noted that some of the original requested and/or proposed changes had been eliminated and/or varied. I am, of course, obliged to deal with the legislation as enacted. Although MAST did not achieve all of its objectives in the new legislation it is clear that some of its concerns were addressed by the amending legislation. It is patently obvious that MTS was, and is, fundamentally opposed to the vast majority of the changes and, in particular, Sections 126(2) and also 129(3). Those views are made clear in the various documents attached as Exhibits to Mr. Ulrich's Affidavit and, in particular, Exhibit O thereof being the submission to the Legislative Committee reviewing Bill 71. The position of MTS is perhaps best summarized in paragraph 50 of the Affidavit of Mr. Pindera in which he states that in his opinion, "without the introduction of a mechanism for compulsory arbitration it would be impossible to establish collective bargaining and collective agreements". He concludes that paragraph by saying:

"If working conditions can no longer be dealt with by compulsory arbitration, then only the salary schedule will be left to collective bargaining. It is my view that this scheme will bring us back full circle to the 1940's."

I note that Exhibits C, D and E of Mr. Ulrich's Affidavit enumerate a number of articles that were dealt with by arbitrators exclusive of salaries and allowances.

I have reviewed very briefly, and undoubtedly inadequately, the background of the collective bargaining process between the parties over a period of close to a half-century. I felt it necessary to do so, not only for my edification, but for the purpose of interpreting the language of the legislation, its purpose and the position of the parties with respect to it.

SUBMISSIONS OF COUNSEL

Both Mr. Simpson and Ms. Matthews-Lemieux presented very full and comprehensive legal arguments. Prior to the proceedings commencing each filed comprehensive briefs citing various statutes, arbitration decisions, judicial decisions, references to various text writers and other material. All of those have been reviewed.

In addition to their briefs, which they reviewed at the hearing, they eloquently made comprehensive oral submissions with respect to the jurisdiction issue.

Argument of Division

Mr. Simpson submitted that a number of the items in dispute were not within my jurisdiction because, firstly, they were prohibited under section 126(2) of the Act and, secondly, because they were not "working conditions". He emphasized that simply because the Minister of Education referred matters to me in the list of outstanding issues between the parties did not automatically mean they were issues over which I had jurisdiction. They were simply a listing of the proposed amendments to the Collective Agreement submitted by each party.

He stressed that in 1956 teachers traded the basin right to strike for compulsory binding arbitration and School Divisions acquiesced. In his opinion, MTS was of the view that the right to arbitration was unrestricted and, accordingly, was taking the position that any legislation which interfered with that alleged unrestricted right had to be interpreted narrowly. He submitted it had to be interpreted broadly.

In his opinion, it was necessary to consider what was given up in 1956, the scheme that had been in place since 1956; the new legislation and, in particular, section 126(2) as well as certain other sections.

Mr. Simpson stated that the scheme of dispute resolution between the parties since 1956 had been governed by the Act. In the Divisions' view, the Act had never granted an unrestricted right to arbitrate all issues and arbitrators had always been subject to limitations, notwithstanding the various arbitral and judicial decisions referred to in the Affidavits. As a result of some arbitral decisions there had been a long standing question as to the scope of the proper authority of arbitration boards. In 1996 the legislature amended the Act in several ways but, of particular significance, it limited the jurisdiction of arbitrators. In his view, the 1996 amendments were only modifications and clarifications to the limitations which had consistently been in the Act since 1956 and accordingly those amendments were remedial legislation.

He referred to the Interpretation Act of Manitoba R.S.M. 1987, c.180 and, in particular, section 12 thereof which reads:

"Every enactment shall be deemed remedial, and shall be given such fair, large, and liberal construction and interpretation as best insures the attainment of its objects."

The amendments were clearly remedial and, even if not, were to be deemed remedial and, therefore, were to be given a wide interpretation so as to ensure compliance with the purpose of the legislation.

With respect to the prior right to strike, he was of the view that it was an "illusory" right as it had never been exercised. The objective of MTS had been to get the statutory right to arbitrate so as to meet its objective of getting signed Collective Agreements. For that purpose MTS gave up the right to strike and in exchange got the right of compulsory arbitration. Exhibit G to Mr. Wallis' Affidavit is a discussion paper prepared by MAST which referred to the previous section 120(1) of the Act which prohibited strikes and he noted that section was still in the Act but had been renumbered 131.8(1). Lockouts were, and are, similarly prohibited. In Exhibit F to Mr. Ulrich's Affidavit, being the presentation by MTS to the Teachers Collective Bargaining and Compensation Review Committee, page 11 showed that MTS believed that the legislation prior to Bill 71 offered a reasonable balance between the parties and that the interest of children, parents and the public had been well served and noted that "arbitration has ensured that not one day of schooling has ever been lost to students anywhere in Manitoba as a result of a bargaining dispute." In his view, this clearly showed that MTS rejected the strike/lockout options as viable and accordingly there was a serious question as to the significance, if any, of the previous right to strike.

He made reference to the definition of dispute under section 97(1) of the Act (supra) and maintained that, although the teachers were apparently satisfied as to how that definition had been interpreted by Arbitrators and Courts, the Divisions did not share that satisfaction, specially since 1989. Mr. Wallis, in paragraph 11 of his Affidavit, expressed the concerns of Divisions over the expansion of the scope of bargaining as determined by certain arbitration awards. Although there had been a long standing dispute between the parties as to what could be arbitrated, the matter appeared to "come to a head" in the 1989 Transcona Springfield Award in which an arbitrator imposed articles involving part-time teachers, transfers, contact time, extra-curricular activities, meal periods, and other items. As a result of that award many new articles had been added to that particular Collective Agreement and, subsequently, to others. There was a substantial cost factor for those articles and the Divisions were accountable to the electorate for those costs. School Divisions sought to have their "right to manage" restored and this required limitations as to what could be arbitrated and required an arbitration tribunal to consider financial costs and the ability to pay. Accordingly Divisions made representations to the Legislature for amendments to the Act. There had been, obviously, a history of conflict and confrontation and it was abundantly clear that the amendments adopted some of the reasoning of, and solutions proposed by, MAST with respect to the alleged erosion of the powers and duties of Boards.

He submitted that there was absolutely "no doubt" that the legislation was to be considered remedial and he referred to the discussions in the legislative assembly ie. Hansard, which, in his view, confirmed the intent and purpose of the amendments. Mr. Simpson further stated that if, perchance, I had doubts that the legislation was not remedial and had not been enacted in response to the concerns mentioned above, then it was only necessary to look at the comments made by the Minister of Education in the debates of the legislature. It was abundantly clear that the amendments were enacted in response to a problem and should be interpreted by examining them from the "purposive approach". It was necessary to look at the language in the specific sections as well as in the context of the Act. The question was simply to determine the objective of the amendments. In his view, that objective was clearly to clarify, modify and limit the scope of matters which could be arbitrated and to mandate certain criteria which had to be considered in financial matters. He reviewed the duties of boards as set out in the Act [section 41(1)] and submitted that the primary duty of any Board was to govern the school district and establish appropriate policies. Its duties and rights had been eroded and compromised by various arbitration awards. Even though some of the issues under section 126(2) might still, from time to time, be bargained, that did not mean that they could be arbitrated. There was no prohibition of a Board negotiating with respect to any of the items in 126(2), but such item could not be arbitrated if the bargaining did not result in a mutual agreement. Even the heading for Section 126(2) confirmed that prohibition. That heading was "Matters not referable to arbitration." I hasten to add that headings are not of any particular significance.

He stressed that the legislature had also enacted new specific legislation to make sure that School Boards did not abuse the provisions of section 126(2) and referred to new sections 131.4(1) and 131.4(2) which read:

"131.4(1) A school board shall act reasonably, fairly and in good faith in administering its policies and practices related to the matters described in subsection 126(2) (matters not referable for arbitration).
131.4(2) Any failure by a school board to comply with subsection (1) may be the subject of a grievance under the collective agreement and may be dealt with in accordance with the grievance process set out in the agreement."

These sections, in essence, mandated that even though certain matters could not be subject to arbitration, grievances could arise out of the Boards administration of its policies and practices with respect to items referred to in 126(2). He submitted that, as a result, there was now greater protection afforded to teachers than previously.

Section 131.4(1), in particular, was similar to sections 80(1) and 80(2) of the Labour Relations Act, L.R.M. 1987, C. L 10, mandating that an employer was to act reasonably, fairly and in good faith in administering the Agreement.

In reviewing Section 126(2), he noted that legislation included the mandatory word "shall". The designated matters were not to be referred to arbitration and were not to be considered by the arbitrator or included in the award. In this particular arbitration, although none of the disputed proposals of the Association related directly to 126(2)(b) (ie. the method of evaluating teachers and principals), he submitted that the other proposals related to other subsections of 126(2). The ERIP request was challenged under a different section ie. that it was not a dispute under 97(1) (supra).

Mr. Simpson reviewed each of the "challenged" requests with specific reference to the provisions of section 126(2) and/or 97(1) and said it was patently clear that those requests of the Teachers were not to be arbitrated. He emphasized that the proposals, on a "broad and liberal" interpretation of the legislation, were not arbitrable and such an interpretation was necessary to deal with the "mischief" which the legislature had sought to eliminate. He stressed the responsibilities of the Division to manage in key areas. There had always been a caveat on arbitration boards which, on occasion, in his opinion, had not been complied with. The restrictions were now clear. He submitted that the challenged proposals, if granted, would substantially infringe on the powers of Divisions and would detract from their primary management function and from their being accountable to the citizens of the District.

Argument of Association

Not surprisingly, Ms. Matthews-Lemieux did not agree with the submissions of Mr. Simpson. She submitted that the new legislation had to be narrowly construed. During the arbitration relating to the Brandon School Division, that Division had submitted that the term "relating to terms or conditions of employment or work done" as set out in the definition of dispute under 97(1) of the Act was to be narrowly construed. Not only had that been argued by MAST in the Brandon arbitration but it had been previously argued before the Courts in numerous cases including the Rolling River School Division case (1979), 3 Man. R.(2d) 7. It seemed inconsistent that the Division could argue for a wide interpretation of the legislation in some instances and for a narrow interpretation in others.

The fundamental question was whether the proposed clauses on early retirement incentive, meal periods. working conditions committee, due process for principals and vice principals, mainstreaming, disruptive students and transfer could be arbitrated. Each of those clauses related to "working conditions" and accordingly were within the definition of dispute. They were not specifically named as being excluded from arbitration by section 126(2).

With respect to the purposive approach, she noted that it was essential that the entire Act be considered and it was incorrect to simply examine one or two sections. The Division's argument, if accepted, would, in effect, "turn back the clock" and ignore more than forty years of history. In her opinion, that certainly was not the intent or purpose of the legislation. Clearly the legislature did not intend to cancel all the negotiated benefits under previous collective agreements.

Without reviewing all her comments about the history of bargaining between the parties, she stressed that it was essential to consider that over the past approximate half century the size of schools had changed; there were very few one or two room schools; Manitoba had changed from being a predominantly rural area to an urban one; the teaching staff had changed; the curriculum and courses had changed drastically; there were larger regional schools and all of those factors lead to a far more qualified teaching staff than in the past. A number of issues had been negotiated as a result of the changing mores of society. Certainly the purpose of the legislation could not have been to undermine all of the advances that had been made.

She was of the view that the right to strike initially granted to teachers was extremely important. Both parties had supported the removal of the right to strike/lockout in exchange for binding arbitration. The prohibition against strikes/lockouts was still in the legislation. It would be patently unfair to now eliminate the right to arbitrate certain issues while maintaining the prohibition against strike/lockout. There had been no amendment to the definition of "dispute" which was substantially in the same words as in the legislation in 1956 and that definition was an inclusive one.

The teachers very properly recognized the necessity for stability in education and had given up their right to strike. The fact that they had not struck only showed that they were responsible and had great concerns for the educational system. That did not mean that the right to strike was not substantial.

She noted that Divisions had not received everything they had requested in their approaches to the various committees of the legislature and she emphasized that the definition of dispute remained unchanged. She agreed that arbitrators had dealt with various "working conditions" but stated that those decisions reflected changes, not only in society, but in the broad picture of education.

In the Division's view, arbitrators were being told that they had to substantially limit the scope of matters that could be referred to or dealt with them in arbitration. She specifically noted that in the submission to one of the legislative committees, MAST had requested that wording be included which would prohibit arbitration from "any matter which may be incidental to any of the foregoing." The "foregoing" listed a number of items including those now enumerated in 126(2). She stressed that the legislature did not choose to grant that request.

The legislation had to be interpreted narrowly and only those matters specified were not to be considered. It was "finite" language and did not say, for example, "without limiting the generality of the foregoing". If the legislature had wanted to prohibit other matters from being arbitrated it clearly would have chosen appropriate language to delineate any specifically prohibited matters. She also noted that in the definition of dispute (supra), no reference was made to section 126(2) whereas it would have been easy for the legislature, if that was its intention, to exclude those specific matters or to make a cross-reference to section 126(2).

Ms. Matthews-Lemieux submitted that there was, in effect, a "vested right" in the Teachers with respect to arbitrate the many matters which had been previously been arbitrated.

One had to consider not only the particular new sections, but the purpose of the entire Act, which was clearly to enhance collective bargaining. It would be incorrect and inappropriate to only look at the purpose of the particular new sections without considering the balance of the Act. In her view, an arbitrator could deal with anything which was a "term and condition of work" unless it was specifically excluded. Any restriction had to be narrowly interpreted as to do otherwise would be to take away rights which had previously been granted.

With respect to section 131.4 she queried as to what would transpire if the Division had no policy and/or practice with respect to any of the items in 126(2) and noted that the section only applied to the "administration" of policies and practices but not to the policy and practice per se. Accordingly, issues which arose might not be grievable and therefore the section might not be an answer to any problems that might arise.

Ms. Matthews-Lemieux, as did Mr. Simpson. reviewed each of the particular proposals as well as the rules of interpretation. I do not propose to set out her very comprehensive submissions on that point. It may suffice to note that she submitted that the following principles of statutory interpretation applied:

1. Express language (ordinary meaning rule)
2. Purposive approach (mischief rule)
3. Historical Setting/Parliamentary History
4. Presumption of Constitutional Compliance

A considerable portion of her argument and submission was with respect to "working conditions" and how that term had been applied by various arbitrators and the courts. I have reviewed those cases and I do not propose to quote from them. Clearly, on occasion that phrase has been given a broad interpretation. Ms. Matthews-Lemieux submitted comprehensive arguments as to why each of the requested proposals was within my jurisdiction.

Mr. Simpson, in response to the argument of Ms. Lemieux, stated that the Division was not in any way attempting to turn back the clock. There was no attempt in the legislation or by Divisions to take anything back that had been established. The purpose of the legislation was simply to clarify and limit the role of arbitrators. The definition of disputes did not require amendment as it already contained a limitation, i.e. it excluded from the definition items "that are not specifically set out in this Act or the Education Administration Act or in the regulations made under either of those Acts". Section 126(2) served the function of setting out what was not previously specifically delineated. Admittedly, section 129(3) was new and imposed mandatory factors on issues with a financial impact.

JURISDICTION

I have carefully considered the comments of Arbitrator Scurfield in the Brandon Division and, in particular, those portions of his award dealing with jurisdiction (pages 3 to 12) and with respect to the role of an interest arbitrator.

I commend Arbitrator Scurfield for the concise manner in which he has set out his views. I do not feel that anything would be gained by reciting his well written comments. Generally speaking I agree with him but I feel bound to add some comments.

The question of the interpretation of statutes has attracted legal scholars and the judiciary for many years. I do not propose to write extensively on the subject (I hasten to add that I do not have that scholastic skill) but hopefully will be able to set out, in simple terms, and with the help of various writers, the rules which govern the interpretation of statutes.

A good summary of the jurisprudence is found in Canadian Encyclopedic Digest (Western), Third Edition, Volume 32, Title 137 Statutes in Chapter III - Interpretation of Statutes. At page 67 I note the following:

> "38 - The judicial function in considering and applying statutes is one of interpretation and interpretation alone. In every case. the duty of the court is to endeavour to ascertain the intention of the legislature by reading and interpreting the language which the legislature itself has selected for the purpose of expressing its intention. If the legislature has explained its own meaning too unequivocally to be mistaken, the court must adopt that meaning. They have only to declare what the law is, not what it ought to be. (Emphasis Added)
>
> 39 - When the words of an Act are plain, the court will not make any alteration in them because injustice may otherwise be done. However regrettable an enactment may appear to be, if the legislative purpose is clear, the courts can neither disregard it nor decline to carry it out.
>
> At page 74, I note the following:
>
> "60 - In construing wills, and, indeed, statutes and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument; in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no father. "

At page 78, the following is found:

"71 - There is not to be attributed to general language used by the legislature a meaning that would not only fail to carry out its intended object, but would produce consequences which to the ordinary intelligence are absurd. A meaning consistent with the objects intended by the legislature must be given to the language. "

At page 83, the following:

"88 - Statutes should be construed according to the intent of the legislature which passed the Acts If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their ordinary and natural sense. The words themselves, in such a case, declare the intention of the lawgiver. But, if any doubt arises from the terms employed by the legislature, it has always been a safe means of discerning the intention to call in aid the ground and cause of making the statute."

At page 86, paragraph 99 reads:

"In construction of a statute, the real meaning to be attached to the words must be arrived at by consideration of the mischief that the statute was intended to remedy and the provisions of the statute as a whole, in addition to the particular language of the section in question. It is the duty of the court to ascertain the real intention of the legislature by regarding the whole scope of the statute to be construed. In each case the court must look at the subject matter, consider the importance of the provision and the relation of that provision to the general object to be secured by the Act."

Another good summary of the rules was stated by Professor E.A. Driedger in Construction of Statutes, Second Edition, at page 106 and I refer the parties to it.

Clearly the entire Act must be considered. It is a comprehensive and lengthy enactment comprising some 160 pages with some 239 major sections and a large number of subsections. There are also numerous regulations and there is some other referenced legislation. However, the primary document governing the relationship between Teachers and Boards is the Act. Obviously, the Act deals with a multitude of other aspects of the educational system but part VIII, entitled Collective Bargaining, encompasses the vast majority of the legislation concerning that relationship. I hasten to add that there are also other references in the Act, in the regulations and in some other legislation concerning that relationship.

In accordance with all of the above I have considered the Act as a whole and, in particular, the amendments previously referred to and enacted as a result of Bill 71.

I do not find any ambiguity in the language chosen by the legislature. The Act, inter alla, sets out, in some detail, a scheme or plan for the resolution of disputes between Teachers and Boards. The intent of the Act is obviously to avoid the strike/lockout possibilities and to replace it with a system of binding arbitration. The definition of dispute under 97(1) (supra) which, as previously stated, has been in the legislation for some period of time, remains unchanged. That definition refers to "matters or things affecting or relating to terms or conditions of employment or work done". There is no limitation to that definition excepting for items "that are not specifically set out in this Act or the Education Administration Act or the regulations under either of those Acts" and does not include a dispute arising out of a termination or threatened termination.

This particular arbitration relates to the imposition of a Collective Agreement and reference has been made to section 110.1 of the Act, which reads:

" 110.1 - Subject to this and any other Act, collective bargaining may be carried out in respect of terms and conditions of employment, including those described in subsection 126(2) (matters not referable for arbitration)."

Obviously, that section confirms that the parties may bargain collectively with respect to terms and conditions of employment including those matters listed in section 126(2) but refers to listed matters that are not referable to arbitration. I am satisfied that the legislature, in enacting section 126(2),clearly mandated that certain items could not be referred to arbitration and were not to be considered by the arbitrator. This prohibition is, in my view, clear and unambiguous. Additionally, the legislature, under section 129(3), mandated that certain factors be considered in any issue having financial consequences. It is clear that an arbitrator is bound by those provisions.

The question that has arisen, both previously and in this arbitration, is whether certain items could be considered a dispute under the umbrella of working conditions. I need not repeat my previous comments with respect to that issue. The legislature, under section 126(2), has clearly expressed its intent to identify certain specific matters excluded from arbitration. This is abundantly clear, not only from the language chosen by the legislature but also from considering it from a "purposive" approach.

Whether the legislation is interpreted "broadly" or "narrowly", it must primarily be interpreted in accordance with the plain and simple meaning of the words chosen by the legislature. Although "remedial" may be a misnomer from the perspective of one or other of the parties, I am satisfied that the amendments are remedial in the sense that they seek to address a specific perceived problem. They are to be interpreted broadly but that does not mean that every possible connotation or extension of a chosen word is applicable. The words chosen must be given their plain, common, simple and ordinary meaning. They cannot be interpreted so broadly or narrowly as to defeat the clear purpose of the

legislation. In this case, the purpose of the amendments was clearly to remove certain items from arbitration. There is a principle of law which states that one cannot do indirectly what one cannot do directly. Obviously the words cannot be interpreted so as to permit prohibited matters from being arbitrated. Similarly not every possible extension of the terms chosen can be deemed to be in-arbitrable. Common sense and common usage must prevail.

I agree with the comments of Arbitrator Scurfield with respect to his interpretation of the words appointment and assignment. I do not feel that the selection, appointment, assignment, and transfer of teachers and principals is limited to the initial action but is ongoing and would apply to subsequent selections, assignments, appointments and transfers. Of course, the Division must act in accordance with section 131.4(1).

There is no issue in this arbitration respecting evaluation, although some peripheral comments may be made with respect to that in my decision relating to the proposal relating to "Due Process for Principals and Vice-Principals".

The language chosen with respect to the scheduling of recesses and the mid-day break is similarly clear and unambiguous. Although the Division may choose to bargain on any of those issues, an arbitrator can not deal with them unless it has been referred to arbitration under the circumstances set out in section 131.4(1).

Section 126(2), subsection (c) deals with the issue of the size of classes in school. As mentioned, the principle of interpretation requires that the legislation be interpreted by attributing the plain and ordinary meaning to the language chosen. The word "size", is defined by the Shorter Oxford English Dictionary, 3rd Edition, as:
"The magnitude, bulk, bigness or dimensions of anything"

Webster's New Collegiate Dictionary, Ninth Edition, defines size as:
"relative aggregate amount or number"

Although I will comment on the matter further when I deal with the specific proposal, I note from the arguments of Counsel that a question may arise with respect to whether the words "size of classes" is deemed to include "composition" of classes.

The same Oxford Dictionary defines "composition" as:
"The action of combining; the fact of being combined; combination
(of parts or elements of a whole)."

I am of the view that the composition of classes is not one of the matters specifically barred from arbitration under section 126(2). In considering the words "size" and "composition" according to their simple and ordinary meaning, I do not find that they are synonymous.

In summary, I am satisfied that the clear intent of the legislature was to place specific limitations on matters which could be arbitrated and to impose certain mandatory considerations if an issue in dispute relates to financial matters. As stated by Arbitrator Scurfield, the issue is not whether I, as an individual agree or disagree with the legislation. It is the responsibility of any arbitrator to interpret it and I have attempted to set out the guidelines I have followed.

I feel it appropriate to firstly deal with each of the items to which a jurisdictional challenge has been made.

The parties had requested that I issue awards with respect to both the jurisdictional issues and to the other matters. I have set forth above the criteria which I believe to be applicable with respect to the issues to which the Division has made the jurisdictional objection. It is beyond question that the legislature enacted amendments which substantially varied the rights of arbitrators and created certain changes to the dispute resolution scheme which has evolved over a period of years.

JURISDICTIONAL DISPUTE ISSUES

New Article - Mainstreaming

It is common ground that Divisions and the Community have adopted the laudable view that students who have special needs be integrated into regular classrooms. The Association has proposed an Article which, inter alla, would provide that the Association and Division would have to mutual agree that the necessary conditions exist to provide a positive education experience for both the students with special needs and the other students, and that the Association and Division would have to jointly examine the various alternatives and jointly develop the detailed procedure and to provide an appeal procedure for the teacher and/or the parent/guardian. The input of teachers and parents is undoubtedly worthwhile. I note the comments of the Association that a special needs student can create additional work for the teacher and, as it was pointed out, "5% of the students can take up 95% of the teachers time".

The Association argues that "mainstreaming" falls within the umbrella of "working conditions" and that the teachers should have the opportunity to express their concerns. As mentioned, that aspect of the issue might be desirable and I would hope the teachers would be given the opportunity to have input into many aspects of the integration of special needs students. However, one cannot disregard part III of the Act which mandates certain duties on Boards and, in particular, sections 41(1)(a) and 41(4). In essence these two sections require the Board to provide adequate school accommodation from grades

1 to 12 for all persons entitled to education as defined in section 259 which mandates that every person who has attained the age of 6 years has the right to attend school.

I am of the opinion that such policy and the implementation of it, clearly rests within the jurisdiction of the Board. I agree with Arbitrator Scurfield who said, at page 12 of the Brandon award, that "he did not believe it was the role of the Arbitrator to shape the educational policy of the Division through an arbitration award". I note the Division has a policy respecting Special Education Services which addresses many of the concerns raised by the teachers.

I would hope that teachers, parents and the administration would all work towards providing a meaningful education for all students regardless of disabilities. However, I do not believe it would be appropriate for an arbitrator to order the inclusion of an article such as that proposed by the Association. Although it is not a matter specifically prohibited by section 126(2) I do not believe that it falls within the general ambit of a "dispute" relating to "term or condition of employment or work done" under 94(1). One cannot disregard the sections of the Act relating to powers and duties of Boards. I am of the view that I do not have the jurisdiction to impose such a condition and accordingly, the request of the Association is denied.

New Article - Disruptive Students

The Association has proposed an Article dealing specifically with students whose behaviour might affect the safety or learning of other students and accordingly such individuals would be considered "disruptive students". It would mandate, inter alla, that upon notification to the principal by the teacher, he or she shall within 5 working days convene a meeting of the teacher, the principal and other support staff who are to review the teachers concern and determine whether the student is to be deemed disruptive. If the student is deemed disruptive the Association proposes a number of actions including the requirement that a full time educational assistant be provided to the teacher until the behaviour has been corrected and that no more than 2 such students be placed in any classroom. It goes on to provide that the teacher would have the right to appeal to a committee established by the Board. This committee of the Board would have wide powers and must act within designated time limits. Ultimately the student who continues to be disruptive could be removed from a regular classroom.

Although such students may be disruptive and, under certain circumstances, might constitute a threat of harm to fellow students and/or teachers, it must be noted again that the obligation of the Division is to provide adequate school accommodations and to make provisions for the education of such students. Additionally, the Division has the ultimate authority respecting discipline. I note that the Division has a comprehensive policy, entitled "Freedom From Abuse" which deals with all types of abuse which might occur and that the principals in consultation with the teacher may take certain actions and may

recommend certain further actions to higher officials of the Division. It would appear that this policy was developed cooperatively with the Association. Although the policy recognizes that problems may occur, the Division has not given up its authority to deal with them. If the proposal of the Association was to be accepted, the teacher would have a direct involvement in the policy formulation of the Division. Additionally, it relates to size of class in the sense that it mandates the number of such type of students who can be assigned to a class and also that assistants would be assigned.

There are undoubtedly abusive students and the submissions of the Association establish that such situations exist to the general detriment of the other students in the class. However, the size of class, the assignment of staff to it and the disciplinary measures are within the sole jurisdiction of the Division and cannot be arbitrated. This request is accordingly denied.

New Article - Working Conditions Committee

The Association has submitted a 9 part proposal which provides, inter alla, that the staff could establish a Working Conditions Committee comprised of between 3 and 5 elected teachers which was to meet whenever requested by a teacher/teachers to consider a problem. An attempt was to be made to resolve the problem with the Principal who was to respond within a designated period of ten days and if it not so resolved it was to go to the Superintendent who was to resolve the matter within ten days. An appeal could then be taken from that decision to the Board which would have the opportunity to rule on the matter.

I note from the submissions that such a clause was inserted in one Collective Agreement by an arbitrator.

Counsel for the Division submitted that the matter was not arbitrable as it was seeking to constitute a Committee for the purpose of considering problems arising out of working conditions and accordingly was not, per se, a working condition.

I do not agree that the matter is not arbitrable. However, I nevertheless do not feel it appropriate for such a proposal to form part of a Collective Agreement. There is absolutely nothing in the Act that prohibits the staff of any school from forming their own committee relating to working conditions and to make representations with respect to those conditions. There may be some merit to having such a committee and Article 11 of the existing Collective Agreement has an extensive procedure established for the settlement of any dispute arising out of the Collective Agreement. Additionally, individual teachers have the right, under section 131.9 of the Act, to present a personal grievance to the School Board at any time. I do not think it appropriate to compel the Division to add another step or steps to the procedure for resolving difficulties when there is already a comprehensive procedure established for

that problem. I did not hear any evidence which lead me to conclude that there was a problem in this area and accordingly I am denying the Association's proposal.

New Article - Due Process for Principals and Vice-Principals

The proposal of the Association is that no Principal or Vice-Principal shall be demoted without just and reasonable cause. It seeks to establish that in any such demotion, if the Principal or Vice-Principal is not satisfied that it is for just or reasonable cause, he/she can refer the matter to arbitration and that the arbitration board shall have wide powers.

The Association referred to a number of other Collective Agreements which have the same, or substantially the same, type of clause and made reference to certain provisions of the Act, provisions of the Labour Relations Act as well as to Regulation E10 and in particular part V being the section thereof dealing with responsibilities of Principals. I am of the view that this particular proposal is not arbitrable under section 126(2) in sub-section (a) thereof, dealing with "the selection, appointment, assignment and transfer of teachers and principals". I have already stated that any of those actions must be deemed to include any subsequent acts and not only the initial one. I note under 126(2) (b) that the method of evaluating the performance of teachers and principals is not arbitrable. However, if the Board acts improperly in administering its policy or in its evaluations the provisions of 131.4(1) might well come into play and the matter arising out of the results of the evaluation, in certain circumstances, might be arbitrable. I deny the request of the Association.

New Article - Meal Period

The Association revised its initial proposal to provide that each teacher in the Division was to be granted a 60 consecutive minute duty-free lunch period. It had previously proposed that such a lunch period be between the hours of 11:45 am and 1:15 pm. Objection to both the original and the revised proposal was taken by the Division under the provision of 126(2) (d) which states that the scheduling of recess and the mid-day break can not be arbitrated. It does not, however, deal with the length of the lunch break. I am of the view that 126(2) does not have the effect of prohibiting the length of the lunch period being arbitrated. It specifically relates to "scheduling" and there is no proposal before me with respect to that issue. I am of the opinion that the request of the Association is reasonable and direct that a clause be inserted in the Collective Agreement to read as follows:

Effective as of June 29th, 1998, every teacher is entitled to and shall receive an uninterrupted meal period of sixty (60) minutes each school day.

New Article - Transfer

The Association has proposed an article which, although it recognizes the right of the Division to assign teachers, nevertheless would mandate that the Division shall consult with fire teacher respecting a number of aspects of the transfer, including that the most reasonable notice possible be given, that its right to initiate transfer be exercised fairly and in a reasonable manner considering the educational needs of the Division and the interest of the teacher involved, and that all teaching or assignment vacancies be posted. I am of the view that issues relating to transfers and assignments are not arbitrable under the provisions of 126(2)(a) of the Act. I parenthetically note, as previously mentioned, that the teachers have certain rights under the Act, and in particular sections 131.4 and 131.9. They may also have rights under the Collective Agreement. I am satisfied that I do not have jurisdiction to deal with this particular proposal and accordingly it is denied.

New Proposal - Early Retirement Incentive Plan

The Association proposed an article that, provided the teacher had seven consecutive years of service with the Division and had attained the age of 54 years, an incentive would be offered to encourage teachers to take early retirement. This was to be effective January 1, 1998.

The Division objected to the proposal saying that it was not a dispute within section 97(1) of the Act and also that it related to the issue of termination which was an area specifically excluded from that definition. The Division also noted that there was a legislative frame work under the Teachers Pension Act (R.S.M 1987, c. T - 20), with respect to certain issues relating to teachers pension.

The Association submitted substantial documentation and made submissions whereby there could be a cost-saving to the Division by its hiring more newly qualified and junior teachers. I do not propose to review the arithmetic. It must be up to the Division to decide if it wants to effect that savings, if any.

I note that in the previous Collective Agreement the parties had established a committee in 1995 to examine the feasibility of establishing an Early Retirement Incentive Plan. There has been a number of teachers who have been offered that incentive plan and that on the 19th of March, 1996 the parties entered into an Agreement establishing certain conditions, whereby certain teachers did take advantage of the plan. That agreement was deemed separate and apart from the Collective Agreement.

It is common ground that a number of Divisions have Early Retirement Incentive Plan but I note that none of them were imposed by arbitrators. They were negotiated.

I do not agree with the submission of the Division that such an issue is absolutely barred from being arbitrated. Severance Pay or an Early Retirement Incentive Bonus could, in my view, be considered as a term and condition of employment. It must be remembered the definition in section 97 does not utilize the term "working conditions" but uses the phrase "matters or things effecting or relating to terms or conditions of employment". The term "working conditions" apparently is one chosen by arbitrators and/or courts. Severance Pay and other similar items are certainly terms of employment and accordingly the matter, in my view, may be arbitrated. However, there is no evidence before me that any individual "suffered" as a result of the plan previously agreed to. I agree with Arbitrator Scurfield who said, at page 16 of his interest award, that "an arbitrator should be extremely reluctant to substitute his/her discretion for that of financial officers of the Division". The Association has submitted a great deal of financial information to substantiate its claim that there would be a savings to the Division. The Division has challenged that submission. I do not think there is sufficient data for me to conclude that there would be a savings to the Division and, in any event, I agree with Arbitrator Scurfield that this is a matter which should be decided by the Division. Accordingly, I am rejecting this request of the Association.

New Proposal - Letter of Understanding - Seniority of Superintendent

A proposal of the Division was that a letter of understanding be executed placing Senior Administrators on the Collective Agreement seniority list for teachers. In essence, the Division requested that if it assigned one of its employees to a position such as Superintendent or other senior administrative position, that individual's position on the teachers seniority list would be protected and if a senior administrator had more seniority than a teacher, teachers with less seniority would be laid off. Additionally, service with the Division in a position as senior administrator would accrue and be counted for the purposes of seniority.

I am of the view that this proposal must be rejected. One need only to look at definition of "teacher" under section 97(1) which states very specifically that it does not include a Superintendent, an Assistant Superintendent or a Deputy Assistant Superintendent. I am of the view that it would be improper and beyond my jurisdiction to direct that such a Letter of Understanding be executed. If, I am incorrect with respect to the denial of the Division's request because of the definition of teacher above referred to, I nevertheless do not feel it appropriate to conclude that seniority gained in administrative positions should have preferential rights over the seniority of someone in a teaching position.

The above proposals all contained an aspect of the issue relating to "Jurisdiction".

NON-JURISDICTIONAL ISSUES

The following portion of this award might be entitled "Interest Issues".

Article 3.00 - Duration of Agreement

The last agreement between the parties terminated on December 31, 1996. Section 131.5(1) of the Act provides that Collective Agreements are to commence on July 1 of the commencement year and to expire on June 30 of the expiry year. Section 34 of Bill 71 provided that for the purpose of bringing into effect subsection 131.5(1), a Collective Agreement whose terms of operation began on or after January 1, 1997 might provide that it be effective on and after January 1, 1997 rather than July 1.

The Association has requested that the Collective Agreement be for the period from January 1, 1997 to June 30, 1998. The Division has requested that it be in effect from January 1, 1997 until June 30, 1999.

The Division and the Association each requested amendments to the existing wording. In particular, the Association wanted to delete existing paragraph 3:01 which in effect permitted that certain articles ie. salary articles to be re-negotiated. The Association proposed that a new article be inserted worded as follows:

> "3:01 - This agreement shall come into force and take effect as from the first day of January 1997 and shall remain in effect for eighteen months from that date and shall automatically renew itself thereafter from year to year unless either party gives the other written notice, by registered mail, of a desire to replace or amend the Agreement. This notice shall be given during the month of April prior to the date of expiry of the term of the Agreement."

It also requested that Article 3:02 of the current Agreement be renewed.

The Divisions' proposal would be to eliminate Article 3:01 and 3:02 and to have one clause which reads:

> "This agreement shall come into force and take effect from the first day of January, 1997 and shall remain in force until the 30th day of June, 1999. Thereafter it shall remain in force unless either party gives the other written notice by registered mail to renew and/or amend the Agreement. This notice shall be given during the month of April prior to expiry of this Agreement."

The working changes in the two above quoted paragraphs are, in my view, distinctions without a difference. Article 3:02 has apparently not caused any difficulties for the parties.

Aside from the wording, the Division was of the view that by the time this award is published, ie. prior to the end of June 1998, the school year will have finished, the Agreement will terminate and the parties will be in a position where they have to immediately re-negotiate for the next school year.

The Association strenuously objected to a June 30, 1999 termination stating that only a minimal number of Divisions had a contract terminating subsequent to June 30, 1998 and accordingly it would be patently unfair to bind these teachers to a contract which might not represent the conditions prevailing during the 1998/1999 school year.

I have reviewed the comments of Arbitrator Scurfield in the Brandon award with respect to the Effective Period and I am in accord with them. I fully appreciate the concern of the Division for a 30 month agreement. However, the evidence submitted does not show any trend as to what has transpired for the 1998/1999 school year. Obviously, comparability with other school divisions is a significant criteria and in the absence of such data I do not feel it would be fair or appropriate to impose a 30 month agreement.

Accordingly after considering all of the above I direct that Article 3:00 be amended as follows:

Article 3:01 shall be as in the Associations proposal as above set forth.
Existing Article 3:02 shall form part of the new Agreement.
The agreement shall be effective from January 31, 1997 to June 30, 1998.

Article 4:02 - Compassionate Leave

The present Agreement provides that in the event of death or serious illness of members of an employee's immediate family, such employee can be granted up to five (5) working days without salary deduction. There were other conditions attached such as the Division's right to request a Medical Certificate and that additional working days might be granted but would be charged at substitute rates.

The Division proposed that the categories of death and illness be separated and that if there was illness and death occurring within the same year, the entitlement should be both for the illness and the death. There are diverse clauses in other Collective Agreements dealing with this issue. There was no evidence presented which leads me to believe that the existing wording created any hardship on either party or that it was being abused. The articles in other Collective Agreements are, to say the least, variable. Not hearing any evidence that the existing language is not working satisfactorily for both parties, I do not grant the request of the Division.

Article 14:01- Salary Schedule

A very substantial portion of the briefs submitted by the parties, as well their oral submissions, were devoted to the salary schedule. A multitude of quotations have been filed from various arbitrators and text writers with respect to the factors which should be considered by interest arbitrators. I do not feel it necessary to again fully recite those criteria. In addition to the statements made in interest arbitration awards in this province, the parties have also referred to decisions and comments made in various other jurisdictions. Those comments have not been restricted only to arbitrations between Teachers and Boards but also to the public sector. I have some reluctance to quote comments that I have made in various arbitration decisions and I see no need to repeat them or other similar comments by other arbitrators.

Obviously, the primary objective of any interest arbitrator should be to fashion an award which is fair and equitable to all of the parties. It is perhaps trite to state that an interest arbitrator should consider what the parties would have achieved while engaged in Collective Bargaining. The simple fact in this case, as in many others, is that the parties were unable to conclude an agreement. Notwithstanding the efforts of the negotiating committees of each of the parties, of conciliation officers and of the mediation attempt under the provisions of the Act, the parties could not come to any agreement. It therefore falls on the arbitrator to determine, as best he/she can, what is just, fair and equitable.

The parties have submitted voluminous amounts of material relating to economic factors within the Division area, within the Northern School area, within the Province and elsewhere. Additionally, data has been presented with respect to various salary arrangements in both the public and private sectors of those same areas. Again I emphasize that although all of that data has been considered, I only propose to recite certain specific facts from it. I might also say that a considerable portion of that data had, subject to the necessary updating due to the passage of time, been presented in previous interest arbitrations.

Of particular significance in this, and any other interest arbitration since the introduction of new section 129(3), is the fact that additional criteria must be considered and ultimately explained. Previous reference has been made to sections 129(2) and 129(3).

Although most decisions in an interest arbitration will have some financial impact, it is patently clear that the adjustments to the salary scale and other allowances will have the most significance.

Each of the parties made proposals with respect to adjustments to the salary scale. Not surprisingly there were initial proposals put forth in the briefs of the parties and there were revised proposals made during the course of the hearings.

The Division initially proposed as follows:

January 1, 1997 to August 30, 1997 - no change
September 1, 1997 to December 31, 1997 - 1% increase (effective Sept. 1/97)
January 1, 1998 to June 30, 1999 - 1 % increase (effective Jan 1/98)

The Division obviously was proposing a 30 month agreement but submitted that if there was an 18 month agreement ie. to June 30, 1998, the increases would be 1 % effective September 1, 1997 and 1 % effective January 1, 1998.

The Division, as mentioned, preferred a 30 month agreement and accordingly submitted a revised proposal during the hearings as follows:

January 1, 1997 to August 30, 1997 - no increase
September 1, 1997- 1 % increase
January 1, 1998- 1% increase
September 1, 1998- 1% increase

The above was based on a Collective Agreement to be in effect from January 1, 1997 to June 30, 1999 and was to apply to the salary scale only and not to administrative allowances.

I note that there had been an earlier proposal from the Division whereby the following increases would be granted:

September 1, 1997- 1% increase
January 1, 1998 - 0.5% increase
September 1, 1998- 1.0% increase

That proposal was listed in Exhibit 3 dated April 16, 1997 at which time negotiations between the parties had ceased.

A final proposal with respect to an 18 month contract was made by the Division
as follows:
September 1, 1997 - 1.5 % increase
January 1, 1998- .5% increase

The Association also had made a number of proposals and based all of its proposals on an 18 month contact.

The Association initially proposed a total increase of 3% payable as follows:

January 1, 1997- 1% increase
September 1, 1997 - 0.5 % increase
January 1, 1998- 1.5% increase

These increases were to be applied to all steps of the scale and to all administrative allowances.

During the course of the hearing, the Association submitted that its members should receive the same increase as in the Kelsey School Division which was:

January 1, 1997- 1.5% increase
January 1, 1998 - 0.5 % increase

Reference was also made to the avenge increase given in all Northern Divisions as follows:

January 1, 1997 - 0.5%
September 1, 1997- 1.0%
January 1, 1998 - 0.5%

It is clear from the above that both the Association and the Division essentially agreed that the teachers were entitled to an increase. There is, of course, a difference in the amount of the increase and the timing of it and as well some portions relate to the duration of the Agreement. However there is not, in my view, a "huge" difference between the parties. I hasten to add that I am fully cognizant that timing of increases and the amount of them have a cumulative cost and effect.

I do not propose to recite the plethora of financial information provided to me. I must, of course, consider all of the criteria in 129(3) as well as various criteria established by interest arbitration boards over a period of years.

It is abundantly clear that many, if not all, of the mandated criteria in 129(3) had previously been considered by interest arbitrators in this jurisdiction and elsewhere.

As mentioned the Association maintained that the duration of the Agreement should only be 18 months and that the same increase as on the salary schedule be granted on all administrative allowances.

One of the most significant factors previously considered by all arbitrators, as well as now being a mandated criteria under 129(3)(b), is the factor of comparability. The importance of that factor as a criteria was referred to in the often quoted remarks of Mr. Justice Dubin in the Metro Toronto Board of Education Arbitration, by Mr. Justice Hall in the Canadian Railway Workers Dispute, and by Arbitrator Shime in the BC Railway Arbitration. Those comments have been adopted not only by text writers but certainly by arbitrators in this jurisdiction and elsewhere.

Section 129(3)(d) mandates that there be a comparison between terms and conditions of employment of teachers in the school division with those of comparable employees in the public and private sectors with primary consideration to be given to employees in the school division or school district in the region or province in which the school division is located. In 1976 this arbitrator chaired the arbitration board relating to interest arbitration between the Association and the Division in Flin Flon. A quotation from that award is found on page 212 of the teachers brief. Although I am reluctant to quote my own awards, it may suffice to say that description is still applicable as is the rationale noted therein for comparing the salaries paid to teachers in various divisions and, in particular, what is called the Northern Region. The Northern divisions are Lynn Lake, Thompson, Snow Lake, Churchill, Leaf Rapids, Flin Flon, Frontier and Kelsey.

In previous arbitrations some emphasis was placed on the consumer price index. It is still a relevant consideration although not of the significance of 129(3) and in particular (d) thereof. From the information submitted by the Division it is clear that the Flin Flon teachers salaries have generally been ahead of the industrial aggregate and are closely allied with the consumer price index for Winnipeg. The statistics filed by the Association show a widening gap. It is interesting to note the statistics presented by the parties vary slightly in that they do not each refer to the same time period. However, there is no substantive difference between the statistical information.

There has not been any degradation in the relationship of teacher's salary to industrial salaries. There are individuals in the northern area who are employed by large industrial organizations such as the mines which have a high wage rate and there are also a large number of individuals in more marginal occupations. The rate differential between teachers and others have not substantially changed.

Perhaps the most significant comparison is to the teacher settlements in the Northern Region. These increases were:

Mystery Lake - 1% - September 1, 1997, 1% - January to June 1998
Leaf Rapids - 1% - September 1, 1997, 1% - January 1998
Frontier - 0.5% - January 1, 1997, 1% September 1, 1997
Churchill - 1.5 % - September 1, 1997, 0.5 % - January 1998
Lynn Lake - 1.5 % - September 1, 1997
Snow Lake - 1% - January 1, 1997, 0.5% September 1, 1997
Kelsey - 1.5% - January 1, 1997, 0.5% January 1, 1998

Much of the statistical information of teacher salaries related to 1996 and, for information only, I note that in 1996 Flin Flon had an average teacher's salary of $50,778.00 and ranked 3rd highest of all of the northern divisions. That average was based on the actual salaries paid and not on the average of the scales. In 1996 Flin Flon was marginally ahead of the Kelsey School Division which had an average salary of $ 50,628.00 and below the Mystery Lake School Division which had an average salary of $ 52,614.00. In 1996 the Flin Flon scale was ahead of the Brandon scale.

An interesting and significant statistic is that the total expenditure per school, per pupil, in the Northern Boards showed that Flin Flon had an average expenditure for 1996/1997 of $ 5,976.00 per pupil which was the lowest of any of the Northern Boards. The Provincial average was $ 5,915.00 and Brandon was shown as being lower at $ 4,864.00.

I also note that the 1998/1999 estimated funding as compared to the 1997/1998 actual funding showed that five (5) Northern Divisions would receive an increase in funding whereas three (3) Divisions would receive a decrease in funding.

I have also reviewed a detail summary of major public sector wage settlements of the period from 1986 to 1999. It must be borne in mind that there was a wage freeze imposed on many provincial employees during 1996/1997 and in effect there was a reduction in their salary because of the reduced work week. That is being restructured in 1998 and will be eliminated in 1999. However, over 16,000 employees represented by MGEU have received an increase 1 % in 1997, 1 % in 1998 and 2% in 1999. Manitoba Hydro employees received the same increase and other employees received increases but there were certain trade-offs for increases or decreases.

I have also considered the budgets for the Division for the fiscal year of 1997 and the anticipated budget for the end of fiscal 1998. I do not propose to review those in detail however, the budget as of June 30, 1997 showed that there had been a surplus of approximately $ 650,000.00 in the operating funds (Exhibit 3 to the financial statement). The statement from the Division showing a surplus update as of February 2, 1998 projects a surplus to June 30, 1998 in excess of $150,000.00 after allowing for salary increases of 2%. An increase of 2% would amount to approximately $175,000.00 based on the 1996 teachers accumulative salaries.

Statistics have been received showing settlements to date in the Manitoba Divisions to December 31, 1998. I do not propose to recite all of them but I note that a number of school division in rural areas and outside of the Northern Division have received total wage adjustments of 2% for period of time from January 31 to June 30. Some of these are Agassiz, Rhineland, Interlake, Evergreen, Garden Valley, Swan Valley, Intermountain and others. Of course, those salary adjustments reflect variations in the date and amount of payment. However, it would be unreasonable to disregard so many settlements. The information provided was that as of May 1998 is that 46% of all Manitoba teachers had settled part or all of the 1997 agreements and 32% had settled part or all of the 1998 agreement. As stated, the increases predominantly are 2%.

As mentioned, it is necessary for me to also consider all of the other criteria mentioned in 129(3). I have already dealt at some length with comparability and will now deal with the others.

With respect to 129(3)(a) respecting the necessity to consider the Divisions "ability to pay" I have not received any evidence which would lead me to conclude that an increase of 2% would work an untoward hardship on the Division. There was some question earlier as to the Divisions largest employer ie. Hudson Bay Mining and Smelting ceasing its operation. However, it would now appear that there will be industrial peace in Flin Flon, at least for the foreseeable future. Additionally, and as mentioned, the financial statement filed reveal that the school division has already budgeted in figures providing for a 2% increase. Although there may be some minimal reduction in Provincial funding, I do not think that the evidence establishes that reduction is so substantial for as to cancel the necessity of the salary increase.

Subsection (b) of 129(3) requires that I consider the possibility of the Division redacting certain services in light of my decision or if the current revenues are not increased. I am not satisfied from the evidence (or lack thereof) that any type of service might have to be reduced.

Subsection (c) of 129(3) requires a consideration of the current economic situation in Manitoba and in the school division or district. As mentioned, there is no evidence that there will be a lessening in the industrial activity of the school division as reflected by the major role played by Hudson Bay Mining and Smelting. Generally, the report of the economic condition of Manitoba as proclaimed by the Minister of Finance is that the financial affairs of Manitoba are "healthy" and that there is some reasonable amount of economic growth. There may be some pockets of reduced economic activity such as in Lynn Lake in the North, but it has not been established that there has been any deterioration in the current economic situation in Manitoba and it appears that there may be some upturn in the economy and in Provincial taxation revenue.

Subsection (d) of 129(3) requires that I consider the needs of the school division to recruit and retain qualified teachers. The statistical information is that there are large graduating classes from the Faculties of Education and a large number of applications for teaching positions. There does not seem to have been any significant amount of retirement from the division or any exodus of teachers. I do not believe that this subsection has any impact whatsoever on my award or conversely that my award will detrimentally affect the staffing of the Division.

After considering all of the above, I am of the view that the teachers in the Flin Flon School Division are entitled to an increase of 2% in their salaries and on some other allowances during the term of the new Collective Agreement. The Kelsey School Division is the closest division in the Northern Region and I note that teachers in that Division received an increase of 1.5% on January 1, 1997 followed by a 0.5% increase on January 1, 1998. Considering the salaries paid in the Northern Districts, as well as the criteria I have motioned, including the newly mandated criteria in 129(3), I see no reason to deviate from the 2% increase negotiated in Kelsey.

Additionally I do not think it would be appropriate to disregard the settlements entered into by mutual agreement between the Divisions and the various Associations across the province for 1997/1998. As mentioned, the vast majority of those settlements recognize the 2% adjustment over the 18 month period. I do not believe the members of the Association should be put into a worse position than their colleagues in the Northern division or throughout the rest of the province.

I cannot see any untoward consequences for the Division in such an award. It may well be that some of the increases will necessitate minimal tax increases, however, it must be borne in mind that the Division operates efficiently ie. the cost per pupil shows that it is the lowest in the area. A minimal tax increase for the purpose of maintaining the quality educational system that exists in Flin Flon is not a sufficient reason to prohibit a reasonable increase to the salary of teachers of the Division.

In view of all of the above I award a 2% increase across all salary scales as follows:

January 1, 1997 - 0.5%
September 1, 1997 - 1 %
January 1, 1998 - 0.5%

All of the above increases shall be cumulative and shall be added to each step of the salary scale.

Article 14:03 - Special Education and Occupational Entrance Classes

I direct that the same increase as on the salary scale shall be granted to individuals in that category.

Article 14:04 - Two Grades in the Class Room. not applicable and have not collegiate

I direct that the same increase as on the salary schedule shall be granted to individuals in that category.

Article 14:05 - Traveling Allowance

The Division has requested that articles (a) and (c) of the Collective Agreement form part of the new agreement and article (b) respecting the teacher of the Co-operative Vocational Education teacher be deleted. The Association has requested that the same increase as on the salary schedule be granted. In view of the evidence at the hearings, I am disallowing the requests of both the Division and of the Association and I direct that the existing wording of Article 14:05, a, b, and c appear in the new Agreement. The specified allowances shall not receive the salary scale increase.

Article 14:06 - Administrative Allowance

I direct that the same increase as on the salary scale be given to those in receipt of administrative allowance as shown in 14:06(a), (b), (c), (d), and (e).

Article 14:07 - Interest on Back Pay

This Article has formed part of the Collective Agreement between the parties for some period of time. The Division initially requested that Article 14:07 be deleted and then revised its proposal and asked that the Association waive interest for this Collective Agreement. The Division has shown that certain Associations did waive the interest but the majority have not. I am not satisfied that the existing Agreement works a hardship on either party. The Division has had the use of the funds during the period of time and the teachers have suffered the loss. For the reasons stated in a number of previous awards, the request of the Division is denied.

Article 14:08 - Substitute Teachers

The Division has requested that the current Agreement be maintained and the Association has requested that the increase on the salary scale be paid to all substitute teachers.

I note that the rates paid to substitutes in the Division exceed the rate paid in all other Divisions with the exception of Winnipeg No. 1. They exceed those paid in all other Northern Divisions but there is no information as to what substitute teachers are paid in Churchill. I believe that substitute teachers are entitled to a minimal increase in view of the substitute teachers in other Divisions having received an increase. Accordingly, I direct that the pay rate for substitute teachers shall only be increased by 0.5% effective the 1st day of January 1998.

New Article - Family Medical Leave

The Association has proposed that teachers be entitled to use up 5 days of their accumulated sick leave for the purpose of attending to the emergency illness, injury or medical appointment of their spouse, or pre-school or elementary age children. The Division has rejected the proposal on the basis that there are no perceived difficulties in that the provisions of the existing Agreement, to some extent, provide adequate provision for leave for teachers. One of the articles in the current agreement is 4:09 dealing with personal leave and the other is article 5:05 being other leave. I note that where a substitute is required a deduction is made. However where leave is granted and no substitute is required, no deduction of salary is made excepting under article 4:09. It seems to me that there are adequate provisions for leave and there is no indication that any teacher has suffered any hardship as a result of the existing policy. Accordingly I am denying the request of the Association.

All of the above constitutes my award in this matter. I believe that the award as structured is fair and equitable and will not work any untoward hardship on the Association, the Division, or the tax payers of Flin Flon.

I direct that those articles of the existing Collective Agreement which have been agreed to as forming part of the new Agreement shall be included therein with the necessary amendments, if any, respecting dates and times. With respect to the items I have imposed, the parties are to finalize the wording and if there is any difficulty in that matter, it may be referred back to me. I retain jurisdiction for that purpose.

I wish to pay particular tribute to all of the representatives of the parties who filed very comprehensive briefs and made presentations which were of great assistance to me.

I also want to express my appreciation to representatives of the Administration, the Division Board, the Association and its members who attended. Obviously they have a direct interest in the proceedings and their presence is encouraging and helpful. It assists an arbitrator in maintaining a realistic view of the issues.

In accordance with the terms of the legislation each of the parties will be responsible for 1/2 of my costs.

DATED at the City of Winnipeg, in the Province of Manitoba this 17th day of June, 1998.

JACK M. CHAPMAN, Q.C.
Mediator/Arbitrator