THE PUBLIC SCHOOLS ACT

BETWEEN:

THE ST. VITAL TEACHERS' ASSOCIATION NO. 6
of THE MANITOBA TEACHERS' SOCIETY,

Bargaining Agent,

- and -

THE ST. VITAL SCHOOL DIVISION NO. 6,

School Board.

ARBITRATION AWARD

Appearances

Appearing for the Teachers' Association were Mr. Saul Leibl and Mr. Henry Shyka, Staff Officers with the Manitoba Teachers' Society ("MTS"), along with MTS Economic Analyst Ms Joan Larsen. Also in attendance were St. Vital Teachers' Association President Linda Brezina, Past President and Bargaining Committee Chair Madeline McKenzie, Past Bargaining Chair June Acason, and bargaining committee members Glenda Mellway, Barry Wittevrongel, Geoff Baggley, Linda Gosselin and Elizabeth Briggs.

For the Division, Mr. Craig Wallis, Director of Labour Relations, Manitoba Association of School Trustees ("MAST"), was the principal representative, assisted by MAST Labour Relations Consultant Ms Sue Cumming. Trustees Marilyn Seguire, Dave Richardson and Bob Bruce were in attendance, along with Division Superintendent Terry Borys, Secretary Treasurer Linda Young, and Assistant Superintendents Lynda Baxter and Omer Fontaine.

Nature of the proceedings

The parties entered into a collective agreement for the period January 1, 1997 to June 30, 1998, but have not been able to conclude a renewal agreement. This is an interest arbitration under Part VIII of the Manitoba *Public Schools Act*, R.S.M.1987, c. P250 ("the Act"). In accordance with sections 129(5) and 131 of the Act, the Award herein will enable the parties to complete and execute a new collective agreement.

The regime for settling collective agreements by interest arbitration has changed several times in recent years. This case proceeded under the legislation generally known as "Bill 72" (S.M. 1996, c. 71), which introduced several important new elements into the process. First, under section 131.1, a mediation stage is required before the commencement of arbitration *per se*, and the legislation specifies that the mediator shall continue as the arbitrator if an agreement cannot be effected by means of mediation. Secondly, some matters, while open for collective bargaining, are beyond the jurisdiction of the arbitration process (section 126(2)). Thirdly, arbitrators are required to consider a statutory list of factors when dealing with issues which may affect a school division's financial situation (section 129(3)).

In the present case, the Division requested the services of a mediator on January 14, 2000, pursuant to section 131.1 of the Act. As the parties were unable to agree on a person to act as mediator-arbitrator, I was selected by the Minister of Labour and, on April 6, 2000, I was appointed by the Minister of Education and Training. I met with representatives of the parties on May 11, 2000 to discuss arrangements for the mediation process, and then met formally with full delegations for both sides on June 16, 2000 in an effort to assist the parties in concluding an agreement. This proved to be impossible, for reasons set forth in my reporting letter to the Minister of Education dated June 17, 2000. As a result, in accordance with section 131.1(5)(b) of the Act, the mediation was converted into an arbitration.

Hearings took place on October 17-18, and November 13-14 and 16, 2000. It was agreed that I was properly appointed and that there were no preliminary objections, aside from a number of jurisdictional issues raised by the Division relating to the restricted scope of arbitration referrals under the Act, addressed below.

It should be mentioned that the arbitration regime for teacher contracts has now changed again in Manitoba. Under Bill 42, enacted during the Spring 2000 sitting of the Legislature, most of the arbitrability restrictions flowing from section 126(2) have been removed (size and composition of classes is still beyond scope) and the mediation-arbitration process has been replaced with straight arbitration. The new provisions apply to the renewal, revision or replacement of collective agreements which expire on or after June 30, 2000. As a result, the present case was conducted under the former Bill 72 regime. However, the transitional provisions did become an issue in this case. The Association requested a 2-year contract terminating on June 30, 2000, which would trigger the new provisions of Bill 42 for bargaining covering the period July 1, 2000 and forward. By contrast, the Division sought a 3-year agreement with a wage re-opener in the third year - a position which would entail the continued application of Bill 72 for the final year of the contract. This matter is discussed in detail later in my Award.

Overview of the issues

At the opening of the hearing, numerous issues remained in dispute, although the parties had succeeded in resolving a number of matters since the original request for mediation was filed with the Minister. Moreover, the Division maintained a jurisdictional objection to many of the Association's proposals, as outlined below.

Existing contract clauses in dispute were as follows:

1. Effective period of the new agreement (Article 2.01). As indicated above, the Association requested a 2-year duration and the Division sought a longer period - 3 years.

2. Retroactive pay and benefits where a teacher is terminated for cause (Article 2.02). The previous agreement precluded retroactive pay for teachers who have been terminated, and the Association requested that this clause be deleted.

3. Classification of schools (Article 5). This clause governs the payment of principal and vice-principal salaries under the schedule of schools listed in Article 6. The Association requested that a formula for school classification be inserted into the agreement, replacing the current provision whereby the Division has discretion to designate school classifications. The Division submitted that the Association proposal was beyond an arbitrator's jurisdiction.

4. Administrative guidelines (Article 7). Again, the Association urged that the Division's discretion to determine the number of administrator appointments be replaced with a formula which would allocate administrators based on a pupil and staff count. The Division submitted that the Association proposal was beyond an arbitrator's jurisdiction.

5. Sick leave (Article 9.02). The Association proposed a number of improvements to this clause, including better coverage for first year teachers and provision for utilization of sick leave by pregnant teachers. The Division agreed in principle with the pregnancy proposal.

6. Maternity leave (Article 9.03). As a priority item, the Association requested adoption of a Supplementary Unemployment Benefits Plan ("SUB") which would pay teachers a top-up over Employment Insurance benefits to the level of 95% of salary for 17 weeks. The Division was opposed on grounds of financial impact.

7. Dispute settlement and arbitration (Article 12). The Division proposed the introduction of a 3-step process leading to grievance arbitration. The Association preferred the current clause.

8. Use of term contracts (Article 19). The Association requested insertion of a definition for "Temporary Teacher" and a guarantee that hiring after two years or partial years as a temporary employee would be done on a normal Form 2 contract with full retroactive benefits. The Division agreed only in part, suggesting retroactive entitlement to sick leave and seniority once a Form 2 contract has been signed. The other teacher proposals were not acceptable, and the Division also raised jurisdictional objections.

9. Payment for substitute teachers (Article 22). The parties agreed on adjustments to the schedule for substitute teacher pay, but differed on the implementation date for the increases, as well as the threshold for application of the ordinary salary scale. Regarding implementation, the Division offered to pay the new rates effective the date of signing the new agreement, whereas the teachers sought full retroactive payment. On threshold, the Association submitted that after 5 days, a substitute should be paid on scale, but the Division argued for a 7-day period. The previous agreement specified a 10-day threshold.

In addition to the foregoing, the parties were in disagreement with respect to several new articles, as follows:

10. Hours of work and contact/non-contact time. The Association initially advanced a proposal which would limit instructional and supervisory time to 1350 minutes (22.5 hours) per week, and guarantee non-contact time of at least 300 minutes (5 hours) per week. During the hearing, this proposal was modified to guarantee non-contact time of at least 150 minutes (2.5 hours). The Division took the position that this matter was beyond jurisdiction, but in the alternative, advanced its own proposal - a minimum work week of 45.5 hours exclusive of lunch period, with employer discretion to assign additional extra curricular or other supervisory duties.

11. Medical procedures. The Association proposed a clause stating that except in emergency situations, teachers shall not administer medication or perform physical procedures such as feeding, toileting or diapering of students. The Division objected both on jurisdiction and merits.

12. Exceptional students. The Association requested new contract language ensuring teacher involvement in the process of student placement, as well as assurances of time and resources to deal with such students. The Division objected both on jurisdiction and merits.

13. Complaints against teachers. The Association requested a clause setting forth procedures for dealing with complaints. The Division objected both on jurisdiction and merits.

In summary, it can be seen that there were numerous issues in dispute in this case. However, basic salary scale adjustments were previously agreed at 2% per annum across the board for the first two years of the contract.

From the Association's perspective, as I understood it during the hearing, the two main priorities were an SUB Plan for maternity leave and defined hours for contact and non-contact time. The Division stated that its priority was a 3-year duration for the collective agreement. However, if there are any clauses awarded on assignment or contact/non-contact time, then establishment of the 45.5 hour work week, as defined in the Division's proposal, would be the major concern.

Over all, the Association stressed the need for reasonable and equitable benefits. The Association also highlighted the growing importance of teacher involvement in sensitive areas such as education for exceptional students. For its part, the Division maintained that it should be allowed as much flexibility as possible, in order to meet escalating service demands with basically fixed resources. The Division suggested that it has adopted reasonable policies to address the teachers' concerns in St. Vital, and therefore the entrenchment of new provisions in the collective agreement is generally unnecessary. Clearly, both parties have legitimate interests and have presented reasoned arguments in support of their positions.

Role of the interest arbitrator

Each party made reference to the established principles governing interest arbitration and the role of an interest arbitrator. I did not perceive any real difference between the parties with respect to these basic principles. As stated by Mr. Justice Halvorsen in *Re Saskatchewan Health Care Association and Canadian Union of Public Employees* (unreported, May 17, 1982, at p. 2-3):

> In compulsory arbitration of this type, it is the duty of the arbitrator to strive for a resolution of the issues which will be consistent with the result which the parties might reasonably have expected had the collective bargaining process not been interrupted by the legislation. That is, the arbitrator is not to mediate the differences, nor is he to wear the mantle of a crusader for social change and impose his notions of what is fair and just. Further, it is his obligation to apply the evidence subjectively so that his award will reflect what probably could have been attained in a freely negotiated settlement. The award should then be consistent with labour relations realities.

In *Re Brandon School Division No. 40 and Brandon Teachers' Association No. 40* (Scurfield, Parkinson, McGregor, 1993), the board characterized its function as follows:

> An arbitrator's task is to award a public employee economic benefits which the arbitrator believes that the parties bargaining in good faith should have agreed to. Public sector employees normally reside in the communities where they work. They are part of that community. A reasonable teacher should expect to receive wage increases which are related to the prevailing economic circumstances in the province. Thus, in practical terms, an arbitrator should seek to make an award which is sensitive to the prevailing economic climate on the basis that such an award represents what the parties bargaining in good faith should have agreed to. That is the object of an arbitration award.

The factors generally considered by an interest arbitrator were summarized in *Re Lord Selkirk School Division No. 11 and Lord Selkirk Teachers' Association No. 11* (Teskey, Parkinson, Shrom, 1993) as including "comparability in terms of other settlements, ability to pay, general economic conditions, demonstrated need due to existing problems, and/or the inherent logic or fairness of a particular request ...".

All the foregoing was reviewed and endorsed in my own award in *Re Winnipeg School Division No. 1 and Winnipeg Teachers' Association No. 1* (Peltz, Olson, Shrom, 1998). The challenge in each case is to apply these guiding principles reasonably. As Arbitrator Chapman wrote in *Re Flin Flon School Division No. 46 and Flin Flon Teachers' Association No. 46* (1998), 'the primary objective of any interest arbitrator should be to fashion an award which is fair and equitable to all of the parties."

In a case being determined under the Bill 72 regime, specific attention must be paid to the statutory factors set forth in section 129(3) of the Act - ability to pay, potential reduction in services, economic climate, comparable terms and conditions of other teachers and other employees, and the recruitment and retention of teachers. These factors have generally been taken into account by interest arbitrators as a matter of course, and in this regard, Bill 72 may not have markedly changed the arbitration process. As Arbitrator Scurfield said in *Brandon School Division No. 40 and Brandon Teachers' Association No.* 40 (1998), "The arbitral task is not significantly altered by section 129(3), since in large part, it constitutes a codification of most of the factors that have been historically considered by responsible arbitrators" (at p. 8, Interest Award). In any event, I have directed myself to the enumerated items in section 129(3) in considering each of the clauses in dispute, and I have given due weight to these factors in coming to my conclusions in this Award.

The limited jurisdiction of an arbitrator under section 126(2) of the Act

I propose to deal with the jurisdiction issues on a clause by clause basis in this Award, since a ruling on jurisdiction requires a proper appreciation of the purpose and effect of each particular proposal in context. However, at the outset, it would be helpful to outline the framework for analysis of jurisdictional issues under the Bill 72 regime, since the Manitoba Court of Appeal has recently reviewed this legislation and several arbitrators have now issued awards dealing with similar jurisdictional arguments: *Re Brandon School Division No. 40* (Scurfield, 1998); *Re Flin Flon School Division No. 46* (Chapman), *supra* (hereafter referred to as "the *Flin Flon* award"); *Flin Flon Teachers' Association No. 46 of the Manitoba Teachers' Society v. Flin Flon School Division No. 46* [2000] MBCA 78, affirming (1999) 139 Man. R. (2d) 176 (Q.B.), (hereafter referred to as "the *Flin Flon* appeal decision"); *Re Fort Garry School Division No. 5 and Fort Garry Teachers' Association* (Fox-Decent, 2000); *Re Turtle Mountain School Division No. 44 and Turtle Mountain Teachers Association No. 44* (Maclean, 2000).

As noted by Madam Justice Steel in the *Flin Flon* appeal decision (para. 15), the starting point is section 97(1) of the *Public Schools Act*: "The prerequisite to an arbitrator acting, however, is that there be a matter in "dispute", as that word is defined in the *Act*." Section 97(1) provides as follows:

> "dispute" means a controversy or difference ... between a school board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the school board, or the teacher or teachers that are not specifically set out in this Act or The Education Administration Act or in the regulations made under either of those Acts; ...

With the enactment of the Bill 72 regime, pre-existing arbitral jurisdiction was limited by virtue of section 126(2), which provides as follows:

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

Having considered the detailed submissions made by the parties, including all the authorities filed, and the foregoing provisions of the Act, I conclude that the following principles apply in the present case:

14. A matter is arbitrable if it is a "dispute" under the Act. The definition of "dispute" is to be given a broad and liberal interpretation. A "dispute" is a matter which relates to, affects or is incidental to terms or conditions of employment. *Flin Flon* appeal decision at para. 16-19.

15. If the Legislature has chosen to deal fully with the terms and conditions of teacher employment in a specific area, then arbitration is not available in that area. "In other words, the parties cannot dispute a matter upon which the Legislature has already spoken." *Flin Flon* appeal decision at para.20, citing *Rolling River School Division No. 39 v. Rolling River Division Association No. 39* (1979) 3 Man. R. (2d) 7 (Q.B.) and other cases.

16. However, if general powers are given to a division, without mandatory direction or express obligations regarding terms and conditions of teacher employment, then arbitration is available. *Rolling River School Division No. 39*, cited above.

17. Arbitration is not excluded simply because the matter involves educational policy. Many issues have a variety of aspects, which may include both policy and working conditions. To be arbitrable, there must be "a significant connection or nexus between the matter and the teacher's conditions of work". The question is whether the matter "predominantly involves working conditions or whether it is a matter which predominantly affects educational policy". *Flin Flon* appeal decision at para. 41-42.

18. Matters listed in section 126(2) are excluded from arbitration, and the stated exclusions are to be *broadly* interpreted with a remedial purpose in mind, namely, preventing arbitrators from imposing new contract clauses in these areas with resulting cost increases to school divisions. *Flin Flon* appeal decision at para. 31.

19. However, not "every possible connotation or extension" of the words used in section 126(2) is applicable in defining arbitrability. *Flin Flon* appeal decision at para. 36. "The words chosen must be given their plain, common, simple and ordinary meaning." *Flin Flon* Award at p. 20.

20. In areas where arbitration is excluded by section 126(2), school divisions will be entitled to act unilaterally, subject to a duty to act fairly and the teachers' right of grievance under section 131.4.

Review of the economic and financial evidence

St. Vital School Division is a large, urban division with 22 schools, 573 teachers (full time equivalents), 156 para-professionals and 9,185 students (as of September 2000). The 1999/00 audited financial statement (dated September 27, 2000) shows revenues of $55.4M, expenditures of $55.6M and a net current year deficit of $320,517. The balance sheet at June 30, 2000 shows an accumulated surplus of $1,357,251, which is down from the previous fiscal year by the amount of the indicated current year deficit. Note 5 to the financial statement indicates that $1,258,067 has been appropriated from the surplus for the following purpose: "Current budget year expenditures for certain schools and other programs which are expected to be made in the following year."

The extent of the Division's surplus became a contentious issue in the arbitration hearing. The Association argued that its proposed contract improvements could be funded without difficulty, pointing to the "Total Accumulated Surplus", among other factors. The Division countered that virtually all surplus funds have been appropriated to ongoing school expenses under the budget carry-over policy. The Division stated that the true level of surplus is reflected by the line entitled "Unappropriated Surplus" - a mere $99,184 as of June 30, 2000. In response, the Association pointed out that notwithstanding such "appropriations" reflected in the financial records of the Division in recent years, St. Vital has carried an ongoing, annually accumulating surplus. The Association doubted whether the appropriated surplus funds are actually spent as claimed. In her supplementary submission dated November 22, 2000, Ms Larsen wrote: "If the appropriated surplus had in fact been spent then the accumulated surplus would not have rolled over year by year as shown by the records." The Division did not respond to this assertion.

Ms Larsen's argument is largely supported by the material before me. The Division's financial statements do not show that "appropriated" surplus funds are expended in such a way as to deplete the surplus account by the amount of the expenditure. For example, on June 30, 1999, the Unappropriated Surplus was $109,075, and in the ensuing year, the annual operating loss exceeded $320,000 - yet the Division *did not* drop into a negative equity position. Instead, the *"Total Accumulated Surplus"* line item fell by the amount of the operating loss. I note in this regard the comments made by Mr. Wallis in his opening review of the Division's financial situation. He said that the "Appropriated Surplus" allows the Division to balance its budget in any particular year where a deficit is sustained, and provides for flexibility in expenditures. This suggests that while funds may well be "appropriated" each summer under the budget carry-over policy, as explained in the Division's November 17, 2000 supplementary written submission from Mr. Borys, considerable allocational flexibility is retained with respect to these funds. During the hearing, in speaking to this issue, both Ms Young and Mr. Borys advised that while *some* of the Accumulated Surplus is spent under the carry-over policy, some funds *remain* as surplus and therefore roll over to subsequent years.

Nevertheless, as explained by Ms Young, the Division Budget for 2000/01 projects an operating surplus of $182,400 with a capital transfer in the same amount to cover a variety of otherwise unsupported capital projects (at p. 22), netting to zero surplus for the current fiscal year.

It is recommended that Manitoba school divisions retain an accumulated surplus between 3.0% and 5.0% of annual operating expenditures. FRAME data ('Financial Reporting and Accounting in Manitoba Education') show that St. Vital was at 3.0% in 1998/99 and, according to Ms Larsen, about 2.4% in 1999/00 following the operating deficit in that year. FRAME data used here are the "Accumulated Surplus" figures, and not the "Unappropriated Surplus" levels emphasized by the Division in its submission on ability to pay. In any event, the most useful information for my purposes here is probably St. Vital's *comparative* position with other Manitoba divisions, especially the Metro divisions. Within greater Winnipeg, only St. James-Assiniboia ranked higher at 7.6% of operating expenditure in 1998/99. Winnipeg School Division stood at 2.6%, River East was at 1.5% and three divisions showed negative percentages. Across the province, the picture is also mixed.

I conclude that in respect of its surplus position, St. Vital School Division is more or less in the middle of the pack. The parties appeared to agree that the same characterization applies in terms of taxing effort. In 2000, St. Vital experienced strong growth in total portioned assessment, leading all other Metro divisions, but prior years have been more modest. The current spike is due to two large property development projects which have come on stream (Home Depot, St. Vital Centre). St. Vital's mill rate over the past ten years has moved from being one of the higher rates within Metro to one of the lower ones. In 2000, the range in Metro is 16.5 mills (St. James) to 26.9 mills (Winnipeg), with St. Vital about in the middle at 21.0 mills, equal to the provincial average.

The Division pointed to school tax increases of 5.3% and 5.5% in the last two years, and argued against any further financial pressure by virtue of this award. However, the Association noted the School Board's March 9, 2000 news release statement explaining the most recent increase and reminding taxpayers that "the Division has maintained a local mill rate well below the average in urban Winnipeg school divisions." The evidence shows that St. Vital has maintained a lower than average per-pupil expenditure level, but this has come at a cost - the Division also had the *highest* pupil-teacher ratio in Metro in 1999. Nothing in life is free. The March 2000 news release underlined the Division's concern for the future: "The Board believes that there is little left to remove or reduce from the system without seriously eroding the current educational programming offered to students."

Looking beyond the borders of St. Vital, taxpayers this year are experiencing some relief at all levels - federally, provincially and within the City of Winnipeg's jurisdiction. The local economy is fairly strong, as is the broader economy.

In light of all the foregoing, what is a reasonable conclusion with respect to the Division's ability to pay, a question which I am bound to consider under section 129(3) of the Act, as well as longstanding arbitral practice?

In *Winnipeg School Division No. 1* (1998), I adopted the approach taken by Arbitrator Jackson in *Re Regional Municipality of Niagara Police Services Board and Niagara Region Police Association (1997)*, where legislation required an arbitrator to consider "the employer's ability to pay in light of its fiscal situation". He defined this requirement not merely as the employer's short-term fiscal capacity, but as its presumptive ability to justify to the public the necessity of any tax increase which might be necessary to pay for the award:

> The test, then, is *the arbitration board's view* of what a majority of fair-minded, well-informed taxpayers would consider to be a fair and reasonable award, even if it meant tax increases. The greater the tax increase required to support the arbitration award, the more confident the board must be that the award is a reasonable and credible one, one that a majority of fair-minded, well-informed taxpayers would see as reasonable and fair. ... If services are to be reduced, then that is an operational and political decision which the *employer*, not the arbitration board, must make. On the other hand, the greater the probability of that happening, the greater the onus on the arbitration board to be confident that the award is a fair and reasonable one, one that would be understood and supported by a majority of the informed, fair-minded public. (at p.22-23)

I accept the Division's argument that it is continuing to face serious fiscal pressures and is loath to erode the quality of education delivered to students. I also understand the point made by Mr. Wallis that most of the Association's proposals involve either a direct cost or a reduction in management flexibility, which restricts the Division's ability to live within its financial means. At the same time, the economic and financial evidence demonstrates that the Division has some capacity to handle improvements in teacher compensation and benefits at this time. I recognize that in this round of bargaining, the Division has already agreed to the 2% general salary adjustments and a new clause on sick leave for pregnant teachers. On balance, I conclude that high priority contract proposals by the teachers should be given consideration in this arbitration, as long as they are reasonable and demonstrably necessary, keeping in mind the likely impact on the Division and its ratepayers.

Effective period of the agreement (Article 2.01)

The Association proposed a two year agreement, terminating on June 30, 2000, which is consistent with the pattern across Manitoba. It appears that virtually all negotiated teacher agreements have adopted this expiry date, which is also the date for commencement of the new bargaining and arbitration regime under Bill 42. I was advised that the only outstanding agreements in the current cycle are St. Vital, Turtle River (arbitration hearing scheduled for January 2001), and Transcona (arbitration award under reserve).

The Division priorized achievement of a longer agreement, originally seeking a four year duration, but later revising this position to three years. Since salary adjustments have been agreed up to June 30, 2000, the Division proposed that salaries in the third year be negotiated, with resort to arbitration if an agreement cannot be reached. While Mr. Wallis acknowledged that the old Bill 72 regime would apply to any salary arbitration for the third year, he argued that there is little practical difference between the ordinary arbitral approach and the requirements of section 129(3) of the Act, setting forth mandatory factors for consideration. Reviewing the history of bargaining in St. Vital, the Division noted that negotiations have been protracted and time consuming. The 1996-98 contract was signed five months *after* it expired. A two year agreement for 1998-00 would also be expired upon signing. A respite from bargaining would be helpful to both sides. Moreover, there is ample precedent for longer term agreements, both in the public and private sectors.

In *Fort Garry School Division No. 5* (2000), Arbitrator Fox-Decent considered the same question of duration. After reciting arguments substantially similar to the ones advanced in the present case, he held as follows:

> I have sympathy for the position of the Board and had there not been a new body of law to take effect almost immediately, I would have given serious consideration to the effective period of this Agreement ending next year.
>
> With the advent of changes to the Act, however, teachers would effectively be denied the right to bargain for another year and this would indeed be a serious denial going to the heart of the right of full participation in collective bargaining at the appropriate moment in time. Imminent changes to the law make that appropriate moment now as opposed to one year later. (at p. 14)

Mr. Wallis conceded that to justify a departure from the clear pattern of awards and contracts late in the bargaining cycle, he was required to prove "compelling and exceptional" circumstances. See *Winnipeg School Division No. 1* (1998), citing the awards in *Leaf Rapids* (1988), *Kelsey* (1994) and *Lord Selkirk* (1994). Applying this test here, I am unable to hold for the Division, notwithstanding the cogency of the argument advanced by Mr. Wallis. I also find persuasive Arbitrator Fox-Decent's reasoning in *Fort Garry* (2000). For these reasons, I have concluded that a two year contract is appropriate.

I therefore award that the effective period of this collective agreement will be from July 1, 1998 to June 30, 2000.

Retroactive pay for a teacher terminated for cause (Article 2.02)

The teachers proposed deletion of this clause on the grounds that it constitutes double jeopardy and a punitive approach to teachers who have been dismissed. Article 2.02 provides as follows:

> In the event a teacher's individual contract (Form 2) is terminated for cause, said teacher shall not be eligible for retroactive pay or benefits if there is no signed Collective Agreement in effect on the date the individual contract is terminated.

The Association itself raised the question of whether this particular clause is inoperative, given that under Bill 42 (see new section 101 of the *Public Schools Act*), once notice is given to commence collective bargaining, the terms and conditions of the existing agreement continue in force until a new agreement is concluded or an arbitration award is issued. Mr. Leibl said that the same principle applied under the previous regime, and therefore there is *always* a signed collective agreement in effect. For the Division, Mr. Wallis denied that the clause is inoperative. He agreed that the prior collective agreement remains in force during renewal bargaining, but said that for purposes of Article 2.02, there must be an actual *signed* renewal agreement in place before retroactive pay is due to a terminated teacher. The Division denies that there is anything punitive about the clause and points out that this provision was negotiated between the parties many years ago.

As Mr. Leibl submitted, there is an important principle involved here - the right to be paid for work done. Retroactive salary adjustment does occur for teachers in the ordinary course. Why should it be different for a terminated teacher? The employment relationship has been terminated, but the teacher should not lose the right to be duly paid for the period during which the relationship enured. On the other hand, there is uncertainty as to the actual effect of this article. It may be that there is *no* denial of retroactive pay. Given this ambiguity, and given the longstanding history of the clause without any demonstrated instances of hardship, I prefer to leave this matter to the parties for further negotiation.

The Association's proposal is therefore denied.

Classification of schools (Article 5)

During the hearing, there was extensive evidence and argument relating to Articles 5, 6 and 7 of the collective agreement. Proposals were presented with respect to the classification of schools under Article 5 and the appointment of administrators under Article 7. These issues are inter-related, but on behalf of the Association, Mr. Shyka submitted that I ought to consider the teachers' proposals for Articles 5 and 7 separately. I agree.

In the current agreement, Article 5 classifies all the schools in St. Vital School Division into four different classes - A, B, C, and D. The significance of these classifications can be appreciated by examining Article 6, which is entitled "Salary Schedule for Teachers in Administrative and/or Supervisory Positions". Article 6.01 establishes a grid for payment of Principal and Vice-Principal salaries based on class of school and annual progressive increments. There are significant differences in the base salary depending on the class. For example, effective January 1, 1998, the minimum starting level for School Class A Principals was $55,943, but for Class B, the rate was $62,568, for Class C the rate was $65,661 and for Class D the rate was $68,909. In round numbers, the starting salary changes by 12%, 5% and another 5% as the School Classification moves up the scale.

According to the evidence, which was not in dispute, the Division uses a formula to arrive at the four classifications, based on a combination of pupil count and teacher count. The Division adjusts administrator salaries effective each September 1st, to the extent required, after confirming the relevant student and teacher counts and applying the formula. The Association has no quarrel with any of the foregoing. The dispute in the present case arises because of Article 5(II), which states: "The Division will designate or change the classification of a school under its jurisdiction after consultation with the Association." The actual formula is not incorporated into the current collective agreement.

The Association submitted that salaries to be paid under the collective agreement should not be subject to unilateral change by the employer, which is presently the case. Rather the salary grid for administrators should be definitively set forth within, or at least should be objectively ascertainable from, the collective agreement itself. Therefore the Association proposed to write in the basic formula presently in use to set the four school classes. There is no immediate financial impact. One new feature in the Association proposal is that where a classification change is *anticipated* before the following January 31 based on projected changes in staff or student counts, the new classification would be set on September 1st. However, current practice requires a retroactive adjustment to September 1st in any event.

The Division objected to the arbitrability of the teacher proposals for both Articles 5 and 7, but reserved most of its comment for Article 7, which involves the appointment of administrators. I have considered the provisions of section 126(2) of the Act. I see nothing which precludes an arbitrator from awarding salaries based on a stated system of school classifications, including a formula or other means of defining the classifications in question. This is a salary matter, not a selection or appointment matter.

From the evidence, it appears that seven Metro divisions utilize some type of formula based on teacher count or student count, or both, to fix administrative allowances. None of these agreements authorize a unilateral change in classifications by the division so as to alter the salary schedule for administrators during the life of the collective agreement. Based on all the foregoing, I conclude that the Association's proposal is reasonable and should be included in the new collective agreement in order to ensure that salaries for all bargaining unit members are properly set forth in the contract. By no means am I suggesting any improper motive on the part of the Division in terms of a misuse of the discretion currently available within the agreement, and none was alleged by the Association.

Sub-paragraph 5(II)(4) in the Association's proposal seems unnecessary, in that salary adjustments are retroactive to September 1st in any case. I therefore award the clause as proposed by the Association, except for sub-paragraph 4, effective June 30, 2000.

Administrative guidelines (Article 7)

The issue under this Article is the following: should the Division continue to enjoy managerial discretion with respect to the number of administrators assigned to schools in St. Vital, or should the collective agreement mandate the level of administrative staffing? Under the current agreement, principals and vice-principals are appointed at the discretion of the Division. The Association proposed a clause which would insert into the agreement an assignment formula based on teacher and pupil counts, in similar fashion to the proposal under Articles 5 and 6 for establishing school classifications and the resulting administrator salaries.

Both parties submitted extensive evidence concerning the merits of this proposal by the Association. George Gartrell, a principal at Samuel Burland school (K-S1), made a moving presentation based on his 32 years of experience in the field, including 28 years as an administrator. He described what the job is like on a day-to-day basis, and said that finding people willing to take on the leadership role is becoming more difficult: "It is reputed to be an extremely stressful and impossible role for little reward, one filled with conflict, emotional labour, increased accountability and a burden of caring which wears the most emotionally stable a bit thin." The Association argued that St. Vital has been operating well below the average for administrative assignments, and while the Division has recently moved to improve staffing levels, there is still a need for at least two more appointments.

The formula proposed by the Association would require such additional appointments. For its part, the Division explained in detail the steps it has taken in this area, and presented comparative data which it said demonstrate that St. Vital ranks among the best staffed divisions in Metro. In rebuttal on behalf of the Association, Mr. Shyka said that "the Division has moved, but not enough."

The parties disagreed on the costing for this proposal. The Division projected a minimum cost of $130,000, but said that in reality the cost would be higher. The Association suggested that the cost should be calculated based on the incremental junior teachers who would enter the system to fill the openings caused by new administrator appointments from the senior ranks. On this basis, the cost would be closer to $70,000.

Regardless of the merits and the costing, there is an obvious jurisdictional problem. Section 126(2) of the Act deprives me of authority to award on matters involving the appointment and assignment of teachers and principals. As I outlined earlier in my discussion of jurisdictional principles, the exclusions listed in section 126(2) are to be *broadly* interpreted with a remedial purpose in mind, namely, preventing arbitrators from imposing new contract clauses in these areas with resulting cost increases to school divisions. I agree with the Association that the use of formulas *per se* is not objectionable, and in the context of Article 5, where the substance of the clause was salaries and allowances, I found no jurisdictional impediment. However, in plain terms, the Association's proposal for Article 7 falls within section 126(2)(b). Proposed sub-clause 7(II) states: "The Administrative Allocation of principals and vice-principals in each school shall be determined as follows ...". Proposed sub-clause 7(V) provides: "Where the administrative allocation for a school is 1.1 or greater a vice-principal shall be assigned to the school. The allocation of school administration shall not impact on the determination of any other staffing."

I conclude that this proposal is exactly the kind of matter which the Legislature had in mind in enacting section 126(2). The Association's proposal is therefore denied.

Sick leave issues (Article 9.02)

The Association made a number of proposals for revision of this Article. Under the current agreement, after completing one year of employment, a teacher is credited with 20 days of sick leave on the first day of each new school year, to a maximum of 115 days. First year teachers are granted 2 days sick leave credit per month - thus they are treated differently, in that they do not enjoy the bank of 20 days when they start the year. The Association submitted that this was unfair and that the differential treatment should be eliminated. (Article 9.02(C)). Mr. Leibl described this as the Association's primary issue under Article 9.02.

The Association also proposed that when term contract teachers are retained on successive contracts, they should be allowed to accrue sick days in the same way as regular teachers. (Article 9.02(E)). A new clause was proposed recognizing sick leave for pregnant teachers (Article 9.02(L), which was acceptable in principle to the Division, subject to specific wording concerns. On-the-job injuries were addressed in new Article 9.02 (J). Finally, another new clause (Article 9.02(M) was advanced by the Association relating to long-serving teachers who exhaust their sick leave and receive Long Term Disability benefits. Upon return to work, such teachers would be credited with one half the quantum of their sick leave accumulated at the time of the illness or injury.

Sick leave credits for first year teachers (Article 9.02(C))

School divisions in Manitoba generally use two different approaches to the accrual of sick leave. A minority of divisions follow the default provisions set out in section 93 of the *Public Schools Act*, whereby a teacher earns one sick day per nine days actually worked ("1 for 9"). Most divisions provide an entitlement of 20 days per year, generally credited on the first day of the school year to all teachers, including new teachers. St. Vital has a hybrid system - the Division follows the majority pattern except for the first year. The Association argued that the first year of a teacher's career presents special and additional stresses, which have been recognized to a degree in St. Vital by the implementation of F.I.R.S.T. (Framework for Inducting, Recognizing and Supporting Teachers). In the same vein, as a "strategy for survival", the collective agreement ought to provide new teachers with the comfort of knowing that they will not exhaust their sick leave credits if they become ill early in their career.

In response to my question, Superintendent Borys stated that no first year teacher had in fact exhausted her sick leave credits, and if this did arise, he undertook that the Division would respond sensitively by granting time off with pay or authorizing an advance on future credits. Mr. Leibl replied that there is no provision for such an arrangement in the collective agreement, so that it would be a paternalistic measure and not a right. New teachers would likely lack the confidence to approach management with a request for such a favour. Probably they would either work sick or sustain a loss in income, neither of which are desirable events in the first year.

For the Division, Mr. Wallis pointed out that the current arrangement is more favorable that the "1 for 9" formula used by a number of Divisions, and the Division's efforts to accommodate and support new teachers had been acknowledged by the Association. He urged that this matter be left for bargaining by the parties.

While I have considerable sympathy for the Association's argument at the level of principle, there is no evidence that this is a tangible problem, and no indication that the Division has been unresponsive to the needs of new teachers. I therefore agree that this issue would better be left for further negotiation between the parties. The Association's proposal is denied.

Sick leave for term teachers (Article 9.02(E))

The Association proposed that teachers employed on successive term contracts be allowed to accumulate their sick leave credits up to the same maximum allowed for regular teachers. At present, if a term teacher is re-engaged on another term, she starts with a zero balance, losing any sick leave credits accrued at the end of the prior term.

No argument was advanced based on cost to the Division. However, the Division pointed to its proposal for Article 19 (Use of Term Contracts) - once a teacher has been employed under a Form 2A contract for two successive entire years, re-employment for a third consecutive year would be by Form 2 with retroactive sick leave. Mr. Wallis described this new provision as a progressive approach which is not widely available to teachers. However, he said that the Association's clause goes much further and exceeds the limits of the Form 2A employment relationship, which is temporary by definition.

Mr. Wallis made a good point, but on the other hand, the Division's own proposal for Article 19 reflects an acceptance that fairness under Form 2A employment may require recognition of a teacher's continuity of service. It seems somewhat artificial for a teacher to forfeit her credits after Year 1, but then regain them retroactively after Year 2 upon hiring under Form 2. The parties do not seem to be very far apart on this issue. The Association's proposal seems fair and reasonable, and is hereby awarded effective June 30, 2000, with jurisdiction reserved to deal with any differences which may arise with respect to the wording of the revised article.

Lengthy or recurring illness (Article 9.02(I))

This proposal by the Association was merely an editorial change to reflect the proper description of the Employment Insurance program, and is awarded.

On-the-job injury (New Article 9.02(J))

The Association proposed this new clause in light of the growing body of evidence relating to violence and safety issues arising in schools. Under the Act, teachers have a duty to seize weapons found in the possession of a student. As Arbitrator Teskey noted in *Transcona-Springfield School Division* (1992), the likelihood of on-the-job injury "is not entirely fanciful given the present actual and/or potential violence within the schools". A clause was awarded in that case, and two other Metro divisions (St. Boniface, Winnipeg) have similar contract provisions. Each of these clauses authorize salary continuance during an absence caused by an on-the-job injury, up to the teacher's accumulated sick leave credits, but without charging the period of absence against the sick leave balance. Workers Compensation benefits are generally not applicable to teachers, by agreement of school boards and teacher associations.

The Division opposed this proposal, but said that if it should be granted, a clear definition of on-the-job injury must be included, limiting coverage to accident or injury occurring on Division premises and in the course of performing duties arising out of employment with the Division. No estimate of cost impact was presented.

Again, the parties do not seem to be far apart. The Association proposal seems reasonable given the absence of ordinary Workers Compensation benefits. The precedents cited above include one limitation not mentioned in the Association's draft clause: the period of salary continuance is restricted by the teacher's total accumulated sick leave credits. In this case, I find that the pattern should be followed if the clause is to be awarded over the objection of the Division. Moreover, the request by the Division for a definition is reasonable, although I see no basis for limiting coverage to injuries taking place on Division premises, given the extent of school activity which can be conducted off-premises.

The following new article is therefore awarded effective June 30, 2000:

> J. On-the-job injury. When a teacher suffers an on-the-job injury and is absent from work as a result of that injury, the Board shall continue to pay the salary of that teacher during such absence, limited to the extent of the accumulated sick leave balance at the time of suffering the on-the-job injury. The period of time absent from work as a consequence of the on-the-job injury shall not be charged against the accumulated sick leave balance. "On-the-job injury" means a disability resulting from an accident or injury occurring in the course of performing duties arising out of employment under contract with the Board.

Jurisdiction is retained to resolve any concerns of either party arising from the language set forth above.

Sick leave entitlement for pregnant teachers (New Article 9.02(L))

The parties agreed that the new collective agreement should contain a clause providing sick leave to pregnant teachers, but disagreed on the precise wording of the clause. The respective proposals were as follows (differences underlined):

> Association proposal:
>
> The Board shall provide full sick leave entitlement to a pregnant teacher who, as a result of her condition either before or after delivery, is unable to be at work and perform her regular duties <u>for a valid health related reason(s)</u>. The pregnant teacher shall follow current proof of claim procedures for sick leave entitlement as may be required by the Board.
>
> Division proposal:
>
> The Board shall provide full sick leave entitlement to a pregnant teacher who, as a result of her condition either before or after delivery, is <u>medically unable</u> to be at work and perform her regular <u>teaching</u> duties. The pregnant teacher shall follow current proof of claim procedures for sick leave entitlement as may be required by the Board.

The Association relied on my reasons in *Winnipeg School Division* (1998), where I discussed the significance of using "health" related reasons as the touchstone for entitlement under this clause, as opposed to illness or disability. Moreover, three other school divisions have similar clauses. In the present case, the Division recommended using the phrase "medically unable", but gave no explanation for this choice as opposed to the teachers' proposal. Mr. Wallis made the general submission that adoption of this clause would increase utilization of sick leave during pregnancy, over and above current practice, which apparently has not been contentious in St. Vital. Therefore this new article carries a cost.

On balance, I see no need to depart from the precedents in terms of wording, and I therefore award the Association's proposed clause, effective June 30, 2000.

Teachers returning from Long Term Disability (New Article 9.02(M))

Under the collective agreement (Article 10), the Division administers the Manitoba Teachers' Society Long Term Disability (LTD) plan, and individual teachers pay the premiums as a salary deduction. The LTD waiting period is 60 working days or exhaustion of accumulated sick leave, whichever is greater. The Association stated that while not a frequent problem, it does happen that a teacher experiences a lengthy illness and does exhaust her sick leave before receiving LTD benefits. Upon return to work, such an individual would have no initial sick leave balance to protect her, although a recurrence of the illness within six months entitles the teacher to resume LTD without an additional waiting period. The Association proposed that for a teacher with 10 years service, upon return to work after a period on LTD, the Division should re-credit the employee with one half of her sick leave balance as it stood when the illness began.

The Division opposed the proposal as undefined in scope, unknown in cost and unprecedented in Manitoba teacher contracts. The arbitrary re-credit of ½ the sick leave balance was also questioned. I agree that there was insufficient information presented to fully consider this matter, and therefore the Association's proposal is denied.

Maternity, parental and paternity leaves (Article 9.03)

The current article allows a female teacher to take 17 weeks of unpaid maternity leave, with provision for a longer leave by mutual agreement. The collective agreement makes no reference to parental leave, but the provisions of the *Employment Standards Code* S.M. 1998, c. 29 apply, and under the provincial regime (as it stood during the effective period of the renewal collective agreement), employees are entitled to a maximum of 17 weeks unpaid parental leave. Such leave may be taken by an adoptive parent or a natural parent. Federal Employment Insurance benefits provide a partial salary replacement during these leaves, to a maximum of 17 weeks for maternity and 10 weeks for parental leave.

In light of the foregoing, the Association proposed that a teacher on maternity leave be entitled to receive 95% of salary (including EI benefits) for 17 weeks and that a teacher on parental leave be entitled to receive 95% of salary (including EI) for 10 weeks. Implementation is subject to the successful conclusion of a Supplementary Unemployment Benefit plan (S.U.B.) with the Canada Employment and Immigration Commission (C.E.I.C.). This proposal essentially tops up available EI benefits.

However, beginning in 2001, the duration of both statutory leaves and EI benefits has been extended to approximately one year. The parties did not address these extensions, and therefore I will be dealing with the issues in terms of the evidence provided to me. However, it cannot be denied that any award of top-up under this article could have additional potential future cost implications for the Division once implemented, assuming that in the next round of bargaining, the Association presses for extension of the top-up to match the more generous leaves now provided by law.

The Association further proposed 2 days of paid paternity leave for a male teacher upon the birth of his child, something not currently covered in the agreement.

In the past, teacher contracts in Manitoba have generally not provided EI top-up, although many public sector employees do enjoy this benefit. In Manitoba, the Manitoba Government Employees' Union contract provides 93% top-up with an S.U.B., as does the Manitoba Medical Association contract with the province. The University of Manitoba agreement with the Faculty Association provides 95% maternity top-up and also 10 weeks of topped up adoptive leave. Across Canada, a wide variety of top-up arrangements exist for public school teachers. Saskatchewan links paid maternity leave with medically established unfitness for work, an approach the Association strongly opposed. Other jurisdictions provide salary replacement levels ranging between 60% and 100%. Some school authorities provide no top-up at all.

Past arbitration awards in Manitoba have acknowledged the importance of this benefit, but have declined to award it for various reasons. In *Lord Selkirk School Division No. 11* (1994), Arbitrator Teskey said that top-up should be presented as a priority proposal by the teachers, and in *Intermountain School Division No. 36* (1994), Arbitrator London expressed the view that such a benefit should be implemented more comprehensively by legislative means. More recently, Arbitrator MacLean echoed this concern when he denied a maternity top-up in *Turtle Mountain School Division No. 44* (2000): "Involved are larger societal issues, 'equality', and support of family issues, which must be balanced against the realities of the budget. ... Of concern is the question of requiring the Division to address what can be seen as a societal matter that ought to be addressed in the larger context" (at p. 9-10). Nevertheless, Arbitrator MacLean recognized that such a provision would assist in the recruitment and retention of teachers.

On the other hand, Arbitrator Fox-Decent granted the substance of the teachers' maternity clause in *Fort Garry School Division No. 5* (2000), noting the significant majority of female teachers in the division. He found that "[t]his is a suitable moment in time to grant an expanded provision relative to maternity leave" (at p. 4), and awarded 17 weeks at 90% of salary. No provision was made for paid parental or paternity leave. The Association relied heavily on the *Fort Garry* precedent, but Mr. Wallis distinguished the award by noting that the arbitrator balanced off the maternity leave expense against savings on other clauses. The Division said there were no such offsets in the present case.

The Association indicated that this issue was its highest priority among all the matters in dispute in the present arbitration, based mainly on the number of women in the workforce. In St. Vital, 67% of the teachers are female, and the proportion is similar across the province. It was argued that families should not be penalized for bearing children and parenting them. For the Division, the main issue was cost. In 1999, there were 254 teacher maternity leaves taken in Manitoba. At an estimated cost of $12,633 per teacher (Class 5 with 6 years experience), a 90% top-up proposal would cost $3.2M if implemented in every division. For St. Vital alone, based on current teacher demographics, the Division calculated a cost of $11,306 per teacher. Annually the total St. Vital expense would be $174,000 in 2001/02, rising to a projected $269,000 by the year 2004/05 because of retirements and incoming younger female teachers. This represents the equivalent of 5 teacher positions which might have to be sacrificed due to scarce financial resources, something the teachers themselves would oppose. In reply, the Association challenged the Division's cost projections as inflated, suggesting a cost range between $5,199 and $9,156 per teacher. The lower figure assumes that the teacher on leave is replaced with a much more junior individual at a correspondingly lower salary. The true incremental cost of the maternity leave is the cost of the *replacement* teacher, according to Ms Larsen's rebuttal evidence on behalf of the Association.

Two conclusions can be reached from the totality of the evidence and arguments presented by the parties. First, the dollar cost of the proposed maternity leave clause is significant, no matter which set assumptions is adopted, and the cost is likely to rise over time as younger women replace retiring teachers. Second, viewed on a "per-taxpayer" basis (assuming that the total cost of the new clause must be met by means of a tax increase), the cost is relatively modest. Accepting the Division's projection to 2004/05, the average homeowner would pay an additional $12 per year. A M.A.S.T. statement cited during the hearing estimated the current impact at about 0.8% of local school taxes.

During the hearing, the Association tried to argue that by entering into an S.U.B. plan and paying EI top-up, the Division could actually *save* money, as compared to the cost of paying sick leave benefits to pregnant teachers. For the Division, Mr. Wallis strenuously objected to the notion that these are 'savings", since in either instance, there is a financial outlay by the employer. I agree with Mr. Wallis. By accepting sick leave for health or medical reasons during pregnancy, the Division has accepted an additional expense item. However, it is also true that the employer becomes a second payer once an S.U.B. is in place, so that it is less costly to make top-up payments than to pay sick leave for an equivalent period. It is my conclusion that the sick leave costs and the top-up costs are not directly cumulative - there would likely be some offset.

It should be noted that the parties did not present costing evidence for the parental leave and paternity leave clauses. The foregoing projections relate only to the proposed 17 weeks of maternity top-up.

In my view, as held by the arbitration board in *Intermountain School Division* (1994), "the costs of childbearing must now be recognized as a public, as well as a private, obligation." In a recent business journal article discussing the respective roles of governmental and other actors in supporting children, economist Judith Maxwell attributes to employers the obligation to provide flexible work time options, to supplement parental leave benefits, to provide support for child care and to develop other family responsibility support mechanisms. Governments and the voluntary sector also have roles to play. See "Investing in Children Should be Our Next Priority", *Canadian Business Economics*, February 2000, p. 15-17. As these kinds of opinions gain broader acceptance, it becomes less tenable to dismiss proposals for paid maternity leave on the basis that these are "societal matters", as held in *Turtle Mountain School Division* (2000). In any event, recruitment and retention of teachers is specifically enumerated in the Act as a factor for arbitral consideration. Paid maternity leave should become an attractive feature of employment in the Division, given the preponderance of female teachers in Manitoba.

I agree with Arbitrator Teskey's comment in *Lord Selkirk School Division* (1994) that "this is an issue of resources combined with equity". It is a matter of judgement as to when a public school system employer can reasonably afford the introduction of this new benefit. In *Fort Garry School Division* (2000), Arbitrator Fox-Decent said that this is "a suitable moment in time" to expand the maternity leave provision.

Earlier in this award, I held that high priority contract proposals by the teachers should be considered for adoption, as long as they are reasonable and demonstrably necessary, keeping in mind the impact on the St. Vital School Division and its ratepayers. Applying this test, and considering all the evidence, I agree with the finding in *Fort Garry* that this is a suitable time to advance the level of salary protection provided to St. Vital teachers on maternity leave.

Given the financial challenges facing school divisions, they may not be well equipped to take the lead on such compensation issues. I therefore concur as well with the decision in *Fort Garry* to set the top-up level at 90% of salary, rather than 95% as proposed by the Association. This clause is, of course, subject to an S.U.B. agreement with the C.E.I.C..

Little was said in the present case about the parental leave and paternity leave proposals. I therefore propose to confine my award to the central issue canvassed under Article 9.03, namely, the 17 week top-up. There is a limit to the Division's resources, and progress in such matters is inherently incremental. I would leave it to the parties to explore these matters again at the bargaining table.

My only hesitation in this regard is that by leaving out parental leave top-up for teachers adopting a child, significant unfairness may result. The Association's proposed article refers to adoptive leave in 9.03(A), but the subsequent clauses make no further mention of the topic. Perhaps it was intended that either parent could take an adoptive leave under proposed clause 9.03(G), but the drafting here seems to contemplate a leave continuing directly after a maternity leave (*ie*, waiting period top-up only for the male parent). No submissions were made with respect to potential *Human Rights Code* requirements in the allocation of paid leaves under the collective agreement, but I believe that there may be live issues in that regard. I suggest to the parties that the new article, which will entitle a teacher to 17 weeks of salary top-up during maternity leave, also ought to reasonably accommodate the circumstances of an adoptive parent. There was no evidence with respect to the projected utilization of adoptive leave. It is my assumption that, adoption being a fairly rare occurrence, the additional cost of this accommodation would not be undue.

The Association's proposal is awarded effective June 30, 2000 at 90% of salary in respect of maternity leaves, but denied for parental and paternity leaves. I will leave the drafting of the new article to the parties. Jurisdiction is reserved to settle the question of adoptive leave in accordance with my observations above. Jurisdiction is also reserved to settle any other differences which may arise in finalizing the new article.

Settlement of differences (Article 12)

The current agreement contains a dispute resolution clause requiring written notice of a grievance within 35 teaching days of the event in question and resort to arbitration if the matter cannot be settled satisfactorily between the parties. The Division presented a revised article with an informal resolution stage at the outset, a 3-step system to process the grievance, and the same arbitration model for matters not capable of settlement. The proposal was said to contain tighter time-lines than the existing clause. Mr. Wallis conceded that there have been few teacher grievances in St. Vital School Division and that the current wording has not really been a problem. However, he argued that because teachers are now subject to the jurisdiction of the *Labour Relations Act*, with the availability of mediation, expedited arbitration and other such provisions, Article 12 should be modified to better match the kind of grievance procedures generally used in collective agreements governed by the labour statute.

The Association submitted that no change is required. If greater conformity to the *Labour Relations Act* regime is needed, the Association suggested that the language of section 78(2) of that Act, the deemed arbitration provisions, should be adopted.

The Division may well be correct in predicting that the new regime will require review and amendment of this article. However, such a review will be far more fruitful if it is based on a period of actual experience under the *Labour Relations Act*. It is also highly desirable that the parties themselves fashion their own mechanism for dispute resolution, since they themselves must use it and live with the results. Thus, while the Division made some sensible suggestions for improvement, under the circumstances, I have concluded that this matter should be left to the parties. The Division's proposal is denied.

Use of term contracts (Article 19)

The current agreement specifies that where a teacher is to be employed for a term certain of one school year or less, she shall be engaged under a Form 2A contract. This is an exception to the normal statutory Form 2 contract, which provides rights commonly known as "tenure" after the first year of employment (*Public Schools Act*, section 92). Termination of a Form 2 contract is reviewable by arbitration. The Association is concerned that teachers not be unfairly continued on a succession of Form 2A contracts, thereby undermining their security of employment. At present, Article 19.03 simply states that *if and when* a teacher is hired on a Form 2 contract after completing two entire years under Form 2A, she will be retroactively entitled to seniority. The current provision imposes no obligation on the Division to convert a Form 2A teacher to Form 2, no matter how long the teacher has served under the temporary contract.

The Division proposed to amend Article 19.03 in two significant ways: (a) after two successive entire school years on Form 2A, a teacher *must be* signed to a Form 2 contract for her third consecutive year, and (b) upon signing, the teacher will be entitled retroactively to seniority *and* sick leave benefits.

For the Association, this was still not sufficient to provide a reasonable degree of security. In its proposals, "temporary teacher" is defined as an individual replacing another teacher for at least 5 teaching days. Temporary teachers must be hired under Form 2A, and the total number of temporary teachers may not exceed the number of teachers away on leaves of absence. The Association proposed that after two successive school years or partial years under Form 2A, a temporary teacher must be signed to a Form 2 contract in the third year. Once so signed, the teacher would be entitled to all benefits retroactively.

The Division objected to the arbitrability of the Association clause, arguing that this scheme interferes with the selection, appointment and assignment of teachers, contrary to section 126(2)(a) of the Act. Similar objections were considered and rejected by Arbitrator Scurfield in *Brandon School Division* (1998) and by Arbitrator Fox-Decent in *Fort Garry School Division* (2000). Those two arbitrators held that while they could not dictate to the division *who* they should select or appoint, they did have jurisdiction to establish the terms and conditions applicable to the teachers who are selected or appointed *by the employer*. I find this reasoning persuasive, especially since the St. Vital School Division itself is requesting that I award a provision (its version of Article 19.03) dealing with the terms under which a teacher is to be hired in her third year.

With respect to the merits, the Division advanced a number of compelling points. Its amended clause enhances the status and security of Form 2A teachers. No evidence was adduced to show that a more restrictive set of conditions is necessary. To the contrary, the Division has demonstrated its good faith by signing a substantial number of permanent teachers in the June 2000 round of hiring. The Association's proposed definition of "temporary teacher" is without precedent, and by setting the threshold at a mere 5 teaching days, a significant administrative burden would be created. In addition, the Division explained that there are legitimate reasons for hiring Form 2A teachers aside from replacing teachers on leave of absence. Finally, the notion that a teacher would achieve Form 2 status after as little as 10 teaching days over the prior 2 years was characterized as unreasonable.

On balance, I am not prepared to award a clause at this time which moves beyond the enhancement proposed by the Division. If experience under the new agreement indicates that there are real problems with the utilization of temporary teachers by the Division, then the parties are free to address these issues in bargaining, and the Association will have full resort to arbitration, unhindered by any jurisdictional objections.

One concern raised by the Association does deserve attention, however. The Division's proposal requires that a teacher serve "two (2) successive *entire* school years" in order to be entitled to Form 2 signing the next year. A teacher could be hired on the *second* day of the year and serve continuously thereafter, but still not be entitled to a Form 2 under the new article. As I understood the Division's position, it was prepared to recognize a right to Form 2 status once a teacher had substantially completed two years under a Form 2A contract. The clause therefore needs some fine-tuning to avoid inadvertent unfairness. On behalf of the Association, Mr. Leibl pointed to the St. James and Brandon collective agreements for guiding precedents on this point.

Having carefully considered all the submissions, I award the following new Article 19.03 effective June 30, 2000:

> A teacher who has been employed full or part time in the Division under a Form 2A contract for two (2) successive entire school years shall, upon employment for the third consecutive school year, be signed to a Form 2 contract and shall be entitled retroactively to seniority and sick leave. An "entire school year" means employment for 180 or more school days in the contract year.

Jurisdiction is reserved to settle any differences arising from the wording of the clause as awarded. The proposals advanced by the Association are denied.

Payment for substitute teachers (Article 22)

Adjustments to the pay rates for substitute teachers were agreed between the parties, but the Division proposed to implement the higher rates effective the date of *signing* the renewal collective agreement. The Association submitted that like salary and allowance adjustments for other teachers, substitute teacher rates should also be revised retroactive to the *commencement* date of the agreement.

The Division's main argument was that with some 400 individual pay cheques to issue, spanning two rate changes, the administrative burden was undue. Many of the amounts involved are relatively small. On the other hand, it was admitted that some substitutes would lose a significant sum of money if retroactive pay is denied. For example, a teacher who worked 100 days each year as a substitute would be deprived of $600 in back pay. In 1999, there were 12 teachers who logged over 100 days as substitutes. During the hearing, it was clarified that the Division already has a full listing of hours worked in each school year period for each teacher, since this information is compiled for government reporting purposes. As I understood it, the adjustment required is to pay $2/day for time worked in 1998/99 and $4/day for time worked in 1999/00. Given that the parties have agreed to retroactive adjustment of all other salary payments, there seems to be no reasoned basis to deny the same benefit to substitute teachers. I therefore award the Association's position on Article 22(1).

The second matter in dispute under this article concerns the threshold for application of the regular salary scale. Currently scale is paid to a substitute after 10 consecutive days. This is outside the range for Metro divisions, which is 5-7 days. The Division agreed to pay scale after 7 days, but the Association urged that the threshold be set at 5 days. I consider that the Division has made a reasonable proposal in moving the threshold within the Metro range, and I therefore award the Division's position in this regard. No submissions were made with respect to the effective date for Article 22(2). It appears to me that it would be difficult to reconstruct the payment for substitutes based on a 7 day threshold. As a result, this clause will be effective the date of signing.

Hours of work and contact/non-contact time (New Article)

The current collective agreement contains no clause relating to hours of work. This is not necessarily surprising, given the professional status of teachers and the broad discretion bestowed upon them in choosing how and when to fulfill their duties outside of defined school hours. Moreover, every individual teacher contract is required by statute to contain the following provision (section 92(1) and Form 2, Schedule D of the *Public Schools Act*): "The teacher agrees with the school board to teach diligently and faithfully and to conduct the work assigned by and under the authority of the said school board ... , according to the law and regulations ... in effect in the Province of Manitoba, and to perform such duties and to teach such subjects as may from time to time be assigned ... ."

There is a rule of thumb, which both sides seemed to accept in the present case, that a teacher spends about one hour of time for each hour engaged in actual instruction with students. A recent national survey cited by the Association estimated that full time teachers spend more than 47 hours a week on the job, including 28 hours of assigned timetable teaching duties and 19 hours of other school related work (Ontario Institute for Studies in Education - O.I.S.E., National Research Network on New Approaches to Lifelong Learning, 1998-99 school year). This finding was consistent with Statistics Canada surveys conducted in 1992 and 1998. The O.I.S.E. study director stated, "The notion that teachers generally have shorter work weeks than most of the labour force is clearly false. Our survey found that the average teacher spends more hours per week in paid and unpaid teaching work than virtually any other comparative occupational group."

The proposals advanced by the parties in the present case are roughly consistent with the foregoing information. The Association requested a clause which would limit instructional and supervisory time to 22.5 hours per week (1350 minutes) and guarantee a minimum of 2.5 hours per week (150 minutes) of non-contact time during the school day, described as non-teaching and/or non-supervisory time. This was an amended proposal. At the outset, the Association was seeking a minimum of *5.0 hours (300 minutes)* of non-contact time. The core argument made by the Association was simple. Teachers need a manageable workload. They currently have more work than time.

For its part, the Division opposed any new article. Mr. Wallis focused on the statutory duties, annual salary and professional nature of the job, all of which requires operational flexibility and precludes any rigid definition of workload or work week. Experts in this field have warned against "compartmentalization" of the education function. Jurisdictional objections flowing from section 126(2)(a) of the Act were also raised. The Division proposed that if hours of work are to be dealt with in this award, then a minimum work week of 45.5 hours should be recognized, exclusive of lunch periods and extra-curricular activities.

During the hearing, there was considerable discussion of the Division's existing practice with respect to contact and non-contact time. Various timetables and charts for schools across St. Vital were filed and explained. It is apparent that this is a complex administrative matter, as illustrated by the data presented at page 457 of the Association's main brief. For full time teachers, non-contact time ranges from 150 minutes to a high of 450 minutes per week in the senior levels. Assistant Superintendent Fontaine said that teachers generally get an assurance of 180 minutes of non-contact time per week, but this is flexible. After discussion with administrators, some teachers may take a schedule with *less* non-contact time, in exchange for other arrangements.

I asked the Division whether there would be any cost impact from an award of times matching the current practice. Mr. Wallis indicated that he could not provide an answer. Both Mr. Fontaine and Mr. Borys stressed the need for maintaining flexibility. Mr. Wallis submitted that the Association's proposal would take us down a "slippery slope", in that the current proposal is only a starting point, and escalating demands would follow once the first clause had been established.

Two members of the Association made presentations at the hearing. Linda Fortier is a Grade Three teacher with 28 years of experience in the division. She currently assists with 3 choirs, supervises a girls' Grade Eight volleyball team, supervises dances, band trips and other gym activities, has coached cross-country running, serves on her school's professional development and assessment committees, sits as the school's representative on the St. Vital Teachers' Association council, and also serves on a divisional professional development funding committee. Ms Fortier estimated her minimum normal work week at 44-48 hours, often rising to 60 hours during busy periods. She stated, "I put in these hours willingly, without obligation on the part of my administrators, because I take pride in doing the best job I can for my students." After describing the multitude of tasks facing her every day, Ms Fortier concluded as follows:

> I do not ask to have my workload reduced, and I would not change professions with anyone in the world. I am not resistant to the changes brought to curriculum and program implementation over the past few years. I embrace the changes willingly, and relish the challenge of being required to enhance my performance. I am not asking for a return to the good old days. What I do ask for is time, during the school day, when I am not responsible for working with students; so that I can attend to the many tasks that must be done, and done well, if I am to be a successful educator in this twenty-first century. Guaranteed non-contact time has always been vital to teachers; now, more than ever, it must be in place for the good of our education system.

In response to questions, Ms Fortier clarified that her estimate of working hours is based on mandatory teacher functions, exclusive of voluntary time spent on choir or similar activities. She stated that she is fairly representative of most teachers in the Division. She agreed that if an arbitration award on workload resulted in the Division increasing class size, this would negatively impact the quality of education.

Linda Gosselin, the second presenter, has 23 years of teaching experience and also teaches Grade Three. Generally she is at the school from 7:30 AM to 4:45 PM, but when she goes home, her work doesn't necessarily end. She said that most days, she loves to be a teacher, but the job can also be frustrating and overwhelming. Ms Gosselin stressed that teachers must have adequate time to prepare. At present she has 30 minutes per day and 60 minutes once per week - a total of 180 minutes.

Arbitration awards cited by the parties clearly demonstrate that "workload" has been a difficult issue in teacher labour relations for at least a decade. Arbitrators have recognized that teachers and school divisions each have legitimate concerns in this area. These concerns have been reiterated by the parties in the present case. In *Winnipeg School Division* (1998), I noted that in professional employee bargaining, "the overall workload cannot be precisely quantified, nor would it be desirable for either party to do so" (at p. 42). Nevertheless, several types of contract clauses have been awarded over the years.

Arbitrator Freedman laid down the general principle in *Transcona Springfield School Division* (1989) when he wrote that "there should be some contractual recognition that no material alterations should be made in any school year in the instructional demands made on a teacher from the situation that existed immediately before the Agreement came into force" (at p. 44-45). The so-called "5% solution" was developed by Arbitrator Chapman in *Winnipeg School Division* (1990), providing in essence that a teacher's teaching and non-contact time could not increase by more than 5% of the average time per teacher in the division during the base year. The "5% solution" has been awarded as recently as last year in the *Fort Garry School Division* (2000) decision. In *Lord Selkirk School Division* (1994), Arbitrator Teskey awarded a clause prohibiting any increase which is unreasonable. In *Winnipeg School Division* (1998), negotiations following the award resulted in the parties quantifying minimum preparation times as follows: 180 minutes per 6-day cycle for full time elementary teachers and 240 minutes for full time secondary teachers.

The jurisdictional objection was considered by Arbitrator Fox-Decent in the recent *Fort Garry* award and rejected. In *Brandon School Division* (1998), Arbitrator Scurfield denied a clause on non-contact time, but not for jurisdictional reasons. Before me, Mr. Wallis argued that the *effect* of the Association's proposal was to limit the Division's ability to assign tasks and duties to teachers. Section 126(2)(a) of the Act prevents me from awarding in relation to the assignment of teachers. Mr. Wallis noted the numerous external forces which are affecting the Division, and said that the Association's article on workload would restrict the Division's flexibility, possibly leading to increased class sizes.

In my discussion of arbitral jurisdiction earlier in this award, I concluded that the exclusionary categories listed in section 126(2) must be broadly interpreted. However, not every possible connotation or extension of the text is applicable in defining arbitrability. I recognize the cogency of the Division's argument in terms of the merits of this issue, but I have concluded that the effect on assignment is too remote to oust arbitral jurisdiction. The substance of the proposed new article relates to hours of work, not the assignment of teachers. As argued by the Association, the purpose of the clause is to "establish reasonable working conditions related to hours of work, which has long been recognized as central to collective bargaining and minimum standards legislation."

It follows that I have jurisdiction to award the Association's amended article, or the Division's article on hours of work, or some variation of these proposals which addresses working hours.

In considering this subject, I was struck by the volume and complexity of the work carried out by the contemporary teacher. Curriculum and teaching methods are changing at a frenetic pace. The expectations placed upon teachers and schools are growing as well. Perhaps not surprisingly, a Queen's University study found that 50% of teachers were exhausted at the end of the school day. In my perception, the priority item identified by St. Vital teachers in this case was an assurance of adequate *non-contact time*, as opposed to a cap or reduction in total working hours. As Linda Fortier said in her presentation, "[g]uaranteed non-contact time has always been vital to teachers; now, more than ever, it must be in place for the good of our education system." No one from the Division disputed the substance of this assertion. The only issue was whether non-contact time should be written into the collective agreement, or left to Division management as a policy matter.

In this regard, I note Arbitrator Scurfield's comment in *River East School Division* (1996) dealing with the teachers' proposal for contact/non-contact time in that case: "The Division is concerned about maintaining maximum flexibility to deal with its budgetary problems. Flexibility is desirable, but in labour relations it is rare to permit one side to unilaterally move the goal posts. This is particularly so when both sides agree that the goal posts are for the most part properly positioned." While no suggestion was made that the Division has acted arbitrarily or unfairly in setting teacher timetables, I concur with Arbitrator Freedman's observation in *Transcona Springfield School Division* (1989) that allowing an unrestricted management right to alter workload demands upon teachers creates "at least potential unfairness". Given the significance of these issues for both sides, it is not inappropriate to include a provision on non-contact time within the collective agreement.

Non-contact time was also raised by the Association under its proposed new clause dealing with exceptional students (see below). It was argued that there is now a large body of exceptional and other "at risk" students in the regular school system, and that teachers need more non-contact time for meetings to deal with the placement, planning and evaluation needs of such students. The whole subject of mainstreaming is a difficult one, both jurisdictionally and in terms of the merits. An arbitrator's role is limited. It is my intent that the clause awarded herein will respond generally to the issues presented regarding non-contact time.

I therefore award the following new article effective June 30, 2000:

> Non-contact time (non-teaching and/or non-supervisory) for full time classroom teachers shall be at least 180 minutes per week. A part time teacher is entitled to a prorated share of non-contact time. This minimum time is subject to variation with the agreement of the teacher or where, due to urgent circumstances which were unforeseen when school timetables were established, the Division is required to provide less non-contact time on a temporary basis.

I decline to award either the Association's proposed article dealing with maximum instructional and supervisory time, or the Division's proposal for defined weekly hours of work. These are matters which I believe should be discussed further between the parties.

Jurisdiction is reserved to address any differences or difficulties arising from the new article as awarded.

Medical procedures (New Article)

The Association proposed the following article:

> Except in emergency situations, teachers shall not administer medication nor perform physical procedures for students including but not limited to the following: oral feeding, toileting, diapering or dressing.

This issue arises because of the increasing integration of students with special health care needs into the public school setting. While the Association declared full support for the principles of inclusion and accommodation, it insisted that teachers are not medical practitioners, and should not be expected to serve such a role in the classroom. The Association had no objection to teachers responding in emergency situations, but did take issue with the assignment of regular duties involving administration of medication or performance of physical procedures. While conceding that in St. Vital School Division, most of these tasks are assigned to para-professionals, the Association still requested the new clause, citing issues of liability, safety, responsibility and training.

This matter was addressed at length by Arbitrator Teskey in *Transcona Springfield School Division* (1994), where the majority concluded that awarding a clause was premature. The issue then was relatively new and provincial policy was still in the process of development. The board felt that a global approach would be preferable. More recently, in *Turtle Mountain School Division* (2000), Arbitrator MacLean faced the same question and again declined an award, despite considerable sympathy for the teachers' position. He referred to "the complexity involved in categorizing medical procedures" and concluded: "I am simply not close enough to the issues to craft a provision" (at p. 16).

The Division objected to the arbitrability of this article, in these terms:

> This proposed article affects the school board's ability to assign teachers as the term "assignment" has been defined in Manitoba. The role of a teacher in fulfilling a student's particular needs is not confined to instruction. The class to which a teacher is assigned may include students who require medication. A teacher's function may include assisting a student who requires medication and/or some other medical or physical procedure. Dealing with students' needs is an integral part of a teacher's assignment.

In response, the Association submitted that teachers do not have an obligation to respond to *all* the educational and non-educational needs which students may have. Citing Chief Justice Laskin's three-part test in *Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society v. Winnipeg School Division No. 1* [1976] 1 W.W.R. 403 (S.C.C.), the Association argued that medical responsibilities do not fall within the scope of a teacher's assignable duties. In the *Winnipeg Teachers' Association* case, the Court stated as follows:

> Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed. (at p. 418)

Arbitrator MacLean basically accepted this line of argument in *Turtle Mountain* when he held that "the Division, while certainly empowered to make assignments pertaining to the work of 'teaching', is not in a position to assign a teacher to perform work that is beyond the scope of teaching" (at p. 15). He stated that carrying out medical procedures, at least in some cases, is beyond the scope of teaching. Therefore, this not being a matter of "assignment", the exclusion in section 126(2)(a) of the Act did not apply. He concluded that the issue was arbitrable, although as noted, he declined the clause on the merits.

On reflection, I have some hesitation about this approach to the question of arbitrability. Under the Bill 72 regime, the legislature has barred arbitrators from making an award with respect to the assignment of teachers. The categories in section 126(2) are to be interpreted *broadly* with a remedial purpose in mind. The Manitoba Court of Appeal has clearly stated in the *Flin Flon School Division* case that this remedial purpose was to prevent the awarding of clauses which could impose cost increases on school divisions. Arguably, therefore, the term "assignment" in the Act should not be read in the context of prior case law defining teacher duties, but rather in the context of cost causation. In plain terms, the Bill 72 scheme was intended to alter prior arbitral authority.

In other words, Arbitrator MacLean and the Association may well be correct in saying that under Chief Justice Laskin's test, medical procedures are beyond the scope of a teacher's current contractual duties. If so, then a rights grievance under the existing collective agreement would succeed. But this is a different question than defining the legislative intent behind the term "assignment" in section 126(2). Whether or not one agrees with the policy of Bill 72, it seems to me that the legislature was seeking to prevent arbitrators from doing exactly what the Association proposes here - imposing a clause relating to the assignment of teacher duties, with resultant administrative and financial implications.

My discussion of this issue is not intended to reflect any conclusion with respect to the current scope of assignable teacher duties in terms of medical procedures. It is not an easy point. In *School District of Snow Lake No. 2309 v. Manitoba Teachers' Society, Snow Lake Local Association No. 45-4* (1987) 46 Man. R. (2d) 207 (Man. C.A.), Mr. Justice O'Sullivan made it clear that teacher duties are not strictly confined to classroom instruction. He rejected the notion that noon hour supervision was a kind of baby sitting which was beneath the dignity of professionals. However, delivering health services to students may fall outside the broad purpose of educational "formation" described by the Court in *Snow Lake*. In terms of the Laskin test, is performance of medical procedures in furtherance of the teacher's principal duties? Is it fair to the teacher? These questions may need to be addressed in the context of teacher employment relations and also modern equality rights principles.

Returning to the question of arbitrability, I have real doubts about my jurisdiction, in light of all the foregoing. However, it is unnecessary to make a definitive ruling on this question, in light of my conclusion on the merits.

Like Arbitrator MacLean, I feel sympathy for the position of the teachers. In light of the evidence reviewed earlier relating to teacher workload and spiraling public expectations, teachers have a right to feel somewhat besieged when they are told to add feeding, toileting and diapering to their daily routine. However, the evidence before me also included substantial presentations from both the Association and the Division (Assistant Superintendent Lynda Baxter) outlining the provincial Unified Referral and Intake System (URIS), which was created as a joint initiative by the departments of health, education and family services to assist schools and other community programs in ensuring the safety and well-being of children with special health care needs. The Division has been quite attentive to this issue and has developed detailed policies under its Annual Divisional Action Plan (ADAP), which was also reviewed during the hearing. The Association acknowledged these efforts, but said that while ADAP now clarifies what needs to be done for special needs students, the question still remains - should teachers be expected to fulfill such health service functions?

On balance, I decline to award the Association's proposal. It is not appropriate at this time to impose a collective agreement provision as part of the arbitration process. I am not convinced that the Division's response to the issue thus far is inadequate, nor that the imposition of these duties on teachers has become oppressive in actual day to day practice. However, this is clearly an evolving and sensitive issue, and I do not by any means preclude future consideration of the matter by the parties in bargaining or by another board of arbitration, especially since arbitral jurisdiction to deal with assignment of duties will be much clearer under the Bill 42 regime.

Exceptional students (New Article)

The Association's proposal for a new article dealing with exceptional students raises many of the same considerations as the previous clause on medical procedures. In essence, the proposal here addresses the process by which students with special needs are to be placed in regular classroom settings, and the resource supports to which teachers would be entitled in dealing with such special needs pupils. Again, the Association expressed no opposition to the policy of mainstreaming or integration. Both the province and the Division are clearly committed to continuing this policy, as demonstrated by the exhaustive documentation filed by the parties during the hearing. Comprehensive procedures are in place within St. Vital School Division for identifying special needs students, assessing their levels and needs, obtaining additional funding and programming, preparing individual educational plans, and monitoring their ongoing progress.

The Association's point, however, was this: given the reality that mainstreaming is here to stay, teachers must be able to negotiate (or arbitrate) collective agreement provisions which address their working conditions in the new educational reality. Madeline McKenzie, a Past President of the Association and currently a teacher of S1 level special needs students, made a presentation stressing the acute need for consultation with classroom teachers, appropriate resources and more non-contact time.

The Division's response was two-fold. First, the Association's proposal was said to be beyond jurisdiction, just as similar proposals in *Brandon School* Division (1998), *Flin Flon School Division* (1998) and *Fort Garry School Division* (2000) were held to be non-arbitrable. Second, the Division argued that it has already developed extensive policies and procedures, including procedures which involve the classroom teacher, and therefore nothing positive would be added by entrenching additional requirements in the collective agreement. In fact, Mr. Wallis suggested that since every aspect of the proposed new clause would be subject to grievance, and much of the language is vague and undefined, significant conflict could be generated. None of this would assist teachers who say they are feeling overwhelmed by their work.

The Association contended that the drafting of its proposal, which was amended on October 3, 2000, shortly before the opening of the hearing, avoids the jurisdictional defects which undermined the earlier teacher proposals considered in *Brandon, Flin Flon* and *Fort Garry*. As noted by Justice Morse in the *Flin Flon* judicial review, "Whether or not arbitration can be had must depend on the specific circumstances of each case" (Court of Queen's Bench decision, at p. 17). This approach was echoed by Justice Steel for the Court of Appeal: " ... it is a question to be decided in each case whether the clause in question is a matter which predominantly involves working conditions or whether it is a matter which predominantly affects educational policy" (at para. 41). It is therefore necessary to consider the specific wording of the current proposal, even though mainstreaming has, in general terms, been held to be an educational policy issue, and not a "dispute" as defined under the *Public Schools Act*.

The Association advanced the following new article in this case:

> Exceptional students shall be defined as any child needing special programming and/or learning environment because of physical, intellectual, emotional, behavioral or social handicap, or because of giftedness.
>
> 1. Teachers who are assigned to teach exceptional students have the right to consultation, appropriate training, appropriate resources, and non-contact time to attend meetings. Notwithstanding the generality of the foregoing, teachers have the right:
>
> 1. To consultation prior to the time an exceptional student is placed in the class;
>
> 2. To request and receive appropriate professional development;
>
> 3. To request and receive adequate material and auxiliary resources required for proper introduction of an exceptional student into the classroom;
>
> 4. To be given additional non-contact time to attend meetings and conferences respecting the placement, planning and evaluation of a specific child;
>
> 5. To receive proper protection against assaults by students.
>
> 2. The Board agrees that exceptional students are placed in the most enabling environment possible for such students and that the most enabling environment does not necessarily mean placement of such students in regular classrooms.

In the prior version advanced by the Association during bargaining, the preamble to clause #1 included a right to "appropriate class size" and sub-clause (e) stated a right to "no more than two (2) exceptional students in a class with appropriately reduced class size". Those proposals were in direct conflict with the exclusions contained in section 126(2)(c) of the Act, but they have been removed by the Association in the current proposal. However, clause #2 still contains language dealing with the placement of exceptional students, and clause #1 grants teachers certain process and resource entitlements.

In the *Brandon* (1998) case, the teachers proposed a clause which would have qualified the statutory right of special needs students to receive public school educational accommodation, in the following terms:

> The Association and the Division agree that the integration/mainstreaming of children with special needs into regular classrooms *shall occur only when the necessary conditions for positive education experience exist* for both the child with special needs and the students in the regular classroom and only when appropriate (mutually agreed upon) supports are in place. (emphasis added)

Arbitrator Scurfield held that while in some circumstances mainstreaming could be characterized as a "working conditions" issue, this clause went well beyond the ambit of safety and health concerns, and "seeks to shape the educational policy of the Division through an arbitration award", something which he found to be inappropriate (at p. 19).

In the *Flin Flon* (1998) case, the proposed clause similarly intruded upon the statutory regime governing the rights of students and the duties of school boards:

> The Association and the Division agree that the integration/mainstreaming of children with special needs into regular classrooms shall occur only when the necessary conditions for a positive educational experience exist for both the child with special needs and the students in the regular classroom.
>
> The Association and the Division further agree that a careful and thorough examination of alternatives shall take place when decisions are made regarding the determination of the necessary conditions for a positive educational experience.
>
> The Association and the Division further agree to jointly develop a detailed procedure to determine the necessary conditions for a positive educational experience, to allow for a careful and thorough examination of the alternatives and to provide a just and impartial appeal procedure for the regular classroom teacher.

Arbitrator Chapman held that while the clause was not precluded by section 126(2) of the Act, this was not a matter falling within the definition of a "dispute" relating to terms and conditions of employment pursuant to section 97(1) of the Act. He concluded that therefore the proposal was not arbitrable, and stated: "I would hope that teachers, parents and administration would all work towards providing a meaningful education for all students regardless of disabilities. However, I do not believe it would be appropriate for an arbitrator to order the inclusion of an article such as that proposed by the Association." This decision was sustained on appeal, and Justice Steel made specific reference to the division's statutory duty to provide adequate school accommodation under section 41 of the Act. She added the following comment:

> That does not mean that every time a dispute affects educational policy there can be no arbitration. Whether or not it falls within the definition of "dispute" must depend on the specific circumstances of each case, and the specific language of the proposed clause. (at para. 42)

Having considered the foregoing authorities, I agree that the Association's current proposal has moved a fair distance from the prohibited zone. Clearly, in the past, teachers have attempted to achieve contract terms which would restrict the right of exceptional students to be placed in mainstream settings. I have no doubt that these prior proposals were motivated by the belief that when teachers have proper resources to deliver special education, then the needs of special needs students can properly be met, and the needs of regular students will not be jeopardized. However, the clauses proposed in *Brandon* (1998) and *Flin Flon* (1998) are simply not arbitrable. The current teacher proposal was advanced on the basis that it contains no pre-conditions to the placement of a special needs student, and therefore avoids any impermissible interference with statutory rights and duties. The Association argued that, having accepted the Division's unqualified right and duty to place exceptional students, teachers are entitled to contract terms which govern the process of placement and the provision of resources - "the tools to do the job", such as information, professional development, resource supports and time.

I find that clause #1 is largely directed to the questions of process and "tools". Based on the evidence presented in this case, I also find that mainstreaming is accepted educational policy in Manitoba and that teacher working conditions have been impacted by the adoption of mainstreaming as a policy choice. Where there is a sufficient nexus between a proposed contract clause and the teachers' conditions of work, there is scope for bargaining and arbitration. As explained by Justice Wright in *Rolling River School Division* (cited above):

> ... if a provision in the statute can be interpreted properly to mean the legislature has chosen to deal fully with the terms or conditions of employment of teachers in a specific area, then it is not open to the parties to engage in the collective bargaining process in that area. But if that interpretation cannot be made then there should be no impediment to collective bargaining so long as the negotiations do relate to terms or conditions of employment of teachers. (at p. 11)

Aside from the basic legislative guarantee of public school accommodation in section 41 of the Act, I was not referred to any other enactment dealing with the matters contained within clause #1 in the amended Association proposal. I am aware of Justice Steel's statement in *Flin Flon* (para. 43) that mainstreaming is predominantly an educational policy issue and that implementation rests within the jurisdiction of school boards. I understand this to refer to clauses, such as the one at issue in *Flin Flon*, whereby implementation of mainstreaming as a policy option would depend on negotiated terms or arrangements with the teachers. The St. Vital Teachers Association is no longer contesting this point. Implementation of mainstreaming, and the placement of exceptional students in regular classrooms, is conceded to be a unilateral Division jurisdiction. Moving beyond that, I note Justice Steel's confirmation in *Flin Flon* that section 97(1) of the Act should be broadly and liberally construed in delineating what constitutes a "dispute" under the Act (paras. 17-20). On this basis, I hold that the matters addressed in clause #1 are arbitrable.

Proposed clause #2, although softened substantially from the *Brandon* and *Flin Flon* versions, still purports to introduce a screening criterion for the placement of students. For that reason clause #2 is jurisdictionally suspect.

In terms of the merits, I am persuaded by the Division's argument that the Association's proposed article as drafted could generate significant conflict and uncertainty. Some of the terms are not defined with precision, and the potential financial impact on the Division is substantial. I agree as well that the Division has been extremely active in developing policy and procedure in this area, thereby embracing its responsibility to implement mainstreaming. On the other hand, I am also persuaded by the Association that this issue is important enough in the day to day working life of teachers that the introduction of some contract language is justifiable at this time.

I therefore award the following clause, which I believe to be consistent with the authorities discussed above, and appropriate in terms of the arbitral role:

> An exceptional student shall be defined as any child needing special programming and/or a special learning environment because of physical, intellectual, emotional, behavioral or social handicap, or because of giftedness. Teachers who are assigned to teach an exceptional student have the right to relevant information concerning the child's circumstances and needs and, to the extent feasible, consultation prior to the time an exceptional student is placed in the class.
>
> Subject to the Division's available resources, as determined in the discretion of the Division, teachers who are assigned to teach an exceptional student have the right:
>
> 6. to request and receive appropriate professional development;
>
> 7. to request and receive adequate material and auxiliary resources required for proper integration of an exceptional student into the classroom.

In awarding the foregoing new article, I have adapted and amended the Association's proposal, keeping in mind the Division's concerns as expressed during the hearing. Non-contact time is not included in this clause as I have addressed it elsewhere in my award. The question of assaults by students is a serious one, but very little was said about it during the hearing, and I have concluded that I do not have sufficient information to address that subject at the present time.

Given the new language in this clause, jurisdiction is reserved to deal with any problems which the parties may anticipate relating to implementation.

Complaints against teachers (New Article)

The Association proposed a detailed new clause governing complaints against teachers, although it was acknowledged at the outset that this has not been a frequent problem. Nevertheless, adverse comment about a teacher can have serious implications for the individual's career, whether or not any discipline is imposed, and therefore the Association urged that a clause be awarded to provide rights to teachers faced with a complaint. The Division criticized the Association's clause on a number of grounds. In addition, the Division argued that a process is currently underway to review the complaints process, and that this work should be completed before collective agreement provisions are considered. I agree. The Association's proposal is denied.

Concluding remarks

In closing, I wish to express my thanks to the principal representatives and all other participants for their hard work, excellent presentations and courtesy throughout the lengthy mediation/arbitration process. Many serious and difficult issues were addressed by the parties in this case. I appreciate the efforts which were made to provide comprehensive background material and helpful explanations to assist me in my role as arbitrator.

I will remain seized of jurisdiction for the purpose of clarifying and implementing this award, to the extent necessary.

DATED at the City of Winnipeg, in Manitoba, this day of February, 2001.

ARNE PELTZ, Arbitrator