THE PUBLIC SCHOOLS ACT

BETWEEN:

THE WINNIPEG TEACHERS' ASSOCIATION NO. 1
of THE MANITOBA TEACHERS' SOCIETY,

Bargaining Agent ,

- and -

THE WINNIPEG SCHOOL DIVISION NO. 1,

School Board.

ARBITRATION AWARD

Appearances

Mr. Henry Shyka and Mr. Tom Paci, Manitoba Teachers' Society ("MTS") staff officers, were the principal representatives of the Winnipeg Teachers' Association ("the Association") in this matter. Also appearing were Ms Susan Yee Wickler, Association President and Negotiations Chair, Mr. Don Teel, incoming Association President and Mr. John Collins, MTS staff. Evidence was given by Association members Linda Monasterski, Chris Pammenter, Claretta Shefrin, David Najduch, Karen Klisko, Brenda Craig and Annick Carstens.

For the Winnipeg School Division No. 1 ("the Division"), the principal representative was Mr. Ray Whiteway. Also appearing and giving evidence were Mr. David G. Bell, Secretary-Treasurer, Mr. Eugene F. Gerbasi, Director of Human Resources, and Ms Janet Schubert, Superintendent of Schools-Central. Trustee Anita Neville attended for parts of the hearing and addressed the

board.

From time to time, various other members and representatives of the parties were in attendance at the arbitration hearings, which took place in Winnipeg on June 11, 12, 25, 26, 29, July 3, September 15, 16 and 28, 1998. The hearings were open to the public.

Nature of the proceedings

This is an interest arbitration under Part VIII of the *Public Schools Act*, R.S.M. 1987, c. P250 (hereafter "the *Act*").

On May 15, 1997, the Association wrote to the Honourable Linda McIntosh, Minister of Education, requesting the establishment of a board of arbitration. The parties had been engaged in bargaining following the expiry of the last collective agreement on December 31, 1995, and as well, the services of a conciliation officer had been utilized, but the parties had been unable to reach agreement. The Association listed some 65 items in dispute, and the Division advised the Minister of several additional items which had been omitted from the list. The Association nominated Mr. David Shrom, Barrister and Solicitor, as a member of the arbitration board, and the Division nominated Mr. E. William Olson, Q.C. Because the two nominees were unable to agree on a chairman for the board, the Chief Justice of Manitoba was requested to select a chairman pursuant to section 123(8) of the *Act*, following which I was appointed by the Minister to serve as chairman on February 13, 1998. All members of the board have duly completed the required oath of office.

By telephone conference call, a series of mutually agreeable hearing dates was established, along with a sequence and schedule for the presentation of each party's case. At the opening of the hearing, Mr. Shyka and Mr. Whiteway confirmed that there were no preliminary issues or objections with respect to the appointment, constitution or jurisdiction of the board of

arbitration. Time limits under the *Act* were waived by the parties.

It should be noted that this matter proceeded under provisions of the *Act* which have since been amended.

Overview of the major issues in dispute

At the opening of the hearing, the parties advised that some of the issues in dispute, as enumerated in the statement of reference provided by the Minister under section 126(1) of the *Act*, had been resolved. Nevertheless, a significant number of contested issues remained. Over the course of these proceedings, the parties have succeeded in further reducing the number of issues in dispute to some extent, but as will appear from this Award, an array of economic issues and contract clauses has been left to this board of arbitration for resolution.

It was agreed by all concerned that wherever possible, a negotiated settlement between the parties is preferable to an award imposed by a board of arbitration. Unfortunately, the Association and the Division have experienced difficulty in concluding a mutually satisfactory collective agreement, and therefore this board must accept its responsibility under the *Act* to make an award which will then become the basis for a new agreement under section 131.

Two major points were agreed between the parties: the new collective agreement should run from January 1, 1996 to June 30, 1998 (30 months duration) and the generally applicable salary, allowance and rate increase for teachers should be 2%. However, the Division proposed to implement the salary increase on June 30, 1998, effectively imposing a wage freeze for the life of the agreement. The Association argued for what it described as the pattern or the "going rate" as revealed by voluntary settlements and arbitration awards in school divisions across the province and the metropolitan Winnipeg area. On this basis, the Association submitted that it was entitled to a 1.5% increase effective September 1, 1997 and an additional 0.5% increase

effective January 1, 1998. In other words, the teachers were willing to accept a salary freeze, but only for the first 20 months, followed by a phase-in of the 2% increase.

It was agreed that the cost of the Association's salary proposal would be $2.25M, without interest on retroactive pay. The cost of the Division's proposal would obviously be nominal, about $12,000. It was further agreed that this would be a "one time cost", in the sense that the parties have agreed to raise the general salary level by 2% going into the next contract period. The payment at this stage is a retroactive adjustment. Of course, the Division would still be required to fund the new, higher salary levels in future years, and this board appreciates the burden of the payroll expense in a labour intensive field such as public school education.

Each party also advanced numerous other contract proposals. The Division requested deletion of Class VII from the teacher salary schedule, creation of a new and lower entry level step, restrictions on pay due to additional qualifications, and controls over leaves of absence taken for Association business. The Division calculated that its proposals would yield savings of $331,000 on an annualized basis. Moreover, the Division urged the board to revise various aspects of the layoff clause in order to improve administrative flexibility, especially with respect to the Division's special program needs. Various clarifications were requested in a number of contract clauses.

The Association sought several significant improvements and protections in the new collective agreement. These included a new definition and limit on teacher workload, an allowance for team leaders at the elementary school level, a restriction on contracting out by the Division, new pregnancy leave provisions, a guarantee of at least one laboratory assistant at each high school, compensatory time off for school governance activities, and a number of other enhancements and clarifications. The Division initially costed these proposals at $7.9M per annum, including $5.0M for the workload clause, $1.4M for compensatory time and $0.9M for team leader allowances. Some of the Division's costing was disputed by the Association, and some of the teacher proposals were modified during the hearing process, with apparent consequential cost reductions. In

particular, the Association claimed that its final workload proposal entailed a nil cost to the Division in the 1998-99 year. The board will address each issue in detail later in this Award.

In general, the Association argued that its salary proposal must be awarded because it was consistent with the established pattern for teacher compensation in this time period, based on the comparability principle. The other contract improvements were proposed based on equity and need. While acknowledging that the package carries a cost to the Division and probably the ratepayers of the Division, the Association submitted that a public employer is required to pay fair and reasonable compensation to its employees if it chooses to offer the services in question.

For its part, the Division characterized the Association's position as unreasonable, given the dire financial position currently faced by Winnipeg School Division No. 1. The Division invoked the ability to pay doctrine and asked the board of arbitration to maintain a sense of reality about the affordability of the teacher proposals on a global basis. Fundamentally, the Division argued that under extremely adverse conditions, the Trustees and management had established a sound business plan which preserves quality educational services, maintains fiscal responsibility, and nevertheless offers fair and competitive remuneration to teachers. If so, an arbitration board should accept the collective agreement proposals which are integral to the current business plan.

As is usually the case, each side presented voluminous material in support of its position. This board was impressed by the depth of the research and argumentation by each of the parties. Compelling points were put forward by both the Association and the Division, all of which has been carefully considered by the board.

Common ground on the approach to interest arbitration

Certain basic propositions were endorsed by both sides.

Interest arbitration should, to the degree possible, replicate collective bargaining. As stated by Arbitrator Steel in *Kelsey (1994)*, "The fundamental object of arbitration is a fair and equitable outcome for both parties. The Board attempts to fashion an award which would most likely represent what the parties could achieve in free collective bargaining."

Arbitrators should not make political choices, such as the level of services to be provided or the allocation of resources to pay for such services. Nor should they impose their own views on questions of social justice. These are functions of public government, and trustees are elected and accountable for their choices in this regard. *Re Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers' Association* (1982) 2 L.A.C. (3d) 157 (Dorsey); *Re Kingston Hospital Arbitration (1979)* (Swan); *Re Manitoba Health Organizations and International Union of Operating Engineers, Local 827 (1991)* (Bowman).

Deference is due to the solutions chosen by parties in collective bargaining, and caution should be exercised in departing from established practices, unless a clear and convincing case can be made by the proponent of such change. At the end of the day, interest arbitration should strive to "maintain, promote and repair" the collective bargaining relationship. *Birdtail River (1993)*(Scurfield).

The challenge for this board is not the articulation of these guiding principles, but rather the application of those principles in the complex circumstances of this particular case.

Duration of agreement: Article 3

The parties agreed that the new collective agreement would commence on January 1, 1996 and run for 30 months to June 30, 1998. The Division submitted that the agreement should be made effective upon signing, whereas the Association sought a retroactive effective date of January 1, 1996. Where necessary, the Association suggested, individual articles could have individual

effective dates. The Division was rightly concerned about the possibility that provisions awarded at this late date would create retroactive rights over a lengthy past period. As a result, I have concluded that the agreement should be effective January 1, 1996, but for each new article or revised article awarded herein, a specific effective date will be stated.

The Division proposed language on page 20 of its brief which the Association said was basically acceptable. Mr. Shyka also said that the parties would review the second paragraph of this clause for further possible refinement.

The current duration clause provides, in the last sentence, that when extended negotiations for a renewal agreement are completed, the amended agreement shall be effective from the first day of January in the then current year. Following recent amendments to the *Act*, collective agreements are now effective on and after July 1 and expire on June 30 (section 131.5(1)). Thus, for agreements after the one to be established by this award, the new timing will be in effect. The Division's clause at page 20 does not contain a replacement sentence to deal with the new statutory requirement. One possibility would be to provide that the amended agreement will be effective on the date following expiry of the previous agreement, except where stated otherwise. This would allow the parties in renewal negotiations to address alternative effective dates for specific clauses as might be necessary. However, as the parties intend to deal with the final form of the wording for paragraph two of the new Article 3, I will not make an award on this point at this stage.

The Division's proposed clause is therefore awarded, subject to the foregoing comments and subject to any revisions the parties may agree upon mutually. Jurisdiction is retained to settle any differences which may remain.

Basic salary schedule: Article 9.01

(a) The comparability principle

In arguing for its position on salary adjustment, the Association relied on the clear weight of arbitral authority to the effect that comparability with other teacher contracts, especially in similar or contiguous divisions, is the most significant factor for an arbitrator. According to Arbitrator Chapman in *St. James-Assiniboia (1994)*, one must give "paramount consideration" to similar divisions, and for the Winnipeg School Division itself, the same arbitrator stated that "the most appropriate comparison for members of the Association is with the salaries paid to other teachers within the metropolitan area." *Winnipeg School Division No. 1 (1991).*

Arbitrator Baizley observed in *Leaf Rapids (1988)* that "it would be dangerous for an arbitration board, whose deliberations are taking place later in the contract year, to break new ground except in the most compelling of circumstances." Still, the process is not completely mechanical. As Arbitrator Steel stated in *Kelsey (1994):* "Although comparability is an important factor, it is not totally determinative. Where there are compelling and exceptional reasons to differ from other awards, then it may be appropriate to do so." There is a "practical onus" on any party seeking to depart from the decided pattern to provide convincing reasons for doing so, according to Arbitrator Teskey in *Lord Selkirk (1994).*

After following the established arbitral principles as recited above, Arbitrator Scurfield introduced a new element in *Brandon (Interest Award) (1998).* He found that teachers were entitled to a 2% increase and that the Division could afford to pay such an increase without reducing any necessary services. Some level of tax increase would likely be required. Notwithstanding the pattern in other settlements, and without finding "compelling and exceptional circumstances", the arbitrator decided to adjust the effective dates of the increases "in a manner which should help to ease the taxpayer into accepting a greater burden of educating

children in the Brandon School Division" (at p. 15). The adjustment was not major, but it did slightly delay Brandon teachers in reaching their 2% increase as compared to similar divisions. The Association sharply criticized the *Brandon (1998)* award and urged this board to disregard it.

According to the evidence, approximately 78% of Manitoba teachers have an agreement covering 1996, 51% have settled part or all of 1997 and 37% have settled part or all of 1998. The record of average salary increases certainly lends support to the Association's position. Indeed, the provincial picture is somewhat more generous than what the Association is seeking, in that increases have averaged 0.8% at January 1, 1997, a further 0.6% at September 1, 1997, and a further 0.5% at January 1, 1998. As mentioned earlier, in the present case, the Association is not requesting any salary adjustment until September 1, 1997, later than the provincial average.

In the metropolitan Winnipeg area, relatively fewer divisions have settled their contracts to date. Aside from Winnipeg School Division No. 1, there are nine divisions. Three (St. Boniface, St. James-Assiniboia and Norwood) have concluded salary adjustments precisely in line with the Association's proposal, namely, 1.5%-0.5%. A fourth (River East) granted its teachers 1.5% effective September 1997 but has not concluded an agreement for any part of 1998 as yet. Five metro divisions remain outstanding. Thus, there is evidence of a pattern corresponding to the salary position of the Association, but the picture is not yet complete. On the other hand, based on the evidence provided by the parties, it is clear that teacher salary increases have historically followed a fairly close pattern in each year, so that once a reasonable sample of settlements is available, there is generally little deviation from the norm as the balance of divisions eventually conclude their collective agreements.

In *Fort Garry (1986)*, Arbitrator Freedman considered that there was a sufficiently clear pattern when fewer than half of the divisions had settled. Arbitrator Scurfield in *Brandon (1998)* referred to the "striking degree of uniformity across the province over the last 15 years" and held that "it would be very difficult for an arbitrator to suggest that a pattern is not generated by 25% or 30% of the divisions voluntarily entering into collective agreements". In the same vein, in *Flin Flon*

(1998), Arbitrator Chapman concluded that it would be "unreasonable to disregard" the pattern when 46% of divisions had settled in 1997 and 32% had settled in 1998.

Responding to all of the foregoing, the Division did not strenuously contest that a pattern has emerged, or at least is certainly in the process of emerging, which is consistent with the 1.5%-0.5% position being advanced by the Association. Mr. Whiteway did point out that the majority of teachers have not settled in metro Winnipeg, and that the Winnipeg School Division No. 1 award will itself develop the trend in a substantial way. This is no doubt true. However, I took the Division's real point to be this: whatever the pattern may be, the Division can prove compelling and exceptional circumstances which justify departing from the norm.

(b) Compelling and exceptional circumstances

The Division's Treasurer, Mr. Bell, gave evidence concerning the unique and challenging circumstances of Winnipeg School Division No. 1. After explaining the public schools finance system currently in place in Manitoba, he expressed the view that the system has treated the Division unfairly, a point which the Board of Trustees has made repeatedly to the provincial government. The Division has shown leadership in Manitoba; it is a "lighthouse division". But necessary provincial support has not been forthcoming. As a result, the Division slipped from a surplus of $8.7M in 1992 to a deficit of $1.6M in 1996. It was only in March 1998 that, for the first time, the province responded with a special grant of $1.6M, which mitigated the 1998 local tax requirement.

Socio-economic and demographic data reveal that the Division is unique among metro divisions in terms of lone parent families, aboriginal population, low family income levels, and several other factors creating high needs for an educational system. This translates into the highest urban operating expenditure per pupil in the province ($6,876 per pupil in 1997/98, according to FRAME, the Financial Reporting and Accounting System for Manitoba Education), and the lowest urban pupil-teacher ratio. By comparison, Brandon spent $4,953 per pupil, and the other

metro divisions spent between $5,503 and $6,367 per pupil. Winnipeg No. 1 has 17% of the general student population, but has 23% of the Level III low-incidence funded students (profound disability or behavioral disorder). The Division, of necessity, has considered the need for supplemental programs such as school nutrition, child counseling services and nursery education, and the trustees have struggled to maintain these vital services despite increasing financial pressures.

The Association does not take issue with the "uniqueness" argument, although it points out that there are other divisions which also have high-needs populations, perhaps not to the same pervasive extent as the Division. The Association simply says that the Division has always been unique, with resulting lower pupil-teacher ratios, higher exceptional education and community program costs, and greater expenditure levels per pupil. Despite this fact, which is raised every year in bargaining, the Division has consistently settled with its teachers at the going rate. In other words, the Association claims that the Division itself has accepted in practice that comparability trumps uniqueness. So have other divisions. When contracts have been settled by award rather than negotiation, arbitrators have taken the cue, and have also followed the pattern.

I accept that in the past, this has been the case. However, another interpretation, as suggested by the Division, is that in these past cases, there may simply not have been enough evidence available to meet the onus of displacing the pattern. In interest arbitration, each case must be judged afresh on its individual merits.

(c) "Filmon Fridays"

In response to fiscal pressures, primarily inadequate provincial support funding, a stringent expenditure management program was implemented by the Division, and 256 F.T.E. staff were eliminated between 1993 and 1998. This included 142 teacher positions. During this period, the province enacted the *Public Sector Compensation Act*, authorizing the imposition of reduced work weeks or "Filmon Fridays", as they came to be known. Across the province, about 35 divisions

used this mechanism to contain costs, but in Winnipeg No. 1, the trustees opted to honour the collective agreement, declining to solve the province's fiscal problems by wage reductions.

In the result, teachers received negotiated salary increases of 2% in each of the 1993 and 1994 years, without Filmon Fridays. This was a benefit to working teachers, but adversely affected employees who lost job opportunities, and negatively impacted the Division's treasury. The Division argues that its limited financial flexibility at the present time can be traced to these events to a significant degree, and therefore teachers should now accept less than the norm. This point has some force, but at the same time, it must be noted that these were policy decisions made by the trustees, presumably with the knowledge that such generosity could cause problems down the road if the Division's finances did not improve (which is exactly what happened). By 1996-97, the Division had no surplus, whereas the average division in Manitoba held 3.5% of operating expenditures as surplus, and only three divisions were in deficit. It was argued that this explains the more generous salary settlements reached across the province in 1997, as compared to the Division's current wage freeze position.

The Association replies that while many divisions did utilize Filmon Fridays to varying degrees, when one examines all the data, there is no demonstrable correlation between cost savings, surplus levels and salary increases. The provincial government is the "silent senior partner" in public school finance. Thus, in the Association's view, the government is both the problem and the solution.

(d) Erosion of the Division's assessment base

The Division relied heavily on a claimed real property assessment crisis and the high level of the special levy in Winnipeg No. 1 as further support for a finding of exceptional circumstances. The Division in essence states that it is unable to pay for the Association's proposal. Without a doubt, the picture is bleak. The Division has lost 11.5% of its assessment base since 1994, a total of $467M. The heaviest losses have been in commercial assessment, which declined 17.5%.

Moreover, the Division is landlocked, restricting the likelihood of future growth potential. As a result, even though expenditure levels have been capped, the special levy mill rate has been rising. From the perspective of the public, this is a double whammy. Taxes go up and services go down.

At 23.6 mills, the Winnipeg School Division had the highest urban mill rate in 1997. Brandon was 12.9 mills, Portage la Prairie 14.2 mills, and the metro divisions ranged from 15.1 to 21.7 mills. The Division is taxing 26% above the provincial average mill rate. At the same time, average family income is the lowest in metro, so that ratepayer ability to pay is a serious problem. Even with the Division's wage freeze position, it is projected that the 1999-2000 special levy will increase by 3.8%.

Again, the Association acknowledges all of the foregoing. However, the Association points out that most of the adverse trends, whether it be property assessment levels or provincial funding supports, are affecting Manitoba divisions in roughly the same manner. The Minister's 1998-99 funding announcement (2.2% average increase) was actually better for Winnipeg No. 1, which received a 3.2% increase. This time it is rural divisions which are facing the most severe local levy impacts.

In particular, the Association cites the Manitoba Association of School Trustees December 1996 *Review of Education Finance in Manitoba, 1984-1994/95*, at p. 24, where MAST states: "Assessment per pupil is very important in the determination of the ability of individual school divisions to raise funds through local taxation." FRAME data for 1997 indicate that Winnipeg School Division assessment per eligible pupil was $131,411, compared to the provincial average of $107,666. In metro, the Division is in the middle of the range, which runs from $92,000 to $158,000. FRAME also shows that over the past five years, the Winnipeg School Division's rate of growth in assessment per pupil is equal to the provincial average (13.9% for the period 1992-97). However, I would also note that compared to the other metro divisions, growth in assessment per pupil is lagging far behind in the Winnipeg School Division. Only Fort Garry

fared worse. Several metro divisions experienced 20% growth, and St. Boniface exceeded 40% for the period.

(e) The "ability to pay" principle in the public sector

Since the Division argued inability to pay as a basis for the proposed salary freeze, there was a significant amount of attention devoted to this subject during the board's hearings.

Interest arbitrators have traditionally been highly skeptical of ability to pay arguments when advanced by public sector employers. As long as the employer possesses taxation authority, in theory there can be no inability to pay, merely an unwillingness to exercise the available levying authority in order to raise the necessary revenue. In the classic statement of this position, Arbitrator Shime ruled as follows in *British Columbia Railway (1976)* at p. 8:

> In sum, I determine that on balance, if the community needs and demands the public service, then the members of the community must bear the necessary cost to provide fair and equitable wages and not expect the employees to subsidize the service by accepting substandard wages. If economies are required to cushion the taxes then they may have to be implemented by curtailing portions of the service rather than wages and working conditions.

As noted by Peter Gall, *Ability to Pay in the Public Sector: A Management Perspective* (1991) Labour Arbitration Yearbook 263 at p. 265, this position has been repeated so often that "it is now permanently ingrained in the ethos of interest arbitration in Canada." However, Arbitrator Shime added this lesser known qualifier in his *British Columbia Railway* award:

> This position should not be considered as suggesting that the source of funds from the community is inexhaustible or that there are not political realities to be considered prior to the taxing power being exercised.

Gall argues that the "prevailing rate" theory, which is the core of the Association's position in the present arbitration, fails to account for differences between public employers and is not responsive enough during difficult economic times. He calls for more individualization of bargaining and arbitration outcomes. On the other hand, responding to Gall, union lawyer Jeffrey Sack notes that employer-defined limits on ability to pay have been overwhelmingly rejected, and comparability affirmed as the main criterion, albeit comparisons must be made within the public sector and also beyond to the private sector. *Ability to Pay in the Public Sector: A Critical Appraisal*, (1991) Labour Arbitration Yearbook 277.

Ontario Arbitrator R.L. Jackson has reframed the principle this way:

> ... an employer may not argue that it lacks the ability to pay a *fair and reasonable wage to its employees.* That means, assuming that the employees in question are not underpaid to begin with, a wage increase which, more or less, matches that of the labour force as a whole. *Why Arbitrators Should Consider 'Ability to Pay'*, (1992) Current Issues Series, Industrial Relations Centre at p. 2.

Discussing his role as the fact-finder in the 1991 Metro Toronto teachers dispute, Jackson felt there was an overemphasis on teacher-to-teacher comparisons as the dominant criterion in setting salaries. He wrote in his report of October 26, 1991:

> ... [T]he argument that it would be an intolerable inequity to have two teachers, each doing the same job and each with identical qualifications ... not making *exactly* the same salary, is simply unrealistic. Of course, it would be *preferable* - it would be *ideal* - to have them making the same amount but, frankly, if one makes a small amount - say, one or two percent - more than the other for a few years, the sky is not going to fall. The brutal fact is that it is not a perfect world, and such inequities exist almost everywhere in the labour force. Indeed, by comparison with the problems currently being faced by an extraordinary number of people in the labour force today, this one is trivial.

Arbitrator Jackson revisited the ability to pay issue 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 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)

In presenting its case, the Division at times stated that no funds had been budgeted for the salary claim of the Association, but I did not take this to mean that the Division was pleading inability to pay solely on that basis. In fact, Mr. Whiteway urged this board to adopt the approach set forth by Arbitrator Jackson: not short-term fiscal capacity, but the presumptive acceptability of tax increases which would ensue. The Division asserted that based on the current mill rate, and the continuing pressure on mill rates due to assessment erosion, the Division has clearly maximized its taxing effort, and cannot reasonably impose any further burdens on the local ratepayer.

The Association went further and suggested, based on the authority of *Re Board of School Trustees of School District No. 68 (Nanaimo) and Nanaimo District Teachers' Association (1993)*, affirmed by

the B.C. Labour Relations Board (August 19, 1993), and a line of other B.C. awards, that the test is impossibility to pay in the sense that the division would be in default of its statutory obligations. *Nanaimo* was a class size grievance arbitration. The collective agreement provided a defence for the employer where external financial constraints existed beyond the employer's control. In B.C., school divisions apparently receive all their funding from the province, and have lost the power of local taxation. This decision is therefore not applicable in the circumstances of the present case, where the Division retains a taxing authority. The test is not nearly as strict as stated in *Nanaimo*.

(f) Ability to pay in the present case

According to the evidence, the impact of the Association's salary proposal on the average assessed residential property in the Division would be $18.53, based on the projected 1999/00 budget. The current projected special levy on an average home is $760.72, which would rise to $779.25. The Association argues that this is not an inordinate impact. The Division, however, does not view this amount in isolation. It is one more increase in a long series. Since 1992, the special levy has risen 22%. Except for 1998, there has been an increase every year. Municipal property taxes, while beyond the control of the Division, have gone up by 42% in the same period, and are experienced together with the special levy and the provincial Education Support Levy as a single tax-payable obligation by the public. The Division believes that taxpayers are becoming increasingly vocal and resistant to tax increases of any quantum.

The Association directed our attention to an offer made by the Division to the teachers on December 17, 1997 for 1% on January 1, 1998 and an additional 0.5% on September 1, 1998, for a 1997/98 cost of $767,000. This offer was refused. On May 16, 1998, the Division made its final offer with a phase-in ending June 30, 1998, which Mr. Paci said should be presumed to have been an improved package. This too was refused. The Association argues that the Division's claim based on inability to pay cannot be taken seriously in light of this bargaining history.

In summing up on behalf of the Association, Mr. Paci concurred with much of the Division's analysis: the Winnipeg School Division is under funded, the local taxpayers are overburdened, the Division has many unique and challenging demographic features, and the trustees face difficult choices. However, the Association is adamant that cutting teacher salaries is no way to help either ratepayers or students. Mr. Paci argued that if this arbitration board accepts the Division's position and rationale, it will let the provincial government off the hook, and encourage the Division to attack teacher compensation at every set of negotiations, to the long-term detriment of the bargaining relationship between the parties.

I would pause here to recall that in this case, the level of teacher salaries at the end of the 1996-98 collective agreement is not in dispute. There will be a 2% increase over the previous agreement. To the extent that 2% constitutes the prevailing trend for the period, the Division's teachers will remain on par with their colleagues in other divisions. The Association portrayed this item as a one-time cost, which undermines the ability to pay arguments of the Division to some extent, but the flip side is also true. If teachers fail to achieve some or all of the requested phase-in between September 1, 1997 and June 30, 1998, this would be a one-time loss or deprivation.

(g) Comparisons with non-teacher contracts

The Division referred to other Manitoba public sector employers with restricted ability to pay, and showed that the parties have agreed to a variety of cost reduction techniques, including reduced hours, reduced wages, lower entry steps and two-tier pay schedules. In health, the recent pay impacts range from -2% to -3%. University settlements have continued work reductions into 1996/97, with an effective 2% reduction in pay. Unionized non-teaching settlements for school employees are variable in 1997, ranging between zero and 2%, with 1998 settlements generally between 1% and 2%.

The Division presented an analysis comparing Division teachers with Manitoba Government Employees Union members over the 1991-98 period. Clearly teachers were better off financially,

as government workers experienced both wage freezes and work reductions (although the work reductions also added to employee vacation time). The most recent MGEU agreement for 1997-99 provides 1%-1%-2%, but the first two years still include "Filmon days".

Comparing Division teacher salaries with those of teachers in other provinces, it appears that Winnipeg No. 1 compares favorably, being neither at the very top nor the bottom of the group.

Looking at the Manitoba private sector, the evidence indicates that in 1997, average wages rose 1.8%, and in 1998, wages rose 3.8%, which clearly leads the public sector. Combining both private and public sectors in Manitoba, for the last two years, average wages increased 1.1% and 2.0%. On the basis of these latter comparators, the Association's proposal is reasonably modest.

(h) Findings and conclusions

There is overwhelming evidence to support a 2% increase for the 30 month contract period in question. Subject to timing, this is the agreed position of the parties herein, and in the vast majority of settlements across the province, this has been the result.

There is less than complete uniformity on the timing or phasing of the 2% salary increase, however, with a variety of configurations evident in the record. Many divisions have granted their teachers a 1% increase effective January 1, 1997, with a further 0.5% in September, and the final 0.5% on January 1, 1998. Those metro divisions which have settled have generally approved 1.5%-0.5% with the timing as proposed by the Association. Several divisions (Thompson, Leaf Rapids, Rolling River) agreed on 1%-1%. Brandon was awarded only 0.5% during 1997, with the balance paid during 1998. There are still other variations. Significantly, no school division has settled on zero for the full 30 month period, as advocated by the Division in the present case.

Both the Association and the Division submitted that this arbitration board should resist any temptation to mediate or "split the difference" on the salary phasing. On the other hand, this is

an interest arbitration, not a final offer selection process, and in the end the board is obligated to make an award it believes is fair and reasonable under all the circumstances.

Based on the all foregoing, I conclude that *prima facie* the Division's position is not supportable, and that the Association's position is consistent with the established pattern of teacher settlements, as well as the Manitoba public and private sectors generally.

Are there compelling and exceptional circumstances which justify departing from the pattern, as argued by the Division? Clearly the Winnipeg School Division is in a unique situation. Although no doubt each and every division lays claim to its own uniqueness, I find in the present case a remarkable and unfortunate simultaneous alignment of numerous stresses which school divisions might face, any one of which would be challenging by itself: intense socio-economic and demographic needs, a provincial funding regime which continues to neglect key aspects of the Division's function, a badly eroding assessment base, high ongoing mill rates, weak family income levels and hence a strained ability to meet levy requirements, and depletion of the Division's surplus with associated reduction of financial flexibility.

While these findings certainly arouse my sympathy for the Division's predicament, I still cannot accept that such circumstances justify substantively lower or different compensation levels for teachers. To pay teachers less in Winnipeg School Division, based on the area's social and financial problems, would ultimately be injurious to the students and the public, as well as unfair to the teachers who are providing an essential service, possibly under even more arduous conditions than normally prevail. Because of the challenges which the Division faces in carrying out its mandate, especially in disadvantaged neighbourhoods and in dealing with special needs constituencies, it is vitally important that the best available educators be hired and retained. Salary alone does not guarantee high professional standards, to be sure, but on the other hand, a policy of paying sub-standard salaries in order to meet revenue shortfalls would eventually erode the quality of teaching in a division.

At the same time, I do not accept the proposition that absolute conformity is required in teacher compensation. The record of settlements over the past 15 years (1981-96) as provided by the Association shows that in metro Winnipeg, in some years salary increases have been identical for each division, whereas in other years there has been variation ranging up to 1.15%. Provincially, there has been greater variability, with a range of up to 3% among all divisions. Only twice were all settlements identical across the province - in 1987 (4%) and in 1995 (0%). Presumably, there are a number of factors at work which preclude total uniformity, such as local concerns and issues, non-salary financial items, catch-ups and adjustments, and the timing of settlements. Seen in this light, the *Brandon 1998* award may not necessarily be as much of an anomaly as claimed by the Association. Whether or not Arbitrator Scurfield had sufficient grounds in that case to make the phase-in adjustment as he did, especially given that division's relatively low taxing effort, the notion that some awards or settlements will differ from the pattern every year should not be troubling.

In the present case, I believe that both the Division and the Association are committed to maintaining fair teacher compensation and high professional standards. It would be unrealistic to think that these goals could be threatened by occasional minor variations from the pattern, as long as substantial equality in teacher compensation prevails.

I believe that our obligation as an arbitration board is to award salaries and other contract clauses so that, as an overall package, the new agreement is fair and reasonable, and approximates the outcome that could or should have been produced by reasonable collective bargaining. Therefore, while the Association's salary position is consistent with the established pattern, I do not find that we are bound to award it automatically. The board is entitled to fine-tune the salary award, if this seems necessary for legitimate reasons consistent with the objectives of collective bargaining, while still keeping within the bounds of substantial comparability. One such legitimate objective would be to mitigate the financial impact of the total package awarded for transition purposes.

Later in this award, I consider the Association's proposal for a new clause on sick leave for health-

related absence arising out of pregnancy and award the clause as sought. The Division projected the annual cost at about $226,000, but it could be higher, depending on experience. At the same time, a series of adjustments to the salary scale which the Division proposed, amounting to a saving of some $316,000, is denied in this award, in part because it would be inappropriate to begin tinkering with the essential structure of teacher compensation while the whole subject is under province-wide review. Thus, there is no cost relief for the Division at this time, but in 1998/99, the Division will be paying the agreed upon 2% general scale increase, retroactive pay, and also the additional cost of health-related pregnancy absences. Whether or not "inability to pay" is made out, it has clearly been shown that the Division faces a problem of "difficulty to pay", which I feel a responsible arbitration board should consider, within the boundaries and principles discussed above.

(i) Award on general salary scale

On the basis of all the foregoing, and considering all the other clauses awarded herein, I consider that all salaries, allowances and rates should be adjusted as follows: 1% effective September 1, 1997 and a further 1% effective January 1, 1998. This was described as Option "B" in the costing exhibit prepared by the Division at the arbitration board's request. It provides the 2% increase in general salary scale as agreed, with approximately the same phase-in as proposed by the Association, albeit somewhat slower. The salary cost of Option "B" was agreed to be $2,047,800, whereas the Association's proposal was costed at $2,249,700, a difference of $201,900. This roughly approximates the Division's cost projection for the pregnancy leave clause, which should assist the Division in adjusting to that new expense for the first year.

The salary cost, if fully passed through to the ratepayers, would increase an average homeowner's special levy payment by $16.84 next year, which I consider to be within the boundaries of ability to pay, as defined above. A majority of reasonably informed and fair minded taxpayers, knowing the Division's financial pressures but also knowing the going rate for teacher salary settlements and the importance of fair remuneration for these vital public servants, would support such a tax

increase. To the extent that some funds may be set aside for these additional expenses already, or can be re-allocated within the Division's budget, then the tax impact can be reduced accordingly. Similarly, I am aware that one possible result of the salary award is service or employment cut-backs, but as noted earlier, arbitrators have been cautioned to leave responsibility for such decisions in the hands of the accountable political representatives.

The general salary scale and all other rates and allowances in the collective agreement will be adjusted accordingly.

Deletion of Class VII: Article 9.01

The basic annual salary schedule contained in Article 9.01 consists of a grid whereby teachers are paid based on their years of teaching experience (up to 9 years) and their classification (Class I to Class VII). This system has been in place for many years. According to Mr. Whiteway, the classifications originated in the 1950's when many teachers had minimal post-secondary education, and it was considered desirable to provide an incentive for teachers to upgrade their academic qualifications. The classes are defined by provincial regulation. Class VII basically requires seven years of university study, including a Master's degree or equivalent. Teachers with a doctoral degree are also rated at Class VII. In the previous collective agreement, a Class VII teacher with 9 years experience earned $59,175. As of September 30, 1997, there were 125 Class VII teachers working in the Division, almost all of whom are at the top of the experience scale.

The Division proposed deletion of Class VII with red circling of incumbents until the Class VI rate catches up to the current Class VII level. The projected cost saving is $147,000 per annum.

In Winnipeg School Division, teachers are largely concentrated in Classes IV and V, which require four and five years of study respectively and an undergraduate degree (1660 teachers out of a total teaching staff of 2189). A significant number are placed at Class VI (368). Thus, as the

Division sees it, the rationale for the system has been met and teachers are well qualified. The Division doubts that the addition of further qualifications up to the Class VII level really produces tangible improvement in teaching output, and yet these are expensive employees to maintain.

It appears that the whole grid system is under review at the moment in Manitoba. The Minister appointed John Scurfield, Q.C., to prepare a report recommending potential new compensation models. In *The Teacher Compensation Process* (February 1998), Mr. Scurfield proposed replacing the current grid with three new classes, defined based on qualifications as well as other criteria. He observed that some 70% of teachers are teaching subjects outside their university discipline. There has been discussion of the Scurfield paper but no resolution

No arbitration board has awarded deletion of Class VII. There are 10 Manitoba divisions which have no Class VII in their pay schedule, but this was achieved by agreement. All these divisions are rural or northern. Teachers in Souris Valley were denied an award inserting Class VII into their agreement, based on the cost impact to the division.

The Association opposed this proposal. Mr. Shyka pointed out that many Class VII members are working in the Child Guidance Clinic and this could penalize a valuable program. Moreover, teachers work hard and incur considerable expense in order to obtain a Class VII level, and there should be some payoff for doing so.

I concur with the board in *St. James-Assiniboia (1994)* which declined a similar request for deletion of Class VII: "It is a fundamental change to a well-established system and we do not feel it would be appropriate for an Interest Arbitration Board to implement such a drastic change." It would be preferable to await the outcome of the current provincial review. The Division's proposal is therefore denied.

New entry step: Article 9.01

The Division believes that given the current over-supply of teachers in the Manitoba market, starting rates can be adjusted without affecting the quality of educational programs. The Division continues to be flooded with teacher job applications. The Division therefore proposed to add a new, lower entry step, which would result in 10 steps to maximum in the grid, compared to the current 9 steps. In metro Winnipeg, all divisions now have 9 steps, but there are numerous divisions outside the City with 10 steps, and even a few with 11 steps to maximum.

The Division projected its cost saving at about $30,000, but this was based on a delayed start-up, with new hires after January 1, 1999 affected by the change. This raises a potential jurisdiction problem, since the new collective agreement will only be in place until June 30, 1998. According to the Association, the loss to new teachers would be significant, amounting to about $18,000 per teacher over the full 11 year period.

Like the Division's proposal to delete Class VII, this is a fundamental change to a long-established arrangement between the parties, and would be better dealt with by negotiated agreement. The request is denied.

Reclassification due to additional qualifications: Article 9.05(c)

Under the previous collective agreement, a teacher whose qualifications were improved and as a result became entitled to a higher classification would be paid based on her new placement in the grid: years of experience plus new classification - the "lateral shuffle". The Division proposed instead that such a teacher would move to the next classification but only to the step nearest to, but not less than, her rate of pay prior to increasing her qualifications. This would basically move the teacher backwards on the experience scale while moving forward in qualifications. The Division projected a cost saving of $138,000 annualized.

To illustrate, a Class IV teacher with 5 years experience now earns $40,936. Moving laterally to Class V, she would expect to earn $43,631 under the grid. The Division proposes that she would only move to the next highest dollar point in Class V, which is $41,826. The negative impact in this example is $1,805.

The Division pointed out that in transitions from Class III to Class IV, the currently mandated pay jumps could be very large, due to the fact that Class III tops out at 6 years experience. A 9 year teacher moving up to Class IV would experience an $11,900 increase. However, the Division has only about 35 teachers at Class III or less, so this may not be the most typical scenario.

The Division's concern relates to value for money. The Scurfield Report expressed it this way: "the only significant incentive in the current compensation system is to acquire, in an indiscriminate manner, further formal education. The present system does not reward the actual work that teachers perform, and in particular, the assumption of extraordinary duties and responsibilities. ... One unfortunate, but predictable, result of the present system is that the faculties of education in Manitoba have, in response to consumer demand, developed courses that appear to be solely devoted to accommodating a teacher's desire to increase his or her class rating without regard for educational rigor."

The whole subject of upgraded qualifications is a difficult and controversial one. The Association and the Manitoba Teachers' Society have strong views on the subject, as do employers. Many arbitration boards have considered similar requests from school divisions, and generally rejected them. Three boards have awarded such a clause in part. In *Assiniboine South (1985)* Arbitrator Freedman discussed the conflicting policy considerations. Additional education for teachers is a desirable objective, and barriers should not be erected. On the other hand, the present system allows for unilateral action by the teacher, resulting in higher salary costs whether or not the employer favors the acquisition of greater qualifications for that teacher's particular job function. In the result, in a so-called "breakthrough" decision, the board in *Assiniboine South* awarded the new clause but limited it to Classes IV and above so as not to discourage upgrades by any teacher

in the lower categories. The board also noted that under the new clause, there would still be a financial incentive to pursue additional qualifications.

The current article on allowance for additional qualifications in Assiniboine South appears to permit the lateral move, as before, if the teacher obtains advance division approval for the proposed studies and upgrade. Approval is in the sole discretion of the employer. Similar provisions are found in Fort Garry, Fort la Basse, Souris Valley and Leaf Rapids. Under this arrangement, where the employer believes that there will be an economic payoff, the teacher receives a more substantial reward. These collective agreements all contain detailed implementation provisions.

This is an important issue, and it is obvious that reform is in the air. The teacher compensation system, developed decades ago, cannot continue indefinitely without evolution and change. I can appreciate the position of any employer who wishes to have input and control over payroll cost escalation based on qualification upgrades. The question is whether such reform should be accomplished by means of interest arbitration. Arbitrator Chapman declined to follow *Assiniboine South (1985)* when the same issue arose in *Red River (1986)*: "We are of the view that if such a fundamental change is to be made, then it would be in the best interests of the parties to negotiate same." He repeated this finding in *Aggasiz (1988)*. Teacher associations clearly are reluctant to give up long-held benefits of this nature in negotiations, but that is the nature of the collective bargaining system. Another avenue may be provincial government action on the Scurfield Report.

If changes are to be made to this clause, they should not be made piecemeal. The Division's proposal relates only to the salary dollars payable upon unilateral reclassification, and if awarded, in my view, would also have to include comprehensive language on procedures for employer-approved upgrades, criteria for employer approvals and other related matters. This is beyond the scope of the present arbitration proceeding.

I concur with the Division's desire to rationalize practice in this area. However, for the reasons stated, I am unable to award the requested clause at this time.

Deletion of reference to Principal - Continuing Education: Article 10.01(a)

The Division stated that there has been no incumbent in the position of Principal-Continuing Education since 1995 and the Board of Trustees ceased to offer the program effective June 1995. In December 1995, the position title was changed to Principal of the Adult ESL (English as a Second Language) Program. ESL was previously part of the Principal-Continuing Education's duties. Further administrative re-organization followed. The Division now wishes to delete the obsolete references.

The Association refused to agree until there is a new article in the agreement dealing with the creation of new positions. Mr. Shyka also linked this clause to the question of contracting out, since the Continuing Education program, according to the Association, is in fact still being operated, but on a contracted basis. The Association does not claim that contracting out is prohibited at this point, but is seeking a restrictive clause in the new agreement.

New positions and contracting out are dealt with later in this award. The Division's request with respect to deletion of the obsolete reference is granted, and as further requested, the amended paragraph on vice-principals as presented on page 498 of the Division's brief is awarded, all effective June 30, 1998.

Definition of "administrative or supervisory position": Article 10.02(e) and Code of Rules, Section 4.2

Article 10.02 deals with replacements for "administrative vacancies". Section 4.2 of the Code of Rules provides certain procedural protections for a teacher after serving two years in "an administrative or supervisory position". These terms are not defined in the collective agreement

and therefore the Division is seeking a clarification. The Division argues that these terms should be confined to persons who evaluate other professional staff in the course of their duties, which would mean principals, vice-principals and area service directors. Apparently no dispute has actually arisen in this regard, and Mr. Whiteway was unsure who, if anyone, would be excluded by the proposed definition as compared to present practice.

The Association suggested that this is the kind of matter which should be left with the parties to resolve. I agree. The Division's proposal is denied.

Lab assistant for every high school: Article 13(a)

The Association made an extensive presentation to the arbitration board, including briefs from two Association members, in support of a clause guaranteeing that each high school would have one full time equivalent lab assistant. Lab assistants are not teachers, but they are included in the collective agreement. Prior to the 1990's, the Division employed over 20 FTE lab assistants, with one or two assistants in each high school, but the number has been steadily dropping, and the Division stated that the position is being phased out by attrition. In essence, the Association argued that it was in the best interests of the students to ensure retention of these staff.

Linda Monasterski has been a lab assistant since 1977. She described her usual duties, stressing her role in safeguarding student safety in dealing with chemicals and other potentially hazardous activities in the lab. She provides technical and curriculum support to the teachers, helps with science fairs and other projects, and maintains an expensive array of science equipment. Chris Pammenter is an adult education teacher. He emphasized the role of lab assistants in supporting teachers, meeting science curriculum requirements, and preserving new equipment and technology in the school.

On behalf of the Division, Ms Schubert explained that the Trustees voted in 1997 to eliminate lab

assistants by attrition. However, schools are able to make adjustments within their overall staffing allocation to increase laboratory assistant time if they wish, and some do so.

There was considerable debate between the parties over the costing of this proposal. The Division projected $256,000 whereas the Association said that $111,000 would suffice. Having heard the evidence, I am inclined to think that the Division's estimate is correct, but this is immaterial. In my view, it is inappropriate in any event for an arbitration board to award such a clause mandating staffing levels. In saying this, I do not diminish the importance of the work done by lab assistants and I do not doubt their value to the science program and the students themselves. However, the Trustees have exercised their political responsibility in this matter, and it is not our role as arbitrators to review such decisions.

The Association's request is therefore denied.

Interest on retroactive salary: Article 14

This article provides that the Division shall pay interest on retroactive salary increases at the lesser of 10% per annum or the Division's average borrowing rate for the past year. It is expected that the applicable rate at this time will be 5.31%. This provision has been part of the Winnipeg School Division contract since the 1970's. A few Manitoba divisions have obtained waivers of interest on retroactive pay, but the vast majority of contracts require interest.

The Division proposed that the clause be deleted because it provides a windfall to teachers, paying far more than would have accrued to them if the funds had been deposited in a non-chequing savings account. Of course, for teachers with personal debt, delay in access to their backpay can be seen as imposing a cost similar to or greater than the Division's borrowing rate.

More importantly, the Division argued that the clause creates an incentive to delay in collective

bargaining. The Division asserted that the Association had unduly delayed bargaining in the present case. Naturally, the Association joined issue, and argued just as strenuously that the fault lay with the Division. The board is reluctant to attempt any analysis of who, if anyone, is to blame for the sequence of events which led up to the convening of this arbitration process.

In *Beautiful Plains (1979)*, Arbitrator Bowman held as follows: "Looking at the matter in principle, it is clear to this Board that it is a matter of simple justice that where a retroactive pay increase is negotiated or awarded, interest ought to be payable on that money, to the person entitled to receive it. Anything else amounts to simply inequity." I agree.

The Division's request to delete Article 14 is denied.

Allowance for Department Heads and Team Leaders: Article 15.01

There are two areas of dispute under this article. First, the Division objects to any general increase being applied to these allowances, which range from $1,562 to $4,170 per annum, depending on the number of teachers in the department or team. At the top of the range, the department head is coordinating a group of 15 or more teachers. No rationale was provided by the Division for excluding these allowances from the general salary adjustment.

I therefore award the general scale increase for allowances under Article 15.01(a) through (g).

The second issue is more difficult. Currently formal department heads and team leaders exist only in junior and senior high schools, and not at the elementary level. The Association has been advocating recognition of these positions and payment of the applicable allowances to teachers performing similar or equivalent functions in elementary schools, but the Division denies that there are any such team leaders or heads at the elementary level. The Division also states that this clause is intended to assist in the organization of education for students taking courses from a

number of different teachers, in different locations around the school. By and large, elementary students remain in a single classroom with a single teacher. The Division argues that the concept is inapplicable below junior high.

According to the Division, staff organization is flexible at the local level, and some principals may be asking some teachers to perform coordinating roles, but these are not, and have never been, head or team leader appointments. In rebuttal, Mr. Shyka acknowledged on behalf of the Association that Mr. Gerbasi was correct in this regard - no formal heads have been appointed at the elementary level. Under Article 15.01, appointments are made by the Division after consultation with the school principal. In practice, according to Directive #95-97 dated May 23, 1997, the Superintendent appoints on the recommendation of the principal.

The Association proposal leaves the discretion to appoint intact, but deletes the reference to "a junior or senior high school" in the paragraph on allowances. The effect would be that where appointed at the elementary level, team leaders would be paid the prescribed allowance.

The Association advanced this proposal as an equity or fairness issue. Over several sets of collective agreement negotiations, team leaders and heads have been discussed but the outstanding issues have never been resolved. Working committees were struck but did not reach agreement. As seen by the Association, the Division is benefitting from the work done by elementary team leaders, but is refusing to pay for it on an equitable basis. Mr. Shyka therefore urged the board to step in and award the requested clause amendment in order to conclude the issue between the parties.

Claretta Shefrin, a teacher with 23 years experience in the Division, gave a presentation on this issue, outlining her responsibilities as an elementary team leader, as she described herself. She has carried out these duties for 8 years. The duties essentially involve meetings and coordination, communication, distribution of materials and organization of special projects and events. The team leaders meet once per cycle for 30 minutes with administration. Ms Shefrin works with 10

class teachers and 5 support teachers, and receives no compensation, although she does receive 60 minutes per cycle for team leader tasks. She said that junior high team leaders in her N-8 school have 3 teachers in their teams, and do receive the allowance. Asked why team leaders take on the role without compensation, Ms Shefrin said it's a positive experience, provides leadership training, and allows for input on school management issues.

Comparing Ms Shefrin's evidence with the duties of Department Heads as set out in Section 2.5 of the Code of Rules, there are a number of similarities, such as arranging meetings, coordinating materials and equipment, and facilitating communication. Department Heads under the Rules appear to have a number of additional responsibilities: supervise the preparation of the details of courses of study and examinations for the department, maintain knowledge of the subject field at a high level, prepare budget statements for supplies and equipment, maintain liaison with heads in the same field in other schools.

Costing this proposal proved to be difficult. The Association withdrew part of its original proposal during rebuttal, after the Division had costed the proposed clause at $885,000. The board does not have a breakdown of the Division's cost estimate for the remaining proposal. Clearly, there is some significant cost, however, and the Division opposes the proposal on that basis. The Association assumed one team leader per elementary school and estimated a cost of about $92,000 per year, but conceded that it was uncertain how many positions would be generated, and acknowledged that this estimate may be at the low end. The Association reiterated that its claim was founded on equity.

The Division said that most urban divisions do not recognize team leaders at the elementary level, and some have eliminated the position at the secondary level. The Association made no argument based on precedent.

As an equity issue, the Association's position has some merit, but I am not entirely convinced that there is equivalence between the roles at the elementary and junior/senior high levels. There is

clearly a coordinator role which is deemed by some elementary administrators to be useful, as they have asked teachers like Ms Shefrin to accept such responsibilities on an unpaid basis. However, it may be necessary for the parties to work out the full particulars of this role in the context of elementary education. In other words, the negotiations and discussions on this issue may need to continue. Although I sympathize with the elementary teachers' argument that there should be some allowance paid where additional duties are performed, I am reluctant to award the Association's proposal on the basis of the evidence in the present case and without a firm cost projection. I encourage the parties to seek a mutually acceptable resolution of this issue.

Based on the foregoing reasons, the proposal by the Association to extend existing department head/team leader allowances to the elementary level is denied.

Allowance to a designated teacher during absence of the principal: Article 15.02

This clause provides for a per diem allowance to a teacher designated to act in place of the principal where there is no vice-principal. The Association proposed that in addition, a substitute teacher shall be employed to perform the designated teacher's regular duties during such times as the teacher is acting in place of the principal. The Division opposed this proposal on cost grounds and advised that the problem has been dealt with already by policy. An acting principal is appointed in cases of long-term absence, and in cases of absence beyond three days, a substitute is generally provided for the designated teacher. For absences shorter than three days, the District Superintendent has discretion to authorize a substitute.

At the rebuttal stage of the arbitration hearing, the Association amended its position to conform with the existing practice, and requested a clause entrenching the three day policy. The Division objected to the change of position without notice and would not consent to a collective agreement clause. However, the Division did not state any opposition in substance.

Given that the parties seem to be more or less *ad idem* in practical terms, I award the Association's amended proposal as a new clause effective June 30, 1998, as follows:

> **15.02(b)** When the absence of a principal exceeds or is expected to exceed three days, a substitute teacher shall be employed to perform the designated teacher's regular classroom duties during such times that the designated teacher is acting in place of the principal.

Deletion of allowance for Learning Assistance Centre Facilitator: Article 15.03

This position was vacated in 1991, deemed redundant and deleted from the staff complement in 1992. The Division requests deletion of Article 15.03 for this reason. The Association will not agree without a *quid pro quo*, namely, a new article on positions not covered by the agreement.

Deletion of Article 15.03 is awarded effective June 30, 1998.

Deletions and revisions to Article 16.01 (a)(b)(c)(d)and (e)

The Division proposed a detailed series of deletions and revisions, as set out at page 550 of its brief. These arise from the termination of the Continuing Education program in 1995 and the Evening School program in 1996. The Association refuses to agree due to its opposition to the contracting out of continuing education.

The Division agrees that the general scale increase be applied to the article as revised.

In practical terms, the positions in question no longer exist, and I therefore award the clause as requested by the Division effective June 30, 1998. The general scale increase will apply.

Summer school teachers and principals: Article 16.02

The Division argued that no change should be made to these rates, since there has been no difficulty attracting summer teachers at the existing pay levels. The additional cost to the Division is $3,000.

As previously noted, I have awarded the general scale increase across the board, which will include Article 16.02.

Rates for substitute teachers: Article 16.03(a)

The parties agreed to apply the general scale increase, and it is so awarded.

Layoff procedure: Article 18

The Division proposed a number of revisions to the layoff clause, some of which were agreeable to the Association, and some of which were not.

Firstly, for the stated purpose of rationalizing the terminology used throughout the Article ("assignment", "specific teaching assignment", "position"), the Division proposed new definitions in Article 18.01 of "position" and also "qualifications". Mr. Whiteway said that there was no problem here, but the rewriting would add clarity. The Association disagreed. Under the circumstances, this proposal is denied. The parties, of course, are encouraged to meet with a view to clarifying language in the agreement, to the benefit of both sides.

Secondly, the Division proposed to amend Article 18.02 to provide greater flexibility upon layoff to consider special program and administrative needs. The following clause was put forward. The italicized portion is the proposed new text:

> Where it is determined by the Division that a layoff is necessary and where natural attrition, transfers, and leaves of absence do not effect the necessary reduction in staff, the Division shall give first consideration, *after taking into account the special subject, programme (including language and cultural requirements) and administrative needs of the Division*, to retaining teachers having the greatest length of service with the Division.

The Division said that the current clause has caused serious problems, especially when numerous junior teachers in the new aboriginal schools were laid off in 1995, causing tremendous parent and community anxiety. Eventually, as retirements were finalized that year, the aboriginal school positions were re-filled, but the Division lost some teachers due to the disruption. These staff are very difficult to recruit, even though the Division is committed to affirmative action hiring and the development of culturally relevant school settings. The proposed clause would allow the Division to protect such priority teachers from the initial wave of layoff notices. A number of other programs were mentioned by the Division which might also be protected in the same way - Hebrew and Ukrainian bilingual programs, the Adolescent Parent Centre, Argyle Alternative High School, etc. The Division pointed out that a number of Manitoba school divisions have had the proposed clause in their contracts for many years.

When layoffs have been required in recent years, the Division has strictly applied the seniority list in identifying surplus staff, without regard to individual experience and abilities. This caused the impact on junior staff in special programs, as mentioned above. However, such strict adherence to seniority may not have been mandatory, in light of Article 18.03, which provides:

> Notwithstanding the foregoing [first consideration to seniority], the Board shall have the right to disregard the length of service of any teacher in the event of layoff, if such teacher does not have the necessary training, academic qualifications and experience for a specific teaching assignment.

In addition, during the course of this arbitration hearing, the parties agreed to add the word "ability" to the list in Article 18.03 (as well as 18.13 and 18.16). Thus, as the provision will now

stand, despite the seniority requirement on layoff, the Division will be entitled to disregard length of service if the senior teacher in question lacks the necessary training, academic qualifications, experience and ability. The definition of "ability" includes a teacher's demonstrated skill and competence to perform a particular teaching assignment.

The Association argued that this new version of Article 18.03 would accommodate any concern with respect to special programs and needs. As well, it was pointed out that in 1998, unlike the 1995 experience, there was only one teacher subject to layoff. Retirements have matched new hires, and for the future, the teacher age profile strongly suggests that there will be numerous additional retirements in the years ahead. In other words, the Association submitted that the problem has solved itself.

In my view, the Division's concern in this regard is serious and important. Strict adherence to seniority at a time when the workforce is shrinking can potentially adversely affect junior employees from minority groups and harm other special programs put in place by the employer. However, one must also recognize the fundamental nature of seniority rights under a collective agreement, and not undermine such rights without good cause. It seems that for Winnipeg School Division, the worst may have passed. Aside from the 1995 episode, no other specific evidence was adduced of problems, especially in the last year. If this problem does indeed arise again, the parties are free to revisit the issue based on actual experience.

Based on the foregoing, I would deny the proposed revision to Article 18.02. The revision of Article 18.03 is awarded on consent.

The third area addressed by the Division concerned Article 18.11 on notice of layoff. The present agreement requires notice by November 1 for layoff on December 31, and notice by May 1 for layoff on June 30. The Division explained that this is too rigid, given the increasing use of semesters, and the tendency for student population to drop during the year, which could necessitate layoffs at other times. The Division argued for a simple 30 day notice applicable

anytime during the year.

In response, the Association stated during the hearing that it would agree to layoff notice to be effective at the end of a semester, where such a system was in place, in addition to the traditional December 31 and June 30 dates, but only on retention of the current 60 or 61 day period. I believe that 30 days is an insufficient period of notice for a professional employee like a teacher, and therefore I cannot accept the Division's 30 day clause. However, it seems sensible to expand the time frames when layoff may occur to include semester-end, as agreed by the Association.

I therefore award a revision to Article 18.11 consistent with the foregoing reasons - two months notice for June 30, December 31 or the end of a semester. Article 18.11 will need to be redrawn, which I leave to the parties. Jurisdiction is reserved to settle any drafting problems which may arise.

Lastly, as mentioned above, by agreement, the word "ability" is to be added as a factor in Article 18.13 (recall within the prescribed period after layoff) and Article 18.16 (teachers employed less than one year), in the manner set forth in the Division's proposal.

All clauses are effective June 30, 1998.

Cumulative sick leave: Article 19.01

The Association requested an new clause requiring that each teacher shall be notified by the end of September of each year of his or her total accumulated sick leave entitlement. The Division did not disagree in principle, but its data handling system is still being upgraded, and compliance at this time would be a costly clerical exercise - about $40,000 per year.

The Division proposed that the references to "sick leave" be changed to "income protection" as

part of an effort to educate the workforce about the true purpose of this provision, namely, protection of the employee's income when he is medically unfit to perform his duties.

While these are sensible requests, neither proposal urgently requires incorporation in the collective agreement at this time. Both requests are denied.

Leave for professional business: Article 19.03

Both parties made proposals to amend this article.

This article allows each member of the Association to take not more than 5 teaching days for Association or MTS business in any school year, provided that a satisfactory substitute is secured and the Association or MTS pays the cost of the substitute plus 10% to the Division. While the theoretical total take-up under this article is enormous (about 12,500 days according to the Division), actual usage is relatively modest. In 1996/97, teachers took 173 days of professional business leave. The previous year 152 days were taken. The 10% adder was agreed to in previous negotiations by the Association, and recognizes that there may be some hidden costs involved when a substitute is utilized. Other metro Winnipeg divisions charge only the actual cost of the substitute, except for Transcona-Springfield, which uses a formula awarded in arbitration (substitute cost plus ½ the difference between the substitute rate and the teacher's daily rate).

The Division expressed concern about the potential total liability for days of professional leave, and proposed a cap of 100 days in each school year. Many divisions have agreed to caps with their associations, and the range runs from 15 days in some small divisions to 60 days in St. James and Brandon. The highest cap is 75 days in Mystery Lake. The Division presented no evidence of any abuse or actual difficulty caused by the present arrangement. I concur with Arbitrator Chapman who denied the same request by the Division in 1990, on the basis that there is no demonstrated problem of overuse.

The Division also proposed an increase in the 10% adder on substitute reimbursement under this article. While I accept that there is some hidden cost which justifies some amount over and above the actual cost of the replacement teacher, there is nothing in the record to support an increase to 50%, and there is no precedent to that effect. The total sums of money in question are not large in any event. I therefore find that the present formula is reasonable.

This article also provides that if a teacher assumes the position of Association or MTS President and takes a leave of absence for that purpose, there will be a measure of job protection upon return to teaching duties. If the President's previous position will not exist upon her return to duty, "the Division will offer the teacher another position which will be as similar to the previous position held by the teacher as can be reasonably established." The Association proposed to add the following words: "without loss of salary or benefits." It argued that teachers must be encouraged to become involved in leadership positions, and that there should be no detriment to serving as President. The Division agrees with this intent in principle, but points out that the proposed clause would give greater protection than if the teacher had never left their original job. No member of the Association is absolutely assured against loss of position or salary during downsizing.

I believe that the present clause provides reasonable protection to the President. Any arbitrary or unreasonable treatment could be grieved. I therefore decline to revise the clause as requested by the Association.

For the foregoing reasons, all the proposals under Article 19.03 are denied.

Additional maternity leave: Article 19.04(vi)

The current clause states: "Additional maternity benefits may be granted to female teachers provided a mutually satisfactory agreement can be concluded between the Division and the

teacher." The Division's proposed clarification really adds nothing to the present clause, and is denied.

Workload: Article 21

Aside from the salary issue, the question of workload occupied more time and attention during the current arbitration hearing than any other issue. This is understandable, since the two most fundamental provisions of any employment contract are pay and hours of work. In professional employee bargaining, of course, as compared to industrial plants, the overall workload cannot be precisely quantified, nor would it be desirable for either party to do so.

The current dispute arises from Association dissatisfaction with the enforceability of the workload clause awarded by Arbitrator Chapman in 1991, which might be characterized as the "base plus 5%" system. The 1991 article defines "instructional time" (time assigned by the administration for contact with students for instruction) and "assignable time" (time assigned by the administration for attendance at the school). The "Base School Year" is the 1990/91 year. In substance, the article states that neither the instructional time nor the assignable time of any full-time teacher shall increase by more than 5% over the average of such times for all teachers in the Division during the base school year.

To summarize the situation in brief, the parties cannot agree on numbers to quantify the base year definition due to data deficiencies for 1990/91, and they cannot agree on a replacement definition of workload. It would be unproductive to recite in detail all the events in this regard since 1991. As a result, as in the 1991 hearing, the Association is again proposing a specific set of hours for inclusion in the collective agreement. The current proposal is as follows. Base year instructional time would be 22 hours per week averaged over the school year (4.4 hours per day). Total base year assignable time would be 28.75 hours per week averaged over the school year (5.75 hours per day), which includes instruction, preparation and time required by provincial regulation. The

5% cap would be restated as a cap of one (1) additional hour per week of instructional time, with the added proviso that where a teacher has been assigned an increase, there would be a corresponding decrease the next year. Part-time teachers would be covered pro rata.

It was common ground that teachers work far beyond these basic time periods, both inside and outside the school. A 1980 Alberta study estimated that for each hour of instruction, a teacher spent an additional hour in preparation and follow-up. For purposes of completing records of employment under the federal *Employment Insurance Act*, the parties agreed on a standard of 45.5 hours per week, but this was understood to be confined to the EI context. As well, there is the whole matter of extra-curricular duties, which has generated considerable debate and litigation. The Division argued that teachers have been held to be bound to carry out many such activities as part of the job, which I do not believe was in dispute for the present purposes.

Since the base plus 5% clause was awarded in 1991, a number of other divisions have adopted the same system, either by award or negotiated settlement. Mr. Shyka advised that about 40% of teachers in Manitoba are working under this type of clause. The rationale for having such a provision in teacher contracts was stated by Arbitrator Freedman in *Transcona-Springfield (1989)* (at p. 44) in the following terms, and has been endorsed repeatedly thereafter by other boards:

> ... one can appreciate the argument that for the Division to have the unilateral and unrestricted right to increase the demands on teachers once the collective agreement is signed, without recourse by the teachers, has elements in it of at least potential unfairness.

The need for reasonableness on both sides was expressed by Arbitrator Chapman in the 1991 Winnipeg School Division award (at p. 21): "The Association must accept that, within the present educational system, it cannot mandate rigid strictly limited hours. The Division must concurrently accept that it cannot mandate unreasonable work loads."

Several members of the Association made individual presentations to the board, describing the

growing demands and expectations facing teachers today. This evidence was qualitative in nature rather than quantitative, but the picture is clear. Karen Klisko teaches nursery and kindergarten. She said that over the past 5 years, there have been new curricula, new computer technologies to be mastered, more special needs students integrated into classrooms, increasing demands relating to student assessment and growing issues around safety and child custody.

Brenda Craig is a grade 1 teacher with 27 years of experience. She described how new curricula appear virtually unannounced. New responsibilities are being imposed on classroom teachers which were unknown previously, relating to autistic and ADD children, medical disabilities, ESL, and fetal alcohol syndrome. Many families are stressed or dysfunctional. Child and Family Services is more involved. In response to all of this, supports and resources for teachers are diminishing.

Finally, Annick Carstens teaches S1 to S4 and reported that every curriculum has changed since 1995, including the adding of S1 to high school. She teaches six curricula. Classes are larger and there are more special needs students. Lab assistants are being reduced, as are other teacher supports. There is greater pressure to participate in extra curricular activity, especially since the release of the Scurfield report.

The Association emphasized that there must be an effective remedy for rights contained in a collective agreement. The present workload clause is not enforceable without a definition for the base year. Mr. Dave Najduch presented the Association's study on 1990/91 workload, which included an extensive survey of timetables and working arrangements across the Division. While there are admitted methodological challenges, the Association claimed that the data support the proposed 28.75 hour assignable time proposal.

The Division strenuously opposed the Association's proposal and costed it at $5.0M. The Division presented three options: delete the current clause, leave the current clause as it stands or award a new clause stating a minimum expected time commitment (exclusive of lunch period) of

45.5 hours, with related language concerning teacher duties. Ms Schubert gave a detailed presentation on the process for allocating human resources throughout the Division based on differentiated pupil-teacher ratios and local area needs. She made the point that workload varies based on many different factors, and is more complex than just the time factor, which is the basis for the Association's proposal.

The Association argued that workload has clearly increased since the base year, as evidenced by the Division's estimated $5M cost to comply. I believe that this would be true if the Association's version of the base year numbers is indeed accurate. The problem is that definitive conclusions cannot be drawn. During his rebuttal argument, Mr. Shyka said the teachers were prepared to move the base year to a period where better data is known to be available, including the current year. He asserted that using the current year, there should be no employer cost at all.

Notwithstanding the difficulties in defining work time for professional employees, I believe that there must be a workable clause in the collective agreement on this subject, recognizing that the Division must have some reasonable flexibility and that teachers must have some benchmark for assessing perceived unreasonable growth in their workload.

This is not an easy objective to accomplish, and cannot be solved at the stroke of an arbitrator's pen. Whatever the board might award will still require follow-up efforts by the parties in good faith to generate practical operating arrangements. As Ms Schubert and Mr. Gerbasi said, teacher workload is a complex subject. Thus, I do not believe that it would be responsible at this juncture to simply delete the current clause, as proposed by the Division. Nor do I find that the board is in a position to accept the specific definitions for instructional and assignable time as proposed by the Association (totaling 28.75 hours), or the division (totaling 45.5 hours). Moreover, it does not seem responsible to leave the current clause in place, since the parties have not succeeded in making it work after seven years.

There may well have been significant workload increases since the 1990/91 base year, but it was

open to the Association to grieve under the existing clause if that were the case. Even if incontrovertible quantitative proof could not be produced, a rights arbitration board could and would entertain qualitative evidence along with whatever objective data was available, such as the Association's study, and a finding could be made. No such grievance, either individual or policy, was ever commenced. I sense that whatever the true facts may be concerning the 1991-98 period, it may be necessary to leave the past behind in order to achieve some resolution on this issue.

The base plus 5% system has its warts. When the current clause was awarded by Arbitrator Chapman in 1991, both nominees (Mr. Shrom and Mr. McNicol) expressed reservations. However, it does seem to be the prevailing approach in Manitoba. We don't really know whether it can be functional with suitable input data for the base year, since no such data have been agreed between the parties for 1990/91. Hopefully the clause has the capacity, eventually, to work for the parties. It seems likely that current data would be much more readily available and less subject to controversy.

Since the teachers have made what in their minds is (and may in fact be) a major concession by accepting a current base year, I believe that a fair resolution at this time would be to revise the current clause by updating the base year definition. I therefore award the following amendments to Article 21:

21.02 Revise to read: This Article shall come into force and effect on June 30, 1998, and shall be applicable to school terms commencing on and after September 1, 1998.

21.05 Revise commencement date to September 1, 1998 and revise "Base School Year" definition to be the school term commencing on or about September 1, 1997 and continuing to on or about June 30, 1998.

21.06 New clause: The parties shall meet within two (2) months of the signing of this agreement to exchange any relevant information in their possession which may assist in giving effect to this Article, and shall meet thereafter as required.

> The parties shall make all reasonable efforts to conclude an agreement further implementing the provisions of this Article. The parties shall address the reasonable application of this Article pro rata to part-time teachers.

Jurisdiction is retained to settle the final wording of the new Article in conformity with the foregoing. This includes jurisdiction to consider the settling of the quantification of the "Base School Year" definition if, after reasonable efforts under new clause 21.06, workable arrangements cannot be concluded by the parties.

Personnel Development Program: Article 27

Since 1982, the Division has offered a program which allows professional staff to develop their leadership skills and increase their awareness of the Division's operations. Participants are chosen through a process involving both parties. The current clause in the collective agreement specifies a minimum program duration of 10 days. Half the days will be regular teaching days. The Division proposed that there should be no stated minimum, leaving the program to be arranged on a year by year basis. The Association replied that according to the Division's policy, the program is already reviewed on a yearly basis by representatives of the Association and the Division's Human Resources Department.

There seems to be no pressing basis for revision of this Article, and the Division's proposal is therefore denied.

Absence for personal business: Code of Rules, Section 5.1(b)

Chapter 5 of the Code of rules deals with leave of absence, and Section 5.1(b) provides for paid leave when permission has been granted in certain situations. The Association proposed revisions to sub-clauses 5.1(b)(i)(6)and(9) to remove any discrimination based on sexual orientation, in accordance with the MTS position with respect to all benefit plans. The Division was opposed

only because the Association provided no definition of "partner" in the proposed article. Mr. Whiteway stated that the Division agreed with the intent. As well, Mr. Shyka said that the Association had no desire to expand the scope of the leave entitlement aside from removing the gender references.

The Division suggested that the following definition of "partner" be added to the proposed new clause:

> Where a teacher establishes that he/she has been residing with a person of the same gender and has lived with that person in a marriage-like relationship for at least twelve (12) months and has publicly represented that person as his/her spouse, that person shall be deemed to be the same gender partner of the teacher.

The clause is awarded as requested by the Association effective June 30, 1998, subject to including the Division's definition as above or as the parties may otherwise agree, if further finetuning is needed in drafting.

Pro-rata of allowance: New Article

The Division proposed that the collective agreement be clarified to specifically indicate that where any position listed in the agreement is not a full time position, then that allowance or applicable rate of pay will be pro-rated for the amount of time the employee is assigned, on a daily basis, to that position. The Division provided a considerable amount of background to this request, explaining that in a number of situations, employees were required to, or have requested to move to part time status. The practice and understanding is that pay is pro-rated, according to both parties.

The Division wants this understanding written into the collective agreement. The Association did not agree, stating that there might be some effect on certain principals or vice-principals, and

that the clarification was unnecessary. The Association did not elaborate on the potential impact.

This does not seem to be a contentious matter. The Division's request is awarded effective June 30, 1998. Jurisdiction is retained to deal with any implementation problems which the parties may experience in drafting the required clause or clauses.

Sick leave coverage for health related absence arising out of pregnancy: New Article

The Association has been trying over the course of five sets of negotiations to persuade the Division to enter a Supplemental Unemployment Benefit plan covering employees on maternity or adoptive leaves of absence. Such plans cover most of the employee's salary through a combination of unemployment insurance benefits (now called employment insurance) and employer top-up payments. No agreement could be reached.

In 1994, Association members launched a series of grievances under Article 19.01 seeking sick leave payment for the duration of their maternity leave periods. A settlement was reached, with the advice of legal counsel for both parties, and a Letter of Understanding ("the protocol") was executed on March 3, 1995. The protocol sets out principles and procedures to be used "in considering applications for sick leave coverage for disability arising out of pregnancy, labour and delivery, and recovery from same". The parties recognized that pregnancy may give rise to a period of disability, and contemplated an application process, provision of necessary supporting medical information to the Division, and a decision to pay sick leave benefits for such period of time as is supported by the information.

Both parties experienced problems dealing with applications under the protocol, especially in obtaining adequate responses from some medical practitioners. However, the Division finds the protocol to be basically acceptable, while the Association has concluded that further changes are needed in the regime for handling sick leave during and after pregnancy.

Lengthy submissions and filings were presented to the board on this subject. The essence of the dispute is this. In acting under the protocol, the Division will only pay sick leave if it is established that the teacher was unable to work because of illness or symptoms due to pregnancy, labour, delivery and recovery. Where the pregnancy and recovery are normal (without illness), but the teacher is absent from work on medical advice in order to maintain good maternal and fetal health, the Division does not pay sick leave.

The Association believes that teachers should be able to receive sick leave for any health related absence during the maternity process, not just when they are ill, or to use the words of the protocol, experiencing "a disability".

Medical opinion supports the notion of a valid health related absence in these circumstances. The Alberta College of Physicians and Surgeons issued a statement on July 7, 1992 as follows:

> That, for a normal pregnancy, a reasonably health-related absence from the workplace might be a period of up to 13 weeks, including two weeks before the expected date of delivery.

The College goes on to say that this statement is not intended to interfere with a physician's clinical judgement, nor does the 13 week figure constitute a minimum or a maximum period. It was intended as a "ballpark" point of reference. No equivalent Manitoba College of Physicians statement was brought to the board's attention.

The Association initially presented two bargaining proposals under this heading. The first proposal revised the protocol by substituting "health related absence" for "disability". However, during the arbitration hearings, the Association withdrew its primary proposal and requested that the alternative article be awarded, as follows:

> 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 for a valid health-related reason(s). The pregnant teacher shall follow current proof of claim procedures for sick leave entitlement as may be required by the Board.

As noted by the Alberta College, while there may be a presumptive period of health related absence, each situation would have to be assessed individually. Speaking for the Division, Mr. Gerbasi said that if the article was awarded as sought, it would amount to a presumptive period of paid sick leave, with significant cost implications. The Division's costs involve the substitute teachers required to cover for regular teachers absent on sick leave. Assuming a presumptive period of 6 weeks, the Division projected an annualized cost of $226,000.

The Association argued in essence that the proposed article was required to avoid discrimination based on pregnancy, as defined by the leading case of *Brooks v. Canada Safeway Limited* (1989) 59 D.L.R. (4th) 321 (S.C.C.). *Brooks* was applied in *Re Parcels and the Red Deer General & Auxiliary Hospital and Nursing Home District No. 15 et al* (June 19, 1991) (Board of Inquiry), affirmed at (1992) 17 C.H.R.R. D/167, 90 D.L.R. (4th) 703 (Alta. Q.B.). Adjudicator de Villars held as follows:

> If a valid health-related reason for absence exists, the employee must be compensated for the time during which the reason lasts.
>
> ...
>
> The Supreme Court is clear that the *Brooks* rationale begins when the valid health-related reason for absence during pregnancy begins. The medical evidence is clear that all women need some time off work before delivery for purposes of their health - even if it is only at the onset of labour. Payments under a benefits plan that compensates health-related absences must begin as soon as the pregnant woman is away from the workplace for a health-related reason.
>
> ...

> The Supreme Court is equally clear that the *Brooks* rationale ends when the valid health-related reason for absence during pregnancy ends. ... Until such time as her health permits her to return to work, a pre-delivery or post partum woman is entitled to payments from the employer benefits plan.
>
> ...
>
> ... "Health" refers to the physical and psychological health of the woman and the health, wellbeing, growth, and development of the fetus. Social health is also part of "health" in Canada. It means the woman's ability to function as a social being interacting with her family, employer and significant others.
>
> A "health-related absence from the workplace" is an absence that is required by the patient's medical condition. The medical condition is such that it is desirable or necessary for the patient not to perform her job tasks. (At p.8-11)

The same approach was taken in *Ontario Cancer Treatment and Research Foundation et al v. Ontario Human Rights Commission* (1998) 156 D.L.R. (4th) 174 (Ont. Ct. Gen. Div.), citing and approving *Parcels.*

For precedent, the Association points to the award in *Assiniboine South (1994)*, where the board awarded essentially the same clause as proposed here. Arbitrator Penner wrote: "It is commonly recognized that, generally, maternity leave ... is a combination of non health-related needs (e.g., simply getting everything ready for the new arrival) and health-related reasons. Surprisingly, it seems to us, the current agreement as it is applied fails to recognize the health-related component in maternity leave." A similar clause can be found in the collective agreement with Tiger Hills No. 29. The Association argued that if adoption of these clauses was unduly onerous to the employer, evidence to that effect would have been available, but none was presented by the Division.

In summation on this article for the Association, Mr. Shyka chose not to advance a legal argument *per se.* The Association based its case on equity and fairness, leaving the matter of possible legal

violation for another day. Neither did the Division introduce any legal opinions or argument. In my view, this issue can and should be determined on the basis of fairness in a collective bargaining sense, although there are clearly cogent arguments available that the proposed clause is legally mandated as well.

While I accept that the Division is trying in good faith to administer the protocol fairly, I find that the result is not fair to pregnant teachers. Non-application of the sick leave provisions to a pregnancy which, although normal, carries with it the reasonable necessity for health-related absence, is inappropriate and unfair. The focus on illness and disability has unreasonably narrowed the scope of coverage. A sick leave program is not just about absence of illness - it is about ensuring employee health. For pregnant employees, as noted in *Parcels*, "health" refers to the physical and psychological wellbeing of the woman, as well as the growth, development and wellbeing of the fetus and baby. There can be no artificial dividing line in this context between the woman and her child.

While the Association clearly is seeking an S.U.B. plan in the long term, this requires the agreement of both the employer and the Unemployment Insurance Commission. It may or may not be achieved. There was discussion of a rights grievance under the protocol as an alternative remedy, but again, whether or not such an approach would be efficacious, this board ought to address the substance of the issue to the degree possible. The Association has requested a clause which would deal with the health component of maternity leaves. This is an important issue, and it should be resolved without ongoing adversarial proceedings.

Cost to the Division is also a serious concern. I have already recognized the gravity of the Division's position in my review of the general salary scale increase. Clearly, this is not the time for wholesale improvements in the collective agreement. Nevertheless, priority equity issues should be considered on their merits. The estimated cost of $226,000, which as noted by Mr. Gerbasi could in fact be higher, depending on experience, is less than two-tenths of 1% of payroll cost. I find that this expense is not undue in the circumstances.

The proposed article is awarded effective June 30, 1998.

Compensatory time: New Article

The Association proposed a system of compensatory time for duties performed outside the regular school day or school year which are related to school governance, Division committees or representation of the Division. Time would be accrued up to 5 days and would not be cumulative beyond one school year. Guidance counselors now qualify for compensatory time in this manner under some circumstances.

The Association argued for this clause on the basis of new governance and advisory structures which are being created in the school system and in the community around the school. The Division stated that teacher participation is voluntary and that in any case, such activity is part of the overall package for which the Division pays a professional level salary. Assuming maximum take-up by every teacher, the Division estimated a cost of $1.4M. The Association claimed that a more realistic cost estimate would be $99,000 per annum.

I am not persuaded that this new article should be included in the collective agreement. The Association request is denied.

Travel time: New Article

The Association proposed the following clause:

> The workload of a teacher who, as part of their duties, is required to travel between schools, shall be adjusted to reflect adequate time for traveling, exclusive of lunch and preparation time.

The Association raised this issue because on occasion, a teacher is working ½ time in each of two

locations, and has to travel over the lunch hour to reach the second school. The Division replied that such cases are rare and have been accommodated satisfactorily. However, the Division estimated a cost of $33,000 for this Article, suggesting that there may be a number of teachers affected. The Division also said that while one compliance option would be hiring more staff to cover for itinerant-teacher travel time, another possibility would be laying off such teachers, and hiring part-time teachers at each of the two locations now being handled by one teacher.

This is not a major item, but where travel is required to meet job responsibilities, it seems fair that the collective agreement ensure that reasonable time is available for the teacher concerned. If, as the Division stated, this is a non-issue, then the incremental cost and administrative burden will be nominal.

Based on the foregoing, the article is awarded as requested by the Association effective June 30, 1998.

Contracting out: New Article

The Association argued vigorously for a restriction on contracting out, even though it was acknowledged that this type of clause is generally not found in teacher agreements. The Association proposal was as follows:

> In order to provide job security the Division agrees not to contract out services which are or have been performed by the employees of the Association where such contracting out would result in a reduction in membership within the Association.

The instigation for this proposal was the termination of the Division's Continuing Education Program and later the Adult Education Centre program, and the offering of similar services to the public through a private company (Sera Smith Educational Consultants) retained for the purpose by the Division. The company is operated by two former senior Division employees,

and appears to be utilizing some Division premises and facilities. Mr. Shyka said that this action was not challenged, on legal advice, since there is no restriction on contracting out at present. The Association is not seeking to reverse the decisions already made, but is worried about future potential cuts in bargaining unit work - nursery education, summer school, institutional education programs, even substitutes.

The Association experiences no comfort in hearing the Division say that such a clause should not be awarded because the Division would never, under any circumstances, agree to it in collective bargaining. Mr. Whiteway stressed that in the current fiscal climate, the Division insists upon retaining maximum flexibility. The option to contract out is very important to the Division. If interest arbitration is intended to replicate reasonable bargaining outcomes, then contracting out restrictions cannot be part of the award. There are now several such clauses in the Division's non-teaching collective agreements, but the Division's objective is to remove them as soon as it can. Mr. Whiteway urged the board "not to tie the hands of management".

The board inquired several times about the magnitude of the impact on Association membership as a result of the above-noted program terminations. It appears that the Continuing Education cutback affected 11 regular teachers and 12 casuals who were paying pro-rated dues. The teachers retained their main employment with the Division, but the casuals were let go, subject to seeking positions with Sera Smith. In the Adult program, 4 teachers were affected, but it was believed they held regular teaching jobs as well. Thus, the impact has not been substantial to date, but clearly, there could be much more serious erosion of the bargaining unit if contracting out was extended on a broad scale.

In *B.C. Tel v. Shaw Cable* (1995) 125 D.L.R. (4th) 493 (S.C.C.), Mr. Justice Cory explained the significance of this issue for unions and the system of labour relations as a whole:

> The exclusive right to work clause ... provides the basic foundation for the collective agreement itself. It is of such fundamental

> importance to both parties but, particularly to labour, that I would be surprised if this type of clause is not included in every collective bargaining agreement. In fact, the exclusive right to bargaining unit work is so essential to labour relations that it has been described as a proprietary right. It must be remembered that clauses which reserve an exclusive right to do certain work to a bargaining unit provide a foundation, not only to a particular collective agreement, but, more importantly, to the entire system of labour relations. Without such a clause, bargaining unit work could be contracted out to those who are not covered by the collective agreement, thereby defeating the entire legislative scheme of collective bargaining. In my view, the importance of these clauses cannot be overemphasized.

It would appear that to date, this issue has not arisen in Manitoba, and there are no precedents in teacher contracts for a restriction on contracting out by school divisions. However, financial pressure on divisions has been increasing over the past several years, which may induce trustees to consider contracting out as an option. Winnipeg School Division has done so, but only outside the core public school service. For any employer contemplating such a move in a substantial way, there are serious labour relations implications to take into account, and at least for public employers, there are political factors. It is not yet clear whether this issue is a looming threat to the Association.

Under the present circumstances, including the unprecedented nature of the proposal and the Division's vehement opposition, I am not prepared to award the clause requested. I recall that in arguing against the Division's salary position, the Association stated that public employers were obliged to pay "the going rate", whatever the hardship, and that any ensuing political decisions to restructure public services were not the concern of an arbitrator.

Having said that, I do believe that at a minimum, there should be some requirement for advance consultation and information sharing in the event that the Division does choose to contract out further bargaining unit work. This would allow for a more open and reasoned debate around the question. The Division is a public employer offering essential public services, and it would be

appropriate that any such decision be as transparent as possible. I took it from Ms Yee-Wickler's comments that there was considerable frustration among Association members about the closed nature of the decision-making process whereby the Sera Smith contracting out was approved. Whether or not a particular collective agreement prohibits or restricts contracting out, it is indisputable that bargaining unit members have a legitimate interest in this matter. Fair process should apply.

I therefore award the following article effective June 30, 1998:

> In order to recognize the interest of the Association's members in job security, the Division agrees not to contract out services which are or have been performed by the employees of the Association where such contracting out would result in a reduction in membership within the Association, until
>
> (a) the Division has provided to the Association four months written notice of intent to contract out such services, including a report in reasonable detail outlining the nature of the proposed contracting out arrangement, the reasons for the proposed contracting out, the expected benefits, the options considered, and the expected impact on membership within the Association, and
>
> (b) the Association has had an opportunity to appear before the Board of Trustees to make representations with respect to the matter.

Position not covered by the collective agreement: New Article

Both parties presented proposals to deal with the situation where a new category of employment or a new position is created which would be subject to the collective agreement, but for which there is no existing provision. At present there is no mechanism in the agreement to deal with such cases.

The Association suggested the following procedure. If a new position is created, the Division would notify the Association, and the parties would negotiate to settle salary, duties, qualifications and any other relevant matters, prior to the appointment being made. Failing agreement, the dispute would go to arbitration under Article 8. Salary or allowances would be effective from the date of appointment.

The Division's proposal was similar, in that the parties would meet and attempt to agree on the new rate of pay as soon as possible. However, the Division would leave such matters to the next round of negotiations if no resolution could be reached, rather than invoking arbitration, an expensive solution.

Both proposals contain reasonable elements. The Association is seeking some assurance of a timely settlement of such matters. Collective bargaining sometimes drags on. There may be multi-year contracts. On the other hand, the Division is entitled under its management rights to create positions, fix rates of pay and qualifications, and get on with the work, without undue delay. Keeping in mind the needs of both parties, and drawing upon the proposals of each side, I award the following clause effective June 30, 1998:

> If, during the term of this Agreement, the Division creates a new position or category of employment which would be subject to the Agreement, the following provisions shall apply:
>
> (a) The Division shall notify the Association of the new position or category of employment, and the proposed rate(s) of pay which will be applicable, and
>
> (b) A representative of the Division and the Association shall meet as soon as possible to negotiate the applicable rate(s) of pay to be incorporated in the Agreement, and
>
> (c) The parties will attempt to reach agreement before any appointment is made hereunder, but if the Division believes in its discretion that there is an urgent need to make an appointment before negotiations are concluded, the

Division may do so on the terms which it has proposed, and

(d) In the event that the representatives of the parties are unable to reach agreement, the Division will establish the rate(s) of pay, and the matter will then be dealt with in the next negotiations for an amended Collective Agreement under Article 3, subject to the following, namely,

(e) In the event that 12 months have elapsed since the appointment(s) under this Article without a negotiated resolution of the rate(s) of pay, the matter may be submitted to Arbitration in accordance with the provisions of Article 8, and

(f) In any case, salary, allowances and any other terms as agreed by the parties or established by an arbitration board hereunder shall be effective from the date of the appointment(s).

Concluding remarks

I wish to thank the parties and their representatives for their energy and dedication in presenting this case on behalf of their respective sides. The parties can rest assured that every available argument was capably advanced by their representatives before this board, not to mention every conceivable piece of documentary evidence which was filed.

Appreciation is due as well to the witnesses from both sides who appeared before the board and expressed their viewpoints with clarity and sincerity.

I am particularly grateful to my colleagues on the board for their patience, hard work and able assistance.

The board will remain seized of jurisdiction for the purpose of clarifying and implementing its award, if necessary.

DATED at the City of Winnipeg this 14th day of December, 1998.

ARNE PELTZ, Chairperson

I concur in part and dissent in part with respect to the above Award, and my reasons are attached hereto.

Dated at the City of Winnipeg this 14th day of December, 1998

E.W. OLSON, Q.C.
Nominee of the Division

I concur with respect to the above Award, /subject to /comments and partial dissent, which ~~and~~ my additional ~~reasons~~ are attached hereto.

Dated at the City of Winnipeg this 15th day of December, 1998.

DAVID SHROM
Nominee of the Association

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THE PUBLIC SCHOOLS ACT

BETWEEN:

THE WINNIPEG TEACHERS' ASSOCIATION NO. 1

of THE MANITOBA TEACHERS' SOCIETY,

Bargaining Agent,

and

THE WINNIPEG SCHOOL DIVISION NO. 1,

School Board.

DISSENT OF E. W. OLSON

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DISSENT OF E. W. OLSON

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OVERVIEW

I have reviewed the Award of the Chair and find that I am in disagreement with a number of points, warranting these comments.

A number of the general principles applicable to arbitrations under the *Public Schools Act* are set out and commented upon in the majority Award. These include comparability with other teachers' contracts and non-teaching contracts, a developing pattern of settlements, the "ability to pay" principle in the public sector, the effect, if any, of the refusal of Winnipeg School Division No. 1 ("the Division") to force upon its teachers, (as it was permitted to so do by legislation), unpaid leaves of absence (commonly known as "reduced work weeks" or "Filmon Fridays"), and whether there are any compelling and exceptional circumstances applicable to this contract and the relationship between these parties which warrants a departure from what otherwise ought to be the result of the interest arbitration based on the evidence before this Board.

As well, I disagree with several articles being awarded at all and if they are to be awarded, would have awarded several additional articles requested by the Division, through the application of the same principles.

ABILITY TO PAY

Much attention was directed at the "ability to pay" principle. In my view, this concept is not as difficult as many of the writers and arbitrators have made it out

to be. First of all, any public sector employer, and in this case the Division is so categorized, effectively has an obligation to balance all of the interests of those within its authority, and teachers are but one of the private interests in question. The same argument is true of any level of government, whether it be municipal, provincial or federal. Each interest group falling within the legislative or contractual authority of a public employer has its' own private interests and needs, and conceptually, particularly in difficult economic times, each can justify its position taken alone. It is the obligation of the public sector employer, however, to make the difficult decisions as to where to allocate the finite and sometimes diminishing resources based on the priorities as determined by it to best serve the entire population. It is in this sense, in my view, that 'ability to pay' is properly considered in the public sector as a consideration of the degree of difficulty faced by the employer. To ignore such a factor, as suggested by the Association, would be to ask this Board to grant a priority automatically to the wishes of the teachers without facing the practical reality which the Division faces - that revenues are stagnant or declining, important programs need to be continued and all costs continue to rise.

Accordingly, it is no answer here to say that the dwindling resources available to the Division is a problem caused by the Province by a reduction in grants or other funding because at a practical level, the fact is there is a finite amount of money available to the Division to balance the various competing demands on it, and to priorize the programs which it must deliver to adequately meet the needs of the

population within the geographic area served. All taxpayers within that geographic area are subject to the taxing authority still available to the Division, but those taxpayers are in similar difficulties insofar as they are also taxpayers to the municipal, provincial and federal levels, where restraint continues to be the applicable approach, and deficit reduction the desired objective. So too most of those taxpayers are employees themselves and are, therefore, subject elsewhere to diminishing or non-existing increments despite rising costs of living.

In fact, the Province of Manitoba has cut back financial support to the various recipients of funding in the education field because it, the Province, has suffered an even larger cutback in transfer payments otherwise due to it from the federal government.

There are then no easy solutions, but "ability to pay" as a concept remains a very real issue even in the public sector. Some have commented on its meaning as including the longer term presumptive ability to justify any increases to the taxpayer. Others would assess, in any particular circumstances, the ability of an employer in the public sector to pay by viewing the business plan employed by that public sector employer to administer the finite resources available to it, and to priorize the programs delivered by it in satisfaction of its obligation to the recipients of the service, in this case, the teaching and educating function. Both are valid approaches.

I would agree that ability to pay ought to be utilized not to avoid the payment of a "fair wage", but rather in the determination of what is fair for any public sector employer. Ability to pay encompasses an assessment and consideration of all of these factors in the unique circumstances of that particular public sector employer. This would also include a consideration of the political realities that exist prior to exercising any taxing power that might exist. Ability to pay further includes an assessment of the relevant factors such as the absence of contingency funds or surpluses, the availability of supplemental funding, and the constraints on funds dedicated to special purposes.

However, applying these concepts and considerations to the facts before this Board results in a difference between the majority and my assessment as to what ought to result in any award to the teachers in this Division.

Efforts were made in the course of the submissions to this Board to draw support from various comments made by arbitrators in circumstances contained within previous arbitration awards in the education field. A careful review of the major awards in that regard, do not support the teachers' position here, as the circumstances were different in those other cases. A representative sampling follows.

Mr. Chapman in the Flin Flon arbitration in 1997, after taking into account the traditional ability to pay considerations, still awarded the average increase

then being agreed upon or awarded in that year. However, in reviewing the arguments of the School Division there in respect of its ability to pay that "going rate", it is apparent that the School Division had a surplus at the time and was concerned with its reduction. That is not the case here, as the surplus that had existed in earlier years, has been used up, at least in part by the Division's decision to honour its contractual obligations to these same teachers, and not impose any work reduction program authorized by legislation several years back.

The Association relied on the Chilliwack decision of Mr. Dorsey in 1997 in support of its position that, so long as a School Division still had the authority to tax, it could not have an inability to pay. That decision only found there to be an inability to pay because the School Division there in question had lost the ability to tax. However, that decision also referred to the various factors that ought to be considered in assessing an ability to pay, and those included the funding formula and its limits, the ability to incur or carry a deficit, the constraints on funds dedicated to specific purposes, the absence of contingency funds, the availability of supplementary funding, and the appropriateness of budgetary plans. Applying all of those factors here, it is difficult to conclude there is an ability to pay without some constraints.

The Association also relied on the decision of Mr. Scurfield in 1995 in the River East arbitration in which he expressed the view that it ought to be the taxpayer, not teachers, who should shoulder the burden of educating the young. Looking

further at the facts there, it is apparent that what was being sought was a wage rollback and Mr. Scurfield expressed the view that there was no support for such a rollback, even though revenues were declining, as overall that School Division ranked as the second lowest payor in Winnipeg, and therefore, on a comparability basis, the rollback could not be supported. Those circumstances do not exist here.

Finally, the Association relied as well on the decision of Mr. Scurfield in Brandon in that he determined that Brandon did have the ability to pay despite difficult economic circumstances. However, the award in Brandon of 2% resulted from Mr. Scurfield being convinced that Brandon taxpayers had the ability to pay such an award "without reducing any necessary services". There is no such evidence here. Further, Mr. Scurfield in Brandon relied on the fact that Brandon's education tax was the second lowest in the Province, with other surrounding areas paying twice as much. It is clear that it was that differential in the tax rates which resulted in his conclusion that the taxpayers there had the ability to pay. Even then, as noted elsewhere, Mr. Scurfield varied the implementation dates from the apparent pattern that was then developing, a fact relied on by the Division here.

As both parties have relied on Mr. Scurfield's decision in Brandon for differing reasons, a closer look at that decision and its analysis of the evidence before it, is appropriate. Mr. Scurfield looked at a number of factors to ascertain whether there was cogent evidence to warrant a deviation from the voluntary settlements

elsewhere, both as to the amount and the timing of such increases. He could find no basis, as I read his decision, on the following six factors, to justify a deviation, in terms of the amount, yet still changed the timing of the implementation. Applying a similar analysis here, if cogent evidence is found before this Board on these six factors which warrants a deviation, ought not there to be a significant adjustment in the timing of any implementation, as requested by the Division? The six factors considered by Arbitrator Scurfield were as follows:

(a) COST PER PUPIL. In Brandon, Mr. Scurfield observed Brandon was eighth, and in fact was the second lowest in terms of dollars. On a comparative basis, Winnipeg School Division is among the highest.

(b) PUPIL TO TEACHER RATIO. Again, Mr. Scurfield found Brandon was the eighth highest at 16.4, and in Winnipeg, the ratio on the evidence before us was 14.1, and the provincial average was 15.4. Both this factor and the previous one are explicable in this Division due to the programs required, the diversity, the ethno-cultural differences, and the "uniqueness" of this Division. Accordingly, on either of these factors, there ought not to be any support drawn by either the teachers or the Division from the Brandon decision.

(c) SPECIAL LEVY MILL RATE. Mr. Scurfield found Brandon's rate to be 12.9, the second lowest and compared it to the average of 18.7 mills. Winnipeg's rate is 23.6 mills, a factor which argues in favour of the Division's position.

(d) TOTAL EDUCATION TAX PAID. Mr. Scurfield found Brandon's tax paid had decreased from 1991 through to 1997. On a comparative basis, the data before this Board indicated there had been an increase in education tax paid of 41.71% between 1992 and 1998 in this Division.

(e) THE SIZE OF THE ASSESSMENT BASE. Mr. Scurfield found Brandon to have an average assessment base. This Division has had a decrease of 11.5% in it's assessment base since 1994. There could not be a more compelling factor warranting a deviation from any "norm" that might be established by pattern.

(f) THE ABILITY TO PAY WITHOUT REDUCING NECESSARY SERVICES. Comment has already been made above on Brandon's circumstances. In this Division, there was a $21 Million reduction in expenditures in the last four years, the surplus was used up, and the Division did not implement Filmon Fridays as referred to previously - hardly permitting a

conclusion that this Division has an ability to pay without reducing the necessary services.

The argument, then, is compelling, by reason of factors 3 through 6 in this Division, that a deviation from voluntary settlements elsewhere is warranted and the Division's ability to pay is severely strained as its taxes paid and mill rates are virtually at the maximum, erosion is a significant factor with no apparent cure in the future, and while the Division thus far has been managing well, it has run out of options.

UNIQUENESS/COMPELLING AND EXCEPTIONAL CIRCUMSTANCES

Much evidence was adduced by the Division as to its size, socio-economic position, special requirement students, nutritional and other special programs, along with its eroding tax base, increasing school taxes, and significant cost per pupil, despite good management and the higher needs of its students. Clearly, this Division is in a much more detrimental position as compared with its neighbouring school divisions than has been the case in previous arbitration awards. This includes the decision of Mr. Chapman in St. James in 1994, in which he, in fact, relied on the relative positive position of the St. James Division to its neighbours in arriving at his decision, and the decision of Mr. Teskey in respect of the Transcona School Division in 1994 in which he both relied on the existence of a surplus in that

school division, and the fact that savings had been generated through the implementation of Filmon Fridays to justify an award of the "going rate" there.

In applying all of these considerations to the case before this Board, this Division is faced with escalating costs, increasing unique needs, and a diminished ability to balance the quality and diversity of programs it delivers with the improvements sought by its teachers. Indeed, the cost of the pecuniary demands before this Board as submitted by the Association is most unrealistic given the circumstances this Division finds itself in.

Interestingly, the Association accepts that this Division is unique and that it has handled the last number of years of restraint particularly well through sound management and fairness, in not implementing the wage rollbacks while others in similar circumstances have done so. Yet before this Board, the Division is now faced with not only improved wage demands, but also improvements in workload definitions, monetary allowances and benefits, and a further restriction in their ability to manage by fettering the Division's ability to cut or reduce programs, or to contract out even if that might be cost effective, and otherwise avoid a reduction in program delivery.

In part, the Division responds by saying that, while it wishes to insure its' teachers receive the "going rate" by way of an increase in wages, some monetary relief is sought through making those increases, "end rates" and any other

improvement in the contract which has a monetary cost associated to it, or any changes which would inhibit its ability to manage, particularly with a shrinking tax base, is virtually impossible. Indeed, the Division seeks various changes itself which would allow it to save some costs, not to "remove" the moneys from the system, but to be better able to continue to carry all its diverse programs and maintain quality and delivery of those programs at the same time as it pays fair wages.

Ultimately, the majority express sympathy for the Division's predicament, but (at page 20), express the view that such circumstances do not justify "substantively lower or different compensation levels for teachers". With all due respect, the levels of compensation are identical, as both the Association and the Division's position before this Board is that a 2% award is appropriate. The majority in fact recognized this fact at page 18. What is in dispute is the timing of the implementation thereof, and that is not a "compensation level" at all.

At page 22, the majority alters slightly the implementation dates from that proposed by the Association which, it points out, results in a difference of $201,900 which roughly approximates the cost projection for the pregnancy leave clause which is awarded. It also points out that adjustments to the salary scale which the Division had proposed which might result in savings of some $316,000, is denied "in part because it would be inappropriate to begin tinkering with the essential

structure of teacher compensation while the whole subject is under province-wide review".

With all due respect, the majority award speaks of "fairness" in awarding provisions to the Association not found in other agreements, while in denying requests made by the Division, return to the standard of deferring to established practices in the absence of dire need for change because a particular clause continues to "work".

In my respectful view, it is inconsistent to award an item which costs the employer, but deny the items which save money for that employer, because overall compensation is under review.

COMPARABILITY

While a pattern of settlements in this field is clearly an appropriate consideration, caution must be exhibited in applying the principle. First, there must be a differing weight applied to this factor in considering an appropriate decision in the circumstances here, which weight would be dependent upon the volume of teachers affected by those other settlements. Thus, if 90% of the teachers within Metropolitan Winnipeg were the subject of agreed upon improvements at the precise level sought to be awarded here, clearly that would be of significant weight, and it would take unique and compelling circumstances indeed to depart from that "norm" so established. On the other hand, if only 5% or 10% of the teachers in Metropolitan

Winnipeg were the subject of a consistent increase in voluntary settlements at the time of this hearing, the weight would be significantly lessened and the weight of the evidence establishing "compelling and exceptional circumstances" would be much lower so as to overcome the weight of the rather insignificant "pattern" so established. Thus, it has to be, by logic, a balancing between these two factors. Similarly, there always must be room for compelling and exceptional circumstances, otherwise this Board would have no function to perform, and it would be obliged to automatically and by rote rubber stamp whatever others voluntarily had agreed upon in other school divisions.

As I understood the evidence, one measurement of the "pattern of settlements" or the lack thereof was that 85% of teachers within Metropolitan Winnipeg did not have any contractual increase in the wages applicable to them at the time of the hearing. In my view, whether or not that number is precisely accurate, the weight of the "compelling and exceptional circumstances" need not be very great to prevent this Board the freedom of independent thought and decision in respect of a wage increase in those circumstances.

Nonetheless, for the reasons previously set out, it would be difficult to envision more compelling and exceptional circumstances in any other school division within Metropolitan Winnipeg than those which exist in the case before this Board.

Secondly, and more importantly, the overall cost of the award is not dealt with directly by the majority, but it is clear from page 22 that the overall cost is approximately the same cost, if not greater than, the cost of the wage increase sought by the Association before this Board (not including some of the other benefits sought). Yet, this Board in its majority has acknowledged that there are compelling and unique circumstances faced by this school division. For some reason that has not translated into a reduction in the total monetary exposure faced by the Division under this award.

There is no evidence that other settlements in neighbouring school divisions or elsewhere in Manitoba had any other cost items agreed to, and in fact, there could be savings agreed to in one or more of those other contracts. The point is there is no evidence whatsoever, one way or the other. How then can this Board say that by "slightly" delaying the impact, it is somehow recognizing unique difficulties, and "paying" for the sick leave clause to which an adjustment is made, and also following the pattern of settlements elsewhere. In my respectful view, those conclusions do not follow.

I would have awarded 1% effective January 1, 1998 and 1% effective June 30, 1998.

ALLOWANCE FOR DEPARTMENT HEADS AND TEAM LEADERS (ARTICLE 15.01)

I concur with the Award of the Chair.

ALLOWANCE TO DESIGNATED TEACHERS DURING THE ABSENCE OF PRINCIPAL (ARTICLE 15.02)

I have no real difficulties in awarding such a provision, as this is essentially the practice in the Division at present.

My concern, however, is that as framed now, following the adjustment in the Association's position during the course of the hearing, this is clearly not a "demonstrated problem" within the Division. Again, it seems to me that the requested changes to Articles 18.03, 19.01 and 19.03 (by the Division), are more critical to the workplace, and also more "fair", but the majority has denied these improvements because there is no proof of a problem in the last two years, (in the case of Article 18.03), or at all (in the case of 19.01 and 19.03).

Accordingly, I would only award travel time and the allowance to designated teachers during the absence of the principal if these other three were also granted. This is particularly true of Article 18.03 where there is some demonstrated need and other school divisions have similar wording as that proposed by this Division.

SICK LEAVE FOR HEALTH RELATED ABSENCE (NEW ARTICLE)

I would propose to keep the protocol in some form, not just insert a new article in the Collective Agreement. More importantly, however, the clause proposed by the majority ought to read:

> "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 medically unable to be at work and perform her regular duties for a valid health-related reason(s)...".

As I understood the evidence before us, Mr. Shyka, on behalf of the Association, agreed that was his position in respect of the proposed clause, and this should be inserted for clarification purposes.

WORKLOAD (ARTICLE 21)

I do not disagree with the majority in updating the base year to 1997/1998 as proposed, but, rather than crafting a new Article 21.06 for implementation purposes, I would refer the matter to the existing Workload Committee. It has dealt with the issue previously, but as I understand the evidence,

was not successful because of the difficulties in obtaining information in respect of the base year.

TRAVEL TIME (NEW ARTICLE)

There was no "clear and convincing" case made out on the evidence that such an article was necessary or appropriate, and it was not shown to be a problem that could not be worked out between the parties. Yet, those principles were adopted by the majority at page 4. Accordingly, I would not award a new clause in the circumstances.

If, however, a change is to be considered by this Board, it seems to me that there is a qualitative difference between the following two situations:

(a) A teacher is .5 and wants to become full time, so the Division accommodates the teacher by melding the .5 position with another .5 position elsewhere in the Division, and the teacher then has to travel somewhat between the two locations.

(b) The Division has a full time teacher and splits the job duties on a regular basis between two different locations, necessitating travel.

It is only situation (b) that, in my view, ought to be contemplated by any change, yet the proposed wording covers both. The proposal then has the potential of discouraging a school division from granting a full time request in the circumstances.

If the only rationale, as indicated by the majority award, is that "it seems fair", again, why are the changes requested by the Division to Articles 18.03, 19.01 and 19.03 not being granted, each of which are "fair"?

CONTRACTING OUT (NEW ARTICLE)

I would not award this article as:

(a) It is not found in other collective agreements.

(b) It could be used as a vehicle to bring "political" pressure against the Division which, in my view, would be a misuse of such a provision.

(c) There is no demonstrated abuse in the sense of a lack of any, or any adequate, business plan. The Division appears to be diligent and proficient in its attempts to maintain the delivery of programs at as high a level as possible.

(d) Contracting out is a basic right of the employer, which, particularly in times of restraint, ought not to be fettered. This is especially so where the Association says that the Division should pay the going wage rate, no matter what the consequences to the programs might be, or what

deficits might result, as it impedes the ability of the Division to "properly" manage in the sense of striking an appropriate balance between the number of teachers required, and the quality and extent of programs offered, all within a cost efficient delivery of the service. The natural, and perhaps inevitable, result of fettering the ability to contract out is to eliminate the most cost effective method of delivering a program which ultimately could result in cutbacks to either programs or personnel.

LAY-OFF PROCEDURES (ARTICLE 18)

Unlike the other members of the Board, I would have awarded the proposed amendment sought by the Division to Article 18.02 to provide greater certainty upon lay-off in consideration of the special programs and administrative needs of the Division.

Mr. Chapman, in the 1995 Birdtail River arbitration, dealt with a request by the teachers to remove an existing clause in the Collective Agreement which permitted the Board to disregard seniority if the necessary training, qualifications and experience was not evident "after taking into account the special subjects, program and administrative needs of the Board". This is the same wording essentially as proposed by the Division here for insertion.

In considering the request to delete these words, Mr. Chapman, in Birdtail, said "Obviously the Division must be able to consider the special subjects and programs which it wishes to include as part of the curriculum". I am of the same view.

There are a number of school divisions which have similar wording in their collective agreements already. If any school division can make a case for the protection of its ability to properly staff special programs, it is this Division which spends 18% of its budget on exceptional instruction. As the Association itself acknowledges, this Division is unique in this regard. If it acknowledges the importance of the issue here, and agrees with the objective, which I understand to be the case due to its argument that the "new" version of 18.03 ought to accommodate such a concern, in my view this Board ought not to leave it to chance or the subsequent interpretation of a new clause. This Board ought to award the proposed wording as requested, and as is contained in many other collective agreements.

I reluctantly would agree with the 60 day notice period with respect to the Notice of Lay-off provisions as awarded.

POSITION NOT COVERED BY THE COLLECTIVE AGREEMENT (NEW ARTICLE)

I would not award the article proposed by the majority award as:

(a) Again this is not a demonstrated problem, nor is this a "clear and convincing" case which is made out.

(b) The proposed article ought not to be applied to new "positions" at all, but rather to new "classifications" or as the Division termed it, new "categories" of employment. If there is a classification or category existing, there can be new "positions" elsewhere that will have existing job qualifications and duties, as well as pay scales established.

(c) The use of "urgent need" in the proposed subsection (c) of the new article, is far too restrictive. Does "urgent" mean someone will die if the appointment is not made? Surely, the clause, if awarded at all, ought to incorporate only the concepts of reasonable efforts to agree on rate of pay, failing which the appointment and setting of the rate is within the discretion of the Division.

CUMULATIVE SICK LEAVE (ARTICLE 19.01)

I would not award the request of the Association for the reasons indicated by the Chair; however, the Division's proposal was merely to change "sick leave" to "income protection" to assist in educating the workforce about the true

purpose of the provision. The evidence before us indicates that this change has been effective on previous occasions. I disagree with the Association's position that the suggestion is an attempt to shift costs to teachers; if the clause is operating the way it was intended, there ought to be no change in the cost experience. I would have granted the request.

LEAVE FOR PROFESSIONAL BUSINESS (ARTICLE 19.03)

Again I would have denied the Association's request for the reasons stated by the Chair. I would, however, have granted the Division's request for a cap of 100 days in each school year as that amount is materially in excess of comparable provisions elsewhere, even though there is no demonstrated problem of overuse, for the same reasons indicated by the Chair earlier in the majority Award. If demonstrated need is indeed to be viewed as a requirement, this proposal would not be granted, nor would travel time or the article respecting an allowance to designated teachers during the absence of the principal.

CONCLUSION

In totality, I would have given the Division more monetary relief through staging the implementation of a 2% increase to a later point in time than that awarded by the majority. In particular, I would have awarded 1% effective January 1, 1998 and 1% effective June 30, 1998.

In respect of many of the other items awarded, I find there to be an inconsistency in the approach taken by the majority. If "fairness" is to govern, and if there is a true recognition of unique circumstances in this Division, then a number of the articles ought to go not as proposed by the majority, but as proposed in these comments. In my view, the Association ought not to maintain fiscal pressure on the Division through implementation of going rates and improvements to other clauses which have monetary effect, and at the same time attempt to limit the Division's ability to effectively manage its' diminishing and finite monetary resources. The majority have failed to recognize this overall principle; I would have done so.

DATED at the City of Winnipeg, this 14th day of December, 1998.

E. W. Olson, Q.C.
Nominee of the Division

THE PUBLIC SCHOOLS ACT

B E T W E E N:

WINNIPEG TEACHERS' ASSOCIATION NO. 1
OF THE MANITOBA TEACHERS' SOCIETY,

Bargaining Agent,

- and -

THE WINNIPEG SCHOOL DIVISION NO. 1,

School Board.

CONCURRING AWARD/PARTIAL DISSENT OF DAVID M. SHROM

I have reviewed the Chairperson's Award and concur with it, with the exception of part of the Award respecting Article 15.01.

On the issue of the general salary scale increase, I am concurring to ensure a majority award. In doing so, however, I do not necessarily adopt all of the reasoning of the Chair. I would have preferred the salary award phased in as per the Association's proposal, which was exactly consistent with other metro Winnipeg settlements. I am comfortable concurring, however, since:

1. the Chairperson's award confirms the fundamental importance of the principle of comparability, and in essence is based thereon; and

2. the Chairperson has found (despite the Division's assertion of exceptional circumstances) that a monetary award different from compensation levels established for other teachers in Manitoba, is not warranted.

For years, well respected and experienced arbitrators in Manitoba have repeatedly said that comparisons with other teacher settlements in Manitoba is the fairest and best guide for interest arbitrators. The reason for this is that arbitrators are to replicate free collective bargaining. If other Associations and Divisions have voluntarily settled at a certain rate, then this is clearly the most compelling criterion.

Given the weight of this arbitral jurisprudence, this Division was left to try and suggest that there were compelling and exceptional reasons that would dictate deviating from the established pattern of settlements.

Although the Chair acknowledged that the reasons advanced by the Division in this regard aroused his sympathy, they did not constitute exceptional and compelling circumstances to warrant substantially lower or different compensation levels for the teachers in Winnipeg No. 1.

Partial Dissent — Article 15.01 — Allowance for Department Heads/Team Leaders

I concur with the Chairperson's Award to provide the general salary scale increase to these allowances (p. 31). I dissent, however, from the Award regarding the more contentious issue — the extension of this allowance to elementary teachers.

The Chairperson accurately recites the equity arguments put forward by the Association in support of this proposal. This issue has been raised in the last three rounds of negotiations, and these repeated efforts have been to no avail. It is an issue that ought to be addressed by this Board of Arbitration. To require further discussion and negotiation is neither responsible nor likely to be productive.

The Division suggested that there were no Department Heads or Team Leaders at the elementary level. This was strange in two respects. First, Ms. Shefrin testified as to the duties and responsibilities she performs at the elementary level, and it certainly seemed, from her description,

that she was in fact performing the duties and responsibilities of a Team Leader. Secondly, the Division provided its own cost estimate for implementing this particular proposal — and it was significant. If in fact there are no Team Leaders or Department Heads at the elementary level, then putting a clause into the collective agreement that provides for a payment of an allowance to individuals if, in fact, they are appointed as such, could hardly have a significant cost impact.

The reality is, as suggested in the Chairperson's Award, that there is some role, perhaps more of a coordinator's role, that is being performed at the elementary level by some teachers with the full knowledge of administration.

It seems inherently unfair to pay individuals at one level (junior and senior high) and not to pay individuals at another level (elementary) who are performing either the same or a substantially similar function. From the point of view of equity and morale, all individuals who are performing these functions should be paid an allowance, regardless of the level of school they are operating at.

If the individuals at the elementary level are performing some lesser duties and responsibilities (and I am not making such a finding), then perhaps there should be some allowance paid, but not necessarily the same amount as the current Department Head/Team Leader allowance.

In any event, with the creation of the new article dealing with new positions or categories of employment, perhaps an additional avenue exists (apart from regular negotiations) to pursue the establishment of such an allowance.

Dated this 15th day of December, 1998.

DAVID M. SHROM
Nominee of the Association