IN THE MATTER OF:

AN INTEREST ARBITRATION

BETWEEN:

THE BRANDON TEACHERS' ASSOCIATION NO. 40
OF THE MANITOBA TEACHERS' SOCIETY

- and -

THE BRANDON SCHOOL DIVISION NO. 40

John M. Scurfield, Arbitrator

JURISDICTION

As a result of the fact that the Brandon Teachers' Association No. 40 of the Manitoba Teachers' Society ("the Association") and the Brandon School Division No. 40 ("the Division") were unable to conclude a new collective agreement through the negotiation process, the matters still in dispute were submitted to mediation under Section 131.1 of The Public Schools Act, R.S.M. 1987, C.P-250, as amended.

I was appointed by the Minister of Education to act as the mediator and failing mediation, to act as a sole arbitrator.

A statement of the matters referred to mediation by the Minister of Education included the following items:

1. Article 2 - Effective Period
2. Article 4 - Classification
3. Article 5 - Salaries
4. Article 6 - Increments
5. Article 7 - Allowances
6. Article 8 - Payment of Salary
7. Article 11 - Sick Leave
8. Article 15 - Leave of Absence for Executive Duties
9. Article 19 - Lay-off
10. New Article - Personal Leave
11. New Article - Early Retirement Incentive

12. New Article - Contact Time
13. New Article - Lunch Meal Period
14. New Article - Extra-curricular Activities
15. New Article - Due Process for Principals and Vice-Principals
16. New Article - Successive Term Contracts
17. New Article - Part-Time Teachers
18. New Article - Mainstream
19. New Article - Class Size
20. New Article - Reservation by Board

The parties failed to reach an agreement through mediation. Indeed, the Association refused to take part in any form of mediation and thus pursuant to the legislation, the mediation was converted into an arbitration pursuant to Section 131.1(5) of the Act. Prior to the arbitration commencing, the Association proposals with respect to extra-curricular activities, class size, and lunch meal were withdrawn. Further, the Division raised the issue of my jurisdiction to hear some of the matters in dispute. In particular, as a result of the passage of Bill 72 by the Manitoba Legislature, which became effective as of January 1, 1997, I was asked to review and consider, *inter alla*, the impact of Sections 125 to 131 of *The Public Schools Act* ("the Act.), as now amended. I understand that as a point of fact, I am the first arbitrator who has had to consider the application of these new provisions and, as such, I had the benefit of extensive, and if I may say so, excellent arguments from Mr. Myers on behalf of the Association and Mr. Simpson on behalf of the Division as to the meaning and impact of the new provisions. I will begin by setting out the most pertinent sections of the new legislation.

Section 126(2) of the Act identifies certain specific matters which are not to be referred for arbitration. That Section provides as follows:

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

As part of Bill 72, the Legislature also enacted Section 131.4(1) which contains an internal reference to the earlier Section as follows:

> "A School Board shall act reasonably, fairly and in good faith in administering its policies and practices related to the matters described in Subsection 126(2) (matters not referable for arbitration)."

Section 131.4(2) reads:

> "Any failure by a Board to comply with subsection (1) may be subject of a grievance under the collective agreement and may be dealt with in accordance with the grievance process set out in the agreement."

It is apparent that the Legislature intended Section 131.4(1) to be read together with Subsection 126(2) and in effect, to provide some protection to teachers in respect of those areas which were being withdrawn from arbitration. In short, while teachers have lost the right to seek an arbitrated solution when parties cannot reach a mutual agreement as to matters defined by Subsection 126(2), they were given the right to file a grievance if the Division exploits its primacy in these areas in a manner which was not consistent with the newly imposed duty to act reasonably, fairly and in good faith. Whether or not this is a fair exchange is not within my purview as an arbitrator. It is my duty to interpret what the legislature actually did as opposed to determining what I believe the legislature should have or should not have done.

The amendments also altered the manner in which an arbitrator is allowed to approach the task of arbitrating issues with respect to salary and benefits. Section 129(3) implements certain mandatory considerations which were not an obligatory part of the process prior to the enactment of this legislation. Section 129(3) reads:

> The arbitrator shall, in respect of matters that might reasonably be expected to have a financial effect on the School Division or School District, consider the following factors:
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> a) the School Division's or School District's ability to pay, as determined by its current revenues, including the funding received from the Government and the Government of Canada and its taxation revenues;
>
> b) the nature and type of services that the School Division or School District may have to reduce in light of the decision or award, if the current revenues of the School Division or School District are not increased;
>
> c) the current economic situation in Manitoba and in the School Division or School District;

d) a comparison between the terms and conditions of employment of the teachers in the School Division or School District and those of comparable employees in the public and private sectors, with primary consideration given to comparable employees in the School Division or School District or in the region of the Province in which the School Division or School District is located:

e) the need of the School Division or School District to recruit and retain qualified teachers."

Section 129(2) makes it clear that the award "shall include the arbitrator's reasoning as to how the requirements of Subsection (3) have been applied." In short, the amendments contained in Bill 72 remove certain issues from arbitration and limit, or mandate, the arbitral approach with respect to economic issues. It is difficult to read Bill 72 as a whole without coming to the conclusion that the legislation was designed to significantly alter the *status quo*. On behalf of the Association, Mr. Myers stated that the legislation "was not an even-handed attempt to balance the interests of the parties, but frankly, an attempt to give M.A.S.T. the upper hand. (M.A.S.T. is an acronym for the Manitoba Association of School Trustees.) Mr. Simpson, on behalf of the Division, characterized the legislation as being remedial in nature and suggested that it constituted a significant modification of the scope of bargaining. He suggested that it reserved to the Division some fundamental management rights that had previously been viewed by arbitrators as falling within their jurisdiction. From my perspective, it is sufficient to say that my duty is not to evaluate the merits of the legislation but rather to apply it.

What then is my jurisdiction? I have concluded that the amendments introduced in Bill 72 were intended to change the arbitrator's jurisdiction when they sit under the Act, but it remains to determine the scope of that change.

Traditionally, the starting point for determining an arbitrator's jurisdiction has been the definition of dispute contained in Section 97(1) of the Act. This approach was driven by the existence and wording of Section 127(6) of the Act, which read:

> "At the conclusion of its sittings, the Board of Arbitration shall make an award, setting out its decision as to the manner in which all matters in dispute between the parties shall be settled, and the Chairman of the Board of Arbitration shall forthwith forward certified copies of the Award to the certified bargaining agent of the teachers, the School Board, and the Minister". (My underlining)
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> Bill 72 repealed Section 127(6) and substituted for it Section 129(2) which reads:
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> "The award shall set out the arbitrator's decision as to the way in which the matters in dispute between the parties are to be settled, which shall include the arbitrator's reasoning as to how the requirements of Subsection (3) have been applied. (My underlining)

Pursuant to Section 97(1)(9), "dispute" is defined as follows:

> "(Dispute) means a controversy or difference or apprehended controversy or difference between a School Board and one or more of the teachers employed by it or a bargaining agent acting on behalf of those teachers, as to matters or things affecting or relating to terms or conditions of employment or work done or to be done by the employer or by the teacher or teachers, or as to privileges, rights and duties of the School Board, or the teacher or teachers that are not specifically set out in this Act, or The Education Administration Act or in the Regulations made under either of those Acts; but does not include a controversy or difference arising out of the termination or threat of termination of contract of a teacher by reason of alleged conduct unbecoming a teacher on the part of a teacher."

In my view, there is no material difference between the use of the phrase "all matters in dispute" and "the matters in dispute". In the result, it is clear that the new statutory regime insofar as it incorporates by reference through Section 129(2) the definition of dispute, does not in and of itself purport to change the ambit of arbitral jurisdiction that has previously been assumed by arbitrators, which has not, by and large, been challenged in the Courts after many years of application.

The term, "dispute" is defined broadly including as it does, "matters or things affecting or relating to terms or conditions of employment" and "work done….. by the teacher" and "privileges, rights and duties of the School Board, or the teacher"

Clearly, arbitrators have never had jurisdiction where the matters in dispute have already been dealt with by way of some statutory provision or regulation Further, arbitrators have been specifically precluded from intervening where the issue involved the termination of the contract of a teacher by reason of alleged conduct unbecoming a teacher, but otherwise, arbitrators have heretofore assumed jurisdiction over a broad range of issues which have arisen as a result of conflicts between teachers and their Divisions.

Absent the express exclusion of jurisdiction, arbitrators have assumed jurisdiction over all matters which might properly be construed as working conditions or even hours of work as well as issues pertaining to salaries and benefits. This assumption of jurisdiction has been considered by the Courts and they have been quite liberal in determining what can be arbitrated under this heading. This is perhaps because they recognize that the Association has given up its right to strike in exchange for arbitration.

For example, in Dauphin Ochre School Area No. 1 v. Dauphin Ochre Division Association No. 33 of Manitoba Teachers' Society, [1971] 4 W.W.R. 38 (Man. C.A.) Freedman, C.J.M. in writing for the Court, concluded that a Board of Arbitration had jurisdiction to make an award regarding the payment of insurance premiums for a salary continuance. The Courts said:

> "A sickness and accident insurance plan is by no means a novel or unheard of thing in arrangements between employers and employees. Indeed, one may safely assert the view that such plans are being encountered with more and more frequency in a modem society concerned about the welfare of the individual. But whether widespread or not, such a plan by its nature concerns or relates to terms or conditions of employment. As such it falls, if not expressly, at least impliedly within the scope of the powers vested in the parties under the Act."

Further, Justice Wright held in Rolling River School Division No. 39 v. Rolling River Division Association No. 39 (1979), 3 Man.R. (2d) 7 (Q.B.), at page 11:

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

Further support for a broad interpretation of working conditions where the parties operate under a similar statutory regime, can be found in the so-called Ontario Police Cases: Re: Town of Dryden and Police Association (1972), 32 D.LR. (3d) 21 (Ont. H.C.J.) at pages 23 to 24 and Re: Metropolitan Board of Commissioners of Police and Metropolitan Toronto Police Association (1975), 57 D.LR. (3d) 161 (Ont. C.A.) at page 163, wherein the Ontario High Court and subsequently the Ontario Court of Appeal, held that the matter of "two man patrol cars" was an arbitrable issue that fell under the umbrella of "working conditions". In the result, it would appear that even where an element of policy clearly intrudes, there may still be an arbitral issue, absent some statutory prohibition, if the matter predominantly involves working conditions. Thus, I have concluded that I have the jurisdiction to consider the issues submitted to arbitration unless I am prevented from so doing by Section 126(2).

Arbitrators should be loathe to abandon jurisdiction within a labour environment where the right to strike has been replaced by compulsory arbitration. On the other hand, an arbitrator has no right to ignore the plain meaning of legislation. I have already stated that Section 126(2) alters and was intended to alter, the jurisdiction of arbitrators in Manitoba where appointed under the Act. While the Association urged a restrictive interpretation of the legislation in order to avoid a construction which it suggests would result in a significant inequality of bargaining power, an arbitrator has no right to override the clear intention of legislation or avoid the application of its plain meaning.

> Section 12 of The Interpretation Act R.S.M. 1987, c. 180 states that:
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> Every enactment shall be deemed remedial and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

The Supreme Court of Canada has confirmed the proper approach to be taken to legislation in the recent decision of Clark v. Clark (1990), 73 D.LR. 4th 1 (S.C.C.) where Justice Wilson summarized the proper principle as follows:

> "In interpreting the provisions of the Act, the purpose of the legislation must be kept in mind and the Act given a broad and liberal construction which will give effect to that purpose".

The principle rule of construction is that words are to be given their ordinary meaning: See Attorney General v. Mutual Tontine Westminster Chambers Assoc. Ltd. (1876) 1 Ex.D. 469, per Jessell, M.R.; Maxwell on Interpretation of Statutes, 12th Edition, Chapter 2.

In the final analysis, all of the authorities dictate a common sense approach to legislation. An arbitrator or Judge is duty bound to give effect to the plain meaning of the language of the legislature. It is not their function to support a social policy which they prefer or subvert a social policy which they oppose.

It is my duty to start with the words of the legislation and to examine extrinsic evidence only when the purpose of the language cannot be discerned by a plain reading of the legislation. The primary rule is that the intention of Parliament must be deduced from the language used. See Capper v. Baldwin [1965] 2 Q.B. 53 per Lord Parker C.J. at P61.

In interpreting the legislation, it is appropriate to look at the legislation as a whole package and then only if the meaning and intention of the legislative package cannot be discerned, should an arbitrator presume to go beyond the legislation and attempt to decide its meaning based on extrinsic evidence. Frankly, it is very dangerous to ascribe meaning to legislative language based on letters from an MLA, submissions made by an interest group to a Minister or even for that matter, comments made by a Minister in the heat of a debate that is occurring prior to or after the passage of the legislation. While it may be possible to identity the general intention of the legislature from such an exercise, the process does not alter an arbitrator's duty where the language is clear. Extrinsic evidence should only be resorted to where there is an ambiguity that cannot be resolved by a review of the legislation as a whole. Drafting legislation is normally performed by professionals and once it is approved by the legislature, the words of the statute must be given more weight than the scattered utterances of interest groups or even individual members of the legislature. Consequently, an arbitrator must first attempt to give the legislative language its proper and ordinary meaning in the context of the legislation as a whole.

I have concluded that the amendments contained in Bill 72 result in a "trade-off". Rights which Teachers' Associations within the Province had previously enjoyed, were abrogated or removed by Section 126(2). They are no longer entitled to submit to arbitration some issues which they have not been able to resolve through negotiation. In exchange, the legislative design gives to the teachers Section 134(1) which creates a duty of good faith and the right to grieve in the event that the School Division does not act fairly within those areas which can no longer be the subject of arbitration.

What issues were removed from arbitration?

We must commence by examining carefully the language of Section 126(2). The parties agree that there is no real dispute as to the meaning of subsections (b) and (c). Further, they have, by agreement, removed subsection (d) from consideration by me. Therefore, the sole issue of jurisdiction before me focuses on the interpretation of Section 126(2)(a). As will be recalled, the material part of the section states:

> "The following matters shall not be referred for arbitration and shall not be considered by the arbitrator or included in the arbitrator's award:
>
> a) The selection, appointment, assignment and transfer of teachers and principals.

Regulations under The Education Administration Act, C.C.S.M. c.E10 and, in particular, the new regulation 68/97, effective March 24, 1997, form part of the legislature package which I must consider.

For example, Regulation 28(2) reads: "The principal is responsible for the supervision of staff, pupils, buildings and grounds during school hours." Regulation 39 provides a more comprehensive description of teachers' responsibilities than heretofore existed.

There is nothing in these regulations which specifically pertains to the interpretation of Section 126(2)a. However, taken as a whole, Regulation 68/97 supports the view that the legislature was attempting to more clearly control, define and to some extent limit the role of teachers and principals.

The Division suggests that subsection (a) of Section 126(2) should be given a "large and liberal interpretation", whereas the Association argues for a “restrictive interpretation”. From my point of view, while I honor the obligation of each of the parties to seek such advantages as are fair and appropriate to their interests, my task as an arbitrator is simply to give a fair and reasonable interpretation to the language. I propose then to examine the language of subsection (a) in this context.

I commence with the observation that the clause is worded in a general fashion. That is to say, for example, it is not confined to the initial selection and appointment, assignment or transfer of a teacher. Further, within subsection (a) the meaning of the words selection and "transfer" are clear within the educational context. Selection refers to the initial hiring. Arbitrators are not intended to have a role in determining which teachers shall become employees of a Division. Further, subject only to the duty of good faith, the right to transfer a teacher or principal from school to school has clearly become a management (or Division) prerogative, the terms and conditions for which cannot be submitted to arbitration.

The real debate between the parties commences when it comes to the interpretation of the words “appointment” and “assignment”. I note at the outset that the legislature chose to use two different words. In Maxwell, On Interpretation of Statutes, (12 ed., 1969) at p.36 the author states:

> "A construction which would leave without effect any part of the language of a statute will normally be rejected.”

I accept that by using different words, the Legislature intended those words to have a different meaning or application, if such a meaning can be reasonably ascribed.

A second fundamental rule of statutory interpretation is that words are to be given their ordinary meaning, unless that leads to a manifestly absurd result. (see Maxwell, On Interpretation of Statutes. *ibid.* at p.43) I have concluded, that within the educational context, I can determine a reasonable meaning for each of the words “appointment” and “assignment”. It is my conclusion that the legislature intended to reserve to the Division the power to "appoint" a teacher to a particular position as, for example, an English teacher in a particular secondary school and thereafter to assign to that teacher certain tasks within the school, such as teaching two grade 12 English classes and one grade 11 class.

The Association argued against this interpretation during its submissions before me. The Association's position was that the Legislature only intended to convey the right to determine what teachers do within the school, but not how much they do. In short, the Association submitted that the division can tell a teacher what type of class he or she will teach, but not how many classes he or she will teach. In practical terms, the Association suggested that a teacher can be told that he or she will teach English in a particular school, but not how many classes of English. While one can understand the Association's desire to reserve the right to negotiate and then failing negotiation, to arbitrate how many classes a teacher is required to teach within the school day, I have determined that the language of the legislation removes this issue from arbitration. I therefore conclude that the words of the section must be interpreted so as to give the division the right to assign to teachers the type and quantity of their duties without arbitral interference as long as they do so in good faith and do not violate either a collective agreement in place between the parties, or Section 131.4(1).

February, 1998

IN THE MATTER OF:

AN INTEREST ARBITRATION

BETWEEN:

THE BRANDON TEACHERS' ASSOCIATION NO. 40
OF THE MANITOBA TEACHERS' SOCIETY

(hereinafter referred to as the Teachers)

- and -

THE BRANDON SCHOOL DIVISION NO. 40

(hereinafter referred to as the Division)

John M. Scurfield, Arbitrator

INTEREST AWARD

At the beginning of the process it was agreed between the parties that I should deliver an award directed to each of the items in dispute, based on the assumption that I have jurisdiction with respect to each of those items. Obviously, it is in the interest of both parties to bring closure to this matter. Consequently, after the argument as to Jurisdiction, we heard three full days of evidence addressed to each of the matters in dispute. I intend to provide an award with respect to each item in order to ensure that a collective agreement can be put into place once all of the legal proceedings come to an end.

From the perspective of this portion of the award, the items which remain in dispute are as follows:

1. Article 2 - Effective Period
2. Article 5.01 - Salary Schedule
3. Article 7.01 - Principals' Allowances
4. Article 7.05 - Administrators' Allowances
5. Article 8.01 - Payment of Salary
6. Article 8.06 - Interest on Retroactive Pay
7. New Article - Early Retirement Incentive Plan
8. New Article - Contact Time
9. New Article - Mainstreaming
10. New Article - Due Process for Principals and Vice-Principals

11. New article - Successive Term Contracts
12. New Article - Part Time Teachers
13. New Article - Family Medical Leave

Arbitrators have frequently stated that an interest arbitration should try and replicate the result of free collective bargaining. In a sense, this is an artificial exercise because we know that the parties have not been able to reach an agreement. I think the point is better made from the opposite perspective, namely, that an arbitrator ought not to impose an agreement that a party acting reasonably would have rejected. In my opinion, arbitrators have the right to impose new articles in collective agreements where the arbitrator has concluded, based on the evidence, that the reluctance of one party to agree to the article is neither logical or fair. On the other hand, arbitrators should be reluctant to unilaterally introduce entirely new articles into collective agreements which have been developed over a long history of bargaining. The exceptions to this approach should be based on evidence that the current practice is impractical, inequitable, or out of step with what is occurring in other Divisions. Minor or marginal problems will rarely be addressed through the unilateral imposition of new clauses by an arbitrator. Arbitrators must be careful not to substitute their discretion for that of a party who has a different but defensible view of the proposed article.

In the instant arbitration, the Division was strongly opposed to the imposition of any new articles by way of arbitration. In fairness to the Division, all of the new articles proposed by the Teachers have very little support by reference to other agreements which have been arbitrated or bargained throughout the province. In plain terms, while there are occasional divisions which have accepted all or part of the proposals which the Teachers urge me to impose on the Division, none of the new articles are widely accepted in the contracts throughout the province. Certainly, I am not compelled by reference to other agreements, to conclude that the Division is out of step with the collective agreements generally in place throughout the province. Thus, no compelling argument exists to impose any of the new articles unless I have concluded that based on the evidence there is a practice or procedure within the Division which is inherently unreasonable or unfair and ought to be rectified. In the result, I propose to commence by examining each new article from this perspective.

1. Effective Period

In my view, the effective period of this award should be from January 1, 1997 to June 30, 1998. I recognize the value of a longer term contract. In the result, I have some sympathy for the Board's proposal, namely, that the period of this contract be extended to 30 months. On the other hand, at the time of this interest arbitration, only 30% of the Divisions within Manitoba have had an opportunity to complete their collective bargaining for the 1997 year. While this generates a significant statistical base for the 1997 year, the same cannot be said for the 1998 and 1999 calendar years.

In order to ensure fairness, arbitrators must pay careful attention to those collective agreements which have been freely bargained by other Divisions and Associations within the Province. This is an ordinary principle that emerges from arbitral jurisprudence, but it must be given even more careful consideration because it has recently been codified by the Manitoba legislature.

Further, the economic evidence presented to me generates the hope, if not the expectation, of a more positive financial climate. The Teachers are strongly opposed to a longer contract. Since at the end of the day the award which I make with respect to salaries and benefits is a modest one, it does not seem fair to remove the opportunity for teachers to argue for an increase in salary and benefits based on more recent experience in 1998. Similarly, if the economic picture were to worsen, the Division should be entitled to produce such evidence.

The Division offered to mitigate this problem by agreeing to a so-called "salary opener". I understand this to mean that all terms of the collective agreement would be fixed except for salary and benefits. Such a proposal has some attraction. However, the Teachers were opposed. They want the right to bargain with respect to ancillary matters. I cannot conclude that their opposition is so patently unreasonable that I ought to override their basic right to negotiate and ultimately arbitrate all of the terms of a new contract.

The parties indicated that the specific language which would govern the effective term and, in particular, the language dealing with when negotiations would re-open, was to be settled as between them and that I should reserve the right to fix that language if and when no agreement is attained. In accordance with their wishes, I so reserve that right.

2. Article 5.01 - Salary Schedule
3. Article 7.01 - Principals' Allowances
4. Article 7.05 - Administrators' Allowances

I was advised at the outset that any increase which I award in terms of salary and benefits should be applied equally across all salary scales. That is to say, each salary classification will simply be increased by the percentage which I award across all steps, classes and allowances.

As always, the main point of contention was the appropriate increase, if any, to the basic salaries of teachers, principals and administrators. The Teachers' initial proposal for 1997 was an increase of 3% on all steps, classes and allowances, effective January 1, 1997 and applicable, presumably, through to June 30, 1998.

The Division's proposal was that there be a raise of .5% awarded as of September 1, 1997 and that effective March 1, 1998 there be a further 1% increase. Thereafter, the Division would have dealt with any increases by way of its offer of a “wage re-opener" which I have, for earlier reasons, not accepted.

At the commencement of the arbitration, the Teachers reduced their wage proposal to an increase of 1.5% on all steps, classes and allowances, effective January 1, 1997, and a further .5% effective January 1, 1998. The Collective Agreement would, of course, expire on June 30, 1998.

It is my duty to approach any award of salary and benefits from the perspective of Section 129 of the new legislation. In particular, Section 129(3) reads:

> The arbitrator shall, in respect of matters that might reasonably be expected to have a financial affect on the school division or school district, consider the following factors:
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> a) the school division's or school district's ability to pay, as determined by its current revenues, including the funding received from the government and the Government of Canada, and its taxation revenue;
>
> b) the nature and type of services that the school division or school district may have to reduce, in light of the decision or award, if the current revenues of the school division or school district are not increased;
>
> c) the current economic situation in Manitoba and in the school division or school district;

d) a comparison between the terms and conditions of employment of the teachers in the school division or school district and those of comparable employees in the public and private sectors, with primary consideration given to comparable employees in the school division or school district or in the region of the province in which the school division or school district is located;

e) the need of the school division or school district to recruit and retain qualified teachers."

It can be fairly said Section 129(3) must be considered and applied in some fashion by an arbitrator to every item in dispute, since it is rare that an argument cannot be made that a decision will not have some form of financial impact. Certainly, I have approached my task from this perspective. Having said that, however, some items in dispute will have a direct and obvious impact and thus the factors identified in Section 129(3) will have to be evaluated more carefully, or weighted more heavily. Obviously, salary and benefits fall into a category of items in dispute between the parties wherein the award "might reasonably be expected to have a financial affect on the school division or school district".

When considering the factors enumerated under Section 129(3), I am mandated by Section 129(2) "to include the arbitrator's reasoning as to how the requirements of sub-section (3) have been applied". In order to satisfy 129(2), I commenced the process by examining what is required by 129(3).

The preamble of Section 129(3) says only that an arbitrator shall "consider the following factors". It does not presume to weight those factors or to suggest how an arbitrator shall apply them. It does not suggest that the factors enumerated therein are the only factors which should be considered. Frankly, the general expression of legislative intent seems to be simply this, arbitrators should be financially responsible when they make an award. Most of the factors identified in Section 129(3) would, in my view, normally be considered by any reasonable arbitrator. As such, 129(3) serves more to codify what arbitrators do, than to create new duties or factors.

In the case of the Brandon School Division No. 40, I was presented with a great deal of evidence which clearly identified the school division's or school district's ability to pay as determined by its current revenues. I reviewed the funding received from the Provincial Government and the Government of Canada and its local taxation revenue. Both of the parties addressed, through evidence and argument, the nature and type of services that the Division provides. This is clearly a well managed Division. Indeed, the evidence leads me to conclude that this is one of the best managed Divisions in the Province. The empirical evidence shows that the local tax rate is one of the lowest in the Province. In the past few years, management has already cut every service that it could identify. Consequently, I have concluded that there is very little room for reduction of the remaining services at this point in time,

without diminishing the quality of education.

In addition, I reviewed a great deal of economic data which established the general economic situation in Manitoba and, in particular, in the Division. Further, much of the time at the interest arbitration was, as has historically been the case, devoted to providing me with a comparison between the terms and conditions of Brandon School Division No. 40 and those other divisions within the region and the province, which form the base of comparables that are normally heavily weighted by any arbitrator. I received and considered general economic information as to the salary levels and increases of employees in the public and private sectors, with particular reference to the Brandon area. Finally, it was agreed, or at least not challenged, that the Brandon School Division No. 40 has no difficulty in attracting and retaining qualified teachers.

As an arbitrator who has had some experience in conducting interest arbitrations with respect to public school divisions, I must say that the evidence which was presented to me did not differ in any significant manner from the evidence that was previously provided during prior arbitrations. Since I have always held the view, and indeed expressed the view in previous awards, that common sense must prevail when attempting to establish fair and appropriate teacher salaries within a division, I cannot honestly say that the new legislation mandates a significant change in my approach. As I said in a previous decision, arbitrators must recognize that the public purse is not inexhaustible. Teachers should expect to share in public prosperity and to accept part of the burden when the community faces difficult economic times.

At the end of the day, an arbitrator must, however, remain independent. Arbitrators must be mindful of the fact that the Teachers have given up their right to strike in exchange for an opportunity to present their position to an independent person who will attempt to impose an award which is, above all else, fair and reasonable. There is nothing in the legislation which leads me to conclude that the legislature intended to interfere with this fundamental principle. In essence, the legislature serves to remind arbitrators to be responsible as opposed to dictating to them what they must award. If I conclude that teachers are underpaid or unfairly compensated, I am still entitled to award them an increase so long as I demonstrate that I have given consideration to the factors set out in Section 129(3). In my view, I am entitled to consider all reasonable and relevant evidence, so long as I ensure that consideration is given to those factors enumerated in Section 129(3). The arbitral task is not significantly altered by Section 129(3), since in large part, it constitutes a codification of most of the factors that have been historically considered by responsible arbitrators. I am comforted in my view that Section 129(3) does not mandate a particular result or even weight of any of the factors, by my conclusion that to do so would constitute an interference with the ability of an arbitrator to form an independent opinion. Moreover, a review of

the factors themselves will sometimes be in conflict in a manner which will require an arbitrator to independently evaluate and weigh those factors based on the individual fact situation in order to come to a fair and just award. By way of simple example, an arbitrator could conceivably determine that the need to recruit and retain qualified teachers was so high that it dictated an increase in salary even where the school division's ability to pay is proven to be lower than that of some other division. It is implicit in the presentation of the factors that an arbitrator retains the discretion to individually resolve and balance the factors set out therein.

It is not my intention to review in detail the hundreds of pages of economic data that were presented to me. I do not believe that Section 129(2) was intended to mandate an exhaustive review of all of the evidence that is presented during the course of a lengthy interest arbitration. I have carefully considered each factor set out in Section 129(3) and I intend only to provide the parties with the reasoning which drove me to my conclusion.

From an arbitrator's perspective, it has often been suggested that a public employer is never unable to pay, but it is sometimes simply unwilling to pay. For my part, I believe argument is mere sophistry. I believe that in the case of a public school arbitration, it is possible to introduce evidence which will, at the very least, demonstrate a much diminished ability to pay. This is particularly so when the arbitrator uses a “comparable approach” to other school divisions.

Clearly there are a number of important economic indicators within a school division that tell an arbitrator a lot about the Division's ability to pay. For example, in addition to general economic data, it is important to know what the assessment base is in the Division. Further, one would need to know what the mill rate is in the Division with particular reference to how the taxing effort in that Division compares to others.

I turn now to a specific consideration of the proposals for a salary increase advanced by the Division and the Teachers.

The Division's position is that they cannot afford to pay an increase beyond that which they have proposed, namely, 1.5% spread over an 18 month term.

The Teachers' proposal is that there be an increase of 2% spread over that same 18 month term.

In addition, there are some differences as to the timing of the increases. The Division suggests that I award a .5% increase for September 1, 1997 and a further 1% on March 1, 1998, whereas the Division suggest that there be an increase of 1.5% on January 1, 1997 and an additional .5% on January, 1, 1998.

I start then from the premise that both parties agree that there ought to be an increase to teachers' salaries during the 18 month contract. On the face of it, the difference between their positions is simply .5 of 1% and the timing of those increases. Considering the overall budget of the Division, it is difficult to characterize this disagreement as one of principle. The only issue is the quantum and timing of the increase.

The position advanced by the Teachers is supported by the evidence as to the voluntary settlements entered into by divisions and teachers' association across the province for the same time frame. While it is fair to say that only 30% of the divisions have concluded collective agreements, this remains a significant statistical sample. Moreover, a significant number of those divisions fall within the western region of the province. For example, Beautiful Plains, Pelly Trail, Fort La Bosse, and Antler River, have all voluntarily agreed to increase their teacher salaries by 1.5% for the 1997 scale year. Turtle Mountain has voluntarily agreed to increase its teacher salaries by 2%. These divisions constitute more than half of the western region. Moreover, none of the other divisions appear to have settled at all. Thus, there is no evidence which would indicate a contrary value.

The evidence before me indicates that there has been a striking degree of uniformity across the province over the last 15 years. After reviewing the figures, 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. This is particularly so when the agreements have been concluded in both rural and urban divisions. Certainly an arbitrator must have cogent evidence which suggests that there is reason to deviate from the pattern of voluntary agreements before striking off on a separate path. Consequently, it is my duty to consider the individual evidence as to the Brandon School Division in order to determine if that evidence justifies a departure from the pattern.

Rural divisions tend to have a slightly lower than average teacher salary scale than urban divisions. One reason for this is the fact that the cost of living in an urban centre is frequently higher than the cost of living in a rural location. Brandon itself is more properly described as a "rurban" division, since it has schools in a rural area as well as within the City of Brandon. On the other hand, the vast majority of the students within the Division fall within the urban area. It is often said that the best, most comparable division to that of Brandon is the Transcona- Springfield Division. Indeed, that division has a slightly greater rural population than does Brandon. Demographically, the Brandon Division is significantly more urban that rural.

When one compares the average teacher's salary in the western regions, one discovers that the salary range between divisions is a very narrow one. The lowest average salary within the western region is $46,313 and the highest average salary is $49,330. Turtle Mountain and Beautiful Plains have a higher salary scale than Brandon. Clearly, the Brandon Division's salary scale is near the top of the range, but it is not the highest salary scale within the western region, even though Brandon is predominantly an urban area and the others are rural. Transcona- Springfield has a higher salary scale than does Brandon. Based on 1996 salary scales, a beginning teacher in Class 4 is paid $32,186 in Brandon and $34,197 in Transcona. In Class 5, the beginning teacher in Brandon receives $34,406 and $36,502 in Transcona. Other purely urban divisions have higher salary scales than Brandon. In conclusion, while Brandon is predominantly an urban division, its current salary scales are comparable to the upper end of the rural divisions. Therefore, there is no logical argument which favors moving the Brandon Division lower down in the salary scale spectrum. To do so would require a finding that Brandon's most logical comparable is a purely rural division. The evidence does not support that conclusion.

Having concluded that Brandon occupies a logical place within the salary spectrum, it remains essential to determine whether or not the remaining economic data supports a departure from the pattern of settlements which is currently emerging. The Brandon School Division prepared a public circular in 1997 which confirms that:

1. The Brandon School Division has the second lowest cost per pupil in Manitoba;
2. The Brandon School Division has the eighth highest pupil to teacher ratio;
3. The Brandon School Division has the second lowest special levy mill rate. At the risk of over-simplification, this means that the tax levied on Brandon School Division property owners for the purpose of supporting education is the second lowest in the province. In fact, the school tax rate is roughly half of the highest tax rate in the Province and the average tax rate in the province is almost 40% higher than that which is found in the Brandon School Division;

4. For residential properties valued at $75,000, the total education tax in 1991 was $722 and the total education tax in 1997 had been reduced by $11 to $711. For commercial properties valued at $300,000 the total education tax only increased by $71 over this 6 year period.

In terms of the value available for taxation, it is interesting to note that the local taxation and assessment per eligible pupil in Brandon stands at $140,795, which is very close to the provincial average. This compares to $97,306 for Transcona-Springfield. In plain terms, Brandon has an average assessment base as against which to assess its local education tax whereas Transcona- Springfield has a below average assessment base. Yet, as has been seen, Brandon pays its teachers less.

In other words, this is an extremely well-managed division, which has managed to minimize the impact on the taxpayer of reduced or frozen provincial grants. Indeed, Brandon taxpayers are far below average in their contribution to the education of their students.

The principal argument addressed by the Division is based on the fact that from 1993 through to 1996 Brandon's special levy for education purposes has increased by 16.61% in order to offset decreases in provincial grants and to compensate teachers for the slight increases which they have experienced in salary and benefits during those years. Expressed as a percentage, this is a significant increase. Divisions have really had no alternative but to increase their tax rates since salaries have increased by 4.1% during the 1993 to 1997 time frame and grants have been reduced by approximately 6%.

The Division provided me with various forecasts and budgets which depend on the increase which I award. Suffice it to say that any increase will probably have to be addressed by a further tax increase since I am convinced that this Division has no "fat" left to be trimmed from its budget.

Clearly, the evidence demonstrates that the general economy in Brandon and the Province is improving. Brandon teachers have had no salary increases during the 1995 or 1996 contract years. Considering the fact that teachers' salaries have fallen significantly behind inflation during the past few years, it is clear that some increase is warranted.

While I was initially attracted to the Division's proposal based simply on the quantum of the tax increase that Brandon taxpayers have experienced, particularly when it is expressed on a percentage basis, I am driven to conclude that that argument can only take the Division part of the way. Tax increases, when expressed on a percentage basis must be viewed in the same manner as a sale conducted by a retail store. True values can only be identified by establishing the reasonable retail price of the item. If the discount is expressed as against a higher than ordinary retail price, then the percentage of the reduction must carry less weight. So too in the case of the Division. An arbitrator must pay attention to what is euphemistically described as the "taxing effort" of the Division. In simple terms, Brandon's education tax rate is the second lowest in the entire province, even after all of the past increases have been implemented. If one compares the special levy rate in Brandon to the special levy rate in Transcona-Springfield, one discovers that the Transcona-Springfield's citizens pay almost 50% more towards educating their children. Some of the surrounding divisions in the western region pay almost twice as much as Brandon residents do to support the education of their children.

In the final analysis, while one has sympathy for any taxpayer who expresses concern about an increased tax bill, one has to measure that concern objectively. Based on the evidence, it is difficult for the Division to argue that its citizens cannot afford to provide a modest and average increase to its teachers. Clearly, the Brandon School Division is one of the best managed divisions in the entire province. It provides its taxpayers with more value for the dollar than any other division that I have reviewed. While taxpayers never want to pay more money than is required to maintain a high quality public educational system, I have concluded that it is reasonable for them to fund a modest increase to their teachers.

If an award flowing from an interest arbitration is to be understood and respected by the public, it must deliver results which are consistent with wage settlements in related areas of the public and private sector. See for example, the fact finding award of R.L Jackson, January 12th, 1992, between the Toronto Boards of Education and the Elementary Teachers employed by the Boards, and Martin Toplitsky, Q.C.: "Ability to Pay in the Public Sector: An Arbitrator's Viewpoint", Labour Arbitration Yearbook (1991) Vol. 11, and Jeffrey Sak, Q.C.: "Ability to Pay in the Public Sector: A Critical Appraisal", Labour Arbitration Yearbook (1991) Vol. 2.

The Manitoba Government Employees Union recently entered into settlement with the Manitoba Government with an effective period of March 29th, 1997, to March 24th, 2000. This was a three year deal with wage increases effective March, 1997, of 1% plus a 1.5% signing bonus and a further 1% effective March, 1998, and a further 2% effective March, 1999. Consequently, a 2% award over 18

months to the teachers would be virtually identical to the average annual percentage increase that the Government has awarded to its employees. In addition, of course, MGEU members received a 1.5% signing bonus and certain benefits which carried with them an additional value. Manitoba private sector salary increases averaged .9% in 1995, 2.2% in 1996, and 2% in 1997. The increases to Brandon teachers during this time frame were 0% in 1995 and 0% in 1996. None of this evidence supports the Division's submission for an award of less than 2% over an 18 months effective period.

In the final analysis, what I said in the Brandon Arbitration Award in 1993 continues to summarize my view of my duty although I have given careful weight to the legislated considerations:

> Teachers are public employees. When consideration is being given by an arbitration board to the wages, hours and conditions of employment, different arbitrators have proposed different factors for consideration. A great debate has arisen over whether or not the ability of the employer to pay is a factor in considering the compensation of public sector employees. Surely, no magic formula is required. Common sense must prevail. Neither the public purse nor the private purse is inexhaustible. While public employees should not be required to subsidize the community through the imposition of substandard wages, neither should they expect to make gains denied to other workers in poor economic circumstances. An arbitrator's task is to award a public employee economic benefits which the arbitrator believes that the parties bargaining in good faith should have agreed to. Public sector employees normally reside in the communities where they work. They are part of that community. A reasonable teacher should expect to benefit from its prosperity and share a proportionate share of the hardships which befall the general community. Any objective right thinking public employee should expect to receive wage increases which are related to the prevailing economic circumstances in the province. Thus, in practical terms, an arbitrator should seek to make an award which is sensitive to the prevailing economic climate on the basis that such an award represents what the parties bargaining in good faith should have agreed to. That is the object of an arbitration award.

I have concluded that Brandon teachers are entitled to an overall increase of 2% over eighteen months as that is consistent with the settlements in the surrounding divisions, the local economic climate, and those of the public sector generally. I am convinced that Brandon taxpayers have the ability to pay this award without reducing any necessary services. However, I intend to adjust the effective dates of those increases in a manner which should help to ease the taxpayer into accepting a greater burden of educating children in the Brandon School Division.

In the result, I award a 2% increase across all salary scales and allowances which increase shall be effective in the following manner:

.5% as of January 1, 1997
a further 1% as of January 1, 1998
a further .5% as of June 30, 1998.

2. Early Retirement Incentive Plan

There was a great deal of evidence and argument devoted to this article. Suffice it to say at the end of the day it is debatable as to whether or not an early retirement incentive plan will result in cost savings to the Division.

There are a number of assumptions which must be made in order to cost such a plan. Without clear evidence that such a plan would provide benefits to teachers without placing an additional burden on the Division, I do not believe an arbitrator is in any position to impose such an article. Frankly, I think an arbitrator should be extremely reluctant to substitute his/her discretion for that of the financial officers of the Division. Clearly, if the Division felt there was a financial benefit to be gained from offering an early retirement incentive plan, it would offer it.

In a sense, this proposal is unlike some of the other proposals since the reluctance of the Division to introduce such a plan should sound a cautionary note to an arbitrator. Common sense dictates the conclusion that if and when the Division can be convinced that there is a genuine cost saving, it will introduce such a plan.

3 . Contact Time

The Teachers urge that I impose a new clause in the agreement with respect to contact time. As previously indicated, there is very little precedent for such a clause in other collective agreements in force within school divisions in Manitoba. One of the few existing clauses in this area is the one which I imposed by way of an arbitration in the River East School Division No. 9 award. That clause was restricted to teaching time as opposed to contact time. I was concerned in that award, and remain concerned, about the definition of contact time. Clearly, there are many definitions of contact time and many ways of weighting the impact of various forms of contact.

Imposing a contact time clause or even a teaching time clause can have an impact on the flexibility of a school division. In my view, the River East School Division No. 9 award was warranted because the evidence indicated that it was probable that any award which was made by the board might be instantly circumvented by imposing additional duties upon the Teachers without awarding them any additional pay. It was felt that such an approach was unwarranted because the evidence indicated that teachers within the division were already working at capacity. Further, the spirit of the award would have been violated or at least eroded by such unilateral action by the division.

In the present case, there is no evidence from which I can conclude that the Division will circumvent any award which I make with respect to salary and benefits by placing a significantly greater burden on the Teachers. From 1993 until the present date, the number of teachers within the Division has remained relatively static. The pupil/teacher ratio has basically fallen into a range of 15.5 to 16.5 to 1. Further, the number of teaching assistants has increased slightly during this period of time. In other words, the statistics support the fact that the Division continues to subscribe to a mission of devoting resources to the classroom. Further, in the course of submissions made to me, Mr. Whiteway, on behalf of the Division, indicated that it was not the Division's intention to circumvent any award that I might make by reducing the number of teachers in the Division and placing that burden on the remaining teachers. Indeed, he offered to agree to appoint me as the arbitrator of the next collective agreement as evidence of the good faith of his representation. I was impressed both by the integrity of the Division based on its past performance and by the representations of Mr. Whiteway. I have concluded that whatever financial award I make will not be visited upon the Teachers in the manner that concerned me in the River East School Division. I recognize that any award of a contact time clause or a teaching time clause is not an award which would ordinarily be agreed to by any division in the course of free collective bargaining. Thus, since the evidence before me does not persuade me that the Division is likely to try and circumvent my award, by placing a greater burden upon the teachers, I do not feel compelled to make an award under this section.

4. <u>Article 8.01 - Payment of Salary</u>

Based on the evidence and submission of the parties, there is no basis for altering the current Collective Agreement with respect to Article 8.01 - Payment of Salary.

5. Article 8.06 - Interest on Retroactive Pay

This was an Article inserted in the Collective Agreement by way of an arbitration award which I wrote as part of a Board of Arbitration in 1993. No evidence was introduced which demonstrated that the Article has been applied in a manner which is unfair to either party. I therefore see no need to change the wording of the current Article.

9. Mainstreaming

Based on the teachers' submission, it appears that one of the most significant problems in the modern classroom is the variability of student conduct and performance. From a social perspective, there is much to be said in favour of mainstreaming. Unfortunately from an educational perspective, mainstreaming can have a disruptive effect on the classroom. Mainstreaming may hinder the performance of students who do not suffer from any physical or emotional disabilities and based on the evidence presented to me, implementation of this policy can have an impact on the teacher who is assigned responsibility for a classroom which is challenged by children who have been "mainstreamed".

It is possible to characterize mainstreaming as a working condition issue as did the Teachers' Association. However, it seems to me that mainstreaming is predominantly an educational policy issue. While it is conceivable that situations may arise where a student is inserted in a classroom in a manner that poses a direct hazard to the safety or health of a teacher, the submission which I must consider is not directed at such extreme cases. The Association proposal is as follows:

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

Clearly, a proposal couched as it is in these broad terms, goes far beyond safety and health concerns and can only in the broadest sense, fall under the umbrella of working conditions. The proposal seeks to shape the educational policy of the Division through an arbitration award. With respect, I do not believe that is the role of the arbitrator no matter where my personal sympathies may lie. Thus, even if I have jurisdiction under the new legislation, I do not believe it would be appropriate for me to exercise it in this instance.

10. Due Process for Principals and Vice-Principals

There is very little precedent for the Due Process for Principals Article that is proposed by the Teachers' Association based on the terms of other Divisions' Collective Agreements. Clearly, principals and vice-principals are in a difficult position. Technically they remain teachers, but practically speaking, they act in a managerial role. As such, one can understand why Divisions have vigorously maintained the right to appoint principals or vice-principals and retain the discretion to transfer them or remove them from their positions. No evidence was introduced before me that this practice or process has been abused in some way by the Division. In the result, no compelling case has been made for inserting a new Article which is not supported by reference to other Collective Agreements.

11. <u>Successive Term Contracts</u>

The Association proposes a new Article as follows:

i) Any teacher employed by the Division on a term contract for two successful full years shall on employment for the third consecutive school year, be signed to a regular Form 2 contract.

ii) Notwithstanding the foregoing, should the Division expect the teacher to be employed for a period of less than three months, the Division may employ such teacher on a Form 2A contract.

iii) A teacher who has been employed on a Form 2A contract for two successive school years and who subsequently is employed under a Form 2 contract as provided for in sub (a) above, shall be deemed to have been on a Form 2 contract since the commencement of his or her duties and shall be entitled retroactively to all benefits arising therefrom.

The new Article is designed to prevent the Division from hiring teachers on successive term contracts and in that manner, circumventing the security and benefits which a teacher derives from being hired as a permanent employee with a Form 2 Teacher's Contract. The evidence before me indicated that there were at least several examples of individuals who have experienced a great deal of personal suffering as a result of the fact that they have continued to work for as many as four years on term contracts without ever being offered a permanent position. During the course of that time, the teachers who were called as witnesses testified that some term teachers continue to be offered term positions when individuals with less seniority, or no seniority, in the Divisions were offered full-time contracts in positions where they felt that they were qualified. The evidence was not specific or direct enough to establish that a competent term teacher was actually refused a position for which he or she was competent and eligible in favour of a person with less seniority within the Division. However, I am satisfied that the manner in which term employees are currently dealt with may unintentionally lead to that event occurring.

The scope of the problem is not large, but it is painful. In 1996, it appears that 12 teachers were given permanent employment who had previously been term employees. Of that group, two of them had three years on term contracts and one had five years on a term contract. In that same year, seven teachers were hired back who had already been on term contracts for two years and two were hired back who had already had three years on term contracts.

A further review of the statistics shows that for 1997/1998, 75 new contracts were awarded to teachers. Twenty-five of those were Form 2 contracts and 50 were Form 2A contracts. In other words, there were 50 term positions and 25 permanent job offers. Of the 25 permanent positions offered, 6 of them were new hires. Based on the testimony before me which was not contradicted, I am left with the compelling and indeed heart-rending story of term teachers desperately seeking some form of job security. Some competent teachers are hired year after year but never given a Form 2 contract. I am told that the Division's current policy is to circulate a list of people on term positions to the principals of various schools within the division in an effort to give term teachers some advantage when permanent positions become available. While it may be anticipated that by the circulation of this list, term teachers will be given some form of preference, there is no policy of preference. Moreover, it seems logical that some principals will prefer teachers they know from within their school over equally competent term teachers with more seniority from other schools, whom they have never met. All things being equal, it would seem fair and reasonable to give preference to term teachers who have served the Division well. If they are not competent and hardworking teachers, then it stands to reason that the Division would not continue to hire them on a term basis. It was an agreed fact during the course of the Interest Arbitration that the Brandon School Division has no difficulty in attracting teachers to the Division. In other words, the decision to award a successive term contract to a teacher is driven not by necessity but by a form of endorsement of that teacher's competence and value. Thus, in my view, the current hiring policy should be reviewed.

Clearly, I do not have the jurisdiction to decide who should be hired by the School Division. On the other hand, it is arguable that a proposal made by the Teachers' Association does not compel the Division in any way as to who they select to teach in the Division but speaks only to the working conditions of that teacher once selected. I prefer that logic to the suggestion that an arbitrator has no right to consider the issue of when a teacher is entitled to the security of a Form 2 contract. At issue is not who the Division hires but the nature of the contract and benefits to which they should be entitled once the Division selects them.

It must be kept in mind from the outset that Section 92(1) of The Public Schools Act has been interpreted by the Courts. Section 92(1) says as follows:

> "Every agreement between a School Board and a teacher shall be in writing, signed by the parties thereto and sealed with the seal of the School Board and except in the case of the School Board authorized to use another form of contract approved by the Minister, shall be in Form 2 of Schedule D."

In a decision written by Mr. Justice Monnin (as he then was), Gadient v. The Manitoba Teachers' Society and The Fort Garry School Division No. 5, [1995] M.J. No. 236, his Lordship approved the use of the Form 2A contract in appropriate circumstances. He notes at page four of his Reasons:

> "The Respondent School Division and School District further argue that the rights that the Applicants maintain they have lost as a result of the Form 2A Contract are not rights granted under contract but are rights obtained through the collective bargaining process. These rights could still be applicable to a Form 2A Contract if they were so negotiated during the course of collective bargaining by the bargaining agents representing the Applicants."

Arbitrators have traditionally been granted the jurisdiction to deal with any matters which the Court deems to be the proper matter of negotiation between the collective bargaining agents of the parties and which ultimately could form part of the contract or collective agreement between the parties. Thus, in my view, I am being asked to review the terms and conditions of employment of teachers who have been hired and not the selection of a particular teacher which falls outside my jurisdiction. Nothing in the language of the Teachers' Association proposal would require the Board to hire any particular teacher. The proposal and my award would be directed simply to the contractual terms that would apply to the teacher after the Board has made its unfettered decision to hire that teacher for a fourth time. No one has ever argued that a teacher who is placed on a 2A contract has not been hired, rather it has been argued that the terms of that employment differ. As Monnin, J. stated at page 8:

> The rights that the Applicants seek are rights that their bargaining agents can bargain for in the collective bargaining process with employer School Divisions and School Districts. If the Applicant seeks some form of redress, they should be seeking it not from the Respondent School Division and School District, but from their own bargaining agents."

It follows that if the issue cannot be resolved during the course of bargaining, it becomes an issue that could be resolved by an arbitrator unless and until the new legislation specifically and directly removes the arbitrator's jurisdiction to deal with that dispute. I do not believe that the legislation goes that far.

I am supported in my view by the decision of The Manitoba Court of Appeal in Gadient v. The

Manitoba Teachers' Society and The Fort Garry School Division No. 5, *supra,* Twaddle, J.A., after reviewing the Act, states:

> "I find it sufficient to decide these appeals that the parties to a teacher contract can amend a Form 2 contract to provide for a temporary engagement. A different situation would obviously arise if a form of 2A contract was used to cover what was intended to be more than a temporary engagement."

Temporary engagements should not require repetitive term contracts. In essence, the need for such teachers demonstrates that such teachers become permanent, not temporary floaters within the Division.

In short, both legally and factually, the focus has to be on whether or not it is reasonable for the parties to agree on what should be considered a temporary engagement. If the parties are entitled to reach an agreement in that regard, but are unable to do so, then for the reasons I have earlier indicated, I believe an arbitrator is in a position to resolve an ongoing disagreement by way of an award. Clearly, the evidence demonstrated to me that fairness and indeed self interest dictates the need for both parties to establish a firm policy to deal with successive term contracts. It is clearly injurious to the morale within the Division to have teachers left in a state of uncertainty. I received clear and convincing evidence on this point. Further, in plain terms, it does not seem fair or logical to avoid the creation of a policy which gives some security to term teachers with seniority in the Division who are clearly considered competent since the Division continues to offer them successive term contracts. I believe that a modified version of the Association proposal would not unduly impact on the flexibility of the Division. Form 2 teachers can still be laid off where it is necessary to do so. Moreover, the new Article does not in any way compel the Division to select or hire a teacher, rather. it simply dictates the terms and conditions of employment after the teacher has been hired for a fourth time. The award should say:

> "i) Any teacher employed by the Division on a "term contract" for three successive full school years shall, on employment for the fourth consecutive school year, be assigned to a regular Form 2 contract.
>
> ii) Notwithstanding the foregoing, should the Division expect the teacher to be employed for a period of less than three months, the Division may employ such teacher on a Form 2A contract."

I wish to make it clear that I am aware of the fact that this award may lead to some teachers' terms not being renewed. The Teachers' Association made it clear that its members were prepared to accept this possibility in exchange for greater certainty. Finally, I am not prepared to make an award which entitles

term teachers to obtain benefits retroactively. Such an award would, in my view, not only be contrary to their original retainer, but it would also create an advantage to hiring new teachers from outside of the Division and would thus run contrary to the objective of those term teachers who seek the benefit of a regular Form 2 contract.

12. Part-time Teachers

The Association sought a clause that would have compelled the division to give a hiring preference to part-time teachers who wished a full-time position.

The Division's position is that it wishes to maintain its complete discretion in the hiring of teachers. Further, the Division indicated that part-time teachers already have an advantage since they can identify job openings before they become available and based on their part-time performance, can recommend themselves to the principals and superintendents who are responsible for awarding positions.

I am not prepared to insert an article in the nature proposed by the teachers into the collective agreement. First, no evidence was introduced before me to support the position that this is a particular problem. Further, only a few divisions have voluntarily agreed to extend a preferential hiring policy to their part-time teachers and so there is no compelling case for such an article.

Secondly, I am not prepared to insert such an article as my interpretation of section 126(2)(a) of *The Public Schools* Act has led me to the conclusion that I do not have jurisdiction to deal with this particular issue. The section removes from consideration by the arbitrator "the selection, [and] appointment... of teachers". Clearly there is an element of selection and appointment in awarding a full-time teaching position to a particular individual who has less than a full time appointment. This differs from the circumstances governing term employees which I discussed above. The article which I have awarded concerning term employees does not require the Division to give preference to a particular employee. Rather, if the Division chooses to hire the term employee after three consecutive terms, then I specified that they are entitled to the benefits and security of a regular Form 2 contract. In the present case I have been asked to give hiring preference to part-time employees and it is my position that the legislation specifically excludes my ability to make such a ruling. Therefore, even if there had been evidence to justify such an article, I would still have declined to make such an award on the basis of lack of jurisdiction.

Pro-rated Pay for Additional Work for Part-time Teachers

During the course of the Interest Arbitration, the parties indicated that they had what they believed to be a common approach to resolving this issue. Suffice it to say from my perspective, it is clear that if a part-time teacher takes on an additional teaching load, he or she must also assume an additional portion of the professional and extra-curricular responsibilities of the school. If a teacher assumes such additional responsibilities then it is clear that he or she ought to be paid in a pro-rata manner. In other words, if a teacher takes on an additional 25% teaching load together with the additional professional and extracurricular responsibilities that can be expected of a .75 teacher over a .5 teacher, then that teacher should be paid 25% more.

13. <u>Family Medical Leave</u>

The existing policy within the Division appears to be adequate. I am not convinced that an arbitrator needs to impose a clause on the Division since the Collective Agreement, together with the Policy followed by the Division, appears to be satisfactory.

February, 1998