IN THE MATTER OF: **Four individual grievances and related Association grievances alleging a violation of the collective agreement, *The Public Schools Act* and *The Human Rights Code* arising from the Employer's requirement to supply detailed medical information in support of sick leave applications.**

BETWEEN:

THE ST. JAMES-ASSINIBOIA TEACHERS' ASSOCIATION NO. 2
of THE MANITOBA TEACHERS' SOCIETY,

Union,

- and -

THE ST. JAMES-ASSINIBOIA SCHOOL DIVISION NO. 2,

Employer.

AWARD

Arbitration Board

Arne Peltz, Chair.
Tracey L. Epp, Nominee of the Division.
Maureen Morrison, Nominee of the Association.

Appearances

Kristin L. Gibson, counsel for the Division.
Valerie J. Matthews Lemieux, counsel for the Association.

Hearing dates

December 17, 2003; April 15-16, 2004.

Nature of the proceedings

Individual grievances were filed by four teachers between October 2001 and January 2002, and in each instance, an accompanying Association grievance was also filed. In summary, the grievances allege that the Division violated the collective agreement by

> (1) denying to each grievor sick leave for a health related absence arising from her pregnancy, delivery and recovery therefrom,
>
> (2) requesting the grievors to provide detailed medical information not contemplated by the collective agreement or legislation, and
>
> (3) further requesting the grievors to provide medical information directly to Division personnel in a manner not contemplated by the collective agreement.

By way of remedy, the Association sought a declaration that the Division violated or misapplied the provisions of the collective agreement, *The Labour Relations Act, The Public Schools Act* and *The Human Rights Code.* Full compensation was also sought for lost wages and benefits. The sick leave requested by the individual grievors arose during the period of approved maternity leave which each teacher had secured pursuant to the terms of the collective agreement.

By the time the hearing opened, the financial element of each grievance had been resolved by the parties. Each individual grievor received some payment for her requested period of sick leave. What remained was the Association's request for declaratory relief in relation to the provision of medical information. The parties jointly distilled the issues into a series of questions which the board was asked to consider and answer in its award. While the factual context for these grievances was a pregnancy and maternity leave scenario, the parties asked the board to address sick leave generally, not solely the case in which sick leave is requested in relation to childbirth.

Section 93 of *The Public Schools Act*, R.S.M. 1987, c. P250 (hereafter "the Act") creates a statutory entitlement to the accumulation of sick leave, subject to collective bargaining which revises or enhances the legislated benefits. The parties herein have negotiated to increase maximum sick leave from 75 days to 115 days. Section 94 of the Act is directly relevant to the present case and states as follows:

> 94 Subject to any collective agreement governing the working conditions of the teacher, where a teacher is absent from school because of sickness, the school board may require the teacher to submit to the school board a medical certificate from a duly qualified medical practitioner certifying that the teacher was sick during the period of absence.

In the collective agreement (Exhibit 1, Tab A), the parties have negotiated the following additional provision relating to medical information.

> 5.06 Illness
>
> (b) In the event of a teacher's being absent for a lengthy period of illness, the Board if it so wishes, may have the case checked by its local nurse or local health officer, or its appointed Doctor, who shall report on the teacher's ability or inability to return to duty.

Finally, the Division itself has promulgated the following policy for administering long term sick leaves (Exhibit 1, Tab B):

> D. 2 When a teacher has been absent due to illness or accident more than twenty consecutive working days and/or when a teacher anticipates being absent due to illness or accident for more than twenty working days, he/she shall apply in writing for sick leave accompanied by a written statement from a physician certifying the inability to work and giving an expected date for return to work.

The issues as framed by the parties and presented to this board of arbitration for decision were as follows:

1. What medical information is the Division entitled to receive? To be more specific, is the Division entitled to a diagnosis, treatment plan and prognosis?

2. When is the Division entitled to receive the permissible medical information having regard to *The Public Schools Act,* the collective agreement and Division policies?

3. Who is entitled to receive the permissible medical information on behalf of the Division - the Superintendent's department or the Division's physician (or other persons named in the collective agreement)? Does the information differ based on whether it is a Division employee or the Division's consulting physician?

4. What are the circumstances that can trigger a review under Article 5.06(b), i.e. what are the factors that must be considered in determining whether there is a lengthy illness involved?

5. Was the information provided by the individual grievors sufficient or was the Division entitled to request the additional detailed information it did, and what limitations, if any were on the Division in relation to its request, access to any information provided and the use of the information? What is the balance between the Division's right to satisfy itself that the sick leave being requested is *bona fide* and the personal privacy rights of Association members?

The Association took the position that the Act and Article 5.06(b) constitute a complete code with respect to medical information. Therefore, the Division is entitled only to a medical certificate, not the underlying diagnosis, prognosis and treatment plan. Only a doctor may receive the information, not Division staff. The words of Article 5.06 (b) - "lengthy period of illness" - mean an absence longer than the norm for that particular illness. Where there is a presumptive period established by medical practice (such as 6 weeks for recovery from child birth), only absences longer than the norm are "lengthy", and only these unusual absences can justify an employer request to check the case under Article 5.06(b). Finally, the Association submitted that on the specific facts, the grievors supplied sufficient information and the Division invaded their privacy by demanding excessive personal information.

The Division took a very different view of the parties' rights and obligations. The Act and the Article are *not* a complete code. The Division is its own insurer with respect to sick leave entitlements and in that capacity it has a legal right to obtain information which is necessary and sufficient for insurance decision-making purposes. Beyond that, the Division cited a lengthy past practice in using the procedures which are now under challenge. The board was asked to consider past practice in construing the collective agreement, or alternatively, to apply an estoppel against the Association.

The Division denied that medical information can only be directed to a doctor or other named health official under Article 5.06(b). With proper precautions to safeguard privacy, information should normally be provided to Division staff, who will then consult as required with medical specialists. With respect to the meaning of "lengthy period of illness", the Division read these words in terms of a lengthy absence from the classroom, not an absence which exceeds a presumptive period delineated by the medical profession. Thus, the Employer was acting reasonably in setting 20 days as the definition of a lengthy absence. Finally, on the particular facts of the four individual grievors, the Division denied that it invaded their privacy or demanded excessive personal information.

There was at least one point of agreement between the parties. In response to Question #2 (when is the Division entitled to receive the permissible information?), both the Association and the Division stated that it depends on the circumstances. However, on the facts, it *was* disputed whether or not the Division automatically demands medical information from teachers.

Three grievors testified before the board. Their specific identities are not material to the outcome of this case. Each one testified about highly personal health matters and their physicians' reports were included in the book of documents filed in the cause. The fourth grievor did not give evidence but her documents were filed. As outlined above, the Association claimed that most of this information should have been kept private and the Division argued that an employer is entitled to see the information, if required for proper administrative purposes. However, it was *agreed* between the parties that this kind of personal health information is sensitive and should be subject to strict measures to maintain confidentiality, assuming that the Division is correct and disclosure to the Employer is required at all. Given that background, it would be somewhat anomalous to publish this award with the grievors' full names included. Labour arbitration awards are now posted in numerous electronic data bases which are broadly accessible, and on occasion, awards are printed in report services. Given the sensitivities and the potential for broad dissemination of the award, the board decided to use only initials in describing the four grievors: S, K, H and D.

Dr. Margaret Ann Burnett (hereafter "Burnett") prepared an expert report (Exhibit 1, Tab G) and testified for the Association dealing with the physiological effects of pregnancy and the return to normalcy experienced by most women. Her expertise was admitted.

For the Division, one witness was presented: Dorothy Young, Assistant Superintendent, Human Resources and Personnel (hereafter "Young").

By agreement, a book of documents was tendered as Exhibit 1. For convenience hereafter, documents from Exhibit 1 will be cited only by their Tab number.

At the outset of the hearing, the parties confirmed that there were no preliminary issues and that the board was duly constituted and clothed with jurisdiction.

Evidence of the Association

Grievor #1: "S"

S is an elementary teacher who began working for the Division in 1990. She described her experience during two maternity leaves, but only the latter pregnancy is included in the grievance.

On September 4, 1998, S applied for maternity leave commencing December 1, 1998 with a proposed return for the beginning of the 1999/2000 school year (Tab C3). The request was approved shortly thereafter (Tab C5). On November 27, 1998, S requested six weeks of paid sick leave for the period immediately following the date of her delivery (Tab C6). She enclosed a medical certificate dated November 26, 1998 which stated as follows:

> Seen today. Routine pregnancy and expected vaginal delivery so would be needing 6 weeks recovery time from date of delivery.

S stated in her letter to the Division that six weeks was "an estimate at this time based on my doctor's current evaluation" and she undertook to provide additional medical information as her doctor evaluated her progress.

As it turned out, S worked a full day on November 30 and then went directly to the hospital where an emergency C-section was performed late that night. On December 28, 1998, she wrote to the Division and amended her sick leave request, extending it to eight weeks because of the C-section (Tab C7). The attached medical note from her physician dated December 18, 1998 stated as follows:

> Seen today. Pregnancy complicated by Breech position baby thus required C-section on Dec 1/98. Thus requires 8 weeks post operative recovery time.

S testified that she was told not to drive for six weeks. She had trouble with stairs and caring for the baby was difficult.

On January 11, 1999, S was called at home by the Division office and informed that she must provide an authorization for the Division to contact her doctor and obtain additional information concerning her labour and C-section. S was told that the authorization must be supplied that very same day, which caused distress and inconvenience to her and her husband, although they managed to comply. This evidence was received over the Division's objection on grounds of relevancy. The board ruled that while these events were not strictly part of the grievance, they were potentially relevant as background to the privacy issue and the impact on individual teachers.

In any event, S's doctor did supply a more detailed letter to the Division on January 20, 1999 (Tab C9). While containing more background information, the letter did not add substantively to the brief note already provided on December 18, 1998. On January 27, 1999, Assistant Superintendent Sharon Smith (hereafter "Smith") acknowledged receipt of the second medical report and approved the requested eight weeks of sick leave commencing November 30, 1998 and ending January 25, 1989 (Tab C10).

S made her second maternity leave application in February 2001, with a commencement date of April 9, 2001 and an extended return date at the start of the 2002/03 school year (15 month leave). The medical note supplied in support of the application (Tab C13) was dated February 13, 2001 and stated:

> Seen today. Routine pregnancy, fit to continue work up to and including April 6/01.

Just before the start of her leave, S requested paid sick leave for the six week period following the date of her delivery. She provided a medical certificate from Dr. S. Barker dated April 2, 2001 in the following terms (Tab C15):

> Seen today to confirm she's pregnant at present & will be having a trial of labour. If she has a routine vaginal delivery she will need 6 weeks recovery time (sick leave).

S advised the Division that her doctor would reassess her condition after six weeks and she undertook to provide another certificate if an extended leave was required. In testimony, S explained that she was told at the time that the odds were 50% that she could have a vaginal delivery. She was also offered the option of a scheduled C-section.

S delivered vaginally on April 14, 2001 but it was a traumatic experience. She had been sick to her stomach with the flu for several days before her labour began. At the hospital, there was a shortage of space and she was moved around a lot. Across the hall, an infant died and S gave up her room for the grieving family. S was given a deadline for a normal delivery, which she found very upsetting. In the end, intervention by forceps and a very large episiotomy was required. S had badly inflamed hemorrhoids which were exacerbated by the delivery. She testified that she experienced great distress due to the combination of these events. She was hospitalized for three days and upon returning home, her two year old son reacted badly to the newborn. At the arbitration hearing, S became emotionally upset recalling the whole birth experience.

The Division objected to various parts of S's testimony. The board, however, accepted the Association's point that this evidence may bear upon the nature of the privacy interest being asserted in the grievances. The board ruled that it would hear the evidence subject to weight.

For 2-3 weeks after delivery, S was physically exhausted. It was uncomfortable to sit or walk due to the hemorrhoids and the episiotomy. She was taking antibiotics and using creams. She took painkillers for about a week.

In response to S's request for six weeks of sick leave, the Division requested additional medical information (Tab C16). On April 24, 2001, S was given a letter addressed to her doctor, posing a series of questions which were to be answered by replying to Superintendent Smith. The reason for the request was explained as follows in Smith's letter to Dr. Barker:

> In soliciting information, we are attempting to ascertain if there were symptoms, illnesses or conditions, which would have required [S] to remain off work. We are also attempting to ascertain if the symptoms, illnesses or conditions are pre-existing or are a result of pregnancy, labour, delivery or recovery.
>
> If there are any symptoms, illnesses or conditions which would have required [S] to be absent from work, we wish to determine what this period of time would be.

Smith asked Dr. Barker to inform the Division of symptoms or illness which S presented or was being treated for, whether these would necessitate absence from work or a hospitalization, the duration of such inability to work, the course of treatment prescribed and the outcome of the treatment. On May 10, 2001, Dr. Barker replied to Smith (Tab C17) and answered the questions as posed. The doctor commented:

> The subjective symptoms she had due to this surgical intervention were severe right perineal pain as well as severe perirectal pain and edematous hemorrhoids. As a result of these symptoms she was unable to sit comfortably for more than 15-20 minutes. I recently saw her earlier today to review this situation and her symptoms persist although they are somewhat better (now day 23 postpartum). However, she still has difficulties remaining seated for greater than 30 minutes due to exacerbation of pain in this area. Thus in direct response to your questions ... in terms of the length of time that she would have been unable to return to work due to these conditions, I would strongly recommend that she remain off work for six weeks due to her inability to sit for prolonged periods. In response to the course of treatment prescribed she has been prescribed to take Sitz baths twice daily as well as apply a local topical ointment four times a day to help reduce the pain, swelling, irritation and to prevent any secondary infection to the area. I would anticipate complete resolution of these conditions given a bit more time.

In tears, S testified that the provision of this report to her employer was very invasive and almost humiliating. During the Division's evidence later in the arbitration hearing, Assistant Superintendent Young stated that the May 10, 2001 medical report satisfied the Employer's need for information regarding S's sick leave application.

Nevertheless, at the time, Assistant Superintendent Smith was *not* satisfied and on July 10, 2001 (Tab C18), Smith wrote again to S to advise that a medical consultant would be reviewing the case. S was asked to sign a consent allowing Dr. Barker to supply additional information to the Division's consultant, another medical doctor. A list of questions by the consultant directed to Dr. Barker was enclosed. In large measure, these questions had already been answered. S was told that the Division itself would not receive a copy of Dr. Barker's reply to the questions. Only a "functional interpretation" of her doctor's answer's would reach the Division. S testified that this new request by the Division caused her more distress. Nevertheless, she took the letter to her doctor, but upon reviewing it, Dr. Barker refused to provide the answers. This added another level of anxiety for S, as she began to fear that her sick leave would be refused based on her inability to provide information as requested by the consultant.

S testified that she was also having bladder control problems and for several months postpartum, she needed to stay close to a washroom. She was very emotional and had to lie down a lot during the day. She developed mastitis, a breast gland infection, which lasted about six weeks. She acknowledged that none of these difficulties were mentioned in her doctor's report. However, S testified that as a teacher of young students who cannot be left unattended, she simply could not have done her job with the totality of her symptoms.

In due course, the Manitoba Teachers' Society (hereafter "MTS") intervened and wrote to Smith (Tab C19 dated August 16, 2001) asserting that the May 10, 2001 medical report was "an appropriate and adequate response supporting [S]'s request for sick leave." Payment was demanded without delay. A battle of correspondence then ensued between MTS and the Division. Smith relied on Article 5.06(b) of the collective agreement as authority for demanding additional medical information. MTS characterized the request as unacceptable and an invasion of privacy. Smith countered that the May 10 report documented S's progress at the 3-week point postpartum, but did not substantiate the claim for a full six weeks of sick leave. So it stood at the end of October 2001. On January 31, 2002, S filed her grievance.

Eventually the financial component of the grievance was resolved and S received payment for six weeks of sick leave. For the balance of her maternity leave, she was paid only EI benefits at the rate of 55% of normal salary. Since then, the parties have negotiated a Supplementary Unemployment Benefit (SUB) Plan which tops up EI benefits to 90% of a teacher's salary for 17 weeks.

S emphasized in her evidence that even today she finds it embarrassing to think that such personal information (namely the May 10, 2001 medical report) exists somewhere in a file. Until the hearing, however, she was unaware of the procedures followed by the Division whereby personal medical files are sealed and kept secure. She expressed anxiety about how many people have now seen these personal details and she felt fearful not knowing who else may have read this report. She agreed in cross examination that since every birth experience is unique and not entirely predictable, the Division is entitled to request medical information *after* delivery. Medical notes written before delivery are merely predictions. S was agreeable to disclosing the manner of delivery (vaginal or C-section) but felt that no more information was required, even in an extended sick leave.

Grievor #2: "K"

K taught in a variety of positions for seven years, mostly as a Kindergarten teacher and also in physical education. She left the Division after this dispute arose and is now teaching elsewhere.

In the fall of 2000, K requested a maternity leave from December 23, 2000 until June 29, 2001. Her stated due date was December 6, 2000 and her request was approved. However, when she saw her physician Dr. Lee on November 14, 2000, complaining of regular swelling at the end of a her Phys Ed days, she was directed to stop work immediately. Dr. Lee wrote a brief medical note and K provided the note to her Principal. K said her goodbyes at the school that day and went into labour that same night. The medical note in its entirety states as follows (Tab D5):

> This will certify that the above named was medically unfit to attend work
> from 15/11/00 to 19/1/01.

K gave birth around 4 am. It was a normal and natural delivery with no episiotomy but some perineal tearing requiring 3-4 stitches. She was in hospital for about three days. K was told by her doctor to avoid stairs and heavy lifting. As a result, she set up a nursery on the main floor of her house for the first few weeks.

K requested sick leave from November 15, 2000 until such time as her doctor confirmed an ability to return to work, basically eight weeks. A second medical note was prepared by Dr. Lee dated December 12, 2000 but unfortunately, the parties were unable to locate and present a copy at the hearing. In response to the medical information provided, Superintendent Smith advised that more would be required. K was given a letter addressed to Dr. Lee (Tab D6), in similar terms to the letter given to S (see above, Tab C16). The doctor was asked to provide information concerning K's symptoms or illness, whether absence from work was required, duration, treatment and outcome. Unlike the letter in S's case, Smith also sought the dates of K's visits to the doctor and copies of the doctor's notes.

On January 31, 2001, MTS replied to Smith on behalf of K (Tab D7) and denied that the Division was entitled to the information sought. Citing section 94 of the Act, MTS asserted that a School Board is only entitled to a medical certificate which certifies that the teacher was sick for the period in question. Smith wrote back on February 8, 2001 (Tab D8) and withdrew her previous request for office visit dates and notes, but reiterated a demand for the balance of the information. On March 15, 2001, MTS replied (Tab D9) that it would forward some additional information in K's case only because her doctor was recommending 8 weeks off work, a longer period than the presumptive six-week postpartum recuperation. MTS claimed that for the standard pregnancy, arbitral precedent now recognized a teacher's right to sick benefits without the necessity of a medical examination or report to the employer.

The additional medical certificate signed by Dr. Lee (apparently dated March 14, 2001) and provided to the Division on March 15, 2001 stated as follows (Tab D9):

> This is to confirm that [K] is my patient and that she was under my care in November and December 2000 and January 2001.
>
> [K] was unable to work from November 15, 2000 to January 7, 2001, due to medical reasons. The earliest date that she would have been able to return to work was January 8, 2001.

Smith rejected the foregoing report as being "not responsive to our request" and declined to process the sick leave application (Tab D10). K testified that she found this reaction very frustrating. MTS then offered to provide additional medical information to a physician named by the Division, on a confidential basis only (Tab D11). Smith replied that as the employer, the Division was entitled to receive the information in its hands directly, following which it could choose to obtain a medical opinion if it so wished (Tab D12). The parties continued sparring on the question of the presumptive six weeks. Meanwhile, on May 10, 2001 MTS forwarded to Smith, on a without prejudice basis, another report by Dr. Lee prepared for MTS legal counsel (Tab D13 dated February 1, 2001). It added the following in support of the 8-week claim:

> ... [K]'s actual date of confinement was November 15, 2000. She had a vaginal delivery which resulted in a second degree tear to her perineum, which required insertion of sutures. She was unable to work on November 15, 2000 as she went into labour. She was unable to work for eight weeks post-partum as she was recovering from the delivery and the repair of the perineal tear. The earliest date she was able to return to work would be January 8, 2001.

The Division was still not satisfied and asked for K's consent to allow its medical consultant to review the case. K signed a limited form of consent (Tab D14) specifying that the only information which the consultant could share with the Division would be an opinion as to medical fitness for work. K testified that her feelings about the whole matter began to change at this point. Up until then, she was naive and hoped that by cooperating at each stage, things would be resolved. Now she was uncomfortable about the questions posed by the consultant for response by Dr. Lee. K testified that "the word vagina was everywhere on the page. It felt like an invasion, it was too much information."

The consultant's first question was, "In what way, if any, was [K] physically impaired by the repair of her 2nd degree vaginal tear?" The questionnaire went on to inquire whether this impairment would have affected the activities of daily living, how this translated into a period of disability, at what point could K have returned to her job, and whether there were any other disabling conditions unrelated to pregnancy. Dr. Lee completed the form and returned it, but K never saw the answers as filed. On October 12, 2001, Smith wrote to K (Tab D15) and approved payment of two weeks wages (not eight as requested), based on the documented extension beyond the normal period of recovery from labour and delivery.

In her testimony, K described the challenging job function of an early years teacher who does Phys Ed classes. She stated that after giving birth, she had difficulty with stairs and walking. She still experienced some bleeding for seven weeks. Dealing with the sick leave claim and legal issues at the beginning of a maternity leave was very frustrating and despite Smith's comment to her that "it's nothing personal, it's a grey area", K said that she *did* take it personally. She pursued a grievance because she hoped it would prevent other teachers from going through the same frustrating experience.

K agreed under cross examination that it was reasonable for the Division to request additional medical information, above and beyond the very first note supplied by her doctor before the delivery (Tab D5 dated November 14, 2000). At that point, the doctor was predicting disability based on events which had not yet occurred. Things can and do change. Originally K was seeking a sick leave which would run both before and after her delivery, but she delivered early. K maintained that the March 14, 2001 certificate (Tab D9) should have been accepted as sufficient. She said that doctors should be trusted to provide the information that is needed.

Grievor #3: "H"

H has worked for the Division since 1993 and taught music and science in the elementary grades. She delivered a son in 2000 by caesarian section and received eight weeks sick pay during her maternity leave. She became pregnant again in 2001 and because of a blood disorder, her doctor told her to stop work. On April 26, 2001, H requested sick leave until the birth of her baby.

H provided the Division with a Sickness Certificate form signed by Dr. Taylor and completed in the following terms (Tab E3 dated April 25, 2001):

> Patient name: [H]
> Date of illness from April 30/01 to postpartum
>
> 1. This patient has sought medical advice relative to ill health. On the basis of history provided, the patient would have been required to be off work during the time indicated above. Yes
>
> 2. I can confirm this information on the basis of my direct examination or management of the patient. Yes

Superintendent Smith again responded with a request that H obtain from her doctor the answers to a series of questions (Tab E4 dated May 4, 2001), much as outlined above in respect of S and K. H testified that she didn't understand this action by the Division. She was at home because of a serious medical concern. Why was the Division questioning her commencement of a sick leave one week early? She thought it was inappropriate.

A few days later, on May 7, 2001, H gave birth to a girl. It was a natural delivery but she sustained a fourth degree laceration from the vagina to the anus, as certified by Dr. McGregor in a note dated May 8, 2001 (Tab E5):

> [H] delivered her second baby on May 7/01. She suffered a fourth degree tear during the vaginal delivery. She will require <u>8 wks</u> of recuperation and thus has been advised to be off work until then (ie July 1 inclusive).

On May 10, 2001, Dr. McGregor prepared a second report addressed to Smith (Tab E6) responding to the Division's questions, including the following:

> At the very end of her pregnancy, she required medical therapy for her condition, ITP, in order to prepare for her impending delivery. She was also experiencing signs of early labour and pelvic pressure. She had a large baby and we were anticipating possible complications of VBAC (vaginal birth after caesarian). Thus she was advised to be off work until the prednisone achieved full therapeutic effect. Thus she required medical leave from work for <u>medical reasons</u>. ... I believe this is termed "sick leave". (Emphasis in original)

H stated in her evidence that while she now does not have ITP, the Division had no reason to be aware of this information. "It doesn't affect my teaching job or my performance on the job."

Two months later, on July 10, 2001, Smith wrote to H and requested consent for an assessment by the Division's medical consultant. The arrangement was the same as described above. H's physician would respond to the consultant's questionnaire and the consultant would provide the Division with a functional interpretation of the responses. At this point, H became extremely upset. She saw herself as a very honest and professional teacher who put in lots of extra time for the benefit of the children she taught. The Division had specific information about her medical condition and inability to work.

This latest request for more information was embarrassing and she felt like a little kid being told she was dishonest. Her doctor also questioned the need for the consultant's review. H said that her medical background during pregnancy is off limits to her employer. The Division is entitled to a medical certificate declaring that she is unable to work for a certain duration, and unless it is an unusual length of time, that should be sufficient for the Division. In her particular case, the eight weeks was quite ordinary and should have been accepted, in her view.

H testified that due to the tear she suffered during delivery, she was definitely unable to work afterwards. For the first two weeks, the pain was very bad and she was constantly taking Tylonol. She could not sit. She also had hemorrhoids. She was up all night to nurse the baby. She had bowel movement difficulties for the first two months and was trying to avoid causing another tear. She required Sitz baths for 6-8 weeks. Up and down movements, stairs and walking were difficult. She couldn't sit without a cushion until August.

Nevertheless Dr. McGregor did complete and return the questionnaire within a week of receipt (Tab E8 dated July 17, 2001). Asked how the repair of H's fourth degree vaginal tear physically impaired H, the doctor wrote:

> The repair caused quite a bit of pain. The usual postpartum recovery phase is 6 weeks. I extended this period to 8 weeks to ensure that her bowel routine and healing was complete. The complication of a nonhealing 4th degree tear repair is fistulation and it was our goal to avoid this eventuality.

On October 12, 2001, Smith wrote to H and enclosed pay for two weeks, based on the medical proof that the normal recovery period was extended in her case to that extent. H testified that eventually the Association settled with the Division and she received the full 8 weeks of pay but only at the 90% pay level. These weeks of sick leave were important to H because she needed the qualifying hours for EI eligibility purposes.

Grievor #4: "D"

D did not testify before the board but her documents were filed as part of the Association's case. D requested an extended maternity leave from November 27, 2001 until January 1, 2003 and it was approved by Assistant Superintendent Smith as sought. On November 26, 2001, Dr. Lu signed a medical note as follows (Tab F5):

> [D] saw me today. She needs sick leave for next 2 weeks.

On the same date, D obtained a report from her obstetrician as follows (Tab F6):

> TO WHOM IT MAY CONCERN:
>
> This is to inform you that I have been seeing the above named patient for her prenatal care. She is now at 36-plus weeks gestation, with an expected date of confinement of December 18/01.

On November 30, 2001, Smith requested that D provide additional information from Dr. Lu, similar to the requests made of the other grievors herein: are there symptoms or conditions requiring absence from work effective November 27, 2001; duration of required absence; course of treatment and outcome of treatment (Tab F7). D then provided another medical note dated December 7, 2001 from Dr. Mason, stating as follows (Tab F8):

> [D] is pregnant and due December 18. She is scheduled for a c/s December 14. She is to be off work from November 26 as it is difficult for her to move about the classroom.

Smith drafted a series of questions for presentation to Dr. Mason (sent in error directly to the doctor instead of to D, for which Smith expressed regret), as follows (Tab F9 dated December 13, 2001):

> 1) You have indicated in your note that your patient ... will not be able to work from November 26, 2001 to December 14, 2001 due to difficulty to move about the classroom. In your opinion, is your patient currently suffering from any medical condition outside the subjective symptom of difficulty to move about the classroom?
>
> 2) In your opinion, what is the cause of [D]'s difficulty to move about the classroom?
>
> 3) The School Division may be able to offer [D] a modified work environment. Do you feel this would be a reasonable option for [D]? If not, please explain why she could not work in a modified environment with the option of sitting frequently.
>
> 4) Given that to date we have been told that [D] suffers only from the subjective complaint of her difficulty to move about the classroom, would it not be reasonable for her to begin her maternity benefits November 20, if required for personal reasons? The use of sick time is generally reserved for individuals where a medical condition/illness results in a functional impairment.

Sparring between the parties ensued. MTS responded on behalf of D and offered a limited form of disclosure, under protest. MTS maintained its position that the collective agreement did not entitle the Division to the direct receipt and possession of personal medical information. MTS stated that D would authorize the Division's physician to review her information and provide a letter to the Division setting forth an opinion as to D's fitness for work during the relevant time (Tab F10). Smith responded that the Division was entitled to direct receipt of the necessary information and that without it, the application for sick leave could not be assessed (Tab F11).

Without oral testimony, it is not entirely clear how events unfolded and how resolution was reached. On January 28, 2002, D submitted a letter requesting paid sick leave from December 14, 2001 to February 8, 2002, a period of eight weeks. Enclosed in support was a new medical certificate from Dr. Mason, as follows (Tab F12):

> Please be advised that [D] had a cesarean section on December 14, 2001 and is completely disabled from work for 6 to 8 weeks from that date.

D promised to supply an updated certificate after her next visit two weeks hence if she decided to seek *additional* sick leave. On January 30, 2002, Smith informed D that sick leave had been approved for the period December 14, 2001 to January 24, 2002 - a six week period postpartum, based on the medical information supplied. As noted above, in the end the parties resolved the financial element of D's grievance.

Opinion evidence of Dr. Margaret Ann Burnett

Dr. Burnett is the Director of Undergraduate Medical Education in the Department of Obstetrics, Gynecology and Reproductive Sciences at the Faculty of Medicine, University of Manitoba . She is also a practising physician and since 1994 has been delivering 170-200 babies per year. She has numerous publications and presentations to her credit in the field of obstetrics and gynecology. As well, she has been an elected member of the College of Physicians and Surgeons of Manitoba for eight years. She presently serves on the Executive and chairs the Program Review Committee of the College. As indicated above, her expertise was admitted by the Division.

Burnett introduced and explained the official Statement issued by the College regarding the issuance of medical certificates by physicians (Exhibit 15). Unlike Guidelines which are also published by the College as general clinical advice for the profession, Statements are formal requirements which doctors must follow. Burnett stated that the intent of Statement 139 on Sickness Certificates is to allow employers enough information so they can assess the basis for the medical opinion being given, while at the same time not divulging so much personal information that patient privacy is undermined. In a background comment, the College notes that employers and insurers rely upon physician certificates and may incur financial liabilities for sick leave and disability coverage. The operative text of the Statement (College website version) provides as follows:

> OBLIGATIONS
>
> When providing a certification, a physician must:
>
> Ensure that there is consent from the patient to provide information to a third party.
>
> Limit the information provided to that covered by the patient's consent.
>
> Limit information to that specifically required by the third party within the scope of the patient's consent.
>
> Ensure that all statements made are accurate and based upon current clinical information about the patient.
>
> Limit the statements to the time period with respect to which the physician has personal knowledge. A physician must not state that the patient has been under the physician's care for a particular time period unless that is a fact.

> When providing a sickness certificate, avoid diagnostic terms. Information provided may indicate:
>
> · Prognosis relative to the work situation
> · Activity limits and ability limits
> · Risk factors (to the patient and to others)
>
> When providing a sickness certificate on the basis of a history provided by telephone or following an office visit where clinical evidence of the illness does not continue to be evident, specifically say so in the sickness certificate.
>
> A physician must not imply that the physician has evidence of an actual diagnosis if the information is restricted to history or examination that is non-contributory.
>
> When providing a sickness certificate, have accurate information about the requirements of the patient's job before giving an opinion on fitness to work.
>
> A physician who gives a certification containing a statement which the physician knows or ought to know is untrue, misleading or otherwise improper, commits an act of professional misconduct.

In her pre-filed report (Tab G) and her oral evidence, Burnett outlined the physiological changes which occur during pregnancy and the process by which a woman's body returns to normal. Her central point was that there is a well recognized and standard recovery period of six weeks which applies to most women, recognizing that in reality there is a range of durations which women experience. She stated that the standard of medical practice is to schedule the patient's postpartum visit for the end of the sixth week, at which time virtually the entire healing process will have been completed and the woman should normally be able to return to regular activity.

Women experience significant impacts during pregnancy and childbirth. Virtually every hormone undergoes change. Anatomical structures are affected, including the urinary tract and kidneys. The uterus distends by 30 fold. The pelvic floor is subject to stretching and tearing during labour. Blood loss amounting to 2 units is common (3 units in a C-section) and this can cause anaemia, which manifests itself in fatigue and shortness of breath. There can be incontinence and bowel problems. Emergence of the baby's head often causes tearing of the perineum down to the rectum and may also cause tearing deep in the pelvis where stitching cannot be done. An episiotomy may be required. Walking, sitting, urinating and bowel movements can all become difficult and painful. Bleeding may continue for some time although normally it ends by six weeks.

It is unnecessary to recount the full detail of Burnett's evidence here. Her medical opinion was not in dispute and no contrary evidence was called by the Division. Similar medical evidence has been given in other teacher arbitration proceedings in recent years (discussed below). During Burnett's examination, much attention was focussed on the variability question. There is a widely accepted six week period of "normal pregnancy involution" (return to normal uterus and pelvic condition) which has been recognized in fee schedules and postpartum examination scheduling. But should an employer be precluded from seeking specific information about progress *within* the six week period? The Division pointed to Burnett's observation that hormonal and anatomical effects end between 2 and 8 weeks postpartum and that vaginal tears resolve 4-6 weeks after delivery.

By convention, doctors see their patients at the six week mark and not before. Burnett testified that it would be a waste of time for both doctor and patient if examinations were scheduled before six weeks, barring special circumstances. Normal healing would be underway but no physician could certify that the effects would be resolved by the six week mark without a *subsequent* examination. Nevertheless, under cross examination, Burnett readily agreed that the effects experienced by women due to physiological and hormonal changes are variable, as is the pace of postpartum recovery.

Asked to agree that in some cases there may be *no* disability due to pregnancy and delivery, she replied that there will always be a degree of disability with *every* delivery. She debunked the mythology of women who could deliver their babies in the agricultural fields and then carry right on working. But Burnett did concede that not every patient is totally disabled. It depends on how significant the various effects are; some recoveries are longer than others. She agreed as well that it depends on the nature of the job function. When doctors speak of a return to normal following childbirth, "intuitively that may not be exactly the same as disability". She agreed that some elements of the recovery period, such as the establishment of breastfeeding, are not relevant to the disability issue. She asserted that sleep deprivation, stress and anxiety, while not the same for every woman, are present to some degree in every case. The impact of these conditions on the woman's degree of functioning, however, is variable.

Burnett testified that immediately postpartum, the physical effects are virtually universal. The fastest recovery a woman could make would be about one week, assuming a quick and easy delivery, no tearing and stiches, no complications. Based on her experience, Burnett estimated that only 1-2% of women fall into this category. In 90% of first births, there is a laceration of the vagina or vulva, pain, blood loss, sutures and some loss of urinary or bowel control. Sometimes there is infection. Even without any visible tearing, the area is considered an open wound which takes six weeks to heal due to microscopic tearing and abrasion of the vaginal mucosa. However, the incidence of laceration falls to 50% for subsequent deliveries. If a woman has had several children, it is relatively common for her to experience an easy delivery.

Questioned about the time required for repair and healing of different degrees of tearing, Burnett stated that there are no research studies. The more layers of tissue affected, the more difficult healing becomes. Similarly with episiotomy and C-section, recovery times also vary. The six week time frame is general to a surgery. Different patients have different pain thresholds. When a C-section is done, there may be additional needs because the patient is caring for a newborn during the recovery period. Burnett agreed that surgery patients recover at different rates but explained that the medical profession uses conventional recovery periods as a guide for patients. People have a strong need to know how they will be feeling and for *how long*. Having said that, there is obviously individual variation.

Dr. Burnett was asked whether there is a standard postpartum recovery period during which women should be away from work. She replied that the question is complex because of the childcare aspect, which is additional to the physiological condition of the patient. She stated that "six weeks is a minimum but many women will benefit from longer." The board asked Burnett whether, in giving this answer, she was referring to more than just the patient's disability, and was including the broader needs of the woman and her child. She said yes. With respect to a woman's physiological needs and her return to normal functioning, "six weeks is a reasonable guestimate for most people".

Teacher disability benefit plans

By agreement, the Association filed two documents (Exhibits 2 and 3) for purposes of facilitating the arbitration hearing but without prejudice to its position that the documents are irrelevant to the case. Short term disability coverage is provided to Association members under a policy held by the Association with Wawanesa Life (Exhibit 2). The policy pays totally disabled teachers 60% of weekly salary for a maximum duration of 105 days. The insurance company is authorized, at its own expense, to examine an insured teacher "when and as often as it may reasonably require during a claim" (at p.12).

The claim form for short term disability benefits (Exhibit 5) requires the teacher to authorize release of personal information held by physicians or hospitals. A standard form of attending physician statement lists the following information which is to be provided to the insurance company: diagnosis of present condition, additional conditions or complications which may affect absence from work, nature of treatment, dates of office visits, duration of absence and expected return date, restrictions or limitations on ability to work, applicability of trial return or modified duties, applicability of vocational rehabilitation.

MTS itself administers long term disability (LTD) benefits for teachers. According to the Disability Benefits Plan Document (Exhibit 3), benefits are payable only when the Plan has received satisfactory proof of claim. "The claimant must provide information required to prove entitlement to benefits and must also authorize the Disability Benefits Plan to obtain information from other sources for this purpose" (at p.18). Moreover, the Plan "has the right to conduct necessary investigations relating to applications or claims, and to obtain independent medical or vocational assessments if required" (at p.20).

Premiums for both the short and long term disability plans are paid by teachers, not by the Division. Premiums are paid as a condition of employment. The Division has no role in decision making under these plans, but it does assist by providing information to teachers who may need to apply for benefits.

The LTD application form prepared and used by MTS (Exhibit 7) requires the teacher to provide the following information: the medical condition which caused the cessation of work, how the condition affects ability to perform normal duties, current treatment and planned program including medications, list of physicians and dates examined. The medical release form authorizes physicians and medical facilities "to disclose any information to the ... Plan Office throughout the duration of my claim".

The standard form letter addressed to physicians seeks the following information for purposes of assessing LTD claims (Exhibit 10): date of last three visits, current diagnosis, changes to health and functional abilities, precipitating factors, any specialists' reports, current symptoms, conditions impacting on ability to return to work, current treatment plan, response to treatment, barriers to return to work, recommendations for vocational rehabilitation.

The above-mentioned forms from the Wawanesa and LTD plans were adduced in evidence by the Division.

Clearly, MTS in its capacity as a disability insurer (or in aid of its short term insurer) collects personal medical information which it argues the Division should *not* be allowed to have in its capacity as insurer of sick leave benefits. The Association distinguished the release of personal information to a person's employer and suggested that more sensitive privacy issues are raised when such information is demanded by an authority figure such as the Division (see further discussion below).

Evidence of the Division

Dorothy Young testified for the Division. She began teaching for the Division in 1967, served as a Vice Principal and Principal for several years and was appointed an Assistant Superintendent in 1997. She is currently the Assistant Superintendent for Human Resources and Personnel and is responsible for all staff hiring, evaluation, discipline and general human resource issues including leaves of absence. She has an extensive background in education, both as a teacher and administrator, and served terms as local Association president and MTS president earlier in her career. Young was previously the Assistant Superintendent for Secondary Schools and assumed her present position on July 1, 2003 when an organizational review was implemented. At the same time, former Assistant Superintendent Sharon Smith retired.

Smith previously managed elementary schools and in that capacity Smith dealt with the sick leave requests which are the subject of these proceedings. Prior to July 2003, Young handled maternity and sick leaves as well, but only in secondary schools. No one except for Young and Smith dealt with sick leave before July 2003.

Young reviewed the Division's policy and practice with respect to sick leaves and medical certificates. For an absence of three days or more, teachers must provide a doctor's certificate confirming they were unable to work because of illness (Tab B1). Young stated that these certificates are routinely provided by teachers without difficulty. The Division policy, approved on June 25, 1991 and never challenged by the Association, states as follows:

> Unless otherwise requested, all employees shall provide a certificate from a duly qualified medical practitioner for each absence of three or more days, confirming that the employee was unable to work because of illness.
>
> The certificate shall, as a rule, be provided to the employee's principal or immediate supervisor on the employee's return to duty. However, the management of the School Division may, at its discretion, request that the certificate be provided before the employee's return to duty.

The Division treats an absence of twenty or more consecutive working days as a long term sick leave. Section D.2 of the policy on Professional Staff Leaves and Absences (Tab B2) provides as follows:

> D. 2 When a teacher has been absent due to illness or accident more than twenty consecutive working days and/or when a teacher anticipates being absent due to illness or accident for more than twenty working days, he/she shall apply in writing for sick leave accompanied by a written statement from a physician certifying the inability to work and giving an expected date for return to work.

Young said that 20 working days is deemed a lengthy absence because it amounts to a full month or one tenth of the school year. In such a case, the Division must look for a appropriate substitute teacher who can carry the program forward in the classroom. This is different than short absences where the ill teacher may arrange a substitute and continue to plan and direct the teaching. The Division has drafted a document describing the process it follows in dealing with extended absences (Process Overview, Exhibit 11). Young stated that the document remains officially a draft pending the current arbitration proceeding. However, this process for lengthy absence has in fact been followed for many years, as far back as 1987:

> Depending on individual circumstances some or all of the following medical information will be required:
>
> 1. Physician has examined the patient.
> 2. Patient has or did have a medical condition that requires absence from work.
> 3. Patient is receiving and participating in treatment/recovery plan.
> 4. Anticipated return to work to full duties.
> 5. Prognosis/anticipated duration of illness.
> 6. Any restrictions/modifications to workplace or duties that are anticipated to be necessary in order to return the employee to work at an earlier date. (Bii, at p.7)

Young testified that as stated in the above policy, she decides what medical information will be requested based on the individual circumstances of each employee. The accompanying form of medical certificate to be completed by physicians asks for the following information in cases of extended illness: reason for inability to work, has a treatment/recovery plan been prescribed, is the employee following the prescribed plan, date of anticipated return to full duties, prognosis, and when modified duties are in issue, a series of questions pertaining to restrictions on the job. Young said that she may or may not need to obtain additional information, depending on the completeness of the certificate originally provided. She prefers the personal touch and calls staff directly. She knows a lot of the teachers personally. She may just phone the principal in cases of shorter absences and get confirmation of illness that way, assuming the principal knows about the teacher's situation.

Young presented and discussed a number of typical first medical certificates which she has received which were lacking in basic required information, such as the reason for absence and whether the employee is fit for work (Exhibit 13). When follow up information is needed after the initial certificate, Young writes to the teacher and requests another report from the physician. She testified that she rarely sends out such formal requests. She provided the following sample letter sent in April 2002 for illustration (Exhibit 12):

> We are in the process of determining our staffing needs for next year and require additional information from your doctor regarding your prognosis.
>
> Specifically, we request a report from your doctor indicating:
>
> 1. What medical condition or conditions prevent – from performing her teaching duties?
>
> 2. What treatment plan is in place to facilitate a return to her full-time teaching duties?
>
> 3. What is the long-tern prognosis for her for the 2002-03 school year?
>
> 4. In the event you believe – could return to work with some restrictions, please indicate what those restrictions would be so we may consider modified duties for her return to work.

The Division has no full-time or retainer physician available for independent medical reviews. After pricing the service, the Division decided it was not cost effective in light of anticipated usage. Thus, an outside medical consultant is retained on a case by case basis. Young decides when an outside opinion is required. If every medical certificate and report had to be sent to an outside doctor instead of directly to Young, there would be cost problems, delays in returning teachers to the classroom and delays in paying out benefits.

Young said such a step was unnecessary: "it's rare that I have to go to that extra length". She estimated that she personally had made fewer than five such requests but could not say how many Smith had made during the pre-July 2003 period. Young conceded in cross examination that she and Smith had little discussion on the subject and were not aware of each other's practice. One instance where Young indicated she may get a second opinion is return to work following a long term illness with psychiatric treatment.

Young testified that the Division takes precautions to safeguard the confidentiality and security of personal health information received from its staff. Medical notes for short absences may be handed to the principal or to her, but after checking them, Young arranges for the notes to be placed in the teacher's personnel file at the Division office. More detailed reports and documents are placed in the file inside a sealed envelope with a notation on the outside that the envelope is only to be opened by Young or the Chief Superintendent. Thus far the Chief Superintendent has never asked to see such file material. In addition, the Board of Trustees can theoretically have access to individual personnel files by Board motion, but again, this has never occurred during Young's tenure. Personnel files are stored in a secure filing cabinet outside Young's office. Teachers themselves have access to their own files or can authorize someone on their behalf to review the file, which is done in the presence of a Division representative. A principal might have occasion to review a teacher personnel file, in the presence of Young or another Division staff member, but in any case, the contents of a sealed envelope would not be available for such access. All employees of the Division are required to execute a pledge of confidentiality (Exhibit 14) pursuant to *The Personal Health Information Act* (PHIA).

Turning to the handling of sick leaves during an approved maternity leave period, Young stated that sick leave of this kind was granted for the first time in 1996. The teacher had a C-section and was paid six weeks. No requests had been received before that time. There were two other such cases before the present batch of grievances, and in each one, the Division accepted a simple medical certificate confirming the C-section.

In another case, there was no C-section but the teacher experienced an extended tear and then contracted flesh eating disease. Young paid out sick leave upon receipt of the doctor's note. She agreed that in retrospect, her practice differed from Smith's approach to sick leaves for elementary teachers before July 2003. Smith demanded more information than she did.

Under cross examination, Young conceded that her practice was to pay sick leave only for C-sections and not for regular deliveries. Directed to some of the arbitration exhibits in which physicians certified the pregnancy, patient examination and need for six weeks off, she agreed that in this respect she was treating pregnancy differently than other types of requested sick leave. She added that some medical certificates were presented without a due date listed. In the Fall of 2003, she did approve sick leave where medical certificates recommended extended bed rest and cited reasons. Directed to the May 10, 2001 medical report regarding S (Tab C17), she agreed that this information was adequate. The doctor described the patient's medical condition, the treatment and the prognosis. Nevertheless, she does differentiate between sickness, on the one hand, and recovery from a normal vaginal delivery, on the other hand. "I would ask, what's outside the norm here to make it sickness rather than recovery from birth?" She confirmed that it is her position that in cases of a normal birth, maternity leave should be available but sick leave should not.

Young said that most teachers take the full amount of maternity leave allowed. They may take more so that often they return at the end of a school break period. Under current law they are allowed a full year. As long as she has a capable replacement, Young accommodates requests for additional unpaid leave.

Cross examined about the reasons for requiring additional medical information, Young listed the need to ensure proper qualification for leave, the need to prevent abuse, assessment of psychiatric illness, ensuring fitness for return to work, compliance with reporting duties relating to communicable disease, and perhaps other reasons which may arise. She would not agree to any general propositions about teacher sensitivities regarding medical information. In her experience, some people take great care to seal their medical reports and mark them as confidential, whereas others just hand their documents to the school secretary or principal. Some reports arrive in ordinary mail and are opened in the office.

Pressed to explain the Division's approach to absence by reason of surgery, Young again replied that it depends on the circumstances. If a certificate states the type of surgery and confirms the need for absence, that's enough. Young said that teachers are usually pretty candid about their situations. A certificate stating "Off 6 weeks for heart surgery" would probably not generate a request for more information, but it's not cut and dried. Surgeries represent the most common reason for lengthy absence but with a changing demographic - more young female teachers - maternity leaves are becoming more frequent.

Once or twice per year, Young does a random check of the sick leave data to watch for suspicious patterns or signs. The numbers are printed out from the highest to lowest, for all Division employees, and she always found on the secondary side that she knew the reasons for all the lengthy absences. While abuse of sick leave is an area of general management concern, it was not suggested by the Division that any of the current grievances raised any issue of abuse.

<u>Arguments of the parties</u>

For convenience in these reasons, the board will refer to the Long Term Sick Leave policy document (Tab B2, especially para. D.2) as "the Policy" and will refer to the Process Overview document (Exhibit 11, especially Part B, Extended Absence) as "the Process". The Manitoba College of Physicians and Surgeons Statement 139 (Exhibit 15) dealing with sickness certificates will be referred to as "the College Statement".

The Association reviewed the details of each individual grievor's medical certificates and circumstances in order to address the sufficiency of the information provided (Question 5 above). However, the Division's submissions in this regard were very brief. Ms Gibson explained that the Division is less interested in rulings on these individual events and more concerned about guiding principles for the future. These submissions will be discussed later under the heading "Analysis and Conclusions".

Final argument of the Association

The Association summarized the main issue before the board in the following terms: is the Division's approach to medical information reasonable in light of the collective agreement and the various relevant legislative provisions, namely, *The Public Schools Act*, *The Human Rights Code* and *The Personal Health Information Act*? The Association argued that both the Policy and the Process violate the collective agreement and the legislative provisions listed above. In respect of the statutes cited, an arbitration board is bound to apply the substantive rights and obligations of the parties just as if they were set forth in the collective agreement: *Mcleod v. Egan*, [1975] 1 S.C.R. 517, applied in *Parry Sound Social Services Administration Board v. Ontario Public Service Employees Union, Local 324*, [2003] S.C.J. No. 42. The Court in *Parry Sound* described human rights statutes as "a floor beneath which an employer and union cannot contract" (at para. 28). The Association relied as well on the College Statement and submitted that the Statement sets forth the permissible limits of information requests which the Division may make of physicians who are treating teachers. Thus, the Division is not entitled to a diagnosis. Section 94 of the Act entitles the Division to "a medical certificate from a duly qualified medical practitioner certifying that the teacher was sick during the period of absence", and not more. The College Statement dictates that physicians avoid diagnostic terms, but allows for discussion of "prognosis relative to the work situation", activity limits and risk factors. The Association argued that these are the permissible boundaries.

By way of example, it is unnecessary for the Employer to know that a teacher has a sexually transmitted disease. It is sufficient for employment purposes if the doctor certifies that there is an infection which requires absence from work, with enough information regarding prognosis to allow for reasonable planning by management. Again, if a teacher needs surgery, why should the Division receive details about the nature of the illness and the surgical treatment, as long as the validity of an absence is verified and the Superintendent knows when to expect a return to work?

Arbitral authority denying employers a diagnosis is canvassed in *Re Regional Municipality of Halton and Ontario Nurses' Association,* (1993) 32 L.A.C. (4th) 137 (Swan) at p.144-148. In that case, the agreement stated that the claimant's evidence of disability must be in writing and "signed by a medical physician who has examined the employee during this period of disability and attests to the disability in his opinion" (at p.141). The board held that this language did not entitle the employer to obtain routine disclosure of the employee's precise medical diagnosis (at p.149).

The Association also relied upon *Re York County Hospital Corp. and Service Employees International Union, Local 204*, (1992) 25 L.A.C. (4th) 189 (Fisher), a case which illustrates the risk to an employee's privacy and dignity when proper confidentiality measures are not maintained by an employer. The grievor in *York County* had experienced embarrassment in the past when front-line supervisors became aware of his medical condition and discussed it within earshot of the grievor's co-workers. The board acknowledged that the medical certificate provided by the grievor was lacking information, but ruled that the employer was *not* entitled to demand the diagnosis. Other measures should have been tried first, a number of which were discussed by the board. The physician who signed the certificate was known to the employer as credible and his qualifications were accepted; "we can reasonably assume" that the doctor carried out a normal and proper assessment (at p.193). No attempt was made by the employer to follow up with the physician by asking questions relating to the grievor's functional capacity, as opposed to his diagnosis. Confidentiality protections were inadequate. On this basis, the grievance was sustained.

In *Re Salvation Army Grace Hospital and United Nurses of Alberta, Local 47,* (1995) 47 L.A.C. (4th) 114 (Tettensor), the challenged medical form required a claimant's physician to provide the "nature of illness". In light of the need to balance privacy with legitimate employer needs, the board construed this phrase as *not* requiring a diagnosis (at p.122). The doctor could comply with the request by giving a description of the nature of the illness and not a detailed diagnosis. Nevertheless, in the present case, the Association interpreted the Division's Process as demanding a diagnosis, not merely a description of the nature of the illness.

The case law does not go so far as to hold that an employer *is never entitled* to a diagnosis. In an exchange with the board in the present case, Ms Matthews Lemieux confirmed that the Association recognizes situations where it may be necessary for the Division to see the diagnosis: where there are reasonable concerns about sick leave abuse, where questions arise regarding fitness to return to work, where there may be a communicable disease. She emphasized that none of these circumstances existed on the facts before the present board.

The Association cited a variety of arbitral authorities dealing with employer access to personal medical information about employees. The broad principles were not in dispute in this case. In *Re Thompson General Hospital and Thompson Nurses M.O.N.A. Local 6*, (1991) 20 L.A.C. (4th) 129 (Steel), it was held that if an employer seeks information beyond the initial certification, it must have reasonable grounds to question the completeness of the certificate and must clearly explain to the employee why the certificate is not acceptable. The employee is entitled to return to her physician to obtain the proper information (at p.135). Moreover, the employer must exercise its right to medical disclosure fairly and in good faith pursuant to section 80 of the *Labour Relations Act* (at p.136). Also cited was *Re Lafarge Canada and General Teamsters Local Union No. 979,* [1999] M.G.A.D. No. 89 (Peltz). These were cases dealing with medical certificates in the context of fitness for return to work.

Re St. Michael's Extended Care Centre and Canadian Health Care Guild, (1994) 40 L.A.C. (4th) 105 (Smith) considered an absenteeism policy in which an obligation to provide a medical certificate was triggered by a prescribed number of absences. The board characterized as "particularly repugnant" the directive to provide a diagnosis, a treatment prescription and a prognosis, given the automatic nature of the requirement for a certificate (at p.120). It was held that the employer's rule was unreasonable in the circumstances and "an unlawful interference with the employee's right of privacy" (at p.121).

In *Re Rosewood Manor and Hospital Employees' Union, Local 180,* (1990) 15 L.A.C. (4th) 395 (Greyell), the collective agreement did not specify the circumstances in which proof of sickness was required for sick leave, and the board ruled that a doctor's note or report could be demanded by the employer "when the circumstances reasonably warrant" (at p.413). The particular policy in question was upheld because proof from a physician was not an automatic requirement for every sick leave absence. There was no invasion of privacy.

The Association pointed to the following statement of governing principles approved by the board in *Rosewood* (at p.411-412), quoting Arbitrator Hope in *Re Victoria Times Colonist and Victoria Newspaper Guild, Local 223* (unreported, February 12, 1986):

> There is no question that an employer has a continuing right to inquire into any absence from work and that an employee has a continuing obligation to account for any absence, including an absence alleged to be due to sickness. ...
>
> But in that context it is important to recognize that there is nothing inherent in the employer-employee relationship which vests in an employer a discretionary right to compel employees to compromise their right of privacy through the disclosure of personal medical information. In particular, that is not a discretion which falls within the retained rights concept which vests in an employer those rights coincidental with the management and direction of the enterprise and the work-force which have not been bargained away. An employer can only intrude upon the privacy of an employee if it has a legitimate business purpose tied to the employer-employee relationship which justifies the intrusion.
>
> In the context of the benefits of sick leave and sick pay, an employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a bona fide sickness or disability. How searching that inquiry can become is a function of the particular facts. The inquiry must be reasonable. Where sick leave and sick pay are addressed in the collective agreement, the inquiry must be in accordance with the provisions of the agreement.

The Association submitted that these and other authorities emphasize the balance which must be struck between an employer's need for information and the employee's right to privacy. On the facts of the present case, the Association argued that in every instance, the Division received all the information it legitimately required once it received the initial medical notes confirming pregnancy. These notes verified the teacher's condition, prognosis and recovery. Pregnancy is different than other grounds for absence from work. Maternity leave is a hybrid, containing both a health-related component (as described by Burnett's evidence) and a non-health related component (bonding, nurturing and other family needs). See *Re Alberta Hospital Association et al and Parcels et al*, (1992) 90 D.L.R. (4th) 703 (Alta. Q.B.) at p.711.

The Association asserted that there is a period of legitimate sick leave (the health-related component) within *every* maternity leave, whether there is a routine delivery or not. The day of delivery is undeniably a day of sick leave. Beyond that, there is a disagreement between the parties in the present case, but the Association asked the board to accept the six week presumptive period for purposes of determining what medical information may be demanded by the Division.

If the presumptive period is accepted, then there is no legitimate basis for the Division to seek additional medical information, as it did with all four grievors. The verified fact of pregnancy was the only piece of information the Division needed and was entitled to receive in support of a six-week sick leave application. Where extra weeks were sought, some additional information was reasonable in order to establish the basis for the extended sick leave period. Moreover, the Association submitted that requiring repeated medical certificates in the weeks after delivery would be wasteful of personal time and public financial resources. The medical convention does not require such examinations and physicians are not paid for them (barring complications). As described in *Re St. Jean Brebeuf Hospital and Canadian Union of Public Employees, Local 1101*, (1977) 16 L.A.C. (2d) 199 (Swan) at p.204-206, a certain amount of reasonableness is needed on the part of employees, employers, doctors and arbitrators, lest sick pay schemes "collapse in a morass of red tape".

According to the Association, nothing in the collective agreement supports the Division's Policy and Process whereby absences of six weeks are treated as lengthy and teachers on maternity leave have their cases checked by an outside medical consultant. The Employer must be held to the words of the agreement as negotiated. *Re Corporation of the City of London and Canadian Union of Public Employees, Local 101*, (1983) 9 L.A.C. (3d) 262 (Langille) noted that "By setting out the degree and type of inspection which the employer will utilize in scrutinizing claims for sick leave the parties have committed themselves to one solution to a delicate issue" (at p.269).

Arbitrators have disapproved when employers imposed automatic requirements for a medical certificates: *Re City of Toronto and Canadian Union of Public Employees, Local 79*, (1984) 16 L.A.C. (3d) 384 (Picher) at p. 395-397; *Re Women's Christian Association of London (Parkwood Hospital Veterans Care Centre) and London and District Service Workers' Union, Local 220*, (1983) 10 L.A.C. (3d) 336 (Brown).

The Association also cited *Re Health Sciences Centre and International Union of Operating Engineers, Local 987*, [2003] M.G.A.D. No. 16 (Spivak). The arbitrator rejected automatic production of a medical certificate after a threshold level of absenteeism, although it was noted that "the Hospital has a right to require a medical certificate on a case by case basis where there are reasonable grounds to doubt the truth of an employee's claim ... " (at para.70). In *Re Pacific Press Ltd. and Vancouver Typographical Union, Local 226 & Vancouver-New Westminster newspaper Guild, Local 115*, (1977) 15 L.A.C. (2d) 113 (Thompson), the agreement provided that "A certificate from the employee's doctor or one selected by the Company may be required by the Company" (at p.114). It was held that this language did not allow the employer to force a claimant to give consent authorizing disclosure of additional information by his personal physician.

The Association submitted that if the Division insists upon defining 20 working days as a "lengthy period of illness" under Article 5.06 (b), then it must negotiate for specific wording to this effect in the collective agreement. Until then, it has no right to treat every absence of 20 days or more as lengthy and subject to additional medical disclosure pursuant to the Policy and the Process. The Association acknowledged that in the Wawanesa policy for short term disability benefits (Exhibit 2) and in MTS' own LTD plan (Exhibit 3), there are disclosure obligations which are much more invasive. However, the Association argued that providing sensitive personal information to an employer is much more worrisome than providing the same information to an arms length insurer or the employee's own labour organization.

The employer is in a position of authority over the employee and exercises disciplinary, evaluation and promotion powers which can change a teacher's professional life. More fundamentally, the Association submitted that if the Division wants and needs similar disclosure, it must seek it at the bargaining table.

The Association referred to a recent line of authorities dealing with sick leave requests during a period of maternity leave. The leading case is *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219 in which the Court ruled that it was discrimination based on sex where the employer disentitled pregnant employees from accident and sickness benefits. While pregnancy is not truly a sickness, it is a valid health-related reason for absence from work. Once an employer enters the field and provides sickness coverage, it may not lawfully exclude benefits to a pregnant employee, whether for non-pregnancy related illness or pregnancy itself (at para.30). *Brooks* was a case decided under the Manitoba *Human Rights Act*, S.M. 1974 c.65, the predecessor statute to *The Human Rights Code*.

This decision apparently spawned a series of Ontario teacher cases in which applications were made for sickness benefits during the course of maternity leave: *Essex County Board of Education v. Ontario Secondary School Teachers' Federation, District 34*, (1996) 136 D.L.R. (4th) 34 (Ont. Ct. Gen. Div.), reversed (1998) 164 D.L.R. (4th) 455 (Ont. C.A.), leave to appeal denied [1998] S.C.C.A. No. 519; *Re Dufferin-Peel Roman Catholic Separate School Board and Ontario English Catholic Teachers' Association*, (1998) 80 L.A.C. (4th) 149 (Samuels); *Re Hamilton-Wentworth District School Board and Ontario Secondary School Teachers' Federation (Chaikoff Grievances)*, (2000) 89 L.A.C. (4th) 194 (Springate); *Re Peel Board of Education and Ontario Secondary School Teachers' Federation*, (2000) 92 L.A.C. (4th) 289 (Kaplan). The Association submitted that in light of the foregoing litigation saga, it is now accepted that there is a six week presumptive period of health-related absence from work which can be invoked by a teacher following natural childbirth.

Therefore, this six week period is not "a lengthy period of illness" under Article 5.06(b) of the collective agreement in the present case and the Division was not entitled to seek medical information from the grievors on that basis. The Association relied in particular on the last award in the above series, *Peel Board of Education*, and urged this board to adopt the following conclusions (at p.306-308):

> This six-week standard of care has developed because it is generally medically accepted that six weeks is necessary to recuperate from childbirth, to allow, among other things, the pelvis and vaginal canal to heal, vaginal bleeding to abate, in the case of caesarean sections and episiotomies, incisions to heal, and the uterus to return to normal. There are numerous other physiological and psychological aspects of recuperation following giving birth and they too explain why, as Dr. Herer testified, the vast majority of doctors are taught and then practise this standard of care. Obviously, standards of medical care cannot be static; received wisdom must be challenged. But in this case, based on the evidence put before me, I must conclude that six weeks is the normal and normative recovery period following an uncomplicated childbirth. ...
>
> ... considering the weight of the medical evidence put before me and considering, importantly, the need to give human rights legislation liberal and purposive interpretations and the need to give collective agreements sensible, workable, and correct constructions, not to mention the requirement to balance management's interests with those of the Federation and its members, I can only conclude that pregnant women who provide the employer with a doctor's letter stating that they will require six weeks off work to recover from an uncomplicated childbirth meet the requirements of the Collective Agreement and establish a basis for six weeks of sick pay provided they have sufficient credits in their bank. I reach this conclusion for the reasons already given and for the reasons which follow.
>
> There is simply no legal or practical purpose to be served by requiring women, any time in the first six weeks following delivery, to attend at their doctor's offices for an examination and/or to advise their doctors that they do not feel well enough to return to work so as to establish entitlement to sick pay. ...
>
> Given the prevalent standard of care, it simply makes no sense to require a woman, following childbirth, to prove that she was recovering, that she was "unwell" in the first six weeks after delivery in order to obtain sick pay.

> Requiring women to attend at their doctors' offices two or three weeks following birth to obtain a doctor's note stating that they are still healing, still recuperating, still medically require further weeks off, might not cost OHIP very much but would be totally counter-productive to the health of the woman, the well-being of her child and social interests considered more generally. It would also ... be extremely formalistic. It is hard to see how a woman could fail to satisfy her doctor at any point up to six weeks that she was unable for medical reasons related to pregnancy and giving birth to return to work. While some savings to management might be achieved in some cases where a woman reported that she was able to return to work before six weeks had passed, it is hard to imagine this occurring with any degree of frequency, particularly in cases of this kind where the sick pay is taken in conjunction or contemporaneous with the maternity leave. ...
>
> It has not gone unnoted that the grievors in this case were necessarily forced, in support of their claims, to publicly divulge highly personal medical information about themselves. Very simply, while adopting a blanket approach might in some cases overcompensate some women, in other cases it will under-compensate some women. However, it is the appropriate result of a proper interpretation and application of the law, the collective agreement and the need to balance the legitimate interests of each party. It should be noted in this regard that both experts agreed in their evidence that there were normative recovery periods for other medical events. Recognizing this one hardly constitutes a radical departure from existing practices. Indeed, it is merely a statement of the obvious and the inevitable.

In the context of the present collective agreement, the Association therefore maintained that "a lengthy period of illness" means a duration significantly beyond the particular medically recognized presumptive period in question, whether it be a period of postpartum recovery, a period of surgery recovery or some other type of ill health. Outside medical review under Article 5.06(b) is not available to the Division unless and until the illness becomes lengthy in this sense. In agreeing to the current wording, the parties did not refer to "a lengthy period of *absence*", which is how the Division wants to read the clause. The Division should be held to the strict terms of the agreement. In balancing privacy versus management interests, the board should give substantial weight to personal privacy.

Ms Matthews Lemieux summarized the Association's position as follows. Section 94 of the Act entitles the Division to receive a medical certificate certifying the teacher's sickness during the period of absence. The College Statement limits the information which can be disclosed. Diagnostic terms are not allowed, but if the Division has a reasonable basis for seeking more information in a specific case, it may state its objection to the sufficiency of the certificate and receive more. Outside medical review under Article 5.06(b) cannot be routinely demanded for absences of 20 working days. The illness must exceed the presumptive period for the medical condition. Even then, the Article only allows for a report on ability to return to work. Finally, the Association expressed grave concern about *who* is entitled to receive the personal health information of teachers. Division managers should not be given access. Personal information should flow to an outside physician who can advise the Division of his or her findings. This procedure would strike a proper balance between the Division's administrative needs and the privacy rights of teachers.

Final argument of the Division

In the end, argued Ms Gibson, there was very little difference between the Association's summary statement of its position (immediately above) and the Division's current practice as set forth in Exhibit 11, the Process. Young also testified that the Division will follow the Process in future. It represents a guideline within which the management can exercise discretion. In express terms, the preamble to paragraph B(ii) states that "[d]epending on individual circumstances some or all of the following medical information will be required ...". This distinguishes most of the arbitral authorities cited by the Association, since it was rigid or arbitrary employer demands for personal information which attracted criticism in those cases. Arbitrators have called for reasonableness and common sense when an employer exercises its discretion in this area. The Division submitted that it's Policy and Process meet that standard.

Moreover, the medical certificate included in the Process complies with the College Statement. The form does not demand a precise diagnosis (para.1). It asks whether a treatment and recovery plan has been prescribed and followed, but does not demand the details thereof (para.2). The inquiry relating to prognosis is tied to the question of return to work on full or modified duties (para.5), just as the College Statement requires. Information is sought to ascertain work activity restrictions (para.6), again following the College Statement. The Division rejected the notion that the College Statement could be deemed binding on employers or an arbitration board. It is binding only on physicians. But the Division is following a practice which basically does conform to College guidelines. The College Statement is permissive and when individual circumstances require more information, nothing prevents the Division from seeking greater disclosure. The Statement refers interchangeably to employers and insurers, which the Division submitted was appropriate and reflected the reality of the Division's financial responsibility for sick leave coverage.

Section 94 of the Act is also permissive, according to the Division. The section provides that "... the school board may require the teacher to submit to the school board a medical certificate ...". In this respect, the Division disagreed with the Association's view that the Act is a complete code. The legislation does not detract from the Division's common law rights as an employer. In addition, section 94 is expressly subject to collective agreement provisions. The parties herein have negotiated Article 5.06(b) which allows for more than a mere certificate. In its discretion, the Division may have a teacher's case checked by a health official or physician. The Division has previously asserted that this Article adds to its common law rights by authorizing an independent medical examination, a position initially upheld in arbitration: *Re St. James-Assiniboia School Division No. 2 and St. James-Assiniboia Teachers' Association No. 2 of the Manitoba Teachers' Society,* [2000] M.G.A.D. No. 43 (Wood), quashed in part [2002] 4 W.W.R. 294 (Man. Q.B.), reversed and quashed in full as inarbitrable (2002) [2003] 6 W.W.R. 193 (Man. C.A), leave to appeal denied [2003] S.C.C.A. No. 34. In any event, the Division submitted that the present case can be decided based upon common law rights.

Ms Gibson noted the Association's concession that the Division is entitled to object to the sufficiency of a medical certificate, on reasonable grounds. Clearly that is in accord with arbitral authority. The parties therefore agree in this regard, although the Division denied that potential abuse is the *only* basis on which management can object to a certificate. As noted in *Re Fishery Products (Marystown) Ltd. and Newfoundland Fishermen, Food & Allied Workers, Local 1245,* (1979) 22 L.A.C. (2d) 439 (Hattenhauer), "medical certificates are not Holy Writ ... their authors are fallible and can be misled" (at p.444). But beyond the issue of abuse or error, the Division is the insurer of sick leave benefits. An insurer is entitled to insist on a proof of claim. It is also entitled to test the proof.

Taking the Association's example of a sexually transmitted disease which might be described only as "an infection" in order to safeguard the teacher's privacy, the Division argued that this may not be sufficient to meet its legitimate needs. "Infection" can have many different effects, from minor inconvenience to serious disabling illness. Each case must be considered and handled individually. The Division insisted that individual consideration is its practice.

The Division rejected the Association's interpretation of "lengthy period of illness" in Article 5.06(b) as meaning 'longer than the norm for that particular medical condition'. Instead, the clause should be read in relation to the Division's need to cover the absence with a substitute teacher. "Lengthy" means a long period during which the classroom teacher is unavailable to her students. Moreover, the Association's position is circular. If there is a presumptive period for a particular condition, how can the Division assess whether the absence exceeds the norm without knowing what the condition is? Yet the Association maintains that the Division has no right to such disclosure.

Finally, the Division pointed to the long past practice with respect to the 20 day definition of lengthy illness under Article 5.06. The Policy has been in place for many years and over the course of many collective agreements. When Arbitrator Wood heard the Association's multi-faceted attack on the long-term sick leave policy in 2000 (cited above), paragraph D.2 was in issue, but not on the grounds currently being argued. The 20 day formula has never been challenged. The Division therefore urged the present board to apply an estoppel against the Association's grievances in this respect, or to use past practice as an interpretive aid if required.

The Division referred to *Re Winnipeg Free Press and Media Union of Manitoba No. 191,* [2001] M.G.A.D. No. 75 (Hamilton) as a case where similar arguments were made by the union in attacking the employer's policy on medical certificates. The form prescribed for use by attending physicians required a medical history, diagnosis, prognosis, description of treatment and (for partial disability claims) a statement of work restrictions. The collective agreement was silent on procedures for making a sick leave claim and the union argued that the company policy was therefore inconsistent with the agreement. Arbitrator Hamilton held (at para.93) that the employer was not prohibited from promulgating its rules simply because the agreement was silent, subject always to meeting the *KVP* test for reasonableness. After reviewing many of the same authorities cited by the Association in the present case, the arbitrator determined that "the Employer may require proof of sickness in the form of a doctor's note or certificate when the circumstances reasonably warrant this step being taken" (at para.108). However, in *Winnipeg Free Press* the policy was written so as to demand a diagnosis in every case, and this requirement was found to be unreasonable (at para.111):

> I have found that requiring an employee to furnish the Physician's Statement *for each and every absence* is unreasonable. The Physician's Statement reflects the type of physician's report which is generally required under a short or long term disability plan administered by an insurance company.

> Such information is usually required in order to justify the payment of benefits for a longer term absence on account of illness or injury. It is quite standard for information relating to the nature of the illness (i.e. a diagnosis) to be included on such forms. However, the critical fact is that completion of such forms is a condition of the plan and the employee must make a formal application for the insured benefits and request his/her attending physician to provide the necessary details. In reality, the employee consents to the furnishing of this information as a condition precedent to entitlement. To the extent Dufort testified that the Employer would require the Physician's Statement to be completed (in certain situations) in order to ascertain the ability of an absent employee to undertake rehabilitative or modified employment duties is reasonable. In the result, I am not prepared to rule that the Physician's Statement is inappropriate per se. Its use will depend upon the facts of an individual case. The key point is that there must be a reasonable basis for its use. For example, if an employee seeks benefits under Article 32 for a long period due to his having to attend the hospital for surgery, to be followed by rehabilitative treatment, then the Employer is entitled to reasonable details in this regard. Using the Physician's Statement would be reasonable in this circumstance. (Emphasis in original)

Ms Gibson pointed to the evidence in the present case and argued that the Division does not take the kind of rigid position which rendered the *Free Press* policy unreasonable.

The Division also cited *Re B.C. Public School Employers Association/Districts No. 5 and 59 and British Columbia Teachers' Federation,* (2002) 107 L.A.C. (4th) 224 (Korbin) as presenting similar facts to the present case. Medical certificates were routinely required for teachers seeking extended medical leave (in the Peace River South District).

The term "extended" was not defined in the collective agreements in question but the arbitrator held, on the evidence, that "extended medical leave is meant for significant periods of absence due to illness or injury, *i.e.,* one month" (at p.245). Much like the present case, the B.C. school board prescribed a certificate which asked the reason for the requested leave, how the illness prevents the claimant from working, whether a course of treatment has been prescribed and followed, dates of examinations and follow-ups, estimated return date and anticipated restrictions. The arbitrator adopted (at p.242-243) the guiding principles set out by Arbitrator Hope in *Victoria Times-Colonist* and found, upon considering the medical certificate form in dispute, that most of the questions were reasonable (at p.245-247):

> As Arbitrator Hope held, an employer is entitled to know on a routine basis the nature of the illness or disability, the prognosis and the expected date of return to work. In this regard, I find that Questions one, two and seven of the prescribed medical certificate [reason for leave, effect of illness on work capability, return date] are clearly legitimate inquiries for the Peace River South School Board to make on a routine basis in cases of requests for extended leave. I agree with the Union that arbitral jurisprudence supports a finding that, as except in unusual circumstances, an employer is not entitled to a specific diagnosis of an employee's health problem. Indeed, the Employer asserts "the questions posed in the forms seek a general statement as to the nature of the illness". In so far as Question one of the medical certificate elicits information on the nature of the illness, then that question should not be taken as an inquiry into the specific diagnosis of the applicant.
>
> As to Question three [course of treatment], the first thing to note about the queries is that they do not actually elicit a description of the treatment. Rather, they limit requested information to whether treatment has been prescribed or recommended and whether that treatment, whatever it is, is being followed. The questions elicit information in two possible ways -- whether treatment is a part of the illness giving rise to the request for leave or whether the treatment itself is the reason for the requested leave. These questions are not about the nature of the treatment and are therefore not unreasonably probing of the teacher's medical situation. In this regard, the Employer seeks only the information that may assist it, together with the other information provided, in making the necessary determination about the requested leave. Therefore, I find that queries under Question three are reasonable. ...

> As for Question six concerning "medical follow-ups", I am satisfied that this inquiry is reasonable as it is commensurate with the School Board's consideration of the duration of the extended leave. Although Question six speaks generally to what the teacher is doing about the illness, I do not find the question to be an unreasonable intrusion into what may be considered private information. In regard to Question eight [restrictions], I find that it constitutes a practical inquiry into what the teacher's expected capabilities may be upon his or her return to work. It is reasonable and justified on the basis of the School Board's need to plan in terms of its staffing requirements.

In the *B.C. Schools* case, Arbitrator Korbin ruled that the employer was not entitled to know when the teacher was first seen by her physician (at p. 246). Such a question is not part of the Division's Process.

Finally, the Division asked the board to take into account the medical disclosure requirements of the Wawanesa policy and the MTS LTD Plan. While the Association is not bound in the present case by terms and conditions it has accepted for its members in the disability plans, the evidence is still relevant. It is a guide to what these parties consider reasonable in practice.

Turning to the issue of *who* may properly receive personal health information, the Division argued that there is no authority which supports the Association's position that the Division's managers are not entitled to be direct recipients of the information. On the evidence, such a requirement would cause unnecessary expense to the Division and would inherently create delay, to the prejudice of both the Division and individual teachers. The Division suggested that it has implemented reasonable safeguards for confidential information. Its managers can be expected to deal sensibly with medical information even though they are not experts. Where the supporting information looks adequate, the claim will be paid. When the Division staff have questions, they will inquire and may seek advice from an outside medical professional. It is the duty and the right of the Division to exercise judgement in choosing to solicit external review.

On the specific issue of the so-called presumptive period of sick leave after child birth, the Division insisted that this issue is not before the arbitration board. All questions relating to individual payments to the grievors have been settled. The Division asked the board not to address the question of whether there is a health-related absence during maternity leave and how long it should be. The Division argued that on the evidence heard by the board, pregnancy and its after effects were not shown to be a disability. A medical convention is not the same thing as a disability. Burnett stated that there is a range between two and eight weeks for recovery after delivery. Therefore, a certificate from a doctor merely confirming the fact of pregnancy is not enough to support a sick leave claim.

Reviewing the Ontario litigation dealing with teacher sick leave during maternity, the Division pointed to the ultimate result in the *Essex County* case. The Ontario Court of Appeal level dismissed the grievance and observed that neither the arbitration board nor the Divisional Court had been able to determine the precise period during which the grievor would have been entitled to sick leave (at para. 20). The case was simply not proven. In *Essex County*, the doctor's note (Divisional Court at p.37) was similar to some of the notes submitted by the grievors in the present case:

> The above named patient will be unable to work on the date of the birth of her child for medical reasons and also for a period of time following the delivery. That date depends upon the type of delivery and the possibility of any complications arising from the delivery.

When asked to amplify his initial note, the doctor provided the following statement which was adduced in evidence (Divisional Court at p.42):

> It is standard teaching in Obstetrics that a normal postpartum birth is 6 weeks. This allows the pelvis to heal adequately, the vaginal canal to heal naturally and properly. The uterus returns to its normal non-pregnant state. The vaginal bleeding has usually subsided by 6 weeks.

The Division therefore argued that, insofar as this issue is before the board, *Essex County* decides the matter. The presumptive six week postpartum recovery period is not by itself proof of an entitlement to paid sick leave.

Responding to the Association's reliance on the award in *Peel Board of Education*, the Division distinguished the case factually. All three grievors in *Peel* had serious complications which went well beyond the scope of a normal pregnancy. In addition, the Division submitted that the board in *Peel* inexplicably failed to follow the Court of Appeal's holding in *Essex*. The arbitration board's comments in *Peel* recognizing a six week sick leave claim without specific proof of disability are inconsistent with appellate authority.

Generally on this point, the Division maintained that the real issue is income replacement during maternity leave. To ensure income replacement, the parties have negotiated a SUB plan which pays a teacher 90% of her gross wages for 17 weeks. On an after tax basis, the difference between sick leave payments and SUB payments is not significant. The arbitrator's social policy reasons for upholding the grievances in *Peel* (at p.306) have no practical application in the present case.

Analysis and conclusions

As set forth at the outset of this award, there were five questions put to the board by the parties relating to the disclosure of medical information. The first four questions may be summarized as follows: *what* information is the Division entitled to receive, *when* may it be received, *who* is entitled to receive it and what is a "lengthy period of illness" which may trigger review of a claim under Article 5.06(b)? Question 5 concerns the adequacy of specific medical information provided by the grievors to the Division and what limitations governed management in requesting more detailed disclosure. The final sub-part of Question 5 is really a synthesis of the entire dispute: "What is the balance between the Division's right to satisfy itself that the sick leave being requested is *bona fide* and the personal privacy rights of Association members?"

Some of the first four questions have a dual aspect. First, there is the case of sick pay claimed during maternity leave, as illustrated by the individual grievors' and their evidence. Maternity leave has been recognized as a unique type of absence from employment, having a hybrid nature: *Parcels* (cited above). Part of a maternity leave is health related and part is not. Under the maternity leave scenario, the parties sought rulings with respect to what may be requested, when, who may receive it and what is a lengthy illness.

Second, there is regular sick leave, about which very little was said during the course of evidence. Nevertheless, answers were also sought to these questions under a regular sick leave scenario.

Question 1.

Is the Division entitled to a diagnosis, treatment plan and prognosis? (Regular sick leave)

This question is easier to answer within the context of a regular sickness claim and therefore the board begins with this aspect of the issue first. A discussion of maternity leave will follow afterward. None of the grievors presented a regular sick leave claim and the evidence relating to regular sick leaves was quite general. There was some reference to mental health leaves and surgeries as two types of extended absences which come to the attention of management. Obviously there may be many other reasons for extended sick leave.

While the parties began this case by stating strongly contrasting positions under Question 1, we agree with Ms Gibson that by the end, there was not a great deal in dispute. At the very least, the positions of the parties were more nuanced, reflecting the reality that a balance is required between disclosure and privacy. Both employer and employee have legitimate interests.

The Association strongly rejected any *routine* demand for disclosure of a teacher's diagnosis and sought confirmation on this point from the arbitration board. The Division acknowledged that automatic disclosure of a diagnosis cannot be required and undertook not to make such demands. The present board agrees with Arbitrator Hamilton who stated in *Winnipeg Free Press* (at para.110), following *Re Ottawa Citizen and Ottawa Newspaper Guild, Local 205*, (1996) 58 L.A.C. (4th) 209 (Dumoulin), that "an employer is not entitled to a medical 'diagnosis' from an employee's physician as a matter of course." However, as held in *Regional Municipality of Halton* (at p.149) and *York County Hospital* (at p.194), there are instances where the employer *will be* entitled to a diagnosis. The Association conceded that the Division may sometimes need to see a diagnosis, such as where reasonable concerns arise about abuse, where a diagnosis is required to deal properly with fitness for return to work and where there may be a communicable disease involved. These are the sorts of reasons which arbitrators have allowed, in the specific circumstances of particular cases, as justification for employer access to an employee's medical diagnosis.

During final argument, both counsel cited and endorsed Arbitrator's Hope's statement of principles in *Victoria Times Colonist*, and this board concurs with the following extract (at p. 8, 20) in further response to Question 1 herein:

> There is no question that an employer has a continuing right to inquire into any absence from work and that an employee has a continuing obligation to account for any absence, including an absence alleged to be due to sickness. ...
>
> In the context of the benefits of sick leave and sick pay, an employer is entitled to require the employee to provide sufficient information to permit it to satisfy itself that a particular absence was for a bona fide sickness or disability. How searching that inquiry can become is a function of the particular facts. The inquiry must be reasonable. Where sick leave and sick pay are addressed in the collective agreement, the inquiry must be in accordance with the provisions of the agreement. ...

> This employer is entitled to require all employees to provide particulars of each absence attributed to illness or disability. Whether the information provided is sufficient will depend on the particular facts. Certainly there can be no objection to routine information as to the nature of the illness or disability, the prognosis, if any, and the expected date of return of the employee. Generally, the employer is entitled to require all the information necessary to equip management to determine whether the illness or disability is bona fide and what impact it will have on the attendance of the employee.

The medical certificate prescribed by the Process (Exhibit 11) is not routinely demanded by the Division, according to the evidence, and in any case, the form of certificate does not request a diagnosis *per se*. Paragraph 1 of the physician's statement asks for completion of the following sentence: "Following examination, I certify that the above-mentioned person will be unable to work due to ... ." The form continues in these terms: "This will prevent the above-mentioned person from working because: ...". As held in *Salvation Army Grace Hospital* (at p.122) and *B.C. Public School Employers* (at p.246), this wording really seeks a general statement as to the nature of the illness and should not be taken as requiring a the physician to provide a specific diagnosis. Construed in this fashion, the board finds the medical certificate to be consistent with the College Statement in that specific diagnostic terms are avoided.

As for the rest of the medical certificate form (Exhibit 11), its contents were not challenged by the Association. Certainly serious issues were raised about the Division's approach to medical privacy in the context of maternity-based sick leave, but this will be addressed further below. The certificate does not ask for revelation of the teacher's treatment and recovery plan. Paragraph 2 only inquires as to whether such a plan has been prescribed and followed. Paragraphs 3 and 5 address prognosis for the clear purpose of assessing the claimant's return to work potential and timing, which was not disputed by the Association. Finally, paragraph 6 contains standard questions about restrictions on the job, designed to allow for modified duties and accommodation of employees still experiencing partial disability.

Since the Division owes a legal duty to reasonably accommodate and since its employees are obliged to cooperate in effectuating a reasonable accommodation, these aspects of the certificate are not problematic and no attack was mounted by the Association.

Is the Division entitled to a diagnosis, treatment plan and prognosis? (Maternity-based sick leave)

Moving to the question of sick pay following childbirth, the issues are more complex and the parties are further apart. Although financial compensation was settled in all four individual grievances, the contentious notion of a six week presumptive period kept surfacing during the arbitration hearing. The board notes that it was asked to rule on a series of questions jointly drafted by the parties, but the presumptive period is not one of those questions. Thus, while the line of Ontario cases on this point is interesting and challenging, nothing herein should be construed as a determination of the issue by the present board.

Female employees are entitled to apply for sick pay during their period of pregnancy and maternity leave. To deny this right is discrimination on the basis of sex. The point was authoritatively established by *Brooks* in 1989. Nevertheless, in the *Essex County* litigation, which began in 1994, the issue was still being contested by the employer. An arbitration board sustained the employer's position. Ultimately, the Ontario Court of Appeal confirmed that while the particular collective agreement may well distinguish between sickness and maternity, providing distinct forms of leave for each, it is not permissible to do so in light of contemporary human rights law (at para.17-19):

> The basic position of the [employer] is that the Agreement does not discriminate on the basis of pregnancy, and that any pregnant woman who also becomes sick or physically or mentally disabled may claim and receive sick leave in addition to her pregnancy leave. All sick or disabled persons are treated in exactly the same manner -- male or female -- pregnant or not pregnant.

> That argument has substantial appeal in that it allows for uncomplicated administration of the Agreement. The problem is that all "disabled" persons are not treated the same by the agreement. Women giving birth normally, and who, it is acknowledged, would nonetheless be "physically disabled", in the ordinary sense of those words, for some undetermined length of time, would not receive leave with pay for that period. In my view, that is all that is being argued about in this case. In that sense, I agree with Adams J. that the [Arbitration] Board's reading of the Agreement results in discrimination against pregnant women. See *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.).
>
> The parties to the Agreement will, no doubt, consider ways to amend its provisions to preclude the practical complications of having to determine a specific period of disability in each case of an uncomplicated pregnancy and delivery.

In the present case, the Division submitted that it took no issue with the *Brooks* principle and had no difficulty with paying sick leave to pregnant teachers, subject always to proof of claim. The Division found it salutary that in *Essex County*, the Court of Appeal denied the grievance for lack of proof, refusing even to remit the case back to the arbitration board to hear further evidence clarifying the period of disability (at para.20-21):

> In this case, [the grievor] had ample opportunity to prove the period of her disability. Her physician, although called as a witness, declined to give the relevant evidence and neither the Board nor the Divisional Court was able to determine the relevant period in which [the grievor] would have been entitled to sick leave. In the circumstances, I see no reason to send this matter back to the Board of Arbitration.
>
> I would allow the appeal on that basis alone, set aside that part of the order of the Divisional Court which remitted the matter to the Board and provided for the payment of interest, and confirm the Board's dismissal. However, in the circumstances, I would make no order as to costs here or below.

The Division defended its handling of the grievors' sick leave applications on the grounds that it was entitled to receive proof of claim and to test the proof. On that basis, pregnant applicants could be required to submit the same type of medical information as regular sick leave applicants - diagnosis in specific circumstances if necessary to assess the claim, or at a minimum the general nature of the condition, treatment plan when required, prognosis when needed for planning return to work. In other words, the same rules would apply as for regular sick leave. The same answers would flow to Question 1 as outlined by the board above.

The Division's position is reasonable, but only up to a certain point. In light of *Brooks*, it is no longer open to an employer to deny that delivery and postpartum recovery constitute valid health related reasons for absence from the workplace. As the Court held in *Brooks* (at para.28), "By distinguishing 'accidents and illness' from pregnancy, Safeway is attempting to disguise an untenable distinction." In the present case, however, Assistant Superintendent Young conceded that the Division *does* distinguish between sickness and normal vaginal delivery when administering sick leave benefits. Maternity leave is available in cases of normal birth but sick leave is not. Young testified as follows:

> I would ask, what's outside the norm here to make it sickness rather than recovery from birth?

The board is bound by judicial precedent to hold that the foregoing distinction is not a permissible one as it is discriminatory. The Division is legally required to recognize that recovery from normal birth is a valid health related reason for absence and therefore a valid basis for claiming sickness benefits. The challenge, however, is to identify the duration of the health related absence. When does it end and when does the non-health component of maternity leave commence? The appeal court in *Essex County* assumed that the parties would find ways "to preclude the practical complications of having to determine a specific period of disability in each case of an uncomplicated pregnancy and delivery" (at para.19). Perhaps that is easier said than done. Struggling to come to grips with the duration problem, both parties in the present case have ultimately sought the assistance of this arbitration board in setting out procedures for medical disclosure.

On the evidence, there is an undisputed medical convention that the recovery period following normal childbirth is six weeks. Much was said in the present case and in the Ontario line of cases about the variability of recovery times. It is a fair point the Division makes. There will always be departures from the norm. The very same point could be made about presumptive recovery periods used by physicians in relation to other medical conditions. The board in the present case was told by Dr. Burnett that there are norms for recovery from surgery, but in actuality, every patient has a different pain threshold and a different recovery rate. Yet the Division did not have a practice of going behind presumptive surgery periods and requiring additional medical information from treating physicians. As observed by Arbitrator Kaplan in *Peel Board of Education* (at p.308):

> It should be noted in this regard that both experts agreed in their evidence that there were normative recovery periods for other medical events. Recognizing this one hardly constitutes a radical departure from existing practices. Indeed, it is merely a statement of the obvious and the inevitable.

The six week convention for normal birth recovery should be recognized and accepted by the Division, just as it accepts other medical norms on an ongoing basis. When the Division receives a medical certificate from a teacher's physician attesting to the date and fact of delivery, the medical condition of the patient following birth and the need for a specified number of weeks off work, the certificate should normally be accepted by the Division without more. In the context of maternity leave, such a certificate does provide the Division with the elements to which it is entitled as insurer. Arbitrator Hope summarized these as being all the facts "necessary to equip management to determine whether the illness or disability is bona fide and what impact it will have on the attendance of the employee" (*Victoria Times Colonist* at p.20).

Without referring at this juncture to specific medical certificates provided by the grievors (see further below), the board notes that some teachers have in the past presented statements from their physicians with a *projected* date of confinement and a request for six weeks sick leave. The Division argued strenuously that these notes are "crystal ball gazing" and that the Division is entitled to see a medical assessment which has been conducted *after* delivery, based on known facts and medical requirements. The grievors conceded under cross examination that this was a reasonable position for the Division to take and the board agrees. While "predictive" medical certificates will continue to be needed at the time of application for maternity leave and also for purposes of filing a sick leave application, the Division is entitled to have a supplementary certificate prepared after delivery. This should not be an onerous requirement for the physician or the patient, but it will satisfy the Division's legitimate need for a "real" certification of condition, treatment and prognosis.

The certificate is not conclusive for the duration of the six weeks or whatever period the physician prescribes. Where the Division has a genuine concern about the validity of the sick leave duration or has other *bona fide* concerns, it may require additional information, as canvassed above under the first part of Question 1. However, the Employer would bear a stringent onus in seeking such additional disclosure. It would be wrong to repeat the error whereby teachers have been asked to explain what condition they are suffering aside from childbirth recovery as a condition of receiving sick pay. Neither may teachers be required to explain how their recovery from childbirth constitutes a sickness or disability.

Given that there is an accepted medical norm for recovery after delivery, and assuming receipt of an informative medical certificate as outlined above, the balance tips in favour of preserving the privacy of personal health information.

Question 2

When is the Division entitled to receive the permissible medical information?

Given the fact that both parties gave essentially the same answer to Question 2, the board sees no need for an extensive discussion. Both parties stated that permissible medical information may not be demanded automatically, but rather requests must be tailored to specific circumstances and must be reasonably necessary for the Employer's purposes.

While there was some dispute at the beginning of the case over the Division's practice in terms of automatic requirements for additional information, it now seems clear that individualized decision-making will prevail, even if it did not always happen that way in the past.

Question 3

Who is entitled to receive the permissible medical information?

The board has carefully considered the Association's objection to receipt by Division management of personal health information. While it is possible to imagine circumstances where sensitive information might be mishandled, leading to acute discomfort and embarrassment for the teacher concerned, this was not the evidence heard by the board. Young testified that the Division has a procedure for safeguarding personal health information. Access to such information is severely limited. There was no indication that these safeguards have failed or may fail. On the other hand, the Division would face cost and administrative burdens if required to route medical information through an outside physician or other health official. Such a system would also cause delays in the processing of claims, to the detriment of Association members. At this point in time, the Association has not persuaded the board that the Division's practice must be changed on grounds of protecting privacy.

Moreover, based on the arbitral authorities presented by the parties in argument, there is no basis for denying the Division direct access to medical information. Article 5.06(b) of the collective agreement does not in terms prevent the Division from receiving such information. The clause allows for a review of a teacher's case but does not confine the Division to that means alone for assessing sick leave claims. The Division retains its common law right to verify an absence from work in a manner reasonably necessary under the circumstances.

Having heard the oral evidence of the grievors and having reviewed the handling of their sick leave applications during the 2001-2002 period, the board appreciates that some very personal information was disclosed to management and to the Division's medical consultant. Several of the grievors expressed real apprehension about the existence of written reports containing such sensitive personal material. Because this dispute was referred to arbitration, three of the grievors were required to relive the experience. The board sympathizes with their discomfort in having to discuss their personal information in front of strangers. To some extent, this problem should be mitigated in future because this award will set ground rules for permissible disclosure and hopefully avoid the need for any further grievances and hearings. The board has also determined that an informative medical certificate attesting to delivery, the patient's medical condition following birth and a required period off work must normally be accepted by the Division without more. This should prevent a recurrence of the humiliating and embarrassing disclosures of which the grievors complained in their evidence.

Nevertheless, it must be recognized that on occasion, the Employer may have reasonable grounds to make a request for additional personal information. Primarily this would happen outside the realm of maternity leave but the board has been careful to find that even in respect of pregnancy, a medical certificate may not be conclusive in all cases. When delving into intensely personal realms, the Employer is exercising a legal right but is also subject to a legal duty.

Whether founded on the common law or *The Personal Health Information Act*, the duty is the same. Privacy must be respected as much as reasonably possible. This duty must be fulfilled by the Division, its management and staff. Thus, in answer to Question 3, both for pregnancy and regular sick leave, the Division is entitled to receive the permissible medical information and is not required to utilize a physician or other health official to receive information on its behalf.

Question 4

What is "a lengthy period of illness" under Article 5.06(b)?

The Division argued that in construing the phrase "lengthy period" in this provision, the main factor to be considered should be absence from the classroom. The board agrees. Paragraph D.2 of the Policy is an operational definition of "lengthy". While there could be various potential time periods chosen, it was reasonable to set 20 consecutive working days as the formula. As noted by Young in her evidence, this amounts to a full month out of the classroom, which is one tenth of the full school year.

The notion of "lengthy" as a duration in excess of the recognized presumptive period was argued by the Association at the hearing but this position has not apparently been taken in the past by MTS or the local Association. Given the longstanding practice whereby 20 days was used as the definition of a lengthy absence without challenge, an estoppel could well be applicable, even if the Association's interpretation was correct.

Article 5.06(b) allows the Division, if it so wishes, to have a case of lengthy illness checked by an outside health officer or its doctor. The outside consultant will then report on the teacher's ability to return to duty. The clause may or may not allow for an independent medical examination, a point yet to be authoritatively decided. However, the clause does not in terms grant to the Division or the consultant access to personal information which would otherwise be inaccessible on privacy grounds, that is, information not reasonably necessary to meet the Division's legitimate administrative needs under the circumstances. Therefore, in coming to the last question posed by the parties - the sufficiency of information supplied by the grievors - the board's focus must be on the test set out in answer to Question 1 above. Moreover, in their submissions on Question 5, the parties approached the issue in the same way.

Question 5: Was the grievors' information sufficient?

S, Grievor #1

S presented a medical note from Dr. Barker dated April 2, 2001 (Tab C15) in support of her application for six weeks of paid sick leave. The Association argued that this was sufficient. The Division made no specific comment on sufficiency.

This note preceded S's delivery and therefore, by itself, was insufficient to support her application, for the reasons set forth earlier in this award. However, the report prepared by her doctor post-delivery (Tab C17 dated May 10, 2001) was fully informative, covering S's condition, treatment and prognosis. It was sufficient, as admitted by Young in her evidence before the board. The Division's follow-up inquiry and attempted referral to its consultant (Tab C18) was unreasonable.

In argument, the Association suggested that the May 10, 2001 report went beyond the required disclosure. Certainly it was a thorough response. It may be that somewhat less detail may have sufficed for the Employer's needs. The board notes, however, that when MTS wrote to Smith on August 16, 2001 (Tab C19), Dr. Barker's report was characterized as "an *appropriate* and adequate response supporting [S]'s request for sick leave" (emphasis added).

K, Grievor #2

The first medical note presented by K was prepared by Dr. Lee and dated November 14, 2000 (Tab D5), recommending two months sick leave, some of which was pre-delivery. This note was cryptic and insufficiently informative. The Association conceded in argument that it was insufficient. K gave birth early and then presented a second medical note dated December 12, 2001. The parties were unable to produce a copy of this document and as a result the board is unable to rule thereon. The Division, however, sought further information. The next note by Dr. Lee was dated March 15, 2001 (Tab D9) and it stated only that K could not work for eight weeks "due to medical reasons". This too was insufficient. Again the Association admitted as much in argument. For the Division, Ms Gibson observed that only now has the Association acknowledged the deficiencies of these notes. At the time, MTS was maintaining that the Division had no right to any additional disclosure, which helps explain the Division's insistence on full reporting.

On May 10, 2001, MTS forwarded a medical letter dated February 1, 2001 prepared by Dr. Lee (Tab D13) which provided sufficient information in support of the requested eight week sick leave. The Division's request for more information and referral to its consultant (Tab D14) was unreasonable.

H, Grievor #3

H was directed by her physician to stop work before delivery. The medical note by Dr. Taylor dated April 25, 2001 (Tab E3) was a bare assertion and was insufficient. In argument, the Association declined to defend the sufficiency of this note and instead asked for a finding that the next report was adequate.

H gave birth on May 7, 2001. Two further reports were prepared by D. McGregor dated May 8 and May 10, 2001 (Tab E5, E6). In argument, the Division made no comment on sufficiency. The board finds that these reports explained in an adequate way the reason for the stop-work direction and the basis for an 8-week recovery from delivery. This was sufficient. The Division's request for more information and referral to outside review (Tab E7, E8) was unreasonable.

D, Grievor #4

The first medical note prepared by Dr. Lu dated November 26, 2001 (Tab F5) was cryptic and uninformative in suggesting two weeks sick leave. The obstetrician's report of the same date (Tab F6) stated an expected date of confinement without more. In argument, neither party made any comment on these documents. For the reasons previously discussed, the board finds these medical certificates were insufficient.

On January 17, 2002 Dr. Mason prepared a note confirming a caesarian section and attesting to complete disability for 6 to 8 weeks (Tab F12). The Division made no comment in argument. The Association said that this note was sufficient and the board agrees, although the Division would have been entitled to clarify what actual duration was recommended or seek more information concerning the final two weeks of sick leave.

Concluding Remarks

The grievances are allowed to the extent that declarations are hereby issued responding to the five questions posed by the parties, as set forth in the foregoing reasons. Jurisdiction is retained to deal with any dispute as to implementation or any interpretive questions remaining.

The board recognizes and understands the degree of frustration which developed on both sides as this case progressed over a number of years. The grievors felt that their integrity was being called into question and their privacy was being invaded. The Association and MTS sought to defend their members. For its part, management felt that it was being thwarted in carrying out its mandate of ensuring the validity of sick leave payments. The legal environment was complex and the parties were in bargaining. The parties have put before the board a broad sweep of issues and arguments and the board has endeavoured to be responsive. It is our hope that this award will help the parties to deal amicably with these sensitive matters in future. The board thanks all participants for their courtesy and assistance.

In accordance with the terms of the collective agreement, the parties will bear the fees and expenses of their respective nominees and will share equally in the fees and expenses of the chair.

DATED this day of July 2004.

ARNE PELTZ, Chair

We agree.

TRACEY L. EPP,
Nominee of the Employer

MAUREEN MORRISON,
Nominee of the Association