IN THE MATTER OF: **AN INTEREST ARBITRATION**

BETWEEN:

TRANSCONA-SPRINGFIELD TEACHERS' ASSOCIATION NO. 12
OF THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as "the Association"),

-and-

THE TRANSCONA-SPRINGFIELD SCHOOL DIVISION NO. 12
(hereinafter referred as "the Division"),

Arbitrator: P.C. Suche, Q.C.

Appearances:

For the Association: Saul Leibl, Staff Representative
Manitoba Teachers' Society

For the Division: Sue Cumming, Labour Relations Consultant
Manitoba Association of School Trustees

SUPPLEMENTARY AWARD

This Supplementary Award is made as a result of a request from the parties to reconsider, clarify or amplify an Arbitration Award made by me on May 14, 2001, and delivered to the parties on May 15, 2001.

On June 7, 2001, and June 11, 2001, the Division and the Association, respectively, wrote to the Minister of Education requesting that I be directed to reconsider, clarify or amplify my Award. In the case of the Division, the request concerned Articles regarding Parenting Leave (Article 7.07); Short Term Disability (Article 14.02(b)); and all awarded articles where specific wording was not provided.

The Association's request concerned Articles regarding Substitute Teachers (Article 3.07); Sick Leave (Article 7.08); Settlement of Disputes (Article 26); Interest on Retroactive Pay (Article 3.11); and all awarded articles to confirm specific wording.

The parties appeared before me on June 27, 2001. At that point, the Minister of Education had not responded to either request made of him. Subsequent to the hearing, however, I received a letter from the Minister dated June 26, 2001, requesting that I reconvene the parties or otherwise provide them clarification of the Award in regard to Parenting Leave, Short Term Disability and all awarded articles as necessary to confirm specific wording for inclusion in the Collective Agreement. The Minister's letter was stated to be in response to the letter from the Division only.

To begin with, it is necessary that I determine the nature and extent of my jurisdiction.

The position of the Association, which was not seriously challenged by the Division, is that I do not have jurisdiction under Section 129.1 of the Public Schools Act, which provides:

> 129.1 Within thirty (30) days after the arbitrator has made an award, the minister may, at the request of either party, direct the arbitrator to reconsider and clarify or amplify the award or a part of it, and the award shall not be considered to be received by the Minister, or to be made for the purposes of section 131, until the reconsidered award is received.

Here, the Minister did not direct me to reconsider and clarify or amplify the Award within thirty days of its making. I agree with the Association that my jurisdiction to reconsider the Award is therefore limited to the test developed at common law. The general rule is that a judicial or quasi-judicial decision may not be reopened once the formal judgment has been drawn, issued and entered. The two exceptions are to correct a "slip" or error in the preparation of the Award, or if there was an error in expressing the manifest intention of the decision maker.

In addition to this limited jurisdiction to reconsider, I also specifically reserved jurisdiction to clarify or interpret the Award issued herein, or to provide specific wording.

Request by the Division

To begin with, the Division raised the fact that in the Award herein, I referred to and relied on the decision of Arbitrator Peltz in Re: The St. Vital Teachers' Association No. 6 of The Manitoba Teachers' Society and The St. Vital School Division No. 6 issued in February 2001. A supplementary award was also issued in that matter to which I did not refer to or consider. The Division had two complaints: that had it been aware that the St. Vital award would be relied on by me, it would have asked for an opportunity to make submissions concerning same; further, the supplementary award ought to have been considered by me. Having said this, the Division could not point to any specific provision in the St. Vital award or supplementary award to which it took exception, or would have specifically relied on. It did not contend that there was anything in the Award herein which should have been different as a result of any view that it held regarding the St. Vital decision, nor that any prejudice was suffered by it not being given the opportunity to make a submission. It argued, rather, that as a matter of principle, it ought to have been given the opportunity to respond at the time.

1. **Parental Leave (Article 7.07)**

The Division maintains that the Award is not clear as to what provisions were awarded under this Article. At issue between the parties was parental leave, maternity leave, adoptive leave and paternity leave. The Division asks which of the Association's proposals were awarded and requests that specific wording be provided for each clause.

Although expressed in the Award, in the interests of clarity and finality, I will specifically state that it was my intention to order the Association's proposed Article 7.07, subject only to the modifications outlined on page 40 of the Award.

The Association's proposal dealt with all of the leaves referred to above. The Division also pointed out that the effective date was stated to be June 20, 2000. This is a typographical error. The Effective date is June 30, 2000.

The following wording is ordered:

a) **PARENTAL LEAVE**

Every teacher who becomes the mother of a child, the father of a child, or the adoptive parent of a child shall be entitled to up to seventeen (17) weeks of parental leave.

b) **MATERNITY LEAVE**

i) Every female teacher shall be entitled to maternity leave.

ii) An employee shall provide a certificate from a duly qualified medical practitioner certifying that she is pregnant and specifying the estimated date of delivery.

iii) An employee shall submit an application in writing for leave under this subsection at least four (4) weeks before the day specified in the application as the day on which she intends to commence such leave.

iv) The Division shall grant a pregnant teacher maternity leave of at least seventeen (17) weeks. A request for leave of more or less than seventeen (17) weeks may be granted by the Division.

v) A maternity leave shall commence no earlier than eleven (11) weeks preceding the date specified in the certificate mentioned in 7:07 (a)(ii) above and shall terminate no later than seventeen (17) weeks following the actual date of delivery.

c) **ADOPTIVE LEAVE**

i) Every teacher shall be entitled to adoptive leave.

ii) Wherever possibly, an employee shall submit an application in writing for leave under this subsection at least two (2) weeks before the day specified by her/him in the application as the day on which s/he intends to commence such leave.

iii) The Division shall grant an adoptive parent an adoptive leave of at least seventeen (17) weeks. A request for the leave of more or less than seventeen (17) weeks may be granted by the Division.

2. **Long Term Disability Benefits (Article 14.02(b))**

At the hearing of this matter, the Division sought to add a statement to the existing wording to the effect that it would administer the Manitoba Teachers' Society Long Term Disability Plan at no cost to the Division. The reason for the request was that the Division felt the existing wording would be interpreted to impose the obligation on the Division to fund the Plan. To address the Division's request and to accommodate a concern raised by the Association regarding the wording of the Division's proposal, I awarded the following:

> "The Division agrees to administer the Employee-Paid Short Term Disability Plan on behalf of the participating teachers, at no cost to them."

The Division requests clarification of this Article, as it is of the view that the wording ordered is confusing. Specifically, it maintains that the clause could be interpreted to mean that it is responsible for funding the Plan. In response, the Association maintains that this is not how it interprets the Article, and that such an interpretation is not reasonable.

While I have difficulty understanding how the interpretation posed by the Division could be given to this clause, in the interests of certainty and finality, I will say that the Article was intended to require the Division to administer the Plan, and to be responsible for the cost of such administration. It was not intended, nor should it be read to mean that the Division is responsible for funding the Plan itself. This is the responsibility of the participating teachers.

Wording

In several instances I left it to the parties to determine the specific wording for various provisions. It appears that they have been unable to do so. The Division seeks wording for the following Articles:

Article 3.07	Payment for substitute teachers
Article 3.11	Interest on retroactive pay
Article 5.01	Allowances for consultants and coordinators
Article 7.08	Sick leave
Article 26	Provision for settlement of differences

Regrettably, the parties did not make any submissions or provide me with wording which they felt was appropriate. I will deal with the issue of the wording at the conclusion of this decision.

Requests by the Association

The Association's letter to the Minister dated June 11, 2001, referenced a number of Articles. At the hearing before me on June 27, 2001, the Association requested that I clarify only the following Articles:

Article 3.07	Payment for substitute teachers
Article 7.07	Parenting leave
Article 26	Provision for settlement of differences

The Association also requested that I provide specific wording for all Articles where wording was not ordered.

1. Payment for Substitute Teachers (Article 3.07)

I accepted the Division's proposal for Article 3.07(b), which states:

> Effective beginning of the 1999/2000 school year, where the substitute teaching is continuous for five (5) or more consecutive days for the purposes of replacing the same teacher, the substitute teacher will be paid a salary in accordance with Article 3.04(b) commencing the 6th day of such consecutive employment.

The Association points out that this wording would allow the Division to seek repayment of monies from substitute teachers who were paid regular salary rates commencing the first day of consecutive employment, which was the previous wording.

The Association seeks clarification as to whether a clawback of salaries paid to teachers at the higher rate was actually intended. It argues that the retroactive implementation of this change is unfair and unreasonable as the teachers in question agreed to work on the basis of a specified minimum rate of pay. The Association submits that the change should take effect as of the beginning the next school year.

In response, the Division agrees that it has the right to recover monies paid to ay teachers who fall within this circumstance. It argues that the Association did not raise this issue at the original hearing, and is asking me to reconsider a matter already determined, which I do not have jurisdiction to do.

I have some sympathy for the Association's position regarding the unfairness to any employees who might be affected by the circumstances described. However, this issue was not raised by the Association during the original hearing. Given that the proposal of the Division, which I accepted, specifically addressed the effective date of the provision, I have no choice but to conclude that this is a request to reconsider or change my decision. It does not, in my view, fall within one of the two exceptions to the general rule that prohibits me from reconsidering a decision.

2. Provision for Settlement of Differences (Article 26)

At the hearing of this matter, the Division proposed a revised procedure for resolving disputes. I awarded the Division's proposal subject to the modification that the preamble of the clause should include reference to the Association as well as employees. As well, it was represented that some minor changes would be necessary for the proposal to be consistent with The Labour Relations Act. Since I was not provided with particulars of those changes, I directed that the parties should attempt to agree on wording to achieve this, and retained jurisdiction to deal with any issues regarding this clause.

The Association has asked that I clarify this Article, and both the Association and the Division have asked that I provide specific wording. As noted above, neither party provided any proposed wording. The Association identifies ten aspects in which the proposed Article does not comply with the Labour Relations Act, (hereinafter "the Act"), requires clarification, or is otherwise inconsistent with law. In response to the Association's request, the Division argues that the Association is seeking a reconsideration of the matter, which I do not have jurisdiction to do.

To the extent that it is necessary to clarify the Award issued herein, I will indicate that it was my intention that the Article should be consistent with the Act, although not necessarily incorporate all provisions of the Act.

The Association seeks clarification or modifications to several aspects of the Division's proposal. I have set out below the issues raised, and the substance of my decision concerning each. I will deal with the matter of specific wording at the conclusion of this Award.

1. Matters referred to in Section 78(2) of the Act: Section 78(2) is

one of the deemed provisions for all collective agreements. Every collective agreement to which the Act applies must include this provision. If not, it is deemed to include the provision. The Division argues that the wording of Section 78(2) should be included.

In my view, this falls within the direction contained in my Award, and I agree that the Agreement should include the wording of Section 78(2). I note, however, that some aspects of Section 78(2) may duplicate other parts of Article 26.

2. Section A(2) should allow for a teacher to have a representative

of the Association/Society present at the without prejudice discussions referred to therein. The Association argues that the proposed clause does not recognize the representational rights of the Association and denying Association members the right of representation in the early stages of a dispute resolution process constitutes a denial of natural justice.

Although I have some difficulty understanding how this provision could be interpreted to deny a teacher the right to representation at such discussions, in the interests of clarity I will indicate that a teacher is entitled to representation at the meetings referred to. This should be stated in the Article.

3. Section A(3) restricts the time limit to the occurrence of an

event. The Association argues this is inconsistent with the discoverability rule which was embodied in the prior Collective Agreement. The Association argues that this aspect of the clause should be redrafted to incorporate the language of paragraph 1 of this prior Article 26.

This is not something that was raised at the original hearing. The Association's request appears to me to require a change to, or a reconsideration of, the wording ordered. In my view, this request does not come with the limited exceptions referred to above, and, therefore, I do not have jurisdiction.

4. The term "hearing" in Step 2 is unclear in that the nature of the

hearing is not defined, nor is the question of whether the Association and its members are provided with an opportunity to appear. The Association suggests that at a minimum it would be preferable to change the word "hearing" to "board meeting".

Having considered the Association's submission on this point, I agree that clarification concerning the nature of the hearing is required.

5. The notifications referred to in Step 3 of Article A and Article

B(1) do not comply with Section 115(2) of the Act. The Association suggests that these two steps should be combined so the notice of referral to arbitration includes the name of the nominee.

6. Article B(2) does not indicate who is to refer the matter to the

Chairperson of Labour Board if the nominees do not agree. The Association points out that this is inconsistent with Section 115(5) of the Act, which provides that the Labour Board appoints upon the request of either party, not the nominees. further, Section 115(4) of the Act provides that the Chairperson is to be agreed to within five days whereas the proposal states ten days.

7. Article B(3) is inconsistent with Subsection 124(1) of the Act,

which permits the Chairperson to cast a deciding vote if the nominees disagree.

I agree with the Association's position with respect to these three items. The Division's proposal should be altered to incorporate or be consistent with the selections of the Act referred to in paragraphs 5, 6 and 7 hereof.

8. The Association argues that Article B(4) is inconsistent with the

Act in that it limits the decision of the Board to the dispute(s) or question(s) contained in the statement or statements submitted by the parties. Section 121 of the Act states that an arbitrator is to have regard to the real substance of the dispute, not just the strict wording of the grievance.

I agree that the proposed wording should be modified to ensure consistency with the Act. In my view, it is appropriate, therefore, to eliminate the first statement in Article B.04, namely those words that appear prior to the word "and".

9. There is no reference to Part VII of the Act. The Association

argues that the Article should indicate that the provisions of the Act respecting the appointment powers, duties and decisions of the arbitrators and arbitration boards apply.

I am of the view that to ensure clarify reference should be made to Part VII of the Act.

Wording

I order the following:

Article 3.07 – Payment for substitute teachers:

a) Rates for substitute teachers will be paid as follows, which includes vacation pay credits.
Class I – III
Class IV – VII

b) Effective beginning of the 1999/2000 school year, where the substitute teaching is continuous for five or more consecutive days for the purpose of replacing the same teacher, the substitute teacher will be paid a salary in accordance with Article 3.04(b), commencing the sixth (6^{th}) day of such consecutive employment.

c) Where a substitute for a teacher is engaged for twenty (20) or more consecutive days for the purpose of replacing the same teacher, the substitute for the teacher will be engaged for the full period of employment under a Form 2A contract. Notwithstanding Article 7.09 of the Collective Agreement, the sick leave entitlement for a substitute engaged under a Form 2A contract herein shall accumulate entitlement for sick leave at the rate of one day of sick leave with pay for every nine days of actual teaching service, or fraction thereof.

d) As pre (a) hereof, payment of substitute salaries shall be made on September 15^{th}, and each moth thereafter.

e) For the purposes of (b) and (c) hereof, a day on which a school is declared closed by the Division, or on which the substitute is not required to teach because of a school or divisional activity, shall not be considered a break in consecutive days.

I have intentionally left out the particulars of the amounts in Article 3.07(a). I will leave it to the parties to agree on this detail.

Article 3.11 Interest on retroactive pay:

The Division will pay interest on retroactive salary increases payable to persons covered by the Collective Agreement. Such interest will be paid on the gross amount of retroactive pay due, less the amount of statutory deductions (Canada Pension Plan, Employment Insurance, Income Tax and Teachers' Retirement Allowance Fund).

Interest shall be calculated from August 28^{th} to the date of the actual payment of the retroactive pay, and will be calculated as monies become due.

Interest shall be computed at the rate in effect at the

Toronto-Dominion Bank for a "Money Builder Account" as at the date of signing the agreement.

Article 7.08 – Sick Leave:

(a) Sick leave shall be granted to provide lost income when a teacher is unable to be at work and perform regular duties due to illness or injury.

(b) Except as hereinafter provided, a teacher shall be entitled to sick leave not exceeding twenty (20) teaching days in any school year. Where the employment of a teacher is continued for more than one (1) year, the unused portion of the sick leave in any year(s) shall be carried forward and accumulated from year to year to a maximum of:

- 40 teaching days in the second year
- 60 teaching days in the third year
- 80 teaching days in the fourth year
- 100 teaching days in the fifth and subsequent years.

(c) Unused sick leave shall accumulate to a maximum of 100 days. In each year of employment (i.e. school year) the number of sick days used shall be deducted from the total accumulation.

(d) Consistent with Article 3.08 and 3.09, teachers employed on a fixed-term contract or on a part time basis shall be entitled to earn sick leave on a pro-rata basis.

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

(f) Sick leave is not payable to a teacher who, in respect of an illness or injury resulting from a motor vehicle accident, is receiving wage loss replacement benefits from the Manitoba Public Insurance Corporation to the extent that such benefits and paid sick leave exceed the teacher’s normal salary. In such cases, the teacher shall reimburse the Division the amount of benefit received from MPI, and the equivalent number of such leave days will be reinstated in the employee’s sick leave bank.

Article 5.01 – Allowances for Consultants and Co-ordinators:

Not having had the benefit of any submission on this Article, it is unclear to me why the Division seeks specific wording. The Award herein order the Division's proposal, which I have set out below s the wording to be incorporated in the Collective Agreement. I will, however, reserve jurisdiction to deal with any issues that may need to be addressed, in the event I have not understood the issue that required direction.

> Effective the 1999/2000 school year, a teacher appointed by the Board to the position of Consultant or Co-ordinator shall be paid an allowance of $8,277.00 on a pro-rata basis over and above his/her basic salary.

The following shall be contained in a Memorandum of Understanding between the parties:

> A. Halbesma shall continue to be paid an allowance of $4,191.00 until such time as she vacates the position of Co-ordinator or the rate payable exceeds her current rate.

Section 26 – Provision for settlement of differences:

I have provided clarification to the parties regarding this Article. I am of the view that they are in the best position to determine the exact wording. If this cannot be achieved, I will reconvene the hearing once again.

Conclusion

I will retain jurisdiction to clarify, interpret or amplify any matters referred to in this Award or to provide specific wording if the parties are not able to agree on the same.

DATED at the City of Winnipeg, in Manitoba this 11th day of July 2001.

P. Colleen Suche, Q.C.
Arbitrator

To Transcona-Springfield Interest Arbitration Award

To Further Supplementary Award