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

SUPPLEMENTARY AWARD

BEFORE:	MICHAEL D. WERIER GERALD D. PARKINSON, Nominee for the Employer MEL MYERS, Nominee for the Union
APPEARANCES:	ROBERT A. SIMPSON for the Employer VALERIE MATTHEWS LEMIEUX for the Union
DATE OF ARBITRATION:	AUGUST 28, 2006
LOCATION OF ARBITRATION:	WINNIPEG, MANITOBA

BACKGROUND

In a majority ruling dated December 15, 2005, this Board ruled that a provision dealing with top-up of leave for adoptive parents inserted into the collective agreement as part of an interest arbitration award was discriminatory under the provisions of the Manitoba Human Rights Code.

We ordered that the parties attempt to negotiate a solution, failing which we would remain seized and determine the remedy, if necessary.

The parties were unsuccessful in negotiating a resolution and have requested that we direct a remedy. They are presently in negotiations for a new collective agreement.

A few preliminary comments regarding Arbitrator Peltz's award are warranted as they set the proper context for consideration of the appropriate remedy.

Firstly, the Association was seeking inclusion of the top-up of leave for adoptive parents and biological parents. The Employer was resisting inclusion of either in the agreement.

Secondly, Arbitrator Peltz made it clear that he would not have ordered the clause for adoptive parents if he believed it to be discriminatory.

Thirdly, he also made it clear that he was not awarding topped-up parental leave, in part due to cost consideration.

The relevant portion of this award that touched on the above points is as follows:

> 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 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 top-up will not apply under the St. Vital teachers' contract.

THE ISSUE

The issue in this case is a determination of the appropriate remedy in the circumstances. Flowing from this overall issue is whether in Manitoba a Board of Arbitration can vary or add to the terms of a collective agreement by bringing the

provisions of the agreement into conformity with human rights legislation.

The Association asserts that a clause should be read into the agreement providing the same benefits for biological parents as for adoptive parents.

The Employer's primary position is that the offending clause be struck from the agreement and that the parties be left to sort out the issue in negotiations or alternately in a further interest arbitration.

The parties' positions are set out in more detail below.

SUBMISSION OF THE ASSOCIATION

Ms. Matthews Lemieux on behalf of the Association noted that there had been a number of Supreme Court of Canada decisions since January which bear on the issue of remedy. She confirmed that the issue in this case was what was the appropriate remedy. She submitted that there must be a remedy, and that to simply defer the matter is not appropriate in the circumstances as it would not result in a final settlement. She insisted that there must be a remedy given by an arbitrator in a given case. This is particularly so when an arbitrator is charged with dealing with human rights legislation and the Charter.

Here, the deprivation of a remedy for the Grievor is to deny him top-up leave. To

simply say a clause is discriminatory without an effective remedy is not a remedy at all.

The Association referred to the following cases:

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) 150

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 submitted that the norms set out in human rights legislation are incorporated into the Agreement and this Board has the remedial authority to remedy the discrimination. The Association pointed to recent Supreme Court decisions where this Court has taken the opportunity to reinforce the importance of administrative tribunals providing appropriate remedies in human rights matters.

The Association also referred to the recent Supreme Court of Canada decision in *Bisaillon v. Concordia Hospital.* The Court said "grievance arbitrators have very broad powers, both explicit and implicit, so as to be able to grant any remedies needed to implement the collective agreement".

The Association also referred to the Supreme Court decision in *Doucet-Boudreau v. Nova Scotia* where the Court held:

> Purposive interpretation means that remedies provisions must be interpreted in a way that provides "a full, effective and meaningful remedy for Charter violations" since "a right, no matter how expansive in theory, is only as meaningful as the remedy provided for its breach". A purposive approach to remedies in a *Charter* context gives modern vitality to the ancient maxim *ubi jus, ibi rememdium:* where there is a right, there must be a remedy. More specifically, a purposive approach to remedies requires at least two things. First, the purpose of the right being protected must be promoted: courts must craft responsive remedies. Second, the purpose of the remedies provision must be promoted: Courts must craft effective remedies.

Here the parties have attempted to negotiate a resolution and have been unsuccessful. The Arbitration Board found the clause to be discriminatory and referred it back to the parties. Therefore it is not just or appropriate to refer it back to them for the process of collective bargaining or for it to be determined in an interest arbitration, particularly in view of the fact that there was not a finding of undue hardship. Budget choices are inherently political, and therefore reading in the clauses is preferable in the circumstances. The Association reiterated its position that the appropriate remedy is for the benefits be paid together with interest, and that the Agreement be amended to provide top-up for biological fathers on the same basis as adoptive parents.

SUBMISSION OF THE EMPLOYER

Mr. Simpson, on behalf of the Employer, indicated that his client was seeking something fair and appropriate in the circumstances. He noted that this case was not a denial of benefits case under the provisions of the collective agreement. He

submitted that this is a case where someone is seeking to gain a monetary benefit that was not negotiated or ordered.

The collective agreement was found to offend human rights legislation because of a clause incorporated into the agreement through an interest arbitration. The Grievor is trying to take advantage of this. The question is what is the Association prepared to give up in exchange for this benefit.

Mr. Simpson posed the question whether it is automatic the Division be required to pay for this benefit. The benefit that the Grievor is claiming is not something he can say he lost. It is something he never had because, like many things, it has not been negotiated and therefore what we are talking about in this case is not a deprivation. Mr. Simpson posed the question of whether the Grievor should gain a windfall because it is not something that was negotiated or something given up in exchange for something else. He would simply be getting this benefit because five years ago an arbitrator tried to give adoptive parents certain benefits.

Mr. Simpson referred back to the Peltz award and indicated that the award provided a benefit for adoptive parents as a first tier, and he specifically restricted it to this. It is apparent from the award that he had no intention of extending it, and if he thought it was discriminatory he would not have granted it. The Grievor is saying that he should be paid as well, and it is the Division's position that this is unfair in the circumstances.

The Arbitration Board ordered that the parties go back and try to resolve the situation. One party says the benefits should be extended, and the other party says adoptive leave should be removed from the agreement. It was noted that in other cases where there was a referral back, the Arbitration Boards, in those cases, directed that the set resolution be cost neutral. The parties dealing with this one issue in isolation could not reach an agreement because of a lack of such a direction. The parties are now dealing with this clause as part of overall negotiations. The parties can simply attempt to negotiate it as part of the give and take in bargaining, and if they are unsuccessful, they can proceed to an interest arbitrator who has the ability to deal with all aspects of the terms and conditions of employment.

It was submitted that the appropriate remedy is to simply strike down the adoptive leave provision entirely.

When Arbitrator Peltz imposed the adoptive leave, it was a nominal cost provision, and if he was not able to do it on a non-discriminatory basis, he would not have done it. In the circumstances, the proper remedy is to undo what Arbitrator Peltz did by removing the clause.

Mr. Simpson submitted that what is just and appropriate is to return the parties to the status quo that existed prior to the Peltz award and let nature take its course

from there.

The Association argued that there has to be a remedy, but the question is why deferral is not a remedy. It was also submitted that the *Billinkoff* decision by the Manitoba Court of Appeal has not been overturned by any of the subsequent Supreme Court of Canada cases. It was important to note that British Columbia and Ontario legislation grants an arbitrator various powers regarding remedial decisions which are not present in Manitoba law. The *Billinkoff* decision is right on point because here the union is asking for a benefit that was not provided for in the collective agreement, and *Billinkoff* is authority for the proposition that an arbitration board does not have the jurisdiction to do what the union is asking.

The cases following the Supreme Court decision in *Parry Sound* do not give an arbitrator the power to modify a collective agreement where the legislature has not given jurisdiction to the Board to do so. Reference was made to the *Schachter* decision, and particularly page 723 where the court indicated:

> Without a mandate based on a clear legislative objective, it would be imprudent for me to take the course of reading the excluded group into the legislation. A consideration of the budgetary implications of such a course of action further underlines this conclusion. This is not a situation comparable to that in *Tetreault-Gadoury, supra.* There, the budgetary implications of severing the provision in question were not extensive. The group of people not previously entitled to benefit by the scheme who would become eligible was a small, discrete group. Here, the excluded group sought to be included likely vastly outnumbers the group to whom the benefits were already extended.
>
> Given the nature of the benefit and the size of the group to whom it is

> sought to be extended, to read in natural parents would in these circumstances constitute a substantial intrusion into the legislation domain. This intrusion would be substantial enough to change potentially the nature of the scheme as a whole. If this Court were to dictate that the same benefits conferred on adoptive parents under s. 32 be extended to natural parents, the ensuing financial shake-up could mean that other benefits to other disadvantaged groups would have to be done away with to pay for the extension. Parliament and the provincial legislatures are much better equipped to assess the whole picture in formulating solutions in cases such as these. Clearly, the appropriate action for the Court to take is to declare the provision invalid but to suspend that declaration to allow the legislative body in question to weigh all the relevant factors in amending the legislation to meet constitutional requirements.

The Employer referred to the decision in *Ontario Hydro and Society of Ontario Hydro Professional and Administrative Employees*, and in particular, paragraphs 28, 33, and 34 where arbitrator Picher indicated that one should try to recreate the status quo realizing that both parties were responsible for the result.

Reliance was placed on the *Izaak Walton Killam Health Centre and N.S.N.U.* decision in 2003. In this decision Arbitrator Veniot indicates that striking out the offending clauses is an option and recognizes that if a benefit is extended to others it would have a cost impact. Arbitrator Veniot considers all the costs and benefits of the various options and refers the matter back to the parties and imposes two conditions. He places a sixty day time limit on negotiations and requires that the agreement be for the balance of the agreement and that it be cost neutral.

It was submitted that the concept of simply extending the benefit to a different and

larger group and requiring the Employer to bear the entire cost of this benefit is untenable, unfair, and inappropriate.

To give the Association what they want, bearing in mind that the Employer's position is that there is no jurisdiction to do so, is to give a monetary benefit that was not negotiated. The Employer asserted that they do not know who else is out there. Lastly, the Employer indicated that the Association relied on a number of cases that are not authority for what they indicate they are. None of them say that in the absences of legislative jurisdiction that an Arbitration Board can rewrite a collective agreement.

REPLY OF THE ASSOCIATION

In reply, Ms. Matthews Lemieux argued that the jurisdiction of an Arbitration Board to read-in a provision of the collective agreement to make it consistent with human rights legislation is not dependant on legislation. While the Manitoba Court of Appeal relied heavily on the decision in *Douglas/Kwantlen Faculty Association v. Douglas College* [1990] S.C.J. No. 124 File No. 20800, and the subsequent case *Nova Scotia (Workers' Compensation Board) v. Martin* [2003] 2 S.C.R. 504, [2003] S.C.J. No. 54, 2003 SCC 54 File Nos. 28372, 28370 decision, the Court, while agreeing with *Douglas,* sounded a caution in terms of relying on its reasoning. Ms. Matthews Lemieux pointed out that our Court of Appeal did not have the benefit of the *Martin* decision, and in particular referred to paragraphs 119 and 120 of the

Martin decision which state as follows:

> As the appellants point out, the policies that used to provide for individualized assessment of impairment in chronic pain cases have been repealed following the enactment of the challenged provisions of the Act and the FRP Regulations. Therefore, giving immediate effect to the declaration [page 579] of invalidity of these provisions could result in prejudice to injured workers affected by chronic pain, as the Board would then have no specific policies or provisions to rely on in such cases. While some default or residuary provisions of the Act and of the FRP Regulations as well as policies of the Board might apply, the results would likely be inconsistent, given the considerable discretion which would be left to the Board in chronic pain cases. The default rules might even prevent certain chronic pain sufferers from receiving any benefits, as was the case for Ms. Laseur. Allowing the challenged provisions to remain in force for a limited period of time would preserve the limited benefits of the current program until an appropriate legislative response to chronic pain can be implemented. Therefore, as the appellants requested, it is reasonable to postpone the general declaration of invalidity for six months from the date of this judgment: see *Schachter, supra*.
>
> This postponement, of course, does not affect the appellants' cases. Mr. Martin is clearly entitled to the benefits he has been claiming, as the challenged provisions stood as the only obstacle to his claims. I would thus reinstate the judgment rendered by the Appeals Tribunal in the Martin case on January 31, 2000.

Even if the Arbitration Board decides not to amend the agreement, there still must be a remedy for the Grievor. There is one other grievance filed subsequent to the decision, and one way to deal with the remedy would be to deal with it prospectively.

Ms. Matthews Lemieux further argued that if there was any doubt that you require specific legislation to amend the collective agreement, reference should be made to the *Isidore Garon ltee v.* Tremblay [2006] S.C.J. No. 3 2006 SCC 2, File Nos.

30171, 30172 decision, and in particular paragraphs 16 and 21 which state as follows:

> A desire to achieve an outcome favourable to the employees in a particular case cannot dictate which principles apply. The collective scheme must survive disputes involving individual rights and yet remain coherent. Employees will be better protected by a harmonious scheme than by an amalgam of mutually incompatible rules. Indeed, the objective of protecting employees is also at the heart of the second line of cases, which favours incorporating into the collective scheme the norms set out in the *Charter*, in human rights legislation and in certain labour relations statutes.
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> *Parry Sound* was decided in the same spirit. In that case, a probationary employee who had been discharged shortly after returning from maternity leave filed a grievance alleging discrimination. The Court had to decide whether such a grievance was authorized notwithstanding a clause in the collective agreement that allowed probationary employees to be discharged for any reason satisfactory to the employer and denied those employees access to arbitration. To make a finding on the arbitrator's jurisdiction, the Court had to determine whether there was a connection with the collective agreement (at para. 19). The Court stated the following (at paras. 26 and 28):
>
> > Management rights must be exercised not only in accordance with the express provisions of the collective agreement, but also in accordance with the employee's statutory rights .....
> >
> > [T]he substantive rights and obligations of employment-related statutes are implicit in each collective agreement over which an arbitrator has jurisdiction. A collective agreement might extend to an employer a broad right to manage the enterprise as it sees fit, but this right is circumscribed by the employee's statutory rights.

She indicated that there had been numerous decisions since that time in Alberta and Saskatchewan which have applied the *Parry Sound* decision.

Lastly, the Association argued that the Supreme Court has said that negotiations

take place in the context of *The Human Rights Act* and rights are now already contained in the collective agreement. There is a body of public law incorporated in the collective agreement. The Supreme Court says you should use purposive analysis when determining a remedy as well as rights. The Employer is asking for the clause to be striken from the Agreement. Ms. Matthews Lemieux posed a question as to how that is a remedy that is consistent with a purposive analysis.

DECISION

Arbitrator George Adams in the case of *The Association of Professors of the University of Ottawa and University of Ottawa* [1999] O.L.A.A. No. 945 85 L.A.C. (4th) 214 dealt with a similar issue as raised in this case. In issuing a supplementary award dealing with the remedy, he very clearly outlined the arguments on both sides of the issue and they warrant repeating. He stated at paragraphs 20 and 21:

> In favour of subtracting or nullifying the top-up benefit is the philosophy of free collective bargaining and that arbitrators are routinely instructed by both parties not to amend or alter collective agreements. The parties know their workplace and priorities best. Arbitrators are relative strangers and are not directly accountable to the constituencies of trade unions and employers. Arbitrators are not likely as expert as boards of inquiry constituted under the Human Rights Code. As well, the top-up provision in question was inserted relatively recently into the collective agreement. It was negotiated into the 1993-96 collective agreement and it would not appear that the Association attempted to equalize the benefit during the negotiations for the 1996-98 agreement. The grievance was then launched under the 1996-98 collective agreement.

> In favour of expanding the provision to all employees is the thrust of human rights legislation. To equalize benefits by denying to adoptive parents a hard fought for right achieved out of the cauldron of collective bargaining would be difficult to characterize as "a large and liberal" approach to implementing human rights policy. Further, the Employer has not presented evidence of its economic detriment or hardship should a benefit expanding remedy be granted. Indeed, the Employer has the ability to review any such detriment with the Association in future collective bargaining negotiations. Arbitrators hear Charter cases and have important expertise relevant to human rights legislation. Moreover, the counsel who appear before them often have substantial human rights litigation experience.

Arbitrator Adams goes on to say that the Employer was not obligated to provide a particular benefit, but once they embark on this path they cannot discriminate, and to deny the grievor access to a top-up benefit. To nullify the right accorded adoptive parents would be "insensitive to the policy of equality underlying human rights legislation".

As noted earlier, Arbitrator Veniot in the *Izaak Walton* case (cited above) takes a more cautious approach to the issue as he is particularly concerned about the cost implications of any action. Arbitrator Veniot directed that any settlement be cost neutral and any adjustments be agreement-long.

While I have great respect for Arbitrator Adams and while I recognize that the majority relied on his earlier decision in *The University of Ottawa* (cited above) to find the clause discriminatory, I am not persuaded on balance that the same remedy should be directed in this case.

In particular, there is a major difference in this case in that the Employer did not embark (emphasis mine) on the path of providing a top-up benefit. The clause was inserted by an arbitrator in an interest arbitration who believed it not to offend human rights legislation and who, after hearing all relevant information, including financial, did not feel it appropriate to extend the benefit across the board to biological parents.

This appreciation of the financial implication overall was reflected in the majority award when, in dealing with the issue of remedy, it was stated:

> 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.

Therefore, I believe that the particular facts of this case distinguish it from others such as *The University of Ottawa*, and in the circumstances, it would be

unreasonable and unfair to extend benefits to all parents and to so financially burden the School Division without a sunset clause. We are mindful of the initiative taken by the Grievor to challenge workplace discrimination.

In the circumstances we order that a provision for top-up of benefits for biological parents be inserted into the Agreement alongside the provision for adoptive parents. Both of these provisions however are to be limited in duration to the life of the existing collective agreement, but will not survive the expiry date of the agreement which was June 30, 2006. The Grievor will therefore be entitled to receive a top-up of pay for the period of leave of ten (10) weeks in the amount of ninety percent (90%) of his salary. We will retain jurisdiction to deal with any quantum issues for the Grievor and any others entitled to the benefit for the relevant timeframe.

We wish to thank the parties for their helpful presentations.

DATED at the City of Winnipeg, in Manitoba, this 13 day of Dec, 2006.

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

DISSENT OF MEL MYERS

This writer agrees with the majority award to:

1. entitle the grievor to receive a top-up of pay for the period of leave of ten (10) weeks in the amount of ninety percent (90%) of his salary.
2. amend the existing Collective Agreement by directing that a provision for top-up benefits for biological parents be inserted into the Collective Agreement alongside the existing provision for adoptive parents.

However, I disagree that these provisions be limited in duration to the life of the existing Collective Agreement and not survive the expiry date of the agreement which is dated June 30, 2006.

The majority of the arbitration award imposes a sunset clause in respect of the top-up benefits for biological parents and adoptive parents on the grounds that since there is a factual difference between this case and the decision in *The Association of Professors of the University of Ottawa and University of Ottawa* [1999] O.L.A.A. No. 945 85 L.A.C. (4th) 214 it would be unreasonable and unfair to impose a financial burden on the School Division by extending these benefits to all parents beyond June 30, 2006, which is the expiry date of the current Collective Agreement.

I agree with the majority award that there is a factual distinction between this case and the decision in the *University of Ottawa (supra)*, but in my view there is no difference between these decisions in substance. The provisions of the *Labour Relations Act, Public Schools Act* and *Human Rights Code in Manitoba* applies equally to Collective Agreement provisions resulting

from the mutual agreement between the Association and the School Division in traditional bargaining and collective agreement provisions which have been imposed as a result of an interest arbitration award. Once a provision is contained in a Collective Agreement, as a matter of law, it does not matter whether the Collective Agreement provision is as a result of collective bargaining or an interest arbitration award.

Arbitrator Adams in the *University of Ottawa (supra)* decision stated:

> When parties bargain in the shadow of human rights legislation, they are on notice that workplace discrimination will be dealt by arbitrators in a manner consistent with human rights legislation.

Although the provision for top-up benefits for biological parents was inserted into the Collective Agreement as a result of an arbitration award, and not through mutual agreement of both parties in collective bargaining, it was the obligation of this arbitration board, on finding a violation of the *Human Rights Code,* to provide an effective remedy in order to eliminate the discrimination from the Collective Agreement.

As a result of imposing a sunset clause, the majority award:

1. removes the top-up benefits from the Collective Agreement as of June 30, 2006, not only in respect of biological parents, but also in respect of adoptive parents.
2. penalizes the Association who successfully established, through the arbitration process, that there was a violation of the *Human Rights Code* in the Collective Agreement by failing to provide an effective remedy for this violation.

In respect of the potential financial impact of an arbitration award in respect of a top-up benefit relating to biological parents, I agree with the following statement of Arbitrator Adams in the *University of Ottawa (supra)* decision:

> . . . Further, the Employer has not presented evidence of its economic detriment or hardship should a benefit expanding remedy be granted. Indeed, the Employer has the ability to review any such detriment with the Association in future collective bargaining negotiations. . .

I note that the Collective Agreement under which this grievance was filed expired on June 30, 2006 and, as a result, the parties are now, or will be in the near future, engaged in collective bargaining for a new Collective Agreement. It would have been open to the School Division, in this round of collective bargaining, to address the issue of any potential financial burden as a result of the insertion into the Collective Agreement of a top-up benefit for biological parents.

For these reasons I disagree with the imposition of a sunset clause in the majority award.

Dated this 13th day of December, 2006.

MEL MYERS, Q.C.
Nominee for the Association