THE PUBLIC SCHOOLS ACT

BETWEEN:

THE ST. VITAL TEACHERS' ASSOCIATION NO. 6
OF THE MANITOBA TEACHERS' SOCIETY,
Bargaining Agent

- and –

THE ST. VITAL SCHOOL DIVISION NO. 6,
School Board.

SUPPLEMENTARY ARBITRATION AWARD

Appearances

Mr. Craig Wallis, for the Division
Mr. Saul Leibl, for the Association.

Requirement for a supplementary award

On February 12, 2001, I issued an interest arbitration award addressing outstanding contract issues for the 1998/2000 period. One major clause in dispute was Article 9.03 on Maternity Leave. In the award, the teachers' proposals and my conclusions wee set forth, in part, as follows (at pp. 28-33):

> The current article allows a female teacher to take 17 weeks of unpaid maternity leave, with provision for a longer leave my mutual agreement. The collective agreement makes no reference to parental leave, but the provisions of the Employment Standards Code S.M. 1998, c. 29 apply, and under the provincial regime (as it stood during the effective period of the renewal collective agreement), employees are entitled to a maximum of 17 weeks unpaid parental leave. Such leave may be taken by an adoptive parent or a natural parent. Federal Employment Insurance benefits provide a partial salary replacement during these leaves, to a maximum of 17 weeks for maternity and 10 weeks for parental leave.
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> In light of the foregoing, the Association proposed that a teacher on maternity leave be entitled to receive 95% of salary (including EI benefits) for 17 weeks and that a teacher on parental leave be entitled to receive 95% of salary (including EI) for 10 weeks. Implementation is subject to the successful conclusion of a Supplementary Unemployment Benefit plan (S.U.B.) WITH THE Canada Employment and Immigration Commission (C.E.I.C.). This proposal essentially tops up available EI benefits.

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

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

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Earlier in this award, I held that high priority contract proposals by the teachers should be considered for adoption, as long as they are reasonable and demonstrably necessary, keeping in mind the impact on the St. Vital School Division and its ratepayers. Applying this test, and considering all the evidence, I agree with the finding in *Fort Garry* that this is a suitable time to advance the level of salary protection provided to St. vital teachers on maternity leave. Given the financial challenges facing school divisions, they may not be well equipped to take the lead on such compensation issues. I therefore concur as well with the decision in Fort Garry to set the top-up level at 90% of salary, rather than 95% as proposed by the Association. This clause is, of course, subject to an S.U.B. agreement with the C.E.I.C.

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

My only hesitation in this regard is that by leaving out parental leave top-up for teachers adopting a child, significant unfairness may result to some individuals. The Association's proposed article refers to adoptive leave in 9.03 (A), but the subsequent clauses make no further mention of the topic. Perhaps it was intended that either parent could take an adoptive leave under proposed clause 9.03(G), but the drafting here seems to contemplate a leave continuing directly after a maternity leave (ie, waiting period top-up only for the male parent). No submissions were made with respect to potential Human Rights Code requirements in the allocation of paid leaves under the collective agreement, but I believe that there may be live issues in that regard.

> I suggest to the parties that the new article, which will entitled a teacher to 17 weeks of salary top-up during maternity leave, also ought to reasonably accommodate the circumstances of an adoptive parent. There was no evidence with respect to the projected utilization of adoptive leave. It is my assumption that, adoption being a fairly rare occurrence, the additional cost of this accommodation would not be undue.
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> The Association's proposal is awarded effective June 30, 2000 at 90% of salary in respect of maternity leaves, but denied for parental and paternity leaves. I will leave the drafting of the new article to the parties. Jurisdiction is reserved to settle the question of adoptive leave in accordance with my observations above. Jurisdiction is also reserved to settle any other differences which may arise in finalizing the new article.

It then became apparent that the parties were unable to resolve the question of top-up for adoptive leave without further recourse to the arbitration process. On February 27, 2001, the Division wrote to the Minister of Education and Training, requesting that the Minister ask me to "reconsider, clarify or amplify" my award regarding 'maternity leave and the purported inclusion of an adoptive leave provisions". Mr. Wallis also contacted me directly to arrange a meeting of the parties, which was held on March 5, 2001. Submissions were made at that time, and an additional written submission was forwarded on behalf of the Association on March 15, 2001. The Division replied on March 21, 2001.

Meanwhile, on March 16, 2001 the Minister wrote to me, acknowledging the Division's request, and stating as follows: " I would therefore request that you reconvene the parties or otherwise provide them with clarification of the award in regard to maternity leave and adoptive leave."

Position and arguments of the parties regarding paid adoptive leave

For the Division, Mr. Wallis stated that the issue of adoptive leave should be excluded from the 1998/2000 contract, and left for the next round of bargaining, which is due to start imminently. He also maintained that at this juncture, I lack jurisdiction to award a clause dealing with adoptive leave, for the following reasons. The issue of salary top-up during adoptive leave was never properly put before me by the Association. The clause proposed during the main hearing failed to include adoptive leave, a problem discussed at page 33 of the award. The Association made no mention of the adoptive issue while presenting its case. In any event, only maternity top-up was ordered, and parental leaves were specifically denied. The hearing is now over, and it is too late in the process to deal with adoptive leave. While the process of reconsideration may well be broad, the matter must have been before the arbitrator in the first instance in order to be reconsidered after issuance of the main award.

The Division declined to make any submission, in the alternative, dealing with the merits of the adoptive leave issue.

The Association replied that while there were admittedly some drafting difficulties with its proposed clause as presented at the main hearing, adoptive leave was clearly in issue. Proposed Article 9.03 (A) stated that 'Every teacher shall be entitled to maternity, parental and adoptive leave." Mr. Leibl said that it was the Association's intent that its position would cover adoptive parents as well as biological parents. In retrospect, a better proposal might have referred expressly to a 17-week top-up for both maternity *and* adoptive leave. In any case, jurisdiction was reserved to deal with adoptive leave if the parties could not resolve the issue between themselves, which is now the case. It is appropriate and normal for an interest arbitrator to insert his or her own language into the collective agreement, since the role of the arbitrator in this context goes beyond merely sitting in judgment. It is an extension of the collective bargaining process. Thus, Mr. Leibl submitted that there is full jurisdiction to deal with the requested clause.

On the merits, the Association argued that there would be unfairness if adoptive leave was omitted from the salary protection now being made available to birth mothers under the main award. No legal argument was advanced under the Manitoba *Human Rights Code*, but the Association did endorse the reasoning in Re British Columbia and British Columbia Government and Service Employees' Union (Reaney grievance) [2000] B.C.C.A.A.A. No. 328 (Sept. 21, 2000) (Germaine). In that case, the collective agreement provided an 85% top-up for maternity leave (17 weeks) and a 75% top-up for parental and adoptive leave (10 weeks). The grievor had undergone a difficult international adoption process, and her child had experienced medical and developmental problems on return to Canada. As a result, the grievor was in need of money as well as more time with her child, but she was forced to return to work prematurely. The grievance alleged discrimination under the B.C. Human Rights Code. The remedy sought was the granting of an adoptive leave equivalent to maternity leave under the agreement. After hearing extensive evidence relating to the adoption process in B.C. and the needs of both parents and children, Arbitrator Germaine held as follows:

> On all of the evidence summarized above, I am persuaded the factual premise of the Union's case is sound. The stresses and burdens imposed by adoption are of course different from those imposed by pregnancy. but the extent of those stresses and burdens is not less than the different stresses and burdens of a normal pregnancy. Put another way, a normal adoption will disrupt and impact on the lives [sic] of the adoptive mother as much as pregnancy will disrupt and impact on the life of a biological mother. … I would be inclined to accept the Union's arguments that the denial of maternity benefits or the equivalent benefits to adoptive mothers is discrimination based on family status and gender." (para. 73, 105)

Mr. Leibl argued that such an inequity shold be avaoided in our case. In concluding an agreement through interest arbitration, why would we not "try to et it right"?

The Association also referred to *Re British Columbia Public School Employers Association (Surrey School Board) and British Columbia Teachers' Federation (Bernier grievance)* [1999] 82 L.A.C. (4th) 57 (Munroe), upheld on review [2000] B.C.L.R.B.D. No. 367 (Oct. 6, 2000). Here the situation was reversed. The agreement provided 17 weeks of top-up to birth mothers and adoptive parents, but not birth *fathers*. The arbitrator stated as follows in allowing a birth father's grievance claim to top-up:

> … the "family status" protection in the Code includes protection against discrimination due to one's status as a father in the parent-child relationship arising from childbirth rather than by adoption. That is to say, it si unlawful to discriminate against a person regarding a term or condition of employment according to whether the person is a birth father or an adoptive father. (at Q.L. para. 31)

I note that the *Surrey* case in essence parallels the result in *Schachter v. Canada* [1992] 2 S.C.R. 679, reversing [1990] 2 F.C. 129 (C.A.), affirming [1988] 3 F.C. 515 (T.D.). Mr. Schacter was a birth father who challenged the 1984 UI amendments under which 15 weeks of benefits were provided for maternity (birth mothers) and also for adoption (either adoptive mother or father or both). In other words, at that time, pregnancy benefits and adoptive benefits wee equal. However, a birth father received nothing. Hence, Schachter's complaint. At trial, the court accepted that this was discriminatory under the *Charter of Rights* and ordered that the same benefits granted to adoptive parents be extended to a natural parent like Schacter.

The holding in *Schacter* is complicated by what happened on appeal. The government conceded the *Charter* violation before the Supreme Court of Canada, and argued only against the remedy of extension. At least two judges in the Supreme Court expressed doubts about the trial court's finding of discrimination in the first place (Justices La Forest and L'Heureux-Dube). The rest of the Court stated it's dissatisfaction that the government's concession prevented the discrimination issue from being canvassed. In the end, the Court struck down the remedy of extension, and left the problem to be resolved by Parliament. A major concern was that by reading natural parents into the scheme, the lower courts had substantially intruded into the legislative domain and changed the basic economics of the benefit system.

Meanwhile, Parliament amended the UI Act to provide 15 weeks of maternity (the so-called first tier of benefits) and a *second tier* available to natural parents as well as adoptive parents. However, the duration of the second tier was reduced to 10 weeks. Adoptive parents were now worse off than before, which has led to yet more challenges (as in *Reaney*).

In concluding its argument, the Association urged that "it would be reasonable, indeed prudent for the arbitrator to be proactive and award appropriate language to deal with the issue."

I questioned the Association on the scarcity of evidence in the record of this case specific to the adoptive leave issue, and the potential hazard of making an award on such a basis. Mr. Leibl responded that, as explained in the Reaney case (cited above), equivalent considerations apply to adoptive and maternity leaves.

In its written reply submission, the Division strenuously objected to Mr. Leibl's claim that the Association had always intended to have the provision cover adoptive as well as biological parents. Mr. Wallis wrote as follows: "While the Association is now attempting to establish intent for an adoptive leave top-up provision and present its case, such informa tion was never before you as arbitrator."

Jurisdiction to award a clause on adoptive leave top-up

Having carefully considered the Division's jurisdictional objection, I conclude that I am clothed with sufficient authority to award the Association's request, or some variation thereof, at this stage of the proceedings.

Adoptive leave was before me during the main hearing, at least to some degree, as evidenced by the text of proposed Article 9.03 (A), which states in plain terms an entitlement to adoptive leave. I observed at page 33 of the main award that perhaps it was intended that either parent could taken an adoptive leave under the proposed clauses providing parental leave. If so, the intent was not well translated into contract language, in that an adoptive mother would require 95% salary payment during the two week waiting period, something not expressly included in the Association's proposal. On the other hand, clause 9.03 (G) (1) might still have been effective for an adoptive mother. In the first two weeks, EI benefits would be zero, and the clause could be construed as requiring payment to the 95% level for these initial weeks. Thereafter, ordinary top-up would apply. for an adoptive father, proposed clause 9.03 (G) (2) and (3) would have been quite adequate to achieve the intent. Providing adoptive leave as a type of parental leave is consistent with the EI scheme as it was modified after the *Schachter* decision.

Provincial employment standards legislation was filed before me, setting forth both maternity and adoptive leave provisions in Manitoba. The Association filed numerous collective agreement precedents, a number of which dealt with adoptive and parental leaves in various configurations (Vancouver Teachers' Federation 1996/98 at p. 192, Manitoba Medical Association at p. 201, University of Manitoba Faculty Association at p. 205-207). Detailed information was also filed from Human Resources Development Canada with respect to the operation of SUB Plans, including arrangements for parental top=ups (at p. 151).

While the Association's intent was only imperfectly conveyed by the overall proposal as drafted, I find that this is enough for jurisdictional purposes. Since I expressly retained jurisdiction to deal with the accommodation of an adoptive parent's salary top-up, as part of the collective agreement clause awarded to pregnant teachers, the matter remains open at this stage. I also stated a general retention of jurisdiction at page 56 of the main award for the purpose of clarifying and implementing the award to the extent necessary. Beyond that, I have been specifically requested by the Minister to clarify the award in respect of adoptive leave, as provided under section 129.1 of the Act.

While I find there is jurisdiction to deal with the adoptive leave top-up, I also note the following caveat. The minimal attention paid to the adoptive leave clause during the main hearing may still be relevant in determining, on the merits, the nature and extent of a further award on this matter, if any.

Is it discriminatory to omit salary top-up for an adoptive parent?

In my initial award (at p. 33), I stated that there might be live issues created by granting maternity top-up without any accommodation for adoptive leave top-up. As is evident, the legal significance of employment benefit distinctions between birth and adoptive parents has received a fair amount of judicial and arbitral consideration in recent years.

In *Attorney General of Canada v. McKenna* [1999] 1 F.C. 401 (C.A.), Mr. Justice Linden reviewed the 'legal blindness" which has often been applied to adoptive parents and adopted children:

> For many years after provincial labour standards accommodated biological mothers with leave from work during pregnancy and childbirth, adoptive mo thers received no leave on account of an adoption placement. In *Schafer vs. Canada (Attorney-General*), Cameron J. at trial discussed the history of labour standards:
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> > Prior to 1984 only two jurisdictions provided adoptive parents with parental leave and job protection under employment standards legislation. In 1984 the Canada labour Code was amended to give both non-adoptive and adoptive parents 24 weeks of unpaid leave. Biological mothers always received 17 weeks of maternity leave. by 1986 most Canadian jurisdictions still lacked parental leave for adoptive parents in their labour standards legislation. Ontario did not grant parental leave to adoptive parents until 1990.
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> This situation persisted even though provincial authorities often demanded that new parents remain home for at least six months after a placement.
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> The general tenor of this history is that in the past adopted children have been regarded as 'second best", and adoptive parents have not been seen as 'real" parents. But in recent years there has been a great deal of momentum toward a more sensitive and humane attitude. In many areas, the law has begun to real adoptive parents and children with much the same respect accorded to their non-adoptive peers. In the area of labour law, many of the benefits that were once available only to birth parents are now given to adoptive parents as well. We now treat adopted children, it will be seen, in much the same way as birth children. Any social stigma that still exists in a carryover fro m older days and older attitudes. (at para. 25-26)

McKenna was a care about the citizenship status of foreign-born children adopted abroad by Canadians. In the foregoing passage, Justice Linden spoke for the full panel of the Federal Court of Appeal, although he dissented on a procedural question which ultimately determined the disposition. Justice Linden characterized the *Schafer* case as an exception in the movement towards equal treatment of birth and adoptive parents. In *Schafer v. Attorney General of Canada* (1997) 35 O.R. (3d) 1 (Ont. C.A.), the court reviewed the *Unemployment Insurance Act* for compliance with the equality rights guarantee contained in section 15 of the *Canadian Charter of Rights and Freedoms.* Under the UI regime in effect at the time (essentially the same as the EI scheme applicable in our case), pregnancy or maternity benefits were provided for 15 weeks to birth mothers (the first tier), and child care benefits wee available to all parents (including adoptive parents) for 10 weeks (the second tier).

Thus, biological family could receive up to 25 weeks of UI benefits in total, but an adoptive family was restricted to 10 weeks. At the trial level, this distinction was held to be discriminatory, but the ruling was reversed on appeal:

> …it is not necessarily discriminatory for governments to treat biological mothers differently from other parents, including adoptive parents. In order to cope with the physiological changes that occur during childbearing, biological mothers require a flexible period of leave that may be used during pregnancy, labour, birth and the postpartum period. Indeed, such leave provisions may be necessary in order to ensure the equality of women generally, who have historically suffered disadvantage in the workplace due to pregnancy-related discrimination. …
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> None of this is to deny the respondents' submission that adoptive mothers also face profound challenges in adopting and caring for their children. The decision to adopt often follows unsuccessful and difficult attempts to conceive a child biologically. The adoption process itself is rife with anxiety and stress as prospective parents are subjected to an invasive background check. An agonizing wait follows. The adoptive parents can have as little as 48 hours' notice of their child's arrival. The anxiety does not end with the child's placement. In addition to the universal demands of parenting s new child, adoptive parents may have to endure a 21 day waiting period during which the birth mother may change her mind about placing her child for adoption. Finally, with many placement of adopted children, there is a six-month probationary period during which the adoptive parents are under close scrutiny. International adoptions are at least equally complicated, often involving extended and multiple periods away from home.
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> However, as severe and distressing as these problems may be, they are not the same problems facing biological mothers. No doubt adoptive parents would put the extra 15 weeks of paid leave to excellent use in preparing and caring for their newly arrived child, but the purpose of the pregnancy leave benefit is not to provide income support to parents who care for their children. it is to provide a flexible system of income support to women who need time away from work because of pregnancy and childbirth. (at pp. 24-25)

Both *McKenna* and *Schafer* were considered in detail by Arbitrator Germaine in the *Reaney* award (cited above). As he noted (at para. 77), the crux of the *Schafer* decision is that compensating only birth mothers for work lost due to pregnancy/childbirth cannot be discrimination because only biological mothers undergo the physiological demands related to childbirth. However, if the purpose of maternity benefits is defined in terms less narrowly related to pregnancy, the result of the legal analysis is different:

> Can there be any other purpose for a "maternity" benefit? In my view, it should be possible to consider whether there is a broader purpose than the one identified in Schafer. To consider the purpose as necessarily fixed by the label "maternity" is to allow the label to determine the nature of the benefit, to permit form to dictate substance. (at para. 78)

By contract, Arbitrator Germaine concluded that the true purpose of the maternity benefit is "to protect working women from the disruptive effects of a new child on the capacity to maintain employment and preserve employment rights." (at para. 80) He then held as follows, in light of his evidentiary conclusion that the stresses and burdens of adoption were different but not less than pregnancy:

> On this approach to the purpose of maternity leave, denial of equal protection to adoptive mothers would constitute discrimination on the basis of family status because "adoptive status" is encompassed within the concept of family status in human rights legislation. … Further, in light of the fact that the burden of adoption and its disruptive effects on the capacity to work are assumed for the most part by women, the unequal treatment would also be seen as based on gender. …
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> Therefore, if the issues wee open to me to decide without regard to existing case law, I would find that the collective agreement does contravene section 13 of the Code. Specifically, I would conclude that the denial of maternity leave allowance or its equivalent to adoptive mothers violates the prohibition against discrimination on grounds of both family status and sex. (at para. 82-84)

In the end, Arbitrator Germaine decided that he should defer to the Ontario Court of Appeal ruling Schafer, even though an Ontario court decision is not binding on a B.C. arbitrator:

> … as the considered decision of an appellate level court, Schafer is of very considerable persuasive precedential value. It will be apparent from the foregoing that I am not persuaded by reasons of the Court in Schafer, but my misgivings have no bearing on the precedentail weight of the decision. (at para. 86)

The grievance alleging discriminatory treatment under the collective agreement was dismissed.

Schafer was also considered recently by an Ontario arbitrator faced with a grievance by a birth father who sought the same parental leave top-up as provided to adoptive parents under the collective agreement*: Re Association of Professors of the University of Ottawa and University of Ottawa (Melchers grievance)* [1999] O.L.L.A. No. 387 (May 13, 1999) (Adams), cited in the *Surrey School Board* case discussed earlier. The University of Ottawa agreement specified parental leave without pay, unless an adoption was involved, in which case 10 weeks of top-up was available, matching the EI benefit system at the time. Top-up was also provided for maternity leave.

Arbitrator Adams construed *Schafer* as deciding that maternity benefits and parental leave benefits have different purposes. Here, where adoption was covered under the parental leave article, equal treatment for birth fathers was necessary: "… I have come to the conclusion and declare that Section 29.2.3 insofar as it treats biological and adoptive parents differently is discriminatory contrary to Section 8.1 of the collective agreement and section 5(1) of the Ontario Human Rights Code." (at para. 31)

As a remedy, Arbitrator Adams ultimately ordered payment to the grievor as claimed and in addition, extension of the top-up benefit to all parental leaves under the agreement: [1999] 85 L.A.C. (4th) 214, [1999] O.L.A.A. No. 945 (Dec. 10, 1999). The employer submitted that in the face of a finding of discrimination, the parties should be required to re-negotiate, since it would be wrong to order a broad extension of costly benefits which the parties had never intended. The arbitrator, however, concluded that under the remedial principle in human rights law, it is preferable to extend benefits rather than to nullify an under-inclusive provision.

Clearly, this is a most complicated area of employment law which is very much in flux at the moment. On the question of whether it is discriminatory to deny adoptive parents equal treatment with birth mothers, the law is mixed. There is no Manitoba authority of which I am aware. Life Arbitrator Germaine in the *Reaney* case, I believe that there are cogent legal arguments to be made in favour of equal treatment for adoptive parents under maternity-type provisions. If Arbitrator Germaine's reasoning wee to prevail, then the Association's position – 17 weeks of paid adoptive leave – would be mandated by human rights law principles. On the other hand, applying the decision in *Schafer* allows for legislation and agreements which continue to provide a two tier system of benefits, with the first tier reserved for pregnancy and childbirth alone. On the basis of Schafer, my award in this case could legally omit any to-up for adopting teachers, and confine this new benefit to natural mothers.

Under the *Human Rights Code* of Manitoba, discrimination is prohibited "with respect to any aspect of an employment or occupation", including remuneration, compensation, or any other benefit, term or condition of employment (section 14). The *Code* is paramount over other provincial laws (section 58), unless expressly provided otherwise. In general terms, therefore, it would appear that an interest arbitrator under the *Public Schools Act* should have careful regard for the provisions of the *Human Rights Code* in fashioning an award.

Notwithstanding all the foregoing, I hesitate to make any formal determination of this difficult legal issue. There is a minimal evidentiary base in the main hearing record dealing with adoptive issues. In addition, the adoption question arose at the tail-end of a lengthy mediation-arbitration process, and was not addressed as a matter of law per se. The parties are both aware of the legal implications in this area, but chose not to address them at the reconvened hearing. Instead, the Division argued that I lack jurisdiction to award adoptive top-up at this stage, and in any event, maintained its opposition to top-up benefits generally. The Association argued that it would be prudent and fair to grant equal treatment, namely 17 weeks for adoptive leave. I conclude that the legal issue, although very real, is best left for another day.

As noted by Arbitrator Adams in University of Ottawa (award on remedy, para. 22), 'When parties bargain in the shadow of human rights legislation, they are on notice that workplace discrimination will be dealt with by arbitrators in a manner consistent with human rights legislation". If there is a discrimination issue here – which I decline to answer – no doubt it will be decided in an appropriate forum at an appropriate time. I will therefore confine my supplementary award to the merits of the teachers' current proposal.

Award on the merits

One common theme which emerges from all the authorities reviewed above, whether holding for or against the human rights position of adoptive parents, is that thee is a genuine need to recognize the "profound challenges" involved in adopting and caring for children. Adoptive parents would put any extra paid leave "to excellent use in preparing and caring for their newly arrived child" (Schafer, at p. 25). If this is so, then arguably Article 9.03 under the new St. Vital School Division collective agreement should make some financial provision for a teacher creating a family or adding to her family by means of adoption, as opposed to childbirth. As Justice Linden said in McKenna (at para. 26), the current approach in Canada favors 'a more sensitive and humane attitude" toward adoptive families.

In *Reaney*, the employer argued that if an adoptive mother's needs are not adequately met by the collective agreement, "that is an unfortunate state of affairs which may reflect poor public policy", and it should be remedied through legislation or collective bargaining, not legal challenges. (at para. 4) This interest arbitration, being an integral part of the teacher collective bargaining process, is therefore an appropriate forum in which to address this issue.

After much deliberation, I am not prepared to award the Association's proposal of 17 weeks top-up for adoption leave. Under the regime in effect at the time of the renewal agreement, only 10 weeks of EI would be payable, leaving the Division as second payer with responsibility for 90% of a teacher's salary for 7 weeks. This is far more than the typical 2-week waiting period which is normally covered by employers with SUB plans. Moreover, without evidence of the type heard in *Reaney*, I am unable to reach any conclusion regarding the reasonableness of equivalent paid leaves for adoption and pregnancy.

On the other hand, I am persuaded that it would be fair and reasonable to allow for some period of adoptive leave which will accommodate the acknowledged 'stresses and burdens" experienced by an employee involved in adopting a child. Adoptive leave top-up matching the EI entitlement at the relevant time, which was 10 weeks, seems the most workable and sensible approach under the circumstances. Such a collective agreement benefit is unlikely to have a material financial effect on the Division beyond the cost of the maternity clause already awarded. The Division declined to address the merits and filed no additional evidence, but I note the comment in *Schafer* that adoptive parents comprise between 2% and 4% of the population. On that basis, the cost of a 10-week adoptive leave top-up should not be undue.

I wish to stress that the new article I am awarding here is *not* a parental leave. It is not a second tier benefit. In the main award, I *denied* the Association's proposal for topped up parental leave, in part due to due to cost considerations. Establishing adoptive leave as a form of parental leave would create a risk that a fresh human rights complaint may arise, expanding the Division's financial exposure beyond the level contemplated in the main award. As in the *University of Ottawa* case (cited above), birth fathers might allege discrimination because they are adversely treated compared to adoptive fathers in accessing second tier benefits.

Rather, the intent of my supplementary award is to provide for an adoptive parent some measure of first tier salary protection, in a manner similar to a pregnancy leave. I feel safe in concluding from the material available to me that such a provision is reasonably necessary in order to avoid hardship and inequity to the small number of teachers who may choose to adopt. This "first tier" is the challenging time period during which the adoption placement is finalized and effected, and nurturing of the child begins. It is not merely "child care". Under the 2001 amendments to both provincial legislation and the EI system, extended second tier benefits will then be available to both natural and adoptive parents, although salary top-up will not apply under the St. Vital teachers' contract.

Again, I will leave the final drafting of the clause to the parties, retaining jurisdiction to settle any remaining differences which might yet arise. The following suggested format may assist:

Maternity, adoptive and parental leave

A. Every female teacher shall be entitled to maternity leave, and every teacher shall be entitled to adoptive leave, in accordance with this Article.

B. Every teacher shall be entitled to unpaid parental leave.

C. As per proposal (B). [Employment Standards Code applies]

D. As per proposal (C). [Mutual agreement to extend the length of leaves]

E. As per proposal (D), at 90% of salary. [17 weeks of maternity leave]

F. As per proposal (E), at 90% of salary. [For maternity leave, 2 weeks of 90% gross salary and 15 weeks of the difference between EI benefit and 90%]

G. A teacher taking adoptive leave pursuant to this Article shall be entitled to receive pay for the period of leave up to ten weeks in the amount of 90% of the salary being received at the time leave was taken, this pay to include any benefits received from Employment Insurance pursuant to a Supplementary Unemployment Benefits (SUB) Plan. The implementation of this clause is subject to the successful arrangement of an SUB Plan with the Canada Employment and Immigration Commission.

H. In respect of the period of adoptive leave, payments made according to the SUB Plan will consist of the following:

1. For the first two weeks, payment equivalent to 90% of gross salary, and

2. Up to eight weeks payment equivalent to the difference between the EI benefits the employee is eligible to receive and 90% of gross salary.

Once again, I wish to thank Mr. Wallis, Mr. Leibl and all the members of their delegations at the most recent session for their assistance.

DATED this 22nd day of March 2001, at Winnipeg, Manitoba.

Arne Peltz, Sole Arbitrator