IN THE MATTER OF:

AN ARBITRATION BETWEEN:

THE TRANSCONA-SPRINGFIELD SCHOOL DIVISION NO. 12,

(hereinafter called "the Division"),

- and -

THE TRANSCONA-SPRINGFIELD TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY,

(hereinafter called "the Association"),

- and -

IN THE MATTER OF THE GRIEVANCE OF:

CARMELLE LETAIN,

(hereinafter called "the Grievor"),

AWARD

The Arbitration Board in this matter was composed of Mr. G. Parkinson, Barrister, the Nominee of the Division, Mr. Grant Mitchell, Barrister, the Nominee of the Association and Mr. Jack M. Chapman, Q.C. was appointed as Chairman. The hearings took place at Winnipeg, Manitoba, on June 20, 1983.

Mr. R. Simpson, Barrister, appeared as counsel for the Division and Mr. M. Myers, Q.C. appeared as counsel for the Association. Mrs. Carmelle Letain was also present.

At the commencement of the hearing the parties confirmed

that the Arbitration Board was properly constituted and that there were no preliminary objections to the matter proceeding to hearing.

We note that there is no dispute as to the facts in this matter. Accordingly, no viva voce evidence was presented and the facts were related by counsel by way of the Exhibits filed.

On March 29, 1982, the Division and the Association executed a Collective Agreement effective for the period from January 1, 1982, to December 31, 1983. The Agreement was filed as Exhibit 1.

In June, 1982, Mrs. Letain and the Division executed a Form 2 Contract whereby Mrs. Letain was hired as a Teacher and her duties were to commence on the 31st day of August, 1982. The Agreement which is the individual Statutory Contract was filed as Exhibit 5.

Mrs. Letain commenced her employment but unfortunately, and as a result of an accident, she was required to be absent due to illness on a substantial number of occasions shortly after the school year started. From the commencement of the term until November 26, Mrs. Letain was absent a total of 14 days. Her absences are shown on Exhibit 2, being a letter from the Division to Mrs. Letain, dated November 29, 1982. On November 23, Mrs. Letain wrote to Mrs. V. Derenchuk, the Superintendent of Schools for the Division, and tendered her resignation from the Division. Her reason for resigning was due to her illness and absences and she obviously felt that it would be in the best interests of everyone to resign. This resignation was

filed as Exhibit 6. Apparently, a result of discussions between Mrs. Derenchuk and Mrs. Letain it was decided that Mrs. Letain would apply in writing for a medical leave of absence as of December 1, 1982. This application was filed as Exhibit 7. On December 7, Mrs. Letain wrote a further letter to Mrs. Derenchuk, explaining her letters of November 23 and November 30 and advised that she was not aware that she could have applied for a medical leave of absence. This letter was filed as Exhibit 8. On December 15th, the Division wrote to Mrs. Letain and advised that the matter would be discussed during January, 1983 (Exhibit 9). On January 19, the Division again wrote to Mrs. Letain and advised that her leave of absence had been granted for the period from December 1, 1982, to May 1, 1983, and requested that Mrs. Letain advise by the 31st day of March if she would be able to return to return to the teaching staff. This letter was filed as Exhibit 10. On March 29, Mrs. Letain again wrote to the Division and tendered her resignation. (Exhibit 11). On April 28, the Division wrote to Mrs. Letain and accepted her resignation. (Exhibit 12).

As stated, Mrs. Letain was absent for 14 days from the beginning of the school term to the latter part of November, 1982. On November 29, 1982, the Division wrote to Mrs. Letain (Exhibit 2) and advised that a salary deduction would be necessary as, in the Division's opinion, Mrs. Letain had only earned the right to 5 days of sick leave and accordingly a deduction from her pay was made for 9 days. The relevant portion Exhibit 2 shows the various calculations and reads as follows:

"According to reports received from your school, it is noted you were absent due to illness on October 6, 7, 8, 13, 14, 22, 25, 26, 27 and 28, (a.m.) November 16, 17, 18, 25 (½ day), and 26, 1982.

In accordance with the School Board Sick Leave Policy, a salary deduction is necessary, and is calculated as follows:

DAYS ABSENT	DAYS EARNED	DAYS DEDUCTED
October 6,7,8,13,14	to October 5 - 2 days	3 days
October 22, 25, 26, 27, 28 (a.m.)	to October 22 - 1 day	3½ days
November 16, 17, 18	To November 4 (a.m.) 1 day	2 days
November 25 (½), 26	to November 23 (a.m.) 1 day	½ day
TOTAL DAYS ABSENT = 14	TOTAL DAYS EARNED = 5	9 DAYS

A salary deduction has been made on your November 29, 1982 payroll cheque, as follows:

$\frac{9}{198}$ days X $16, 767.00 = $762.12"

On January 18, 1983, the Association wrote to the Division disputing the deduction and the methods of the calculation of sick leave. This letter, filed as Exhibit 3, is the grievance in this matter and reads as follows:

" The Transcona-Springfield Teachers' Association No. 12 of The Manitoba Teachers' Society (hereinafter referred to as 'the Association') and Carmelle Letain - a teacher at Ecole Centrale, hereby notify The Transcona-Springfield School Division No. 12 (hereinafter referred to as 'the School Division') that there is a difference between the Association and the School Division in respect of the meaning, application or violation of Article 7.06 of the Collective Agreement. The association and Carmelle Letain contend that the School Division has misapplied, misinterpreted and/or violated Article

7.06(a) of the Collective Agreement by failing to pay to Carmelle Letain fifteen (15) days of sick pay in accordance with Article 7.06(a) of the Collective Agreement.

The Association and Carmelle Letain request that the School Division comply with Article 7.06(a) of the Collective Agreement and pay to Carmelle Letain fifteen (15) days of sick pay in accordance with Article 7.06(a) of the Collective Agreement.

Dated the 19th day of January, 1983."

It is to be noted that the grievance refers to Article 7.06(a) of the Collective Agreement. This reads as follows:

"7:06 Sick Leave

a) Where a teacher is sick, he shall be entitled to sick leave during his illness and to be paid his salary during his sick leave; but subject to subsection (b) the leave shall not exceed twenty (20) teaching days in any school year."

The essence of the grievance is that the Association maintained that Mrs. Letain, under the terms of Article 7.06(a) was entitled to 20 teaching days of sick leave in any school year and that the 20 days vested immediately on the teacher commencing employment. The Division submits that Mrs. Letain was only entitled to 5 days of sick leave for which she had been paid.

We were referred to a number of Sections of the Public Schools Act, S.M. 1980, c. 33 - Cap. P250. These sections read as follows:

"Accumulation of sick leave.

93(1) Each teacher who is continuously employed by a school board shall accumulate entitlement for sick leave at the

rate of 1 day of sick leave with pay for every 9 days of actual teaching service, or fraction thereof, unless a Collective Agreement governing the working conditions of the teacher provides for another manner of accumulating sick leave.

En. S.M. 1982, c. 37. s.2"

Section 93(1) prior to the 1982 amendments, and in force when the Collective Agreement was signed, read as follows:

"Sick leave.

93(1) Where, on, from and after the coming into force of this Act, a teacher is continuously employed by a school board he shall accumulate entitlement for sick leave at the rate of one day of sick leave for every nine days of actual teaching service, or fraction thereof, to a maximum of 20 days per year but the total sick leave which he shall be entitled to accumulate shall not exceed 75 days."

Prior to Section 93(1) first being enacted, in 1980, the relevant Section of the previous legislation was 282(1) which read as follows:

"Yearly sick leave.

282(1) Where a teacher is sick, he is, subject to subsection (2), entitled to a leave of absence (herein called "sick leave") during his sickness and is entitled to be paid his salary during his sick leave; but subject to subsection (3) and (4), the sick leave shall not exceed twenty teaching days in any school year.

Am."

We were also referred to Section 93(6) of the Public Schools Act which reads as follows:

"Payment for sick leave under Collective Agreement.

93(6) Where a teacher whose sick leave is governed by the provisions of a Collective Agreement, whether entered into before or after the coming into force of this Section, is sick, he is entitled to be paid during his sick leave whatever is provided in the Collective Agreement.

En. S.M. 1982, c. 37. s.2"

and sections 95.1(1), 95.1(2), 96.5(3) and 95.1(4). These sections read as follows:

"Sick leave negotiable.

95.1(1) Notwithstanding any other provision of this Act, a school board may negotiate, and shall be deemed always to have had authority and capacity to negotiate with a local society representing teachers employed by it, as part of a Collective Agreement, the right and entitlement of teachers to sick leave and to accumulate sick leave and all matters relating to the manner of accumulating and limiting the accumulation of sick leave as part of the working conditions of the teachers and, where the school board and the local society cannot agree on those matters, the matter may be referred for arbitration under Part VIII in the same way as any other dispute arising our of negotiations for a Collective Agreement.

En. S.M. 1982, c. 37. s.2

Application of sec. 117 to dispute.

95.1(2) Section 117 applies to any dispute as to the content, meaning, application or violation of a provision of a Collective Agreement relating to sick leave of teachers.

En. S.M. 1982, c. 37. s.2

Validation of old provisions re sick leave.

95.1(3) Where a Collective Agreement governing the working conditions of teachers entered into before the coming into force of this Act contained a provision relating to sick leave, the provision is valid and enforceable as though Section 93 and subsections (1) and (2) had been in force at the time the Collective Agreement was negotiated and entered into.

En. S.M. 1982, c. 37. s.2

Continuance of sick leave provisions in Collective Agreement.

95.1(4) Notwithstanding any other provision of this Act or The Education Administration Act or the regulations under either Act, all provisions relating to sick leave for teachers in any Collective Agreement governing the working conditions of teachers which is in effect on the coming into force of this Section continue in force and effect on, from and after the coming into force of this Section in accordance with the terms of that Collective Agreement.

En. S.M. 1982, c. 37. s.2"

The sections above set forth including 93(6) were enacted in

1982 and were not the legislation in effect when the Collective Agreement was signed. The legislation in effect at the time of signing is set forth on page 10 of this Award. The Division submitted that the entitlement to sick leave was determined by the legislation in force at the time the agreement was signed. That legislation provided that sick leave be earned on the basis of one day of sick leave with pay for every nine days of actual teaching service.

The Association submitted that the correct basis of calculating paid sick leave was not under the concept of "earned time" as set forth in the original Section 93(1) of the legislation, but rather under article 7.06(a) of the Collective Agreement (supra). In the Association's view this Section conferred an automatic vesting of sick leave. It was submitted that the provision of 7.06(a) was not effected because of the provisions of the final sentence of the amended Section 93(1) and because of the new sections 95.1(3) and 95.1(4).

Mr. Simpson noted that Mrs. Letain was not an employee of the Board prior to August 31, 1982 and again referred the Board to Exhibit 5 which showed her commencement date of employment as being at that time.

It is important to note that the present wording of Article 7.06(a) of the Collective Agreement is the same wording as appeared in the Collective Agreement between the parties effective as of January, 1978. The only change in the wording in the two clauses is that reference is made to "his/her" in the 1978 Agreement and to "his" in

the current Agreement. We note that the wordings in both the 1978 and the current Agreement are substantially the same as the wording of the legislation in Section 282(1) (supra).

It may suffice to say that the original Section 93(1) of the new Public Schools Act (supra) was the replacing Section for the previous Section 282(1). As stated earlier, the first Section 93(1) dealt with the concept of what might be called "earned sick leave". The 1982 legislation amended Section 93(1).

A number of Association/Division Collective Agreements in force at the time of the original Section 93(1) provided for sick leave and also provided, inter alia, for periods of more than 75 days as was first specified in 93(1). In 1981 the matter was referred to the Courts. Mr. Justice Wilson in Manitoba Teachers' Society (Portage la Prairie Division Association No. 24 and Evergreen Teachers' Association No. 22) v. Portage la Prairie School Division No. 24 and Evergreen School Division No. 22, 14 Man. R. (2nd) 233, dealt with the matter. The decision of Mr. Justice Wilson was, inter alia, that the new legislation prevailed over the Collective Agreement. The decision was appealed to the Court of Appeal for Manitoba whose decision was reported at 14 Man. R. (2nd) 340. On March 8, 1982, the Court of Appeal upheld the decision of Mr. Justice Wilson. It should be noted that the case, inter alia, dealt with the situation where existing Collective Agreements provided for 80 days of sick leave whereas the new legislation (the original Section 93(1)) in force at that time only permitted 75 days. The Court held that to increase the amount of accumulated sick leave over

75 days was a matter solely within the discretion of the Board and that sick leave was not a subject matter for collective bargaining. The "ratio" of the Court decision is clearly that the legislation in force at that time, i.e. the original Section 93(1), had the effect of making any contrary provisions of the Collective Agreement invalid and unenforceable.

Subsequent to the decision of the Court of Appeal, the Legislature enacted substantial changes to the new Public Schools Act (supra). The intent of the amendments was clearly to validate the provisions of older agreements respecting sick leave and to continue the provisions of same forward notwithstanding the new legislation. We note that at the time of the Court decision in Manitoba the legislation read as follows:

> 93(1) Where, on, from and after the coming into force of this Act, a teacher is continuously employed by a school board he shall accumulate entitlement for sick leave at the rate of one day of sick leave for every 9 days of actual teaching service, or fraction thereof, to a maximum of 20 days per year but the total sick leave which he shall be entitled to accumulate shall not exceed 75 days.
>
> 93(2) For the purposes of this section any day during which the teacher is absent from school because of sickness does not constitute part of actual teaching service.
>
> 93(3) The number of days a teacher is on sick leave shall be deducted from his accumulated sick leave entitlement at the time of his returning to work.

93(4) Where, on, from and after the coming into force of this Act, a teacher is sick, he shall subject to subsection (5) be entitled to be paid his salary during his sick leave up to the maximum entitlement as set out in subsection (1).

93(5) Subject to subsection (1) a teacher shall, on the coming into force of this Act, continue to have such sick leave entitlement as he had under authority of any previous Act together with any additional sick leave as may accrue to him under this Act.

94. Where a teacher is absent from duty as a result of illness, the school board may require the teacher to submit to the school board a medical certificate from a duly qualified medical practitioner certifying that the teacher was ill during the period of absence.

95. Notwithstanding subsections 93(1), (2) and (3) the school board may in any school year grant to a teacher sick leave with or without pay for a period longer than that authorized under those subsections.

We have previously quoted the sections enacted in 1982 after the court decision.

It is important to note that the original Section 93(1), prior to the amendment in 1982, provided for a fixed method of calculating sick leave. In the amended Section 93(1) reference is made to the statement "unless the Collective Agreement governing the working conditions of the teacher provides for another manner of accumulating sick leave". This particular amended Section coupled with the

provisions of all of the new sections 93(6), 95.1(1), 95.1(2), 95.1(3) and 95.1(4) lead us to the conclusion that the provisions of the Collective Agreement govern the entitlement to sick leave by Mrs. Letain.

This conclusion causes us to consider the meaning of article 7.06(a) (supra). The question is whether the 20 days of sick leave vest in a teacher upon he or she commencing their employment. By way of explanatory example, the question appears to be: if a newly hired teacher, such as the Grievor, works on her first day of employment and then is absent because of bona fide illness, is she entitled to receive 20 days of paid sick leave?

Mr. Myers took the position that, as the same provision had been in the Collective Agreement since 1978, it was relevant to consider evidence as to how the parties had applied that provision in the past. Mr. Simpson submitted that if we determined that the provisions of the Collective Agreement were in effect, we must then decide whether article 7.06(a) is ambiguous. If there was no ambiguity then we were not entitled to consider any other evidence. He submitted that there was no ambiguity.

Mr. Myers submitted that if the parties had applied the Agreement in a certain manner in the past, then they were now estopped from altering the method of application. Mr. Simpson submitted that if the wording of the Agreement was clear and unambiguous, it was improper to consider any evidence alleging or

proving any agreement outside of the Collective Agreement.

It should be pointed out that the particular evidence in dispute was a schedule of how the Division had applied the provisions of the 1978 Agreement in dealing with the claim of one Michel Belanger, and of certain correspondence between the parties relating to the amendments to the Public Schools Act which were in force prior to the Court decision. The Board, subject to the objection of counsel for the Division, admitted the evidence on the basis of its showing evidence of the past practice of the parties. The Board received Exhibit 14 which was a copy of the relevant portions of the 1978 Agreement; Exhibit 15, which was the calculations prepared relating to a Mr. Belanger, Exhibit 16, being a letter from the Division to the Association dated January 14, 1982, showing how it would apply the new legislation and Exhibit 17, being a letter from the Association to the Division expressing the views of the Association.

We wish to state that we have found that the Agreement is not ambiguous. In our view, the plain and simple meaning of Article 706(a) is that there is an immediate vesting of the 20 days of sick leave. Accordingly in answering the example explanatory question previously asked, with respect to what would have transpired if Mrs. Letain had only worked the first day of school, we are satisfied that she would be entitled to 20 days of sick leave.

We are of the view that the evidence of the past practice of the parties is relevant to the issue of Estoppel. It is not accepted by

us for the purpose of interpreting the agreement. We do not propose to quote from the authorities at any substantial length but we note the decision in Re Edwards of Canada Unit of General Signal of Canada Limited and United Steelworkers, Local 7466, 6 L.A.C. (2nd) 137; the decision in Kenyon Construction and B.C. Provincial Counsel of Carpenters, Local 1696, 2 L.A.C (2nd) 107; and the decision in C.N.C.P. Telecommunications and Telecommunications Union 4 L.A.C. (3rd) 205, which decision was upheld by the Divisional Court of the Supreme Court of Ontario in Re C.N.R. Co. et al and Beatty et al 1981, 128 D.L.R. (3rd) 236.

We will, however, quote from some very recent cases. The first of these is Re Municipality of Metropolitan Toronto and Canadian Union of Public Employees reported at 7 L.A.C. (3d) 74, where arbitrator Teplitsky said at pages 75 and 76.

> " Mr. Goldblatt raised, however, estoppel as a basis for awarding relief and relied upon Re C.N.R. Co. et al. and Beatty et al. (1981), 128 D.L.R. (3d) 236, 34 O.R. (2d) 385, 82 C.L.L.C. para. 14,163, a decision of the Divisional Court which confirmed an award of Professor Beatty [unreported]. In that case, the employer for a long period of time had provided sick-leave benefits more generously than those which the Collective Agreement terms required. Without affording the union an opportunity to bargain for a change in the terms of the Agreement, the employer gave notice that its past practice would cease. Mr. Beatty held that the employer was estopped by its conduct from adopting this posture and this decision as previously noted was affirmed in the Divisional Court.
>
> This decision is of considerable significance. For one thing it illustrates a different use of past practice from that with which we are ordinarily familiar. Usually, past practice is utilized as an aid to construction of provisions which are either latently or patently ambiguous. If the

> provisions are not ambiguous, past practice cannot be resorted to. However, in this case, past practice is invoked, not in aid of construction (the Collective Agreement is clear) but as evidence of a representation by the employer that it would not rely on its strict legal rights, ..."
>
> (emphasis added)

It would seem from the above that an Arbitration Board can use evidence of past practice to deal with the questions other than interpretation.

The final authority we wish to comment on is Re Consolidated-Bathurst Packaging Ltd. and International Woodworkers of America, Local 2-242 reported at 6 L.A.C. (3d) 30. This case reviews at some length many of the principles of Estoppel. At pages 38 and 39 we find the following:

> " There remains the employer's alternative submission: that the union's long-standing and knowing acquiescence in the company's summer student policy is a bar to the instant grievance - at least in so far as the union claims any retrospective relief. The employer contends that the union condoned its policy for years, and, therefore, consistently lulled the company into a belief that its application of the Agreement was acceptable. The company maintains that it is now too late to complain that it was misapplying the Agreement; moreover, the policy was terminated following the filing of this grievance, and the entire matter has now been settled through negotiations. The company argues that, in the circumstances, it would be unfair to issue any remedy other than a simple declaration.
>
> Any residual doubt about the applicability in labour arbitrations of a doctrine analogous to estoppel has now been dispelled by the recent decision of the Ontario Divisional Court in Re C.N.R. Co. et al. v. Beatty et al. (1981), 128 D.L.R. (3d) 236, 82 C.L.L.C. para. 14,163, 34 O.R. (2d) 385. At p. 243 D.L.R., p. 293 O.R., the court observed:
>
> In estoppel by conduct, on the other hand, there is no question before the Court or tribunal as to what

in fact as the Agreement between the parties. The question is whether the Agreement, or part thereof, should be applied, having regard to the conduct of the parties. Questions of the application of Collective agreements are squarely within the jurisdiction of arbitrators in labour disputes.

* * * * *

Reflection and a perusal of many arbitration cases, including those of which the present arbitrator made reference, has persuaded me that the judgment in the Sarnia General Hospital case [Re Hospital Com'n, Sarnia General Hospital and London District Building Service Workers' Union Local 220, S.E.I.U. (1972), 30 D.L.R. (3d) 660, [1973] 1 O.R. 240, 73 C.L.L.C. para. 14,157], to the extent that it doubted whether the principle of estoppel by conduct could arise in labour arbitration proceedings, was too sweeping, as well as going beyond what the decision of the case required. True, a Collective Agreement, like a contract, should be construed without reference to extrinsic evidence if it is clear upon its face. What the arbitrator did here, however, was not to interpret the Agreement but to make a finding as to its proper application and to give consequential relief. Indeed in C.N.R., the court appears to have sanctioned the use of 'estoppel' as a 'sword' rather than a 'shield', for the decision approves an arbitrator's finding that a longstanding practice, extrinsic and contrary to the express terms of a Collective Agreement, could provide the foundation for a positive claim."

At page 40:

" Can inaction or acquiescence amount to a representation? At least some arbitrators have held that it can. In Re United Packinghouse, Food & Allied Workers, Local 469, and York Farms Division of Canada Packers Ltd. (1970), 21 L.A.C. 188, Professor Schiff observed that 'for the doctrine of equitable estoppel to be applicable there must have been conduct, absence of conduct or representation made by the party against whom estoppel is being claimed'. In Globelite Batteries Ltd., supra, Reville Co. Ct. J. put it this way [at p. 14]:
It has been held that an estoppel by conduct may equally arise from inaction as well as action, because action is part of conduct and consequently inaction may amount to a representation of fact on which the other party may rely. This is simply another way of stating that where a man has kept silent when he ought to have spoken, he will not be permitted to speak when he ought to keep silent. Generally speaking, if a party has an interest to prevent an act

> being done and acquiesces in it so as to induce a reasonable belief that he consents to it, and the position of others is altered by their fiving credit to his sincerity, he has no more right to challenge the act to their prejudice than he would have had if it had been done by his previous licence.
> More recently, the same question was asked and answered in Re Ottawa-Cornwall Broadcasting Ltd. (CJOH-TV) and National Assoc. of Broadcast Employees & Technicians (1977), 15 L.A.C. (2d) 64 (Fraser) at p. 70:
>
> Can estoppel arise from such inaction? The earliest helpful statement of the principle of estoppel is found in the judgment of Denning, L.J., in Combe v. Combe, [1951] 1 All E.R. 767 at p. 770 [quotation omitted].
>
> That statement clearly contemplates a positive act by way of words or conduct, coupled with an intent to affect legal relationships. However, the doctrine has been modified in its application to recent industrial relations situations, to allow its application where the union has in some way agreed to a practice resulting from an interpretation by the company which is at variance with the requirements of the Collective Agreement.
> That acquiescence or inaction can have the effect of a representations appears to be firmly established."
>
> (emphasis added)

As stated earlier, we do not feel there is any ambiguity in the Agreement. The condition precedent to entitlement is simply "where a teacher is sick". The wording of the clause provides that the teacher "shall" be entitled to sick leave and the maximum amount of sick leave is specified. We can find no other qualification relating to entitlement. Applying the 'plain and simple meaning rule' we are of the view that there is an immediate vesting of the sick leave.

As stated earlier, we admitted the evidence relating to Mr. Belanger, and this evidence established the past practice of the parties. Exhibit 15, relating to Mr. Belanger shows that he

was credited with 20 days of leave which was used in September, October and November and he then resigned. We incidently state that the interpretation used by the parties at that time is supportive of the interpretation we have placed on the Agreement. We have also considered Exhibits 16 and 17 and in particular note that the Division planned, in accordance with the then legislation, to alter its method of granting sick leave. Whatever the desires of the Division were, they were certainly not enthusiastically received by the Association. If the legislation had not been changed in 1982, then the Division may well have been entitled to institute the changes. We are, however, faced with the indisputable fact that the Legislature changed the relevant provisions of the Act and clearly stated that the "old" provisions of Collective Agreement apply. In view of the meaning we have attributed to article 7.06(a) we are satisfied that there is an immediate vesting of the sick leave of twenty days, and accordingly we do not need to rule on the question of Estoppel.

In considering the facts of this particular case one further observation should be made. As stated earlier Mrs. Letain first tendered her resignation to be effective December 17. She subsequently asked for a medical leave of absence effective December 1, 1982. She then sought to withdraw her letter of resignation. It is clear that her leave of absence was subsequently granted but she nevertheless resigned again. It would appear that her changed requests were to a great extent effected by the kind consideration and intervention of the Superintendent, whose actions

were approved ultimately by the Board. We are of the view, however, that considering all of the circumstances of this case, that the Grievor's employment should be deemed to have been terminated on November 30, 1982.

In view of all of the above, we hold that she was entitled to receive sick leave for the days she missed due to illness from the date of the commencement of the term up to and including the end of November, 1982. If in accordance with Exhibit 2, she was absent 14 days during this period of time, then she was entitled to receive 14 days of paid sick leave. We are of the view that she is not entitled to any sick leave days for any absent days which took place after the end of November.

We note that the grievance requests a payment of 15 days of sick pay. It would appear that this 15 days is in addition to the 5 days which were paid to Mrs. Letain in accordance with Exhibit 2. We are of the view that her grievance should be allowed to the extent of repaying to her the 9 days which were deducted in accordance with Exhibit 2.

In summary, we hold that the grievance be allowed to the extent that the grievor would have been allowed 20 sick days if she used these prior to December 1, 1982. As stated earlier, it would appear that she only used 14 of those days within the relevant period of time and we hold that she should have been paid for those 14 days.

In the event of there being any dispute as to the application of our Award or of payment to be made to the grievor, then we retain jurisdiction for the purposes of determining same.

We wish to thank counsel for their very thorough and complete presentations which were of great assistance to the Board.

Each of the parties will pay the costs of their Nominee, and the parties will jointly share the costs of the Chairman.

DATED at Winnipeg, Manitoba, this 23rd day of September, A.D. 1983.

JACK M. CHAPMAN, Q.C. - CHAIRMAN

I (~~do~~ / do not) concur with the above Interim Award and (am / ~~am not~~) attaching my reasons.

DATED at Winnipeg, Manitoba, this 21 day of Sept., A.D. 1983.

Mr. C. Parkinson -
Nominee of the Division

I (do / ~~do not~~) concur with the above Interim Award and (~~am~~ / am not) attaching my reasons.

DATED at Winnipeg, Manitoba, this 23rd day of September, A.D. 1983.

Grant Mitchell

Mr. Grant Mitchell -
Nominee of the Association

IN THE MATTER OF:	)	AND ARBITRATION BETWEEN:
	)	
	)	THE TRANSCONA-SPRINGFIELD SCHOOL DIVISION NO. 12,
	)	
	)	(hereinafter called "the Division"),
	)	
	)	- and -
	)	
	)	THE TRANSCONA-SPRINGFIELD TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY,
	)	
	)	(hereinafter called "the Association"),
	)	
IN THE MATTER OF THE GRIEVANCE OF:	)	- and -
	)	
	)	CARMELLE LETAIN,
	)	
	)	(hereinafter called "the Grievor"),
	)	

DISSENTING AWARD

I have had the opportunity of reading the Majority Award in this matter and, with respect, I cannot agree.

I shall briefly set out my reasons for dissent.

I can see no grounds for applying an estoppel in this case. The simple tendering of Exhibit 15 does not establish a consistency of action of any sort. We heard absolutely no evidence that any person had relied upon any representation or conduct made by the Employer with respect to sickleave credits or accumulation.

I am also of the view that the law of estoppel cannot possibly apply since the law as established by statute with respect to accumulation of sickleave changed between 1978 and the relevant period of time. This fact was well known to the Union and the Employer and in negotiating the collective agreement there is no reason to assume that either party negotiated without full knowledge that the "rules" as established by statute were different that those prevailing in 1978.

Regardless of the foregoing, Exhibits 16 and 17 clearly establish notice by the Employer to the Teachers' Association of their approach to the accumulation of sickleave henceforth. This notice predated the entering into of the contract. Estoppel cannot possibly apply.

Regardless of any of the foregoing, the decision we must make turns upon a proper interpretation of a new statutory provision, being Section 93(1) of the Public Schools Act. S.M. 1980, c. 33 as amended S.M. 1982, c. 37. I am aware of no law that indicates estoppel can apply to the proper interpretation of the rights of persons under a statute.

The law is clear at the relevant period to this grievance that the Grievor had to accumulate entitlement for sickleave at the rate of one day of sickleave with pay

for every nine days of actual teaching service, or fraction thereof unless a collective agreement provides for another manner of accumulating sickleave.

The issue for this board then becomes very simple. Past practice and allegations of estoppel become irrelevant. Accordingly I am of the opinion that the board erred in making such great use of prior conduct of the parties to support its interpretation of the collective agreement. The board has found the agreement was not ambiguous and therefore past practice evidence could not be admitted as an aid to interpretation. The board has ruled that it does not need to rule on the question of estoppel. That should have been the end of any consideration of the conduct of the parties prior to the relevant period concerned in the grievance.

A new statutory provision governed the rights of the Grievor. In reviewing the collective agreement in force at the relevant time, I can find no other method of accumulating sickleave other than that set out in the statute.

The Union takes the position that there is no accumulation of sickleave but rather it is immediately vested on the first teaching day of each year in the amount of twenty teaching days. If that were a proper interpretation of 7.06(a) of the collective agreement so as to find another manner of accumulating sickleave as provided by the Act there would be no point in referring, in Article 7.06(c), to "accumulation" of sickleave.

Similarly, the words "not exceed" in 7.06(a) of the collective agreement would be interpreted to be nonsense in view of the finding of the board it was not possible for a teacher to be entitled to less than twenty teaching days of paid sickleave. If the parties intended that it was impossible for a teacher to start with less than twenty days immediately vested, why use "not exceed" which contemplated the occurrence of less than twenty days entitlement?

Further, when the collective agreement was signed the governing statutory provision was:

> "Where, on, from and after the coming into force of this Act, a teacher is continuously employed by a school board he shall accumulate entitlement for sickleave at the rate of one day of sickleave for every nine days of actual teaching service, or fraction thereof, to a maximum of twenty days per year but the total sickleave which he shall be entitled to accumulate shall not exceed 75 days."

The amended Section of the Act (supra) was not in existence or known to the parties at the time of signing the agreement. It is surely extraordinary to make a finding that the intent of the parties was in 7.06(a) to provide for "another manner of accumulating sickleave." when they had no power to do do at the time of entering into the contract.

In summary I agree with the finding of the board that the collective agreement is not ambiguous. Having made that finding I cannot understand why the board went on to make

findings as to what the established past practice was. I am satisfied the board has erred in law in applying the principles of estoppel since there is no factual basis on which to do so and they are applying it to the interpretation of a statute in reality. I am satisfied the agreement cannot possibly be interpreted as setting out any manner for accumulating sickleave other than that set out in the Act and therefore I would dismiss the grievance.

All of which is respectfully submitted this 26th day of September A.D. 1983.

G. D. Parkinson
Board Member