IN THE MATTER OF:

AN ARBITRATION BETWEEN:

THE SEINE RIVER SCHOOL DIVISION NO. 14,

(hereinafter called "the Division")

and

THE SEINE RIVER TEACHERS' ASSOCIATION NO. 14 of the MANITOBA TEACHERS' SOCIETY,

(hereinafter called "the Association")

and

PIERRETTE TIMSHEL

(hereinafter called the "Grievor")

ARBITRATION AWARD

The Arbitration Hearing in this matter took place on March 10, 1988. Mr. D.K Kells, Barrister, was the Nominee of the Division and Professor J. London, Q.C., was the Nominee of the Association and the Grievor. Mr. Jack M. Chapman, Q.C. was appointed to act as Chairperson. It should be noted that the original nominee of the Association and the Grievor was Mr. David Shrom. Mr. Shrom, due to a conflict, was unable to act and Professor London was appointed in his place. Both Mr. Kells and Professor London confirmed the appointment of the Chairperson, and counsel for the parties took no objection.

Mr. M. Myers, Q.C., appeared as counsel for the Association and the Grievor. Mr. R. Simpson, Barrister, appeared as counsel for the Division.

Counsel confirmed that there were no objections to the composition of the Arbitration Board or its jurisdiction to hear the matter. Counsel also confirmed that there was no other person who would be affected by our decision.

Mr. Myers, in a brief opening statement to the Board stated that, to a great extent, the arbitration before us was a repeat of an earlier arbitration. He specifically referred to an arbitration between the Agassiz School Division No. 13 and the Agassiz Division Association No. 13 of the Manitoba Teachers' Society relating to the grievance of Anne Longston. The Arbitration Board in that case was composed of Mr. Martin H. Freedman, Q.C., who acted as Chairperson, Mr. D.H. Kells was the Nominee of the Division and Mr. David Shrom was the Nominee of the Association. The Division sought to quash the majority award in The Court of Queen's Bench. The application was heard before Schwartz J. and dismissed. We will comment further on that case in greater detail.

Mr. Myers said that the dispute related to the application of the sick leave provisions of the Collective Agreement. He stated that the Grievor was off work because of the birth of her child, which occurred prior to the date when the Grievor's maternity leave was to commence. It was the Association's

submission that the Grievor was entitled to use some of her sick leave benefits during the time prior to her maternity leave commencing. He noted that there was very little disagreement as to the facts and that the claim was for sick leave benefits for the 8 day period commencing with her date of confinement. He pointed out that there was some difference in the facts in the Longston case and the case before us.

Mr. Simpson, in his opening statement, stated that the Division had received a request for maternity leave from the Grievor and that the request was granted. The child was born earlier than expected. Accordingly, the Division advanced the maternity leave to the date of confinement. In the Division's view, normal pregnancy, normal delivery and normal recovery did not constitute sickness and the Grievor was not entitled to utilize the sick leave provisions of the Collective Agreement.

Mr. Myers took the view that any condition which disabled an individual was to be treated as a sickness.

By agreement, a number of exhibits were entered. These were as follows.

1. Exhibit 1 Copy of 1987 Collective Agreement the Division and the Association.
2. Exhibit 2 Copy of extracts from the Collective Agreement.
3. Exhibit 3 French and English translations of the Grievor's request for maternity leave dated February 5, 1987.
4. Exhibit 4 Response to the Grievor (in English and French) granting the maternity leave.
5. Exhibit 5 Letter from the Division to Dr. Francis Lee dated April 27, 1987.
6. Exhibit 6 Letter from Dr. Francis Lee to the Division dated February 6, 1987.
7. Exhibit 7 Letter from the Association to the Division dated May 6, 1987 requesting a meeting.
8. Exhibit 8 Grievance filed on the 29th day of April 1987 by the Grievor.
9. Exhibit 9 Grievance filed by the Association dated May 8, 1987.
10. Exhibit 10 Letter from the Division to the Association denying the Grievances.

Counsel agreed that the claim being advanced was for 8 days of sick leave entitlement.

The Grievor gave evidence. At the relevant time she had been teaching for some 3 years. In February, 1987 she advised the Division (Exhibit 3) that she was pregnant and that her expected date of confinement was April 10, 1987. Her request was for maternity leave was to be effective from April 6, 1987 and to continue to June 30, 1987. On the evening of March 17, 1987 the Grievor realized that the birth of her child was imminent and accordingly attended the St. Boniface General Hospital. The baby was born early on March 18, 1987. The Grievor stated that after arriving at the hospital she was taken to a birthing room and her child was born without complications. She had a surgical procedure known as episiotomy. We were advised that this surgical procedure is utilized in approximately 80% of all births. We note that March 18, 1987 was a Wednesday. She remained in the hospital for 3 days, was discharged from the hospital on the Saturday and stayed at home in bed until the Monday. She stated that it took her approximately 6 weeks to recover her full physical and emotional health. She was asked whether she would have been able to teach during that period. She candidly replied that she thought she would have been able to teach, but "not as well as normally". She confirmed that she received advice that the maternity leave benefits had been advanced to March 18, 1987; however she did not consent to the advancement. Under the terms of the Collective Agreement she had approximately 30 days of sick leave due, but was only requesting benefits for 8 days.

During cross-examination, she confirmed that it was her intention to be absent from teaching from the expected date of her confinement to the end of the school year. She had worked on March 17, 1987 and the baby was born on March 18, 1987. She confirmed that the only untoward occurrence was that the baby was born earlier than anticipated.

No further evidence was called by the Association, and the Division did not call any witnesses. As stated, the facts are not in dispute.

The Arbitration Board was advised, as an agreed fact, that the spring break for the School Division commenced March 30, 1987. Accordingly that week, i.e., from March 30, 1987 to April 3, 1987 would not be counted. The maternity leave was originally scheduled to commence on April 6, 1987. Accordingly the 8 teaching days in issue are March 18, 19, 20, 23, 24, 25, 26 and 27.

Exhibit 8, being the Grievance filed by the Grievor reads as follows:

G R I E V A N C E

PIERRETTE TIMSHEL grieves that there is a difference between herself and THE SEINE RIVER SCHOOL DIVISION NO. 14 (hereinafter referred to as "the School Division") relating to the meaning and/or application and/or violation of Article 6 of the Collective Agreement. The School Division has misapplied and/or misinterpreted and/or violated Article 6 of the Collective Agreement by failing to pay Pierrette Timshel sick leave with pay for the period of March 18, 1987 to March 27, 1987.

PIERRETTE TIMSHEL requests that the School Division:

1. acknowledge that it has misapplied and/or misinterpreted and/or violated Article 6 Collective Agreement; and

2. comply with Article 6 of the Collective Agreement and pay to her sick leave with pay for the period March 18, 1987 to March 27, 1987.

DATED at St. Pierre Jolys, in the Province of Manitoba, this 29th day of April, 1987.
"Pierrette Timshel"
Pierrette Timshel"

Exhibit 9, being the Grievance filed by the Association, reads as follows:

GRIEVANCE

THE SEINE RIVER DIVISION ASSOCIATION NO. 14 OF THE MANITOBA TEACHERS' SOCIETY (hereinafter referred to as "the Association") grieves that there is a difference between the Association and THE SEINE RIVER SCHOOL DIVISION NO. 14 (hereinafter referred to as "the School Division") relating to the meaning and/or application and/or violation of Article 6 of the Collective Agreement between the Association and the School Division. The School Division has misapplied and/or misinterpreted and/or violated Article 6 of the Collective Agreement by failing to pay Pierrette Timshel sick leave with pay for the period March 18, 1987 to March 27, 1987.

The Association requests that the School Division:

(1) acknowledge that it has misapplied and/or misinterpreted and/or violated Article 6 of the Collective Agreement; and

(2) comply with Article 6 of the Collective Agreement and pay to Pierrette Timshel sick leave with pay for the period March 18, 1987 to March 27, 1987.

DATED at Lorette Collegiate, in the Province of Manitoba, this 8th day of May, 1987.

THE SEINE RIVER DIVISION ASSOCIATION NO. 14 OF THE MANITOBA TEACHERS' SOCIETY

Per: Ron Nicolas
President

Exhibit 5, being the letter from the Division to Dr. Lee dated April 27, 1987 reads as follows:

April 27, 1987

Dr. Francis Lee
906 Medical Arts
233 Kennedy Street
Winnipeg, Manitoba

R3C 3J5

Dear Dr. Lee:

Re: Pierrette Timshel

Further to your memorandum dated January 29, 1987 in which you indicated that Mrs. Pierrette Timshel's expected date of confinement would be April 10, 1987, the Seine River School Division granted her request for a maternity leave effective April 6th until June 30, 1987.

As you no doubt know, the baby arrived on March 18, 1987 and, therefore, the School Division advanced the starting date of the maternity leave to March 18, 1987 to coincide with the actual date of delivery.

Since that time, the School Division has received a verbal request that the eight (8) working days between March 18th and April 6th be paid in accordance with the sick leave provisional of the Collective Agreement. In order to permit the administration to further consider this request, we would like to know your professional opinion as to whether or not Mrs. Timshel was unable to perform her teaching duties during this period due to illness or due to the delivery of the child.

Thank you for your cooperation in this regard.

Yours truly,

"W. Sparkes"
Wendell Sparkes
Superintendent"
(Emphasis added)

Dr. Lee's response to the above letter was filed as Exhibit 6, and reads as follows:

May 6/87

THE SEINE RIVER SCHOOL DIV. #14
192 CENTRAL AVE, C.P. 160
STE. ANNE, MANITOBA
ROA lRO

RE: PIERRETTE TIMSHEL

DEAR WENDELL SPARKES:

As per your letter, Pierrette Timshel delivered on March 18/87 and from March 18/87 to April 6/87 was unable to go back to work because of the delivery of the baby and it is not because of illness of any other sort. I hope this will be of satisfaction to you.

Yours truly,

"Francis Lee"
FRANCIS LEE, M.D."
(Emphasis added)

Mr. Myers submitted that, with the exceptions of the nongranting of the sick leave and the unilateral advancement of the maternity leave, the Collective Agreement had been complied with by both parties. He stated that the request was under Article 6 of the Collective Agreement. There was no dispute that the Grievor, under Article 6.03 had some 30 days of unused sick leave to her credit Article 6 reads as follows:

"ARTICLE 6 SICK LEAVE

6.01 Where a teacher is sick, he/she shall, subject to Article 6.02, be entitled to sick leave during his/her sickness and to be paid his/her salary during his/her sick leave; but subject to Article 6.03 the leave shall not exceed 20 teaching days in any school year.

6.02 The Board may require that the sickness be certified by a physician who may be appointed by the Board.

6.03 Where the employment of a teacher is continued for more than one year, the unused portion of the sick leave in any year(s) shall be carried forward and accumulated from year to year to a maximum of:
40 days in the second year
60 days in the third year
75 days in the fourth and subsequent years

6.04 Article 6.03 shall be deemed to have been in effect for all teachers employed in the Division after January 1st, 1969.

6.05 Teachers employed on a parttime or temporary basis and who have a contract (Form 2A) with the Division, shall be granted sick leave with pay prorated on fulltime equivalents."

Mr. Myers made reference to various provisions of The Public Schools Act, S.M. 1980, c. 33, Cap. P250 and The Employment Standards Act, S.M. 1980, Cap. E110.

He stressed that the Grievor and the Association were not claiming a violation of any particular statute only of the Collective Agreement. He referred specifically to The Public Schools Act which specified that the parties were bound by the terms of a Collective Agreement and that in the event of a dispute the matter would be referred to arbitration.

He noted that under Article 6.01, the precondition of entitlement was:

> "... where a teacher is sick, he/she shall, be entitled to sick leave during his/her sickness and to be paid his/her salary during his/her sick leave: ..."

In his view, the Division could not unilaterally deny granting a benefit provided in the Collective Agreement and that the Grievor could either claim leave with pay (sick leave), or without pay (maternity leave). She had chosen to claim sick leave with pay for the 8 day period. He submitted that sick leave was one of the benefits bargained for between the parties and was part of the compensation package. The issue we have to determine is whether or not the Grievor is entitled to be paid the sick leave benefits for the 8 day period during which, he submitted, she was disabled. He argued that if an employee was disabled, he/she was entitled to receive his/her sick pay notwithstanding the cause of the disability. It was an earned and vested benefit. He distinguished the facts in the Longston case as it involved a Cesarean Section, whereas the Grievor was disabled as a result of the "normal" delivery. He referred to the letter from Dr. Lee (supra) and submitted that the doctor confirmed that the Grievor was unable to work because of the delivery and not because of any other illness. In his view this letter implied that she was "ill" because of the delivery.

Mr. Simpson did not agree with the submissions of Mr. Myers. In commenting on Exhibit 6, he argued that it was unreasonable to interpret the letter from Dr. Lee as stating that the Grievor was "ill". He submitted that we should accept the decision of Arbitrator Freedman who, in the Longston case, chose not to attach any significance to certain words chosen by the doctor.

He agreed that the facts were not in dispute. He stated that there were no untoward complications in the Grievor's pregnancy and, in fact, she had worked the day before her confinement. She was only

hospitalized 3 days. She had both a completely "normal" pregnancy and delivery. It was clear that the Grievor and her physician could only estimate the expected date of confinement. The child was born earlier and the Division simply accelerated the maternity leave provisions of the Collective Agreement. These benefits are specified under Article 7 of the Collective Agreement (Exhibit 1) and read as follows:

> "ARTICLE 7 MATERNITY LEAVE
>
> 7.01 Every female employee with one or more years of service in the Division covered by the Collective Agreement shall be entitled to maternity leave.
>
> 7.02 To request maternity leave, the employee shall make written application to the Division not later than four weeks before the leave is to commence. A doctor's certificate giving expected delivery date must accompany the written application.
>
> 7.03 The conditions of maternity leave shall be determined to the mutual satisfaction of the employee and the Board.
>
> 7.04 Following the mutual agreement by the employee and the Board on the conditions of the maternity leave to be taken, the Board will provide the teacher with a written memorandum of the agreement, including the statement that, at the termination of the maternity leave, the employee will be reinstated in the position occupied by her at the time such leave commenced or in a comparable position with not less than the same wages and benefits.
>
> 7.05 Where no agreement is reached between the employee and the Board pursuant to Article 7.03, then the employee concerned shall be granted leave according to provisions in current legislation.
>
> 7.06 Nothing in the foregoing shall reduce the rights of the employee with respect to maternity leave which is provided in current legislation."

He said the actions of the Division were reasonable and that the Grievor was not entitled to be paid sick leave for the 8 days.

He also submitted that if the child had been born at any time after April 6, 1987, the Grievor would not have made any claim for sick leave benefits as she intended to avail herself of the maternity leave provisions and would have collected benefits under the provisions of The Unemployment Insurance Act. He noted that there were no complications to her pregnancy and/or delivery, and that it was only because of her unexpected early confinement that she was advancing her claim. He distinguished the facts in this case from those in the Longston case as follows:

1. In the Longston case there was no application for maternity leave.
2. Mrs. Longston's child was delivered by Cesarean Section.
3. The Collective Agreement in the Agassiz School Division did not provide for specific maternity benefits but simply made reference to The Employment Standards Act.

Mr. Simpson referred to various sections of The Public Schools Act and in particular to the requirements for the Form 2 contract. In particular, he referred to Article 5(c) of that contract which made reference to sickness as authorized under the statutes. He noted that Sections 93(1) to 93(6) of The Public Schools Act dealt with sick leave entitlement. He pointed out, as we have noted earlier, that Article 6.01 of the Collective Agreement has a specific precondition of receiving sick leave benefits, i.e. that the teacher be "sick". In his view we could not interpret "sick" under the Collective Agreement without reference to the Statutes and the Form 2 contract. He noted that in each the prerequisite of entitlement was that an applicant had to be "sick".

He stated that even though the Grievor had an accumulation of sick leave time, the onus was upon her to prove a basic requirement, i.e., that she was "sick". Accordingly we would have to determine whether she was "sick" after a normal delivery. If not, she would not be entitled to any benefits.

He noted that the Legislature had clearly recognized that the specifying of a date of confinement was, at the best, an estimate, and referred to some sections of The Employment Standards Act, as follows:

> **"Maternity leave.**
>
> 34.1(1) Every female employee
>
> (a) who has completed twelve consecutive months of employment for or with an employer;
>
> (b) who submits to her employer an application in writing for leave under this subsection at least four weeks before the day specified by her in the application as the day on which she intends to commence such leave; and
>
> (c) who provides her employer with a certificate of a duly qualified medical practitioner certifying that she is pregnant and specifying the estimated date of her delivery;
>
> is entitled to and shall be granted maternity leave consisting of
>
> (d) a period, not exceeding 17 weeks if delivery occurs on or before the date of delivery specified in the certificate mentioned in clause (c); or
>
> (e) a period of 17 weeks plus an additional period equal to the period between the date of delivery specified in the certificate mentioned in clause (c) and the actual date of delivery, if delivery occurs after the date mentioned in that certificate.
>
> (Emphasis added).

He also noted Section 34.1(1.1) which reads as follows:

> **Commencement and terminating dates of leave.**
>
> 34.1(1.1) Maternity leave granted to a female employee under subsection (1) shall commence no earlier than 11 weeks preceding the date specified in the certificate mentioned in clause (1)(c) and shall terminate no later than 17 weeks following the actual date of delivery." (Emphasis added).

In his view, we were not entitled to disregard the statutory provisions.

Mr. Simpson submitted that the parties had, under the Collective Agreement, developed two separate schemes, one for sickness and one for maternity leave. The Grievor had opted for maternity leave. He argued that it could not be said that sick leave applied to maternity leave.

Mr. Simpson emphasized that the Grievor's pregnancy was "normal". This was not the type of case where a pregnancy related sickness such as high blood pressure, toxemia or other similar illnesses developed. He noted that the Grievor had confirmed that the delivery was "normal" and there were no complications. He submitted that if the Grievor, or any pregnant woman under such circumstances was asked if she were sick, she would reply no.

Mr. Simpson, as did Mr. Myers, referred to a vast number of arbitral and judicial precedents and we will comment on some of them further in this award. He submitted that the Division was entitled to commence the maternity leave benefits earlier. He noted that the grievor in the Longston case had not applied for these maternity benefits. In this case Mrs. Timshel clearly applied for maternity leave and it had been granted.

In conclusion, he submitted the following:

1. To be entitled to the benefits of the Collective Agreement the Grievor would have to be "sick".
2. "Sickness" does not include anything arising as a result of a normal pregnancy or delivery of a child.
3. The parties had agreed on two separate schemes and they were mutually exclusive, i.e., maternity leave or sick leave.
4. In the case before us the Grievor had applied for maternity leave, and the Employer was entitled to advance the date to her actual date of confinement. This was certainly contemplated by the legislation (supra) which anticipated under 34.1(1) of The Employment Standards Act and 34.1(1.1) that maternity leave benefits could commence earlier than the date under certain conditions.
5. If the Grievor was not on maternity leave then she was simply on an unpaid leave of absence. In his view, she could not be determined to be on sick leave.

In a final comment, Mr. Myers stated that he disagreed with the position of the Division that it could unilaterally change the commencement date of maternity leave. He also disputed that the two "paths chosen by the parties" were mutually exclusive. In his view, the parties had agreed upon those paths and a member of the Association was not restricted to choosing one or the other.

Counsel referred us to a very substantial number of judicial and arbitral authorities. We have considered all of these although we may not comment about all of them. Aside from the Statues previously referred to and the decisions in the Longston grievance, we have reviewed and considered the following:

1. Re Cominco Ltd. and United Steelworkers, Local 9705, 24 L.A.C. (3d) 32.
2. Re Tracey and the Crown in Right of Ontario (Ministry of Correctional Services), 28 L.A.C. (2d) 302.
3. Re Simon Fraser University and Association of University and College Employees, Local 2, 8 L.A C. (3d) 385.
4. Re Board of Education for the City of Toronto and Ontario Secondary School Teachers' Federation, District 15. 9 LA.C. (3d) 104.
5. Re Oshawa General Hospital and Ontario Nurses' Association, 16 L.A.C. (3d) 65.
6. Re Metropolitan General Hospital and Ontario Nurses' Association, 18 L.A.C. (3d) 411.
7. Re Metropolitan Separate School Board and Ontario English Catholic Teachers' Association et al. 16 L.A.C. (3d) 353.
8. Re Windsor Raceway Holdings Ltd. and Hotel & Restaurant Employees' Union, Local 743, 345.
9. Re Tellier Cohen v. Treasury Board, 82 C.L.L.C. 16, 555.
10. Re Toronto Board of Education and Ontario Secondary School Teachers' Federation, 15 L.A.C. (2d) 1.
11. Re Northern Electric Co. Ltd. and United Automobile Workers, Local 1530, 6 L.A.C. (2d) 181.
12. Re Central Newfoundland Hospital Corp. and Canadian Union of Public Employees, Local 990, 9 L.A.C. (2d) 264.
13. Re Canadian Union of Public Employees, Local 840, and Corporation of the Borough of York, 22 L.A.C. 389.
14. Maloney v. St. Helens Industrial Cooperative Society. Ltd., 1982 A.E.R., 437.
15. Washington Publishers Association, 39 LA. 159.
16. St. James Assiniboia Teachers' Association and St. James Assiniboia School Division No. 2 (Sutton Grievance) (Kroft, April 6, 1978).
17. Canadian Air Line Flight Attendants' Association v. Pacific Western Airlines Ltd., 1981 5 W.W.R., 455.
18. The City of Winnipeg v. Canadian Union of Public Employees, Local 500, Baert Grievance (Freedman) July 4, 1986.
19. Truscott v. Board of Oxbow School Unit No. 1, Saskatchewan Court of Appeal, May 7, 1976.

20. The Boards of Education and the Government of Saskatchewan v. The Teachers of Saskatchewan (Snyder Grievance) (Smith, June 30, 1983).
21. Re Sola Basic Ltd. and International Assoc. of Machinists, Local Lodge 1168, 11 L.A.C. (2d) 328.
22. Boarelli v. Flannigan 36 D.LR. (3d) 4.

We do not propose to review all of the above. Arbitrator Freedman in the Longston case reviewed many of the primary authorities in a clear and succinct way and we do not feel it necessary to fully review them again. However, we do feel it worthwhile to comment briefly on some of the decisions.

Many of the cases deal with pregnancy related illness and we do not need to recite jurisprudence which has been well established. In those particular cases we are referring to such conditions as toxemia, high blood pressure and other similar ailments.

Pregnancy per se has historically not been considered by arbitrators or Courts to be the same as a sickness, and so merely because a person happens to be pregnant, she will not be entitled to sick leave or disability benefits. The obvious fact that a person is in a sense disabled and unable to come to work for at least some time due to even the most routine pregnancy generally has not been considered as an entitlement to paid sick leave, at least until most recently. In the past, such a person has had to rely upon provisions such as those of section 34.1 of The Employment Standards Act and sections 18.04 and 18.05 of the Collective Agreement in order to claim an unpaid maternity leave.

If, before going on maternity leave, a disability not directly related to the pregnancy somehow arose, then typically the employee would be entitled to sick leave. For example, where an employee suffered from a hypertension condition prior to the pregnancy, which could not be treated during the pregnancy, she was entitled to go on sick leave (Re Metropolitan Separate School Board and Ontario English Catholic Teachers' Association (1984), 16 L.A.C. (3d) 353, Ontario). Similarly, where a pregnancy aggravated a preexisting back problem, an employee was entitled to sick leave (Re Cominco Ltd. and United Steelworkers, Local 9705 (1986), 24 L.A.C. (3d) 32, B.C.).

In cases where the pregnancy was somehow different than normal, and so caused a disability, the degree of abnormality was the key factor in determining whether the employee was properly on sick or maternity leave. For example, where a complication of the pregnancy endangered fetal growth, the employee was entitled to take sick leave because she was considered to be in an *"abnormal, undesirable and unhealthy bodily condition"* (Re Hotel Dieu St Joseph Hospital and O.N.A. (1985), 20 L.A.C. (3d) 29, Ontario). Where an employee suffered from spotting and cramps but could not supply medical documentation requiring her to stay at home under bed rest, she was considered to not be entitled to sick leave (Re Windsor Raceway Holdings Ltd. (1976), 13 L.A.C. (2d) 345, Ontario).

Without specifically referring to each of the many cases, suffice it to say that the Boards or Courts typically would consider the definition of *"sickness'","disability", "maternity leave"* or *"pregnancy"* contained in the collective agreement, if there were such definitions, and then apply these to the specific type and degree of disability of the employee. Barring determinative language in the collective agreement, in most cases, the decisive issue was whether or not the pregnancy was *"normal"*.

This approach has led to a repeated exercise in drawing either fine or artificial distinctions between cases, which to some extent has depended somewhat upon the prevailing attitudes of the day concerning pregnancies and what is or is not *"normal"*. More importantly, and perhaps because of an increasing concern with equal rights for women, the classification process has undergone a noticeable shift to a limiting of the definition of that which is *"normal"*, and the converse broadening of the adjudicative definition of *"sickness"* or *"disability"*. "

This shift became evident as long ago as 1971 in Re C.U.P.E., Local 840 and Corporation of Borough of York (1971), 22 L.A.C. 389 (Ontario), which until the last year or so stood alone as support for the proposition that even a normal pregnancy without complications could properly result in sick pay, at least for the period when the employee suffers from *"pair', discomfort, and physical sickness, making it impossible for her to perform her usual work" (p.* 395).

In TellierCohen v. Treasury Board (1982), 82 C.L.L.C. 17,007 the Canadian Human Rights Commission accepted this reasoning; and the Board of Arbitration in Manitoba did so last year in Re Agassiz School Division No. 13 and Manitoba Teachers' Society (1987), 28 L.A.C. (3d) 420, upheld on review at [1987] 5 W.W.R. 510 (Man. Q.B.). In Agassiz, the majority of the Arbitration Board (Martin Freedman and David Shrom) held that

> "when the condition of pregnancy reaches the stage, whether by virtue of a pathological condition (anticipated or otherwise) associated with pregnancy, or whether by the simple effluxion of time leading to the delivery and confinement stage, that the female employee is unable to perform her normal duties of employment her condition is then properly characterized as a condition of sickness, according to the commonly understood meaning of that word... We agree with the observations of the board in the Tracey case that pregnancy per se is not a condition creating eligibility for compensation, but it is our view that inability to work due to or consequential upon pregnancy is such a condition. We are of the view that the inability to work as a result of a normal delivery and confinement is as much a *'sickness'* as is an inability to work brought on by, for example, a condition of toxemia during the course of the pregnancy." (at p. 431)

In the Queen's Bench, Mr. Justice Schwartz held that because the grievor did not give a "*normal natural birth to her child"*, due to the earlier than expected delivery by Cesarean Section, she was *"sick"*. He also stated that *"this court does not find it necessary to adopt the reasons of the majority'* with respect to the above quoted comments, and so he avoided deciding whether or not a *"normal"* pregnancy would permit sick leave.

While Mr. Justice Schwartz did not make that decision, it is significant that he classified a birth by Cesarean Section as something other than *"normal",* and so resulting in sick leave for the employee. This is in contrast to Re Tracey and the Crown in Right of Ontario (1981), 28 L.A.C. (2d) 302 (Ontario) in which a clause in the collective agreement granting maternity leave for *"the purposes of childbirth "* was seen as broad enough to include birth by Cesarean Section, despite the obvious sympathy of the Board for the grievor's position.

In both cases the employee had not applied for maternity leave, and was instead requesting sick leave. It is true that in Tracey the definition of *"maternity leave"* in the collective agreement may have been determinative, and in Agassiz there was no such troublesome definition to overcome to grant sick leave, but the fact remains that Mr. Justice Schwartz could have, but chose not to restrict the application of sick leave for pregnant employees. While not going as far as Messrs. Freedman and Shrom, Mr. Justice Schwartz expanded the potential application of such benefits.

Of significance is the fact that the parties have chosen specific wordings with respect to maternity leave. In the Agassiz Division Agreement, the reference to maternity leave simply incorporated by reference the provisions of The Employment Standards Act. Article 7.06 of Exhibit 1 confirms that rights under The Employment Standards Act cannot be reduced by virtue of the Collective Agreement.

It is always dangerous for any arbitration board to accept the principles enunciated by another arbitration board without carefully perusing the collective agreements involved. However, we specifically note the comments of Arbitrator, Chertkow in the Re Cominco Ltd. and United Steelworkers, Local 9705 (supra) where he says at page 38 as follows:

"I also note in passing that art. 22 of the collective agreement does not give the employer the right to place any employee on pregnancy leave at its discretion. Pregnancy leave comes about only at the request of the employee. She has the right to choose, within the timelimit constraints of that provision, when she will take her pregnancy leave. The decision of the company to unilaterally place her on maternity leave on December 11, 1985, was in error..."

(Emphasis added)

Arbitrator Hope in Re Simon Fraser University and Association of University and College Employees. Local 2 (supra) said at page 400 as follows:

"...Having considered all the evidence and the representation of the parties, we find that a pregnancy, per se, is not a sickness. It is a normal biological function. It would be both a distortion and an insult to characterize a pregnancy as a "sickness". While a pregnant woman may suffer real illness because of her pregnancy, the pregnancy itself cannot be construed as an illness.

I agree with that reasoning and I go so far as to say that the use of the term "pregnancy" in the context of the ability of an employee to perform work must be taken as excluding rather than including illness and disability, whether or not it is related to the pregnancy. In the result, the grievance must be granted.

...The submission of the employer that its response in denying the application for sickleave was based upon the fact that the grievor was already on maternity leave ignores the fact that she was placed on maternity leave by the employer. While it is correct for the employer to say that an employee on maternity leave cannot collect sickbenefits. the circumstances whereby the employee comes to be on maternity leave cannot be ignored in assessing her rights. The grievor should have been granted sickleave and she is entitled to be compensated for whatever she may have lost in terms of benefits by reason of the denial of her application for sickleaave..."

(Emphasis added).

The Arbitrator in Re Metropolitan Separate School Board and Ontario English Catholic Teachers' Association et al (supra) at page 364 and dealing with the Ontario legislation, (which in our view is quite similar to the Manitoba legislation), said as follows:

"...In the alternative, we hold that the second sentence of art. 22.07(d) is not an accurate reflection of the rights and responsibilities set out in s. 35 of the Employment Standards Act and that, to the extent that the article attempts to expand the right of the employer to adjust the timing of a maternity leave to accommodate an illness arising out of a pregnancy as opposed to the pregnancy itself as discussed in Re Simon Fraser University, supra, the article contravenes the Employment Standards Act and can be given no force and effect. We think it highly unlikely that the Legislature intended an employer to have the right to accelerate the commencement of a maternity leave because of an illness arising out of pregnancy that might affect the performance of an employee's work, particularly when it is realized that such illnesses may arise in the very early months of a woman's pregnancy with the result that an accelerated pregnancy or maternity leave could expire prior to the actual delivery date... "

It is important to note that none of The Employment Standards Act, The Public Schools Act or the Collective Agreement define the term "sick". Arbitrator Freedman, and Schwartz, J., in the Longston case referred to various definitions of "sick" and adopted the statements of the Court of Appeal in England in Maloney v. St. Helens Industrial Cooperative Society, Ltd., (supra).

We note the statement by Lord Justice Scrutton at page 438:

... there is a wellrecognized meaning of the word in the English language which contrasts sickness with health, and does not trouble about either the cause of the sickness or the nature of the ailment. 'Sickness' which prevents you being in perfect health, refers to bodily incapacity as compared with health, which is the body in full capacity."

Arbitrator Freedman also made reference to the Washington Publishers Association, (supra). We believe that a further comment at page 160 of that decision should be noted, especially as the Grievor in that

case had a "normal pregnancy and delivery". Such was the case with Mrs. Timshel. Arbitrator Katton said:

> "...I am satisfied it is more accurate to say that pregnancy is a physiological condition, involving substantial changes in various organs of the mother's body. We may properly take 'judicial notice' that in these times and in this community (as in most others), it is usual and generally considered imperative that a pregnant woman be attended by a physician before, during, and after confinement, and that almost all babies are delivered in hospitals. Similarly, there is no need to resort to technical or scientific sources in order to be aware that labor and confinement result in some amount of trauma and debilitation. Such was the situation here, as shown by the physician's report and the testimony of Mrs. N herself. In everyday language, she went to the hospital to have a baby; she was attended by a doctor; leaving the hospital in three days. She went through a process of healing and convalescence; and after an absence of six weeks she was able to go back to work. She had no infection or other complication and it is not claimed that she was gravely ill. On the other hand, what she suffered was clearly much more than a mere trifling or passing indisposition: it was a substantial impairment of her strength and her body functions, which made it impossible for her to perform her usual work. It would be unrealistic to hold that she was not entitled to the sickness benefits above described."
>
> (Emphasis added).

We note the comments of Chief Justice Culliton of the Saskatchewan Court of Appeal, in Truscott v. Board of Oxbow School Unit No. 1 (supra) at page 2:

> "...'Sickness' is usually defined as an illness or indisposition arising from any cause..."

and at page 3:

> "...In my opinion the definition suggested by Scrutton, L.J., is that which applies to the word 'sickness' as used in Section 236(1) of The School Act. In other words, 'sickness' in that Section means sickness whatever may be its cause..."

We wish to emphasize that although we have not referred to all of the cases cited, we have nevertheless considered them carefully.

We are satisfied that the Employer does not unilaterally have the right to accelerate the maternity leave provisions. This principle is clearly established by the cases cited and commented on. The Collective Agreement does not grant this right to the Division nor does The Employment Standards Act.

The essence of the issue before us is whether a pregnant woman who has a normal pregnancy and then has a "normal" delivery, prior to the date of maternity leave commencing, is entitled to sick leave benefits. The authorities indicate several approaches. One line of cases says that any illness related to pregnancy should be excluded from sick leave provisions. We note that there is no such specific restriction in the Collective Agreement here. Some other cases suggest that illness arising as a result of pregnancy should qualify for sick leave benefits. An even more enlightened approach is that some aspects of any pregnancy and delivery may meet the qualification of being "sick".

In this case we are concerned with the 8 day period commencing with the date of confinement. There is no question that the Grievor had a "normal" confinement, albeit approximately 3 weeks earlier than anticipated.

We note that the decision of Arbitrator Kroft (as he then was) in St. James Assiniboia Teachers' Association and St. James Assiniboia School Division No. 2 (supra) relating to the grievance of Maureen Sutton. The majority of the Board referred to a number of the cases we have cited and stated:

> "...while distinguishable in some respects, all proceed on the same premises do we, namely that pregnancy is a health welcome event for women and that the complications thereof are tragic and unexpected events. The former is a natural state, the latter denotes an illness."

While pregnancy may well be a "healthy welcome event" (in most cases), the state of being pregnant is not normal, in the sense that the vast majority of women are not pregnant for any substantial portion of their lives. Presumably there are some attendant discomforts of being pregnant. Those discomforts do not, under normal circumstances, constitute being "sick". We agree that the state of pregnancy, per se, is not in itself a disability or sickness.

The Grievor taught her classes on March 17, 1987. There is no evidence before us that she suffered any illness as a result of her pregnancy which required her to be absent from her teaching duties. We may safely say, as was confirmed by the Grievor, that her pregnancy was completely "normal". On March 18th she was admitted to the hospital and her child was born early that day. The delivery itself was "normal", but notwithstanding she was still required to have a surgical procedure known as episiotomy. According to Dorland's Illustrated Medical Dictionary, 24th Edition, an episiotomy is defined as:

"Surgical incision of the vulvar orifice for obstetrical purposes."

The evidence before us is that this type of surgery is performed in approximately 80% of all deliveries. GordyGray in The Attorneys' Textbook of Medicine, Third Edition, in paragraph 3.06.36 make the following comment:

> "Episiotomy, surgical incision into the perineum, is a very commonly used obstetric operation whereby an incision into the vulva is used to relieve the pressure placed on the perineum by the forward thrusting and descent of the fetal body..."

It is clear that such a surgical procedure in "normal" deliveries is common. However, one cannot lose sight of the fact that surgery has taken place and of necessity requires some period of convalescence and recovery. Whether such a procedure is "normal" or whether it occurs as a result of pregnancy is not, in our opinion, really the primary consideration. It is obviously more than a discomfort. The fact that is significant, is that the Grievor was confined to the hospital and according to the evidence was not discharged until Saturday, March 21, 1987. She then remained at home in bed until Monday, March 23, 1987. In our view, the comments of Scrutton, L.J. in Maloney v. St. Helens Industrial Co Operative Society, Ltd., (supra) at page 297 are applicable:

> "In my view the word 'sickness' is very commonly used to denote a body in imperfect health, whether that condition arises from disease or accident." (Emphasis added).

We are satisfied that, at least during that period, i.e., from the Thursday to the Monday, which involved 4 teaching days, the Grievor was "sick" and in imperfect health to the extent that she was unable to work. It is apparent to us that being confined to a hospital bed as a result of surgery, regardless of why the surgery was necessitated, is a clear and inescapable indication of being "sick". At that particular time the Grievor was not on maternity leave and is, in our view, entitled to rely on the sick leave provisions of the Collective Agreement.

The question, however, remains as to the Grievor's entitlement to sick leave subsequent to the period when she had been discharged from the hospital and was not bedridden at home, i.e., from and after

Tuesday, March 24, 1987. It seems to us that barring any unforeseen complications in the delivery and after the Grievor is no longer bedridden, she is not "sick" and is no longer entitled to sick leave benefits. There was no evidence, medical or otherwise, that she was bedridden or sick after March 25, 1987. The Grievor stated that she felt it would take her approximately six weeks to get back to her normal physical and emotional state. It is exactly for that purpose, i.e. to get back to normal for which maternity leave is granted. We have previously held that the Division was not entitled to unilaterally advance the date of the maternity leave commencing.

We are of the view and hold, that the Grievor was entitled to receive sick leave benefits for the 4 missed teaching days during which she was confined to her bed and was convalescing from the surgery and the trauma of delivery, i.e., the Wednesday, Thursday, Friday and Monday (the 18th, 19th, 20th and 23rd of March). In effect this means that she will not receive such benefits for the following Tuesday, Wednesday, Thursday and Friday, (the 24th to 27th of March, inclusive). We must rely on the evidence and no evidence of any kind was presented to establish that the Grievor suffered from any state of "sickness" for those days which would allow the sick leave benefits to be invoked for her benefit. The grievances are allowed to the extent set forth, i.e., that the Division pay the Grievor 4 days of sick leave entitlement.

The Chairman apologizes for the delay in the finalization of this Award.

We wish to express our sincere thanks to Mr. Myers and Mr. Simpson who, as usual, presented the evidence and the law in a comprehensive and detailed manner.

In accordance with the terms of the Collective Agreement, each of the parties shall pay the costs of their nominee and shall jointly share the costs of the Chairman.

DATED at Winnipeg, Manitoba, this 8th day of August, 1988.

Jack M. Chapman, Q.C., Chairman.

I do concur in the above Award and am attaching my reasons.
DATED at Winnipeg, Manitoba this 22 day of August, 1988.

"J.R. London"
Professor J. London
Nominee of the Association

I do not concur in the above Award and I will be publishing my reasons in due course.
DATED at Winnipeg, Manitoba this 22 day of August, 1988.

"D.H. Kells"
Mr. D.H. Kells,
Nominee of the Division