IN THE MATTER OF AN ARBITRATION:

B E T W E E N:

LOUIS RIEL SCHOOL DIVISION ("Division")

Employer

-and-

LOUIS RIEL TEACHERS' ASSOCIATION ("Association")

Union

RE: GRIEVANCE OF CHRISTOPHER CHAPMAN

AWARD

BEFORE:	MICHAEL D. WERIER
APPEARANCES:	ROBERT A. SIMPSON for the Employer
	VALERIE MATTHEWS LEMIEUX for the Union
DATES OF ARBITRATION:	APRIL 26 and MAY 13, 2005
LOCATION OF ARBITRATION:	WINNIPEG, MANITOBA

NATURE OF THE PROCEEDINGS

The Grievor has been employed by the St. Vital School Division since 1991, and at present is a guidance and resource teacher at Dakota Collegiate, which is part of the Louis Riel School Division. In 2002, the St. Boniface School Division and the St. Vital School Division were amalgamated into the Louis Riel School Division.

The Collective Agreement ("Agreement") between the parties was effective from July 1, 2002 to June 30, 2004.

The following chronology of events was submitted by the Association and not challenged by the Division:

(a) On November 19, 2003, he requested parental leave for the period from December 19, 2003 to February 19, 2004 (10 weeks), as his spouse wanted to return to work at the beginning of January 2004. She was required to work a minimum number of hours within a 5 year period to maintain her nursing license, and she found it difficult to stay at home. His spouse had a permanent 0.7 position as a nurse at Riverview Health Centre where she works evenings from 3:00 p.m. to midnight, 7 days on, 7 days off.

(b) On December 19, 2003, he applied for top-up on the basis that he should not be disadvantaged as a biological father. On March 17, 2004 the Division indicated it was considering his request, and then by letter dated April 20, 2004 denied his request.

(c) His letter requesting the top up of parental leave stated as follows:

> "I am requesting that the Louis Riel School Division top-up my parental leave for the period of December 19, 2003 to February 29, 2004 to 90% as is the benefit paid for maternity for 17 weeks and adoptive leave for 10 weeks. As a father for my naturally born child, I would like to be

treated the same as if I adopted a child and be topped up for the same 10 week period.

I feel that under the Division's Collective Agreement from July 1, 2002 to June 30, 2004 I am being placed at a disadvantage for salary top-up because I am the biological father of my child and therefore women on maternity leave and men or women who adopt get unfair advantage over men who request parental leave for the same duration and are the biological father of a child."

(d) On April 20, 2004, the Division denied his request and stated as follows:

"In your letter dated December 19, 2003, received at this office on February 23rd, 2003, you request consideration for a ten week period top-up of salary as a result of you being the father to your naturally born child.

Further, you indicate that you believe the Division's Collective Agreement results in you being placed at a disadvantage for salary top-up. Please be advised that the Collective Agreement that you reference is jointly owned and negotiated by the Division and the Louis Riel Teachers' Association of the Manitoba Teachers' Society. I have reviewed that Collective Agreement and I believe the Division is administering the Collective Agreement exactly as an Arbitration Board awarded on this clause and exactly as the Association and the Division intended it to be administered in subsequent negotiations. I cannot concur that you be treated in a manner not consistent with the Collective Agreement."

(e) On May 5, 2004, a grievance was filed and states as follows:

"Christopher Chapman grieves that there is a difference between him and the Louis Riel School Division (hereinafter called "the Division") in relation to the application of the collective agreement between the Louis Riel Teachers' Association and the Division.

Christopher Chapman grieves that the Division misinterpreted and/or misapplied and/or violated the provisions of the collective agreement, and in particular Articles 2.01 (obligation to act fairly) and 6.01 (maternity, adoptive and parental leave), section 80 of *The Labour Relations Act*, Division 9 of the *Employment Standards Act* and sections 9, 14 and 56 of *The Human Rights Code* by refusing to top-up his salary while on parental leave in the same manner as biological mothers and adoptive mothers and adoptive fathers. Mr. Chapman, the biological father of his child states that he is being treated in a manner that discriminates against him on the basis of gender and family status.

Christopher Chapman requests:

1. A declaration that the Division misinterpreted and/or misapplied and/or violated the provisions of the collective agreement, *The Labour Relations Act, The Employment Standards Act* and *The Human Rights Code.*

2. An order that he be paid all salary top-up and benefits during the period of the parental leave, including interest on same; and

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

Dated this 5th day of May, 2004 at the City of Winnipeg, in the Province of Manitoba."

The grievance alleges a breach of Article 6.01 of the Agreement which states:

Article 6.01 - Maternity, Adoptive and Parental Leave

A. Every female teacher shall be entitled to maternity leave and every teacher shall be entitled to adoptive leave in accordance with this article.

B. Every teacher shall be entitled to unpaid parental leave.

C. Except as otherwise provided herein the Manitoba Employment Standards Code will apply.

D. The teacher and the Division may mutually agree to extend the length of leave if the teacher so desires. Any such arrangements shall be confirmed in writing by the Division.

E. A teacher taking maternity leave pursuant to this article shall be entitled to receive pay for the period of leave up to seventeen (17) weeks in the amount of ninety percent (90%) of the salary being received at the time leave was taken, this pay to include any benefits received from Human Resources Development Canada to a Supplemental Unemployment Benefits (SUB) Plan. The implementation of this clause is subject to the successful arrangement of a Supplemental Unemployment Benefits Plan with Human Resources Development Canada.

F. In respect of the period of maternity leave, payments made according to the SUB Plan will consist of the following:

1. For the first two (2) weeks, payment equivalent to 90% of her gross salary, and

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

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

H. In respect of the period of adoptive leave, payments made according to the SUB Plan will consist of the following:

1. For the first two (2) weeks, payment equivalent to 90% percent of gross salary, and

2. Up to eight (8) weeks payment equivalent to the difference between the Employment Insurance benefit the teacher is eligible to receive and 90% of gross salary.

I. The parties agree to the following application rules, terms and conditions:

1. The maternity leave period which is eligible for payment under this Article is the first seventeen (17) weeks (the two (2) week waiting period and the next immediate fifteen (15) weeks).

2. Where any portion of the seventeen (17) weeks referenced in (1) above falls during the Summer Break, Christmas Break, Spring Break, or any other period when the teacher is not earning her salary, that portion of the maternity leave period does not qualify the teacher to receive maternity leave top-up benefits.

3. A specific application or registration for a Supplemental Unemployment Benefits Plan is not required. The only requirement from Human Resources Development Canada is that the comments section of the Record of Employment confirming that section 38 of the Employment Insurance Regulations are met.

4. Teachers must be under contract to the Division during the period when maternity leave top-up benefits may be paid by the Division in order to be eligible to receive those payments.

5. The qualifying period of seven teaching months must be seven consecutive teaching months in the employ of the Louis Riel School Division, as per the Manitoba Employment Standards Code. The full seven (7) months qualifying period must be served in order to qualify for any maternity leave payment. For greater certainty, should a teacher fail to serve the full qualifying period prior to the start of the maternity leave, then that teacher shall be eligible to receive maternity leave top-up benefits only for that portion of the seventeen (17) weeks referenced in (1) above which occurs after the completion of the seven (7) month qualifying period.

6. The Division requires, from each of the teachers on maternity leave, a copy of the Statement of Finalized Employment Insurance Benefits in order to accurately calculate her entitlement. This is a document which the teacher should have received (or will receive) from Employment Insurance four to six weeks from the date that she applied for Employment Insurance Benefits. Should payments to teachers be required prior to receipt of the Statement, an estimate of the correct entitlement will be made with an adjustment made following receipt of the Statement.

HISTORY OF BARGAINING

The Association first raised the issue of top-up of parental leave benefits in 1998 at the same time it sought a top-up for maternity leave.

The issue was raised in an interest arbitration before Arbitrator A. Peltz. Arbitrator Peltz issued an Initial Award (February 12, 2001) and Supplementary Award (March 22, 2001).

In the Initial Award, Arbitrator Peltz awarded a seventeen (17) week top-up of maternity benefits at 90% of salary, but denied a top-up for parental and paternity leaves. He also stated:

> I suggest the parties that the new article, which will entitle a teacher to 17 weeks of salary top-up during maternity leave, also ought to reasonably accommodate the circumstances of an adoptive parent. There was no evidence with respect to the projected utilization of adoptive leave. It is my assumption that, adoption being a fairly rare occurrence, the additional cost of this accommodation would not be undue.

Because the parties were unable to resolve the question of top-up for adoptive leave, Arbitrator Peltz heard further submissions and issued the further award. He determined that adoptive leave top-up matching the EI entitlement at the relevant time (10 weeks) should be awarded.

In making this award, Arbitrator Peltz stated at pp. 17 and 18 of the decision:

> I wish to stress that the new article I am awarding here is *not* a parental leave. It is not a second tier benefit. In the main award, I *denied* the Association's proposal for topped up parental leave, in part due to cost considerations. Establishing adoptive leave as a form of parental leave would create a risk that a fresh human rights complaint may arise, expanding the Division's financial exposure beyond the level contemplated in the main award. As in the *University of Ottawa (Melchers grievance)* [1999] O.L.L.A. No. 387 (May 13, 1999) (Adams), birth fathers might allege discrimination because they are adversely treated compared to adoptive fathers in accessing second tier benefits.
>
> Rather, the intent of my supplementary award is to provide for an adoptive parent some measure of first tier salary protection, in a manner similar to a pregnancy leave. I feel safe in concluding from the material available to me that such a provision is reasonably necessary in order to avoid hardship and inequity to the small number of teachers who may choose to adopt. This "first tier" is the challenging time period during which the adoption placement is

finalized and effected, and nurturing of the child begins. It is not merely "child care". Under the 2001 amendments to both provincial legislation and the EI system, extended second tier benefits will then be available to both natural and adoptive parents, although salary to-up will not apply under the St. Vital teachers' contract.

The Peltz award was not the subject of an application to quash. The Peltz award will be referred to at length later on in this award. Subsequent to this award, the Association proposed parental top-up in 2003 and 2004/05 during negotiations for an amalgamated agreement. Their proposals were for 10 weeks top-up for parental top-up as opposed to their proposal of 17 weeks for adoptive top-up.

A few other divisions have a top-up parental leave benefit, including Transcona School Division, which has 17 weeks top-up for adoptive leave and 10 weeks for parental leave.

ISSUES IN DISPUTE

The issues in this case were summarized by the Association in their written submission as follows:

1. Whether the lack of top-up for parental leave benefits for a biological father constitutes discrimination on the basis of family status?

2. If the provisions in the Agreement are discriminatory, can they be justified?

3. If lack of top-up is discriminatory, and it cannot be justified, what is the appropriate remedy?

The submissions of the parties, the evidence tendered, and the legal authorities relied upon, will be reviewed in some detail.

A summary of the Association's position on the above issues are reproduced here:

1. The lack of a top-up for biological fathers constitutes discrimination on the basis of family status. Chapman's position is that the purpose of "family status" being a prohibited ground for discrimination under *The Human Rights Code* is at a minimum to avoid discrimination against a person because the person is in a parent-child relationship, whether arising from childbirth or adoption. The intention of parental leave benefits is to provide gender neutral, job-protected leave from employment for purposes of child rearing. In simple terms, it is unlawful for the Division to discriminate against Mr. Chapman on the basis that he is a birth father rather than an adoptive father or a birth mother or adoptive mother.

2. The SCC in *Meiorin* established the three step test for determining whether the standard is a BFOR (1) that the employer adopted the distinction in the provision of top-up benefits for a purpose for a rationally connected to the

provision (2) the employer adopted the distinction in an honest and good faith belief that it was necessary for the fulfillment of the provision of parental leave (3) the standard is reasonably necessary to the accomplishment of that legitimate purpose - here the employer must show that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship on the employer. Review of evidence demonstrates that having regard to the purpose of parental leave, the burden of undue hardship cannot be met in this case. There is no special distinction on the basis of the evidence between the child rearing needs of adoptive parents compared to biological or other types of parents that can justify a blanket exclusion from this term or condition of employment. It is no different than government deciding that because Chinese immigrants seldom go on welfare to establish a social assistance program that excluded Chinese. It would be discrimination and the blanket exclusion could not be justified. The same principles apply here.

3. Remedy - Chapman wants a declaration that there has been a violation of *The Human Rights Code*, as incorporated into the collective agreement and an order that he be paid the top-up. The Association has brought forward a provision for top-up for parental leave in each of the rounds of bargaining since 1998. The first time it was brought forward it was part of a proposal to establish top-up for maternity leave. The matter went to interest arbitration and was awarded top-up for mat leave and adoptive leave, but not parental leave. The

Association again brought forward the parental leave top-up proposal in subsequent rounds - the last two of which have included the issues related to amalgamations between St. Boniface and St. Vital SD. In the circumstances, we request this Board to make these determinations and not refer the matter back to the Association and the Division to bargain given that the Division, at least 4 or 5 times has rejected clauses that have been agreed to in other Divisions.

The Division's overall position can be summarized as follows:

1. The lack of top-up for biological fathers does not constitute discrimination on the basis of family status. The Division says that adoptive leave is a separate and distinctive right from maternity leave and asserts that Arbitrator Peltz considered all the relevant facts in coming to his decision. The argument for top-up of parental leave is not based as some general legal entitlement.

2. The Association did not challenge Arbitrator Peltz's award.

3. At best, if the Association is correct, the appropriate remedy is to refer the issue back to the parties.

THE EVIDENCE

The Association filed and referred to a variety of statistical reports dealing with population and health, and statistical reports dealing with parental leave. They also filed a report from Dr. Michael Lamb, an expert in child development.

Highlights of the above evidence will be reviewed.

The Association in its written submission outlined the critical points made by Dr. Lamb which supports their argument. These include:

(i) fathers play significant roles in child development;

(ii) the quality of relationships with both parents affect patterns of adjustment and maladjustment in similar ways;

(iii) most infants form meaningful attachments to both parents at about the same age - 6 to 7 months;

(iv) the quality of both mother- and father-child interaction remains the most reliable correlates of individual differences in psychological, social and cognitive adjustment in infancy, as well as in later childhood;

(v) as interaction is critical for the establishment and interaction of parent-child relationships it is important to maximize the amounts of time that parents have to interact with their children;

(vi) with a newborn it typically takes 6 to 7 months to establish such relationships but less time is needed when the child is more cognitively and developmentally mature, as might be the case when a child was adopted sometime after birth;

(vii) the same processes are involved in the development of relationships with mothers and fathers and there is every reason to expect that adoptive relationships develop the same way;

(viii) it is common practice in many countries to provide adoptive parents the same time off work to facilitate their adjustment to new parental responsibilities and development meaningful relationships with their children in the same way that opportunities are made available to mothers who have just given birth, as well as their partners;

(ix) all new parents and their children benefit from these opportunities in the same way, whether biological mothers or fathers, or adoptive mothers or fathers;

Statistical information tendered included:

(a) Manitoba's birthrate is declining and women are having children at an older age;

(b) Low birth weight and high birth weight can be an indicator of future developmental problems; and based on Manitoba's stats in 2002, 2,777 children would be affected by low and high birth weights;

(c) U.S. stats show that 12% of adopted children have disabilities compared to 5% for biological children.

The Association challenged many of the findings in the Knight report tendered by the Division.

EVIDENCE OF THE DIVISION

The Division tendered a report entitled "Report on Challenges Facing Adoptive Parents" prepared by Janice Knight, Coordinator, Adoption and Post-Adoption Child Protection Branch, Department of Family Services and Housing.

Portions of her report are reproduced here:

(a) Special Needs of Adopted Children

> In my experience, I would estimate that 85% of Canadian adoptions, both International and Permanent Wards are not newborns. All of the intercountry adoption placements I have been involved with (exclusive of international relative adoptions), have had orphanage or foster care prior to their adoption

placements. In Manitoba, all permanent wards have been in "foster care" prior to adoption. A "best practice" and placement priority standard in the Province is to ensure children are placed in "foster homes" that are extended family as a first choice of care. However, extended family members are not always available for our children.

Generally, children who have been institutionalized experience developmental delays due to lack of stimulation and poor nutrition and care. The longer the child remains in institutionalized care, the longer the delay tends to be.

(b) Comparison of Parenting Natural Born Children

The differences between parenting adoptive and biological children in the initial period after the child is brought home depends on the age and needs of the child. In general, healthy newborn biological children are not exposed to the high risk factors such as poor pre-natal care, nutrition, and institutionalization which impacts on a child's physical, mental, and emotional development. Therefore, these children would not require the same intervention as special needs adoptive children. I would suggest little difference between a biological newborn and a healthy newborn placed for adoption.

However, the majority of children placed for adoption are not newborn. In regards to adjustment period of an older special needs child, this is a critical time that requires the ability and availability of the parents to meet the child's needs, insecurities and testing of their commitment to the child.

In the case of family's adopting an older or special needs child, I would highly recommend, if possible, both parents to be available to spend time with the child and establish and build a trusting, nurturing relationship, as well as develop consistent routines and expectations for the child. It is very important for an adoptive child to feel supported. Where the child is older, this is particularly important because the child is cognitively aware.

Where the child is from a foreign jurisdiction, there will be adjustments based on transitioning out of institutionalized care and cultural differences. Sleeping alone in the child's room will be an adjustment from sharing a room with many other children. The child's diet will be different. The sounds and the smells will also be different. The child will require nurturing support to adjust to these changes.

The establishment of routine in the parenting of a child is an integral part of the attachment process, and is especially significant when adopting a special needs child. The child will need support in establishing a routine and adjusting to her new surroundings.

In all cases, we encourage adoptive families to seek out assistance in assessing their child's special needs. Obviously, if the children do require services such as medical or speech occupational therapy, dental, optometrist follow-up, then this would impact on their availability during office hours. We also strongly recommend counseling for the adoptive family if they are having difficulties meeting the child's special needs.

(c) Role of Biological and Adoptive Fathers

The role of an adoptive father of a healthy newborn, would in my opinion, not be that different from a biological father of a healthy newborn. In the case of parents adopting or parenting a newborn, if possible it is a tremendous benefit to a child to have both parents caring and nurturing them at the beginning of their lives and the developing formation of a family unit.

However, the majority of adopted children are not healthy newborns. In regards to an older or special needs adopted child (permanent ward or international), I believe it is extremely beneficial and helpful to a child to have both parents present during their initial "transitional" or "adjustment" period, as they adapt to their new caregivers, environment, and routines.

In the case of international placements, the child has many issues to deal with from the overall impact of the cultural difference (food, climate, language), to the adjustment from orphanage care to a family home environment. The child's needs are much greater and require the availability and accessibility of both parents to begin to adjust to their new lifestyle and caregivers, and deal with the overall impact of being removed from their country of origin.

LEGAL ARGUMENT OF THE ASSOCIATION

Ms. Matthews Lemieux stated that the Grievor's claim was based on a violation of *The Human Rights Code*, and in particular, s. 9. The top-up for adoptive parents was discriminatory in that it constituted differential treatment based on "family status". Furthermore, it was argued the Division has failed to establish that its discriminatory standard was a bona fide occupational requirement.

The Association referred to the following statutory provisions and legal authorities:

A. *Employment Standards Act* - Division 9, Maternity Leave, Parental Leave and Compassionate Care Leave

B. *The Human Rights Code* - Part II, Section 9 & 14

1. *McLeod et al v. Egan et al, Supreme Court of Canada, Laskin, C.J.C., Martland, Judson, Spence, Pigeon, Dickson and Beetz, JJ., May 27, 1974; 46 D.L.R. (3d)*

2. *Parry Sound (District) Social Services Administration, Board v. Ontario Public Service Employees Union, Local 324 (O.P.S.E.U.), [2003] 2 S.C.R. 157, File No: 28819, Supreme Court of Canada*

3. *University of Alberta Non-Academic Staff Assn. v. University of Alberta, [1997] A.J. No. 803, Alberta Court of Queen's Bench*

4. *Corner Brook (City) v. Canadian Union of Public Employees, Local 768, [1996] N.J. No. 35, Newfoundland Supreme Court - Court of Appeal*

5. *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.) (Meiorin Grievance), [1999] S.C.J. No. 46, Supreme Court of Canada*

6. *Surrey School Board and B.C.T.F. (Bernier); British Columbia Public School Employers Association (Surrey School Board) and British Columbia Teachers' Federation (Surrey Teachers' Association); 82 L.A.C. (4th) 57; File No. A-90/99, July 6, 1999*

7. *Schachter v. Canada; Shalom Schachter v. The Queen and Canada Employment and Immigration Commission, [1988] 3 F.C. 515, [1988] F.C.J. No. 522, Court File No. T-2345-86, June 7, 1988*

8. *Ontario Hydro and Society of Ontario Hydro Professional and Administrative Employees (Maternity Grievance); [1999] O.L.A.A. No. 362, File No. MPA 9900610; May 3, 1999*

9. *Assn. of Professors of the University of Ottawa and University of Ottawa (Melchers Grievance); [1999] O.L.A.A. No. 387, File No. MPA 9900639, May 13, 1999*

10. *Izaak Walton Killam Health Centre and N.S.N.U. (Bennett), Izaak Walton Killam Health Centre and Nova Scotia Nurses' Union; 120 L.A.C. (4th) 353, File No. 2003-032, July 9, 2003*

11. *Syndicat de l'enseignement de Champlain et al v. Commission scolaire regionale de Chambly; Court File No. 23188, June 23, 1994*

12. *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights) [1993] 3 S.C.R. 868; [1999] S.C.J. No. 73, File No.: 26481, Supreme Court of Canada*

13. *Hussey v. British Columbia (Ministry of Public Safety and Solicitor General), [2003] B.C.H.R.T.D. No. 73, 2003 BCHRT 76, Decision: November 13, 2003*

The Association argued that the jurisprudence established that an arbitrator has the jurisdiction to interpret and apply *The Human Rights Code* and to declare that the Agreement discriminates against birth fathers (as in *Surrey* supra).

As was stated in *Schachter* (Trial Division case) at paragraph 31:

> Therefore a distinction made between adoptive parents and natural parents in respect of a period of child-care following introduction of a child into the home appears to create inequality of benefit in terms of the very purpose of the Act and the section itself (referring to the *Unemployment Insurance Act* and then section 32).

The Association pointed to the very strong opinion of Valerie Lamb as being supportive of their argument that the top provisions were discriminatory. Particular reference was made to the Trial Division in *Schachter* in which Strayer J. referred to the evidence in that case as follows at paragraph 36:

> The evidence indicates that such distinctions cannot be explained by natural differences among the classes of people involved and work to the substantial disadvantage of those denied child-care benefits. Evidence on this point was provided by Dr. George Awad, Associate Professor of Psychiatry at the University of Toronto and Director of the Family Court Clinic, Clarke Institute of Psychiatry, Toronto. In the latter role he deals with referrals of children by the Family Court to advise, inter alia, on matters of custody. In this process he has to examine and assess past and future relationships developed between children and parents and he has dealt with over one thousand such referrals. According to his evidence a close, positive, parent-child relationship is important in child development generally; and that an early involvement of the parent with the child will likely have a long-term good effort on such a relationship. In his view there is no difference between mothers and fathers in this respect, and that fathers are equally capable of caring for infant children in this sense. Fathers will be encouraged to know that he finds no basis for the theory that infants are "monotropically matricentric" in orientation (i.e. having an affinity only for their mother). Thus from his experience he concludes that "the more a father is involved with the life of a child, the better it is for the father-child relationship, and for child development". He sees this improved father-child relationship as having benefits for the father as well as the child and also strengthening the relationship between the parents. In respect to none of those matters could he see why there should be any distinction made between adoptive parents and natural parents. He believes from a psychological standpoint there is no justification for distinguishing between natural fathers and adoptive fathers in this respect.

It was submitted that this opinion evidence was similar to that offered by Ms. Lamb.

Reference was also made to Mr. Justice Strayer's comments in *Schachter* with respect to the alleged differences between the roles and responsibilities of adoptive parents and natural parents. He noted that there may be some differences in the situation faced by the parents, but went on to state at paragraph 37:

> But that is not a justification for a blanket denial of child-care benefits to natural parents, or the denial of choice between them as to who is to stay home.

The Association suggested that in this case there has been a blanket denial to natural parents of top-up for parental leave and the provision of the Agreement.

The Association submitted that the bulk of the arbitral jurisprudence is supportive of their position. For example, the facts in *Ontario Hydro* (cited above) are analogous and Arbitrator Picher determined that there was discrimination on the basis of family status.

Likewise, in *Assn. of Professors of University of Ottawa* (cited above), Arbitrator G.W. Adams made the same finding after considering the matter and determines that the provision of the agreement should be struck. Specific reference was made to a number of comments made by Arbitrator Adams, including at paragraph 27:

> ... the article (top-up clause) is based on the more general social importance of a parent or parents being able to spend time at home at the time of introduction to that home of a pre-school age child without regard to the sex of the parent claiming benefits. Such a rationale would apply equally to care-giving by natural parents in respect of their newborn child.
>
> No evidence was led of other possible justifications for the impugned distinction, in this case, between natural fathers and adoptive fathers. For example, in Schacter there was evidence that in Ontario only 22 percent of children adopted are under one year of age at the time of adoption and that adopted children over that age may have "special needs" which require more parental attention than needed by a typical child growing up with its natural parents. While Strayer J. did not find this possibility to be a justification for a blanket denial of EI childcare benefits to natural parents, in the case at hand evidence of such a justification or concern underlying Section 29.2.3 was not led and it cannot be inferred from the text of the challenged article. Reading the same judgment, one can also discern childcare interests of biological parents of similar or equal merit.

The Association submitted that the case at hand was not dealing with the distinction between maternity and parental benefits.

Arbitrator Adams, in a Supplemental Award, ordered that the grievor (a natural parent) be paid top-up benefits and the collective agreement was ordered to be amended accordingly.

A similar finding was made by Arbitrator Veniot in *Izaak Walton Killam Health Centre* (cited above). He also opined that "discrimination against a subset of a group will suffice". The discrimination is against biological parents whether mothers or fathers.

Arbitrator Viniot dealt with an employer submission in that case that the existence of adoption top-up flawed from the fact that the purpose of adoptive leave is much broader than the child-care/family formation purpose which forms the basis for parental leave and that there was a justifiable reason for the distinction. Also, adoptive leave allows the parents to deal with the legalities of the adoptive process and top-up assists with that process.

Ms. Matthews Lemieux anticipated that the Division might advance such an argument in this case based on the Knight report. She pointed out that the statistics for adoptions in Manitoba and Nova Scotia were similar, including the percentage that were agency adoptions.

In the final analysis, Arbitrator Veniot stated at p. 18 of the decision:

> My problem with the employer's argument lies not with the general nature of her fundamental legal proposition - - that if there is a different purpose, it may be possible to justify differential treatment - - but with her conclusions on the evidence at the hearing. With respect, I do not share them. To me, the two leaves - - parental and adoptive - - do have a similar purpose at the most relevant and important level: they both provide a period of leave for persons who have to cope with a new addition to their family. The adjustments required in each case are not exactly the same, but they do share this most important common ground. I believe both circumstances can be included in the phrase appearing in the passage from Schafer v. [page 376] Canada, supra, that both leaves are essentially concerned with "the social needs of child care".
>
> More importantly, considering the precise benefit under consideration - - the adoption top-up - - I believe that the extension of the adoption top-up to a birth parent would serve the same purpose as it does with the bargaining unit member who is an adoptive parent: to ameliorate the costs associated with becoming a parent. All of the matters urged upon me as showing a different purpose for the adoption top-up are referable to the need for a period of leave, not to the incremental financial benefit represented by the 10 (or 12) week adoption top-up. In my opinion, there is a failure of proof on this point and I find a breach of Article 18. The adoption top-up provisions of Article 13.06 are under-inclusive in a way which discriminates against the individual grievor, and, with respect to the policy grievance, those provisions discriminate against male biological parents generally. The discrimination arises in both cases because male biological parents are part of the class of biological parents, a group that, for reasons given above, should be included in the adoption top-up benefit. I can now move to consider remedy.

Dealing with the issue of reasonable accommodation and hardship, the Association referred to *Meorin, Chambly, Grismer* and *Hussey* (cited above). It was argued that there was no evidence of unreasonable financial burden and that the collective agreement cannot absolve parties from the duty to accommodate. It was noted that in this case there was a blanket refusal to consider any options and this is not justifiable.

Furthermore, a big number is not sufficient to substantiate undue hardship, particularly where the employer is large government service provider.

LEGAL ARGUMENT OF THE DIVISION

Mr. Simpson, on behalf of the Division, pointed out that in this case there was no issue as to the interpretation of the Agreement. What the Grievor was seeking were benefits that do not exist and have not been negotiated. The Agreement provides for maternity leave and adoptive leave, but none for parental leave, which causes the Division to ask why a claim is not being made against the Association.

The Division also referred to the *Billinkoff* 134 Man. R. (2d) 99 (Man. C.A.) decision. In particular, it was noted that the Association is asking the Arbitration Board to take the benefit given to adoptive parents and reading in parental leave. The ~~Association~~ Division raised the issue as to the propriety of raising the issue in this forum, and it particularly affects the remedy the Board can impose.

The Division posed the question as to whether it can be said that providing a top-up for adoptive leave and not parental leave that there was differential treatment, and therefore discrimination. It was submitted that the top-up on parental leave is not based on the same general legal entitlement. The basis for the claim has to be that this alleged differential treatment is discriminatory. It was pointed out that if this

Agreement did not provide top-up for those taking adoptive leave, that we would not be here.

The history leading up to the Peltz award was reviewed. Prior to July 2002, St. Boniface and St. Vital were separate school divisions and then formed the Louis Riel School Division. In St. Vital, negotiations lead to interest arbitration awards. Proposals had been tabled, and Peltz dealt with these. It was noted that what is apparent from Peltz's supplementary award is that he was well versed in the subject matter. At page 8 of his supplementary award he refers to the *Schafer* award, and determined that it was not discriminatory to give adoptive mothers less than biological mothers on maternity leave.

Reference was made to the *Schachter* award. The Division noted that the Association referred to the trial decision in *Schachter*. The *Schachter* decision was appealed to the Supreme Court, and it is important to note that the majority decision states as follows at page 695:

> I find it appropriate at the outset to register the Court's dissatisfaction with the state in which this case came to us. Despite the fact that *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, was handed down in between the trial and appeal of this matter, the appellants chose to concede a s. 15 violation and to appeal only on the issue of remedy. This precludes this Court from examining the s. 15 issue on its merits, whatever doubts might or might not exist about the finding below. Further, the appellants' choice not to attempt a justification under s. 1 at trial deprives the Court of access to the kind of evidence that a s. 1 analysis would have brought to light.

The Division therefore submitted that the *Schachter* decision was not a binding authority in light of the Supreme Court's concerns as expressed above.

The Division also made reference to the Federal Court of Appeal decision in *Nishri v. Canada* [2001] F.C.J. No. 563. At page 12 of the decision the Federal Court noted as follows:

> However, Strayer J.'s decision must be considered in light of subsequent events. First, the Crown did not appeal the validity of the impugned provision, but confined itself to the propriety of the remedy granted: [1990] 2 F.C. 129 (F.C.A.), rev'd. [1992] 2 S.C.R. 679 (S.C.C.). Writing for the majority in the Supreme Court of Canada, Lamer C.J. expressed dissatisfaction (at page 695) with the Crown's refusal to put the section 15 issue before the Court. In separate concurring reasons, written for himself and L'Heureux-Dube J., La Forest J. went further and expressly doubted (at page 727) whether Strayer J. was correct on section 15. In my opinion, these comments inevitably weaken the support that the appellant can derive from Strayer J.'s decision in Schachter, supra. Moreover, the breach of section 15 conceded on appeal by the Crown was remedied by the Supreme Court by reading out the under inclusive provisions, not by granting a declaration of the kind awarded by Strayer J.
>
> Second, the authoritativeness of Strayer J.'s decision is further limited by the Supreme Court's subsequent elaboration of the constitutional concept of equality embodied in section 15, especially in Law v. Canada (Minister of Employment and Immigration), [1999] 1 S.C.R. 497, and by the application of that jurisprudence by this Court in Sollbach v. Canada (1999), 252 N.R. 137 (F.C.A.), where the Court upheld the validity of a statutory cap on the number of weeks of unemployment insurance benefits that a person could claim, even though its effect on the applicant, a birth mother, was to reduce the length of the parental leave to which she was entitled.

It was submitted that when one reviews the cases relied upon by the ~~Division~~ Assessment, one will note a reliance on the Trial Division decision in *Schachter* in support of the conclusions arrived at. Peltz was aware of this situation and notes the concerns that the Supreme

Court had with respect to these findings. Peltz reviewed *The Human Rights Code* and was well attuned to the case law. Both in his initial and supplementary award he indicates that he recognizes what he is awarding and that it will not have significant cost implications. In fact, he was correct in so stating in that one female and no males have accessed the adoptive leave in four years.

The Division referred to the relevant portions of Peltz's decision, and in particular, the following:

> On the other hand, I am persuaded that it would be fair and reasonable to allow for some period of adoptive leave which will accommodate the acknowledged "stresses and burdens" experienced by an employee involved in adopting a child. Adoptive leave top-up matching the EI entitlement at the relevant time, which was 10 weeks, seems the most workable and sensible approach under the circumstances. Such a collective agreement benefit is unlikely to have a material financial effect on the Division beyond the cost of the maternity clause already awarded. The Division declined to address the merits and filed no additional evidence, but I note the comment in *Schafer* that adoptive parents comprise between 2% and 4% of the population. On that basis, the cost of a 10-week adoptive leave top-up should not be undue.
>
> I wish to stress that the new article I am awarding here is *not* a parental leave. It is not a second tier benefit. In the main award, I *denied* the Association's proposal for topped up parental leave, in part due to cost considerations. Establishing adoptive leave as a form of parental leave would create a risk that a fresh human rights complaint may arise, expanding the Division's financial exposure beyond the level contemplated in the main award. As in the *University of Ottawa* case (cited above), birth fathers might allege discrimination because they are adversely treated compared to adoptive fathers in accessing second tier benefits.
>
> Rather, the intent of my supplementary award is to provide for an adoptive parent some measure of first tier salary protection, in a manner to a pregnancy leave. I feel safe in concluding from the material available to me that such a provision is reasonably necessary in order to avoid hardship and inequity to the small number of teachers who may choose to adopt. This "first tier" is the challenging time period during which the adoption placement is finalized and

> effected, and nurturing of the child begins. It is not merely "child care". Under the 2001 amendments to both provincial legislation and the EI system, extended second tier benefits will than be available to both natural and adoptive parents, although salary top-up will not apply under the St. Vital teachers' contract.

While the Association spent a great deal of time talking about the similarities regarding the leave, the Division stipulated that they were not talking about leave. Parental leave is available, and is the same for all parents. They were talking about a separate benefit, i.e. top-up of available Employment Insurance while on leave.

If one wants to consider the purpose of top-up, one does not have to look anywhere but Peltz's award, and the purpose of awarding it is expressed in his award as set out above. It was noted that there was no application by the Association to quash the award, nor was there any appeal. The Association at the time did not say it was illegal or discriminatory. The award regarding parental leave top-up of an adoptive leave top-up was incorporated into the St. Vital collective agreement, and was carried forward into the Louis Riel agreement. It was noted that through three sets of negotiations, the provision has remained and continues to be in the Agreement.

It was interesting to note, the Division submitted, the proposals submitted by the Association subsequent to the award proposed different top-ups for adoptive leave than parental leave in that the proposal for adoptive leave was 17 weeks top-up and for parental leave it was 10 weeks top-up. The Division therefore stated that the

Association by asserting something discriminatory was clearly recognizing that there was a difference between the two types of leaves.

It was also noted that reference had been made to other school divisions, and the fact was that of the thirty odd divisions, a few had top-up for parental leave. One is Transcona School Division where there is top-up of 17 weeks for adoptive leave and 10 weeks for parental leave. There is differential treatment. That is evidence of an agreement where nothing was imposed. In this case, as a result of bargaining and an interest arbitration process, there was provision for adoptive leave. It was done by Arbitrator Peltz, who is fully aware of all the case law and all the circumstances.

With respect to the evidence put forward by the Association in the form of Dr. Lamb, the Division submitted that no one questioned the importance of time between parents and children. It was noted that we are all products of a family situation. Furthermore, the Division does not argue whether it is beneficial for parents to spend time with their children. The issue here is not leave, it is paid top-up for Employment Insurance. Whether it would be good to have it may be so, but that is not the benefit that was negotiated between the parties, or what the Board can provide. If the Association wants this benefit, they can pursue it in negotiations or through an interest arbitration process. It is not appropriate for that to be done in a rights arbitration such as this.

The Division referred to the Knight report. Knight talks about various types of adoptions and the pre-adoption process. It was noted there are complex situations in

adoptions, probationary period and trying times. Knight does talk about the special needs of adoptive parents. The fact of the matter is that not all adoptions are newborns. The fact of where a child has been in the past may be unknown. Knight compares parenting of newborns versus child caring at a later age. It is absurd to try and tell us that there is no difference between newborns and adoptive children. They are different even without Knight having to expound on this issue. Peltz recognized there were differences and determined to make an award for adoptive parents.

Subsequent to the Peltz decision, there is jurisprudence supporting Peltz's finding. In particular, Arbitrator Keller in the *Upper Canada* decision made a similar finding. In *Upper Canada* the facts were the same as exist in the present case.

The Division indicated they do want to get into a debate regarding natural born children birth versus adoptive because we are dealing with a professional group. Notice should be taken that none of the newborns born to members of this bargaining unit would be under the poverty line. In the *Upper Canada* case, the expert evidence was on all fours with that supplied by Knight. Reference was also made to the peculiarities of adoption, and in particular at page 9:

> One other area of evidence needs to be dealt with. The union called Mr. Greg McGillis to testify. Mr. McGillis was President of District 26 for four years. He was President of the bargaining team involved in the negotiations of the collective agreement at issue in this rights arbitration. At the end of his cross-examination, employer counsel put the following question to Mr. McGillis. What was the rationale for the special leave for adoptive parents? Mr. McGillis responded: To recognize the different experience of adoptive as opposed to biological parents.

Overall, it was submitted that the *Upper Canada* case is consistent with the case before us and there is clear arbitral support for what Arbitrator Peltz set out to do, and did in fact do in his award.

Reference was also made to the ~~Schmizer~~ Schmitz report. He did a costing and determined that if a top-up was extended to biological fathers, there may be a cost upwards of $200,000.00 per year to the Division. It is important to note that Peltz was attempting to provide a benefit that he recognized would be of minimal cost to the Division.

The Division submitted that if one concludes that what Peltz did was to create a discriminary clause, then one has to consider what the appropriate remedy should be. The Division submitted that it was their view that the provision for adoptive leave top-up was appropriate because it was not imposed as a second tier benefit related to child care, but as a first tier benefit related to the exigencies of adoption. The Division commented on certain of the authorities relied upon by the Association. It was pointed out that the *Meorin* test was not directly on point because it was not an action of an employer in this particular case, but the fact that an interest arbitrator had awarded the top-up leave. With respect to the *Isaak Walton* case, while the evidence was the same, the arbitrator goes a different way than Keller does in the *Upper Canada* decision. *Walton* looks at the purpose of leave and the context of parental leave. It was pointed out that one is not talking about leave in this case, but talking about top-up. Top-up is not for the same purpose as leave.

Overall, the Division submitted that what Peltz awarded did not give rise to differential treatment giving rise to discrimination and the grievance should be dismissed. If it is concluded that the Peltz award somehow renders the process discriminatory, one option would be to so declare and then dismiss for want of authority to provide any other remedy. It was noted that the Court of Appeal has stipulated in *Billinkoff* that one cannot order the inclusion of the provision of an article not negotiated or arbitrated. The Division urged that caution be exercised when looking at other jurisprudence because in British Columbia and Nova Scotia there is authority to interpret the legislation as if it is incorporated at the collective agreement. It was noted that that is not the case in Manitoba. In other cases the matter was referred back to the parties and they were given a timeframe in which to deal with the matter. It was suggested that if the Arbitration Board felt that it was discriminatory, it could give a declaration and ask the parties to deal with it. There is no evidence of hard bargaining over the issue. To extend the benefit to a whole other group would be a huge cost impact on the Division and unfair in the circumstances. Furthermore, there is no basis for awarding damages in light of the particular facts of this case.

REPLY ARGUMENT OF THE ASSOCIATION

The Association reminded me that the Peltz awards only dealt with a portion of the top-up sought out by them. The Division resisted the Association's position and therefore as in *Meorin* it was the employer who in effect caused the problem.

While the Division questioned the value of *Schachter* as a precedent and argued *Nishri* casts doubt on it, the Association submitted that one cannot predict what the Supreme Court would have done in the circumstances.

Also, it was pointed out that in *Nishri* the Federal Court of Appeal of Canada found that a cap applied in the same manner was not discriminatory. The Association argued that the facts of the case at hand were different. In *Nishri*, as well, the case concerned legislative provisions that were transitional in nature.

The Association stated that while the decision in *Upper Canada* (listed above) was contrary to its position, it was the only similar case in which there was not a finding of discrimination. Also, it is interesting to note that Arbitrator Keller made no mention of the decision to the contrary.

While the Division argued that the Manitoba Court of Appeal decision in *Billinkoff* precluded an arbitrator reading a provision into the collective agreement, the Supreme Court in *Parry Sound* found to the contrary. The Supreme Court stated that the substantive rights of *The Human Rights Code* can be read into the agreement.

Regarding submission that there is a distinction between dealing with newborns and adopted children, the Association stated that all the cases say there are certain differences, but these differences are not sufficient to justify discrimination.

Lastly, on the question of remedy, it is not sufficient to argue in favour of submitting the issue back to negotiations because the cost would be so high. Human rights cases cost money. The issue is whether there is undue hardship.

DECISION

This case raises a difficult issue. As Peltz stated in his Supplementary Award, "As is evident, the legal significance of employment benefit distinctions between birth and adoptive parents has received a fair amount of judicial and arbitral consideration in recent years".

He goes on to say "Clearly, this is a most complicated area of employment law which is very much influx at the moment". I heartily concur with that observation.

This case is complicated by a number of factors. Firstly, there are cases by learned arbitrators on both sides of the issue. Secondly, there are no specific Manitoba cases on point. Thirdly, the Supreme Court statements in *Schachter*, it is arguable, leave in doubt the view of the highest court on this very issue. Fourthly, on its face, a strict application of *The Human Rights Code* leads at first glance to a conclusion that a distinction in the treatment of adoptive, as opposed to birth parents, would support a finding of discrimination.

The present state of the law is to the effect that an arbitrator should apply *The Human Rights Code* in interpreting a collective agreement and I am satisfied based on the case law that this jurisdiction is well founded.

Before addressing the main issues in this case, it is useful to review the basis for Peltz's distinction in the St. Vital Supplementary Award, between a top-up of 17 weeks for maternity leave, 10 weeks for adoptive parents, and none for parental leave.

Peltz did not extend a top-up of 17 weeks to adoptive parents because, as he described it, 10 weeks "is far more than the typical 2-week waiting period which is normally covered by employers with SUB plans". The evidence in the matter was also insufficient for him to reach such a decision - he states that "without evidence of the type heard in *Reaney*, I am unable to reach any conclusion regarding the reasonableness of equivalent paid leaves for adoption and pregnancy".

Peltz is also careful to distinguish between adoptive benefits and parental benefits because, as he puts it, "establishing adoptive leave as a form of parental leave would create a risk that a fresh human rights complaint may arise" in the form of a challenge from birth fathers. Peltz was concerned that framing adoptive leave as a form of parental leave would automatically render discriminatory any distinction between adoptive and parental benefits. He alludes to this in his assessment of *Re Association of Professors of the University of Ottawa and University of Ottawa (Melchers*

Grievance), in which he notes that "where adoption was covered under the parental leave article, equal treatment for birth fathers was necessary".

In essence, Peltz chose to follow the line of reasoning in *Schafer* and recognized the existence of two tiers of benefits. This allowed him to extend top-ups of different lengths to birth and adoptive parents, in response to their purportedly different circumstances. Following this line of reasoning that emphasizes form (adoption/birth) over function (parenting, generally), Peltz attempted to shield his decision from a finding of discrimination.

Turning then to the issues in this case. The issues to be addressed are as follows:

1. What constitutes discrimination?
2. What is the purpose of the top-up benefit in the Agreement?
3. Can the distinction be justified?
4. If discriminatory, what is the appropriate remedy?

Issue 1 - Discrimination

In *The Human Rights Code* "discrimination" is defined as follows:

> (a) differential treatment of an individual on the basis of the individual's actual or presumed membership in or association with some class or

group of persons, rather than on the basis of personal merit; or

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

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

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

Included among the characteristics applicable to s. 9(1) are the following:

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

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

[...]

(i) marital or family status.

Mr. Justice McIntyre in *Andrews v. Law Society of British Columbia* (1989), 56 D.L.R. (4th) 1 (S.C.C.) defined discrimination as follows:

> What does discrimination mean? The question has arisen most commonly in a consideration of the Human Rights Act and the general concept of discrimination under those enactments has been fairly well settled. There is little difficulty, drawing upon the cases in this court, in isolating an acceptable definition. In Re Ontario Human Rights Commission and Simpson-Sears Ltd. (1985), 23 D.L.R. (4th) 321 at p. 332, [1985] 2 S.C.R. 536 at p. 551, 9 C.C.E.L. 185, discrimination (in that case adverse effect discrimination) was described in these terms:
>
> > It arises where an employer ... adopts a rule or standard ... which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristic

> of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the work force.

It was held in that case, as well, that no intent was required as an element of discrimination, for it is in essence the impact of the discriminatory act or provision upon the person affected which is decisive in considering any complaint. At p. 329 D.L.R., p. 547 S.C.R., this proposition was expressed in these terms:

> The Code aims at the removal of discrimination. This is to state the obvious. Its main approach, however, is not to punish the discriminator, but rather to provide relief for the victims of discrimination. It is the result or the effect of the action complained of which is significant. If it does, in fact, cause discrimination; if its effect is to impose on one person or group of persons obligations, penalties, or restrictive conditions not imposed on other members of community, it is discriminatory.

Is this policy discriminatory in this case because it denies birth fathers the opportunity to have salary top-up protection? Clearly the policy is discriminatory on its fact.

Issue 2 - Purpose

Adams in *University of Ottawa* provides a useful framework for the analysis of the issues in this case. Relying on the Supreme Court decisions in *Gibbs* and *Brooks*, Adams states at p. 9:

> The first step at hand is to determine the purpose of the section (referring to top-up) in all the circumstance. If different benefits are allocated pursuant to a common purpose as a result of characteristics that are not relevant to that common purpose discrimination may exist. However, if the benefits in question are allocated pursuant to different purposes, differences in benefits may not be helpful in determining discrimination.

The stated purpose of the tier 1 adoptive benefits according to the interest arbitration award of Peltz was to provide the adoptive parent some measure of first tier and salary protection in a manner similar to pregnancy leave. He makes a distinction of form (adoption) over function (parenting).

Issue 3 - Justification

Both adoptive leave and parental leave are benefits that are extended for the same purpose - facilitation of direct parental care. Labeling the benefit as more than mere childcare, does not detract from the function it is intended to protect, that is giving income security while parenting.

While Peltz attempted to avoid the potential challenge to his award by labeling the top-up a form of benefit akin to pregnancy leave, I believe on the evidence this is a distinction without a difference.

While it may be that adoption may have its unique challenges, so does parenting itself and overall the benefit is still one intended to facilitate direct parental care, not support because of pregnancy and childbirth.

Therefore, I am not satisfied there is a real justification for the impinged distinction. Based on all the evidence before me, and particular Dr. Lamb's expert evidence, I have determined that the applicable section providing top-up for adoptive parents is

discriminatory, and I have the authority to make such a determination. It is in breach of s. 9 of *The Human Rights Code*. The differential treatment relates to family status. Furthermore, I am not satisfied that the Division has met its onus to establish that there is a justification based on undue hardship.

Overall, I believe this finding is consistent with the intention of the legislature and with the majority of the jurisprudence in this country. I find Arbitrator Adams' analysis and findings in particular to be compelling and persuasive. I do not find Arbitrator Keller's decision in *Upper Canada* to be binding, particularly so because he does not comment on the leading jurisprudence in the area.

Subsequent to the end of the hearing, I had an opportunity to review the following two recent decisions:

1. *Ontario Secondary School Teachers' Federation v. Upper Canada District School Board* [2005] O.J. No. 4057 (Ontario Superior Court-Divisional Court);
2. *Reference re Employment Insurance Act* (Can.), Supreme Court of Canada, 2005 SCC 56

In the *Upper Canada* case, the Teachers' Federation applied for judicial review of Arbitrator Keller's decision *(cited above)*. The Court dismissed the application and found that the Arbitration Board did not error in finding that there was no violation of the *Human Rights Code*. The Court felt that there was no negative reflection on human dignity of biological parents, and that other arbitration decisions to the contrary were not binding as their evidentiary records were different.

In the *Reference* case, the Supreme Court of Canada held that ss. 22 and 23 of the *Employment Insurance Act* which pertain to maternity and parental benefits are constitutional. The Court found that the provision of income replacement benefits during maternity leave and parental leave does not trench on the provincial jurisdiction over property and civil rights.

Neither of these cases caused me to change my decision. In my view, the Supreme Court decision is instructive and supportive of the decision.

The following portions of the Supreme Court decision are particularly relevant:

> The parental benefits program arose out of a recommendation made by a task force established by the then Minister of Employment and Immigration, and was first implemented in 1984 out of a concern for fairness to adoptive parents *(Unemployment Insurance in the 1980s* (1981), at p. 70; *Act to amend the Unemployment Insurance Act, 1971 (No. 3)*, S.C. 1980-81-82-83, c. 150, s. 5).
>
> The purpose of benefits for adoptive parents is to enable the parents to care for the child who has been placed with them for adoption. Here again, the EIA does not govern parental leave. It merely allows parents who are absent from work for this purpose to receive income replacement benefits.
>
> The program was extended to all parents in response to the judgment of the Federal Court in *Schachter v. Canada*, [1988] 3 F.C. 515 (T.D.): *Act to amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, S.C. 1990, c. 40, s. 14. In that decision, Strayer J. described the discrimination faced by natural parents on the birth of their children. While adoptive parents were able to take time off work and receive benefits to care for their children, natural parents were denied that choice. Strayer J. regarded the distinction as unjustified discrimination against natural parents in relation to adoptive parents. The decision was appealed to the Court of Appeal and this Court on other issues, but the finding that the provision was discriminatory was not contested.

> This unjustified distinction had in fact already been noted, specifically in relation to natural fathers, in the Boyer Report, at p. 9, which considered their exclusion to be the most obvious flaw. The question was also addressed in the *Commission of Inquiry on Unemployment Insurance Report* (1986), at p. 123 (Forget Report), in which the exclusion was characterized as "surprising".
>
> I see no reason why parental benefits should be characterized differently from maternity benefits. In both cases, the benefits relate to the function of the reproduction of society. The status of adoptive parent carries with it all the rights and obligations of a natural parent. All parents have equal obligations. At a time when society is stressing the responsibility of both parents, they cannot be treated unequally. Such an approach would be anachronistic. Because of the discrimination that would occur if benefits were not paid to both natural and adoptive parents, parental benefits must be permitted. The inclusion of this type of benefits in the unemployment insurance plan is an extension of the plan that is made necessary by the equality rights that are also an integral part of our Constitution.
>
> As in the case of maternity benefits, the right of claimants to take time off work is governed not by the EIA, but by provincial legislation: *Act respecting labour standards*, s. 81.10.
>
> I therefore find that parental benefits, like maternity benefits, are in pith and substance a mechanism for providing replacement income when an interruption of employment occurs as a result of the birth or arrival of a child, and that it can be concluded from their pith and substance that Parliament may rely on the jurisdiction assigned to it under s. 91(2A) of the *Constitution Act, 1967*.

The Judges in the *Upper Canada* case did not have the benefit of the Supreme Court's comments as outlined. Furthermore, the Court did not refer to the Federal Court's decision in *Schachter*. The Supreme Court however expressed their views on *Schachter* in the *Reference* decision.

As well, the Court in *Upper Canada* deferred to the Arbitration Board's finding of fact on the expert evidence presented at the hearing. Lastly, I remain of the view that the Board and Court in *Upper Canada* were in error when they found the purpose of the

provisions were to respond to the special needs of adoptive parents when the purpose remains to provide income replacement during a period of leave for parenting.

Issue 4 - Remedy

The Association urged that there has been a violation of the *Code* as incorporated into the Agreement and an order that the Grievor be paid top-up. In the circumstances, the Association requested this Arbitration Board to make the determinations requested and not refer the issue back to the parties for bargaining because they have not been able to agree on the issue in the past.

In these particular circumstances I am ordering that the matter be referred back to the parties for review. This top-up provision was not freely negotiated by the parties. It was the subject of an award by an interest arbitrator who in so ordering took specific notice of the potential minimal financial impact on the Division.

I agree with the Division's counsel that in these circumstances the potential financial impact to extend the top-up requisition might be significant, and I am not prepared to burden the Division with these costs without giving them the opportunity to negotiate them. This issue is a problem for both the Association and the Division to resolve. I so order that the matter be remitted back to the parties to negotiate the matter over the next six (6) months.

The Board shall retain jurisdiction to deal with any matters arising out of this Award and to implement a remedy if the parties cannot agree.

I wish to thank the parties for their comprehensive submissions which were of great assistance in arriving at a decision.

DATED at the City of Winnipeg, in Manitoba, this 16 day of December, 2005.

MICHAEL D. WERIER,
Arbitrator

I, concur/dissent to the above Award.

GERALD D. PARKINSON,
Nominee for the Division

I concur/~~dissent~~ to the above Award.

MEL MYERS, Q.C.,
Nominee for the Association

The Board shall retain jurisdiction to deal with any matters arising out of this Award and to implement a remedy if the parties cannot agree.

I wish to thank the parties for their comprehensive submissions which were of great assistance in arriving at a decision.

DATED at the City of Winnipeg, in Manitoba, this 15 day of December, 2005.

MICHAEL D. WERIER,
Arbitrator

I, ~~concur~~/dissent to the above Award.

GERALD D. PARKINSON,
Nominee for the Division

I concur/dissent to the above Award.

MEL MYERS, Q.C.,
Nominee for the Association

IN THE MATTER OF: AN ARBITRATION

BETWEEN:

LOUIS RIEL SCHOOL DIVISION ("Division")

Employer

- and -

LOUIS RIEL TEACHERS' ASSOCIATION ("Association")

Union

RE: GRIEVANCE OF CHRISTOPHER CHAPMAN

DISSENT

I have had the opportunity to read the Majority Award in this matter and with respect I cannot concur. I do not disagree with the able setting out of the facts in the Majority Award.

I would not have decided this case on the basis of reference *Re: Employment Insurance Act (Can), Supreme Court of Canada 205 S.C.C.* 56 for two reasons.

Firstly, to my knowledge this case was not called to the attention of counsel or argued by counsel before us. If the majority were going to base their decision on that case, as has clearly occurred, counsel should have been invited to make representations as to the effect of the case.

Secondly, that case does not decide that the granting of an adoptive parent benefit constitutes discrimination under the Human Rights Code so that a violation of that Code exists if the same benefit is not afforded to a biological parent. The only issue before the Court in reference *Re: Employment Insurance* Act was irrelevant to this case.

The Court only held that it was not unconstitutional to provide in the *Employment Insurance Act* for benefits to both biological parents and adoptive parents.

I would have accepted the compelling statements of the Supreme Court of Canada in Schacter and held that Mr. Peltz was correct.

Further, I disagree with the majority's analysis on justification.

The Board did not deal with the binding fact that Arbitrator Peltz rejected the benefit for biological parents on the basis that it would be too expensive to the Division. His Award is binding on all parties on that point. He accepted the request that he award the benefit for adoptive parents on the basis that there was justification within the meaning of the Human Rights Code. That decision was binding on all parties. To accept the Association argument in this grievance is to effectively allow them to take the benefit of the Peltz Award but to appeal it. That is not possible under the *Public Schools Act*. They should be bound by Mr. Peltz's decision as to justification and we should not have gone further.

I will not comment on remedy at this time as the Board is anything but functus with respect to the course of action it may take with respect to remedy. However, I would have declined to award a remedy at all in view of the following:

1. Mr. Peltz made it clear that he would not have ordered the inclusion of the adoptive leave clause into the Collective Agreement if it was discriminatory under the Manitoba Human Rights Code to exclude biological parents from that benefit; and

2. There was no dispute but that the article now being challenged would not have been before Arbitrator Peltz for possible inclusion in the Collective Agreement were it not for the fact that the grieving party - the Louis Riel Teachers' Association - was asking that he put it in.

For all of the foregoing I would have dismissed the grievance.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15 day of December, 2005.

G.D. Parkinson, Board Member