IN THE MATTER OF: AN ARBITRATION
AND IN THE MATTER OF: GRIEVANCES FILED BY ALLAN STEVEN APPEL, SHELDON GOLDBERG, GARY NORMAN SHAPIRA AND SHIRLEY WEINSTEIN, EACH DATED NOVEMBER 15, 1999

BETWEEN:

ALLAN STEVEN APPEL, SHELDON GOLDBERG, GARY NORMAN SHAPIRA AND SHIRLEY WEINSTEIN,
(hereinafter referred to as the "Grievors"),
THE ST. JAMES ASSINIBOIA TEACHERS' ASSOCIATION,
(hereinafter referred to as the "Association"),
- and –
THE ST. JAMES ASSINIBOIA SCHOOL DIVISION NO. 2
(hereinafter referred to as the "Division"),

AWARD OF ARBITRATION

MEMBERS OF THE BOARD

A. Blair Graham, Q.C.	Chairperson
Robert Simpson	Nominee of the Division
Mark Gabbert	Nominee of the Grievors and the Association

APPEARANCES

The Grievors and the Association:	Mel Myers
The Division:	Kris Gibson

INTRODUCTION

On February 28, 2001, this Board of Arbitration issued a written decision (Mr. Simpson dissenting) dismissing a preliminary objection of the Division. The preliminary objection of the Division was that each of the four grievances ought to be dismissed on the basis that the Association and the Grievors were estopped from proceeding with the grievances.

The Board decided that although the elements necessary to give rise to an estoppel (a representation by the Association on behalf of its members and detrimental reliance on the representation by the Division) were present in this case, the preliminary objection of the Division was dismissed because the grievances were based on arguments that Article 5.08(b) of the Collective Agreement was discriminatory in its effect upon certain teachers and therefore violated sections 14(1) and 14(2) of The Human Rights Code, R.S.M. The reasoning of the majority of this Board was that human rights legislation was legislation of a special character, and that estoppel could not be invoked to prevent a determination of whether the rights of the Grievors under the Human Rights Code had been violated.

The Board's decision of February 28, 2001 was limited to dismissing the preliminary objection of the Division; no additional relief was granted.

Accordingly, the Board reconvened on October 25, 2001 for the purpose of receiving evidence and hearing argument with respect to the substantive merits of the four grievances.

The written reasons dated February 28, 2001 are extensive and analyzed some of the same issues that are analyzed in this Award. Accordingly, this Award should be read in conjunction with the earlier award dated February 28, 2001.

Each of the Grievors has grieved that the Division has:

> "…unreasonably, discriminatorily, and improperly deducted from my salary the sum of $** being my per diem salary rate when I was absent from work on an approved leave of absence for the religious holy day of Yom Kippur September 20, 1999."
> ***
> $145.58 – Mr. Appel
> $291.16 – Mr. Goldberg
> $291.16 – Mr. Shapira
> $129.59 – Ms Weinstein"

Article 5 of the applicable Collective Agreement deals with leaves of absence. Article 5.08(b) of the Collective Agreement in force between January 1, 1997 and June 30, 1998, and Article 5.09(b) of the Collective Agreement in force between July 1, 1998 and June 30, 2000 (which was finalized and agreed upon by the Division and the Association in mid October 1999) are identical, and provide as follows:

> "A teacher requiring religiouis leave shall, prior to September 30th in each year, or where employment commences after the opening of school in September within 30 days of active employment with the Board, inform the Board in writing of the days required for such leave. The Board shall grant such leave and the teacher shall take such leave requested. Deductions shall be made at the per diem rate."
> (hereinafter this Article will be referred to as "Article 5.08(b) in order to coincide with the reference to the applicable Article in the four grievances.)

Broadly stated, the grievances five rise to two issues which this Board must determine:

> Broadly stated, the grievances give rise to two issues which this Board must determine:
> 1. Whether or not Article 5.08(b) of the Collective Agreement has been discriminatory in its effect upon the Grievors?
> 2. If so, whether or not the Division has reasonably accommodated the interests and needs of the Grievors?

THE EVIDENCE

The evidence introduced before the Board on October 25, 2001 consisted of a Statement of Agreed Documents and Facts. The Agreed Documents included, inter alia, relevant portions of

collective agreements between nine school divisions, and the respective teachers' associations, relevant portions of two collective agreements relating to different time periods between Winnipeg School Division No. 1 and the Canadian Union of Public Employees, statistical information relating to religious holiday leave from three other school divisions, and useful information from Professor Terence Day, a Senior Scholar in History of Religions in the Department of Religion at the University of Manitoba. Professor Day's materials outlined the dates of "religious holidays" observed by nine different religious groups in Canada during three school years (1999 – 2000, 2000 – 2001, 2001-2002), and also divided the "religious holidays" into three categories as follows:

(i) Category A – religious or holy days which may carry mandatory religious obligations requiring leaves of absence from work during a school day;
(ii) Category S – popular social occasions with religious connotations, but without mandated religious obligations;
(iii) Category L – "secular" occasions without defined religious connotations.

Most of the collective agreements between school divisions and teachers' associations that were filed as agreed documents provided for leaves for religious purposes with pay, but subject to a maximum number of days per school year (usually three). Some of those collective agreements contained an express recitation that the parties agreed that the relevant Article constituted reasonable accommodation for "religious holy leave".

One of the collective agreements, between the Seven Oaks School Division, and the Seven Oaks Teachers' Association for the period July 1, 1998 to June 30, 2000 provided that leaves for religious purposes to a maximum of three days per school year were permitted but were to be paid for by the personnel concerned, and that the total cost was to be shared equally among all personnel absent for a particular religious holiday. The Seven Oaks Agreement also contained an express provision reciting the parties' agreement that the Article described above constituted reasonable accommodation for "religious holy leave".

The Agreed Facts provided some historical information relating to the religious leave provisions which were contained in some of the previous collective agreements between school divisions and teachers' associations, including that:

(i) in Winnipeg School Division No. 1, collective agreements between 1988 and 1998 provided for up to two days paid leave;
(ii) in Fort Garry School Division No. 5, a previous collective agreement contained no provisions in respect of religious leave, but gave the Superintendent discretion to grant up to one day of personal leave per school year.
In the Fort Garry division a letter of understanding was signed on September 2, 1999 indicating that teachers would be granted up to three days of paid religious leave;
(iii) in Assiniboine South No. 3, a previous collective agreement

contained no provisions in respect of religious leave.

The Agreed Facts also contained comparative information with respect to student enrolments in, and the number of full time equivalent teachers employed by, several school divisions including the Division, Winnipeg No. 1, Assiniboine South No. 3, Fort Garry No. 5, and Seven Oaks No. 10.

It was also agreed that each of the Grievors had applied for, and received leaves of absence for Yom Kippur on Monday, September 20, 1999, and that they were each subject to salary deductions in respect of those leaves.

Viva voce evidence was also received from three of the Grievors, Messrs. Appel, Goldberg and Shapira, and from Steven Chapman, the Manager of Human Resources of the Division.

Each of the Grievors testified that the fact that deductions were made from their salaries when they took leaves for religious purposes, because for at least some of the time periods involved they were resource teachers with either no regular classroom duties or limited classroom duties. Pursuant to the relevant provisions in the applicable collective agreements, deductions were made from their salaries regardless of whether substitutes were required.

One of the Grievors, Mr. Goldberg was a member of the bargaining committee of the Association during the negotiations which led to several collective agreements, including the collective agreement in force during September 1999. The Association stipulated during the hearing that when negotiating that particular collective agreement, it was aware of the Supreme Court of Canada decision in Syndicat de L'Enseignement de Champlain et al v. Commission Scolaire Regionale de Chambly (1994) 115 D.L.R. (4th) 609 ("Chambly"), referred to extensively in this Board's decision dated February 28, 2001, and was also aware that many school divisions and teachers' associations had negotiated provisions with respect to religious leaves in their collective agreements which were different from the provision contained in the collective agreement between the Division and the Association.

None of the Grievors was aware of any significant educational problems being encountered by students or the schools in question, as a result of substitute teachers replacing one or more of the Grievors during Yom Kippur or Rosh Hashanah.

Mr. Chapman testified on behalf of the Division. The salient points of his evidence were that:

(a) one of his duties as the Manager of Human Resources is the recruitment of substitute teachers;
(b) there are 189 teachers on the Division's substitute list;
(c) approximately 80% of those substitutes work for other divisions as well, whereas the remainder work exclusively for the Division;
(d) many individuals on the substitute list cannot teach all subjects, or cannot teach in all programs offered by the Division. For example some of the substitutes cannot teach in the French Immersion program, and some cannot teach courses requiring specialized knowledge or expertise

such as music, or higher level mathematics or science courses;

(e) the Division occasionally experiences difficulties in either having the appropriate number of substitutes, or appropriately qualified substitutes, available on particular days;

(f) to date, the Division has had few requests for religious leaves, and the Division is unable to predict whether such requests will increase in the future. Based on the experience of other divisions, the Division expects that such requests will increase if its teachers become entitled to take religious leaves with pay;

(g) Mr. Chapman was unaware of any significant problems being encountered by the Division as a result of teachers employed by the Division taking leaves for religious purposes;

(h) Mr. Chapman did not know what impact would result from a change entitling teachers employed by the Division to take religious leave with pay.

ANALYSIS

As discussed in the written reasons of this Board dated February 28, 2001, the Grievors contend that Article 5.08(b) of the Collective Agreement is discriminatory in its effect upon Jewish teachers, and other teachers, with respect to an aspect of their employment, namely their remuneration. The Chambly decision provides persuasive support for that contention.

In Chambly, after first reiterating that discrimination can result from the effects of an otherwise neutral rule (adverse effect discrimination as distinct from direct discrimination), the Supreme Court of Canada concluded that the schedule of work in force, although non discriminatory on its face, was nonetheless discriminatory in its effect.

Mr. Justice Cory writing for the majority, expressed the point in the following terms:

> "In my view, the calendar which sets out the work schedule, one of the most important conditions of employment, is discriminatory in its effect. Teachers who belong to most of the Christian religions do not have to take any days off for religious purposes, since the Christian holy days of Christmas and Good Friday are specifically provided for in the calendar. Yet, members of the Jewish religion must take a day off work in order to celebrate Yom Kippur. It thus inevitably follows that the effect of the calendar is different for Jewish teachers. They, as a result of their religious beliefs, must take a day off work while the majority of their colleagues have their religious holy days recognized as holidays from work. In the absence of some accommodation by their employer, the Jewish teachers must lose a day's pay to observe their holy day. It follows that the effect of the calendar is to discriminate against members of an identifiable group because of their religious beliefs. The calendar or work schedule is thus discriminatory in its effect."

In its argument before this Board on October 25, 2001, the Division essentially acknowledge that Chambly stands for the proposition that a secular calendar setting out a work schedule can be discriminatory in its effect, and that the work schedule in the Division is discriminatory in its effect on Jewish teachers.

The Division therefore focused its arguments on the issue of whether the interests and needs of those teachers have been reasonably accommodated by the Division.

Determining whether reasonable accommodation has occurred in any particular situation is a factually specific exercise. A particular arrangement or agreement between an employer and a union, or group of employees, may constitute reasonable accommodation in one situation, and not in another, depending on the particular set of circumstances that apply in a specific work environment.

When issues with respect to religious leaves for teachers arise, one way of achieving reasonable accommodation is by the employer providing for leave with pay for teachers who seek time off for religious purposes, while at the same time imposing a limit on the number of days that may be taken per school year and stipulating that reasonable notice must be given for all leaves taken. Within this category of reasonable accommodation, there may still be variances between divisions as to the maximum number of days that may be taken per school year and the amount of notice to be given.

In other employment contexts, the case law also provides examples of reasonable accommodation being achieved with respect to religious leaves, without providing for leaves with pay. In those cases the employees were given other options, such as taking the days required as part of their annual vacations, or working extra hours on other days to make up for the time away on leave. Counsel for the Division emphasized that reasonable accommodation, even in a school context, can be achieved in other ways, and not simply by granting leaves with pay.

The Supreme Court has provided guidance in several cases as to the meaning of reasonable accommodation, and as to the process of assessing whether it has been achieved in any particular set of circumstances.

In Ontario (Human Rights Commission) v. Simpsons Sears Ltd. (1985) 23 D.L.R. (4^{th}) 321 (S.C.C.), the Supreme Court described an employer's duty as follows:

> "The duty in a case of adverse effect discrimination on the basis of religion or creed is to take reasonable steps to accommodate the complainant, short of undue hardship: In other words, to take such steps as may be reasonable to accommodate without undue interference in the operation of the employers' business and without undue expense to the employer".

The Supreme Court elaborated on the concept of undue hardship in Alberta Human Rights Commission v. Central Alberta Dairy Pool (1990) 72 D.L.R. (4th) 417 (S.C.C.), in which Wilson J., writing for the Court stated:

> "I do not find it necessary to provide a comprehensive definition of what constitutes undue hardship but I believe it may be helpful to list some of the factors that may be relative to such an appraisal. I begin by adopting those identified by the board of inquiry in the case at bar – financial cost, disruption of a collective agreement, problems of morale of other employees, interchangeability of work force and facilities. The size of the employer's operation may influence the assessment of whether a given financial cost is undue or the ease with which the work force and facilities may be adapted to the circumstances. Where safety is at issue, both the magnitude of the risk and the identity of those who bear it are relevant considerations. This list is not intended to be exhaustive and the results which will obtain from a balancing of these factors against the right of the employee to be free from discrimination will necessarily vary from case to case".

Other Court cases and arbitration awards have elaborated upon the type of factors that may be considered when assessing a particular arrangement to determine if it constitutes reasonable accommodation up to the point of undue hardship. An example is the arbitration award in Re: Seneca College v. Ontario Public Service Employees Union Local 561 (2000) 93 L.A.C. (4th) 355, which is interesting because it dealt with an educational institution which had received requests for personal leaves with pay by two grievors who were members of the Greek Orthodox Religion. The Seneca College case identified 11 factors to be considered in an assessment of reasonable accommodation and undue hardship including:

(a) The number of employees requesting leave;
(b) The number of days of leave sought;
(c) The duties of the employees seeking leave;
(d) Potential disruptions to work flow;
(e) The size of the administrative unit;
(f) Any actions which the requesting employees are able to take to assist in facilitating the leave request.

The Division, in its submission, pointed out that there are several references in the authorities dealing with reasonable accommodation to the importance of reviewing what the parties themselves have agreed to in the applicable collective agreement, as part of an assessment of whether a particular arrangement constitutes reasonable accommodation. Counsel for the Division specifically referred to Re: Richmond et al v. Attorney General of Canada (1997) 145 D.L.R. (4th) 622, a case which is commented upon extensively in the written reasons of the Board dated February 28, 2001.

Counsel for the Division also referred to Large v. City of Stratford [1995] 3 S.C.R. 733. In Large, the Supreme Court was dealing with a case of alleged discrimination on the basis of age,

involving a mandatory retirement provision (age 60) applicable to police officers. In determining whether such a provision could be justified as a bona fide occupational requirement, the Court stated:

> "The collective bargaining process also must be considered when assessing this objective test. Collective agreements represent carefully constructed and fairly negotiated bargains between employers and employees. These agreements cannot be readily dismissed from consideration. Cory in *Dickason v. University of Alberta* [1992] 2 S.C.R., stated at p. 1133:
>
> > "It is safe to assume that the terms of the collective agreement pertaining to compulsory retirement were not the manifestation of an abuse of its power by the employer University. Rather, they represent a carefully considered agreement that was negotiated with the best interests of all members of the faculty association in mine." "

In Chambly itself, Cory J., writing for the court said:

> "…Yet, the terms of the agreement are relevant in assessing the degree of hardship which may be occasioned with interference with its terms. Thus, as pointed in our *Renaud, supra*, at p. 587, a substantial departure from the normal operations of the conditions or terms of employment set out in the collective agreement may constitute undue interference in the operation of the employer's business…"

The Division argues that the parties themselves are the best judges of what constitutes reasonable accommodation in any particular workplace. The Division and the Association, knowing what the state of the law was, (as outlined in Chambly), and knowing that other divisions and teachers' associations had agreed to Article 5.08(b), which was a clause allowing for unlimited religious leaves, on reasonable notice, but subject to a per diem salary deduction.

The Division therefore submits that Article 5.08(b) ought to be regarded as a reasonable accommodation in the context of the particular conditions applying in the Division.

Although I accept that the terms of the collective agreement are a relevant consideration in determining whether a reasonable accommodation has been achieved in a particular workplace, I do not agree that the terms of the collective agreement are necessarily determinative of the issue. The Supreme Court in Chambly made that point, clearly and succinctly in the following sentence, which immediately precedes the passage relied upon by the Division and quoted above:

> "The provisions of a collective bargaining agreement cannot absolve either the employer or the union from the duty to accommodate."

In the absence of additional evidence as to the circumstances in the Division which may be relevant to this issue (such as the financial position of the Division, and a reasonable estimate of

the potential number of requests the Division may receive if a change is implemented), it is impossible to conclude that Article 5.08(b) represents a reasonable accommodation to the point of undue hardship.

Accordingly, a consideration of factors relating to undue hardship, such as those outlined in the Central Alberta Dairy Pool, and the Seneca College cases must be undertaken.

The Division chose not to lead specific evidence as to the financial condition of the Division, or as to some of the other factors outlined in Central Alberta Dairy Pool. However there is evidence before the Board in the Statement of Agreed Documents and Facts as to what has been agreed to between other divisions and teaches' associations with respect to religious leave and the size of those divisions relative to the Division, both in terms of student enrolment, and the numbers of full time equivalent teachers employed. There is also evidence before the Board in Professor Day's reports, and in the multi-faith calendars, as to the significant number of days with respect to which teachers of various non-Christian faiths, and teachers of the Eastern Orthodox Christian faith might reasonably request leave for religious purposes.

On the basis of that evidence, and on the basis of statements in various of the authorities as to what will happen when leaves with pay are allowed, the Division submits that if it is required to grant religious leaves with pay, it will undoubtedly face a significant increase in requests for such leaves.

The Division says that in the year after Winnipeg School Division No. 1 agreed to provide 3 days of paid religious leave to its teachers, it received in excess of 900 applications for religious leave. Allowing for a proportionate reduction in the number of such requests on the basis of the smaller size of the Division, the Division nonetheless says that it is clear that it will face a major increase in requests for religious leaves, if it is required to grant religious leaves with pay.

I understand the Division's position to be that, in addition to the significant financial costs associated with the increased requests, the difficulties the Division periodically experiences with the availability of substitutes, will also be exacerbated.

Mr. Chapman, when testifying on behalf of the Division acknowledged that the Division does not know, nor does it have the means of knowing, the religion of most of its teachers. Although Mr. Chapman indicated he expected requests for religious leave to increase if the Division agreed to pay for such leaves, he could not say with certainty that such requests would increase.

I certainly think that Mr. Chapman's expectation is reasonable, and that an increase in requests for religious leave will occur, if the Division agrees to, or is required to grant such leaves with pay.

However, it was also clear to me from Mr. Chapman's evidence that the Division is not able to calculate with precision, nor even to reasonably estimate the financial costs associated with providing for paid religious leaves, because that cost would be subject to a number of variables, most of which are not known.

Similarly in terms of other issues, including the availability of substitutes, the effect on the quality of education provided to the Division's students, and the effect on the morale of other teachers and paraprofessionals, it is difficult, if not impossible, to assess the impact of a change in the Division's practice with respect to religious leave.

As indicated elsewhere in this Award, Mr. Chapman fairly acknowledged that he does not know what impacts would result from a change enabling teachers employed by the Division to take religious leave with pay. I assume the same would be true for any change to the way the Division provides religious leave to the teachers whom it employs. Any change may have a financial consequence, and may result in some administrative inconvenience.

However, an undetermined financial consequence, and the prospect of some administrative inconvenience is not a sufficient basis for this Board to conclude that the Division has achieved a reasonable accommodation to the point of undue hardship.

In the result, the evidence before this Board is insufficient to establish that a change in the way the Division provides for religious leave for its employees will constitute an undue hardship on the Division by unduly interfering with the Division's operations, or by bringing about an undue expense to the Division.

In summary, I have concluded that:

1. Article 5.08 (b) of the Collective Agreement is discriminatory in its effect upon the Grievors;
2. Article 5.08 (b) does not represent a reasonable accommodation of the interests and needs of the Grievors to the point of undue hardship.

DECISION AND REMEDY

The grievances of the Grievors are therefore allowed.

In terms of remedy, the grievances as filed sought a declaration that Article 5.08 (b) of the Collective Agreement be declared void and of no effect by reason that the Article violated s.14(1) and s.14(2) of The Human Rights Code, R.S.M., and an order or orders that each of the Grievors be paid a certain sum of money representing the per diem amounts that had been deducted from their respective salaries in relation to their absences from work on September 20, 1999 to observe Yom Kippur.

At the hearing, counsel for the Association and the Grievors asked for somewhat different relief, namely a declaration that Article 5.08 is discriminatory in its effect, and that the last sentence of Article 5.08 (b), dealing with deductions, be declared void and of no effect. Counsel for the Association also asked for an order or orders that the Division pay to each of the Grievors the amounts which were deducted from their respective salaries in relation to their absences from work on September 20, 1999.

In contract, counsel for the Division submitted that if the decision of the Board is to allow the grievances, the only relief that ought to be awarded is a carefully worded declaration, and that no consequential relief, such as an order directing the payment of money, ought to be granted. The Division argued that any financial obligation to be imposed upon the Division by virtue of the operation of Article 5.08 (b) must be clearly outlined in that article or a related article. The Division also argued that awarding financial relief in this case would mean that the Board and effectively read into the Collective Agreement an obligation to grant unlimited religious leaves with pay, when Article 5.08 (b) does not so provide. When considering this argument it is important to remember the Division's position that the needs and interests of the Grievors relating to religious leave may be reasonably accommodated in ways other than providing for such leaves with pay.

The Association responds to the Division's arguments by emphasizing that "where there has been a wrong, there must a remedy", and that the granting of a declaration without consequential financial relief is to grant an unsatisfactory remedy.

In determining the appropriate relief in this case, I have also considered some of the arguments that were made in support of, and in opposition to the preliminary objection of the Division, that the grievances ought to be dismissed on the basis of estoppel principles.

The grievances wee filed within a month of the Association advising the Division that its members had ratified the Collective Agreement, and within days of the Collective Agreement being executed.

This gives rise to the suggestion that the Association, being aware of Chambly, and of the provisions in collective agreements in other divisions providing for paid religious leaves subject to certain limits, did not attempt to seriously negotiate with the Division with respect to religious leave, but rather allowed a new collective agreement to be signed including Article 5.08 (b), while always intending to proceed with grievances challenging that article.

An argument could be made that if that was the strategy of the Association, such a strategy would be unfair and inappropriate because it would have misled the Division into believing that the parties were ad idem with respect to religious leave when in fact they were not, and when in fact the Association intended to file grievances relating to that issue. This argument could lead to a conclusion that the Board should exercise its discretion, and refrain from ordering a financial payment, as a way of expressing its disapproval of the Association's bargaining behaviour.

However, the decision as to the relief to be awarded in this case, should not be influenced by arguments with respect to the Association's bargaining behaviour for at least three reasons:

(i) although the timing of the grievances relative to the dates that the Collective Agreement was ratified and signed raises questions with respect to the bargaining behaviour of the Association, there was insufficient evidence before the Board to allow any proper conclusion to be drawn on that issue;

(ii) an argument could also be made that the Association may have

genuinely believed that the Chambly case established that articles in collective agreements such as Article 5.08 (b) were discriminatory and that given the willingness of other divisions in Manitoba to include provisions for religious leaves with pay in their collective agreements, the Association therefore felt that it should not be obliged to negotiate with the Division with respect to religious leave for its members. As an aside, I would observe that although it is understandable that the Association may have held such a belief, that would overlook the fact that the issue of reasonable accommodation could still have been the proper subject of negotiations between the parties. Chambly does not prevent teachers' associations from entering into negotiations with divisions as to how the religious interests of Jewish and other teachers are to be reasonably accommodated. Indeed Chambly recognized the benefit of parties to a Collective Agreement addressing the issue of reasonable accommodation in their negotiations;

(iii) refusing to make an order for the payment of money to the Grievors, if such an order is otherwise warranted, as an expression of the Board's disapproval of the Association's bargaining behaviour would affect the individual Grievors more so than the Association, when in fact only one of the Grievors had been actively involved in the negotiations on behalf of the Association.

Accordingly, the Board is left to decide whether any order of financial compensation is warranted in this case.

The amounts being sought by each of the Grievors through these grievance proceedings are small. The Grievors are not seeking payment with respect to all of the leave they took for religious observances over a period of several years. They are limiting their claims to one day, namely Yom Kippur on September 20, 1999. I do not think that the Grievors pursued this matter solely in order to receive compensation for one day of leave taken on September 20, 1999.

I disagree with the Association's assertion that a declaration without a specific order directing compensation to the Grievors would be an unsatisfactory remedy. by virtue of this Award, the parties know that Article 5.08 (b) is discriminatory in its effect on certain teachers, and that Article 5.08 (b) does not represent a reasonable accommodation of the interests of those teachers to the point of undue hardship. In other words the parties know that Article 5.08 (b), in its current form, offends the Human Rights Code of Manitoba.

I am also cognizant of the Division's arguments that it may be possible to arrive at a reasonable accommodation of teachers' interests in relation to religious leave without providing for leaves with pay, (although I am also mindful of Cory, J.'s remarks in Chambly that a teacher can only teach when the school is open and the pupils are in attendance).

The Division and the Association should now have an opportunity to negotiate a new provision with respect to religious leave knowing that Article 5.08 (b), in its current form, is not in accord with the law.

I will therefore refrain from issuing an order or orders directing payments of money to the Grievors, because I believe the declarations outlined below are sufficient to resolve the issues raised by the grievances, while at the same time affording the parties the opportunity to agree upon an appropriate replacement article.

As indicated above, the Grievances of the Grievors are allowed. In terms of specific remedies, I am granting:

(a) a declaration that Article 5.08 (b) (or 5.09 (b) as the case may be) has been, and is discriminatory in its effect on the Grievors, and that Article 5.08(b) (or 5.09(b) as the case may be) does not represent a reasonable accommodation of the interests of the Grievors in relation to religious leave to the point of undue hardship; and

(b) a declaration that the final sentence of the Article namely "Deductions shall be made at the per diem rate", is null and of no effect.

This Board will retain jurisdiction in the event the parties, or either of them, take the position that any further orders or directions are required in order to conclusively resolve the grievances in question.

DATED this 28th day of January 2002.
A. Blair Graham

I concur in part of the above Award, but also dissent in part from the Award. I am attaching my reasons.
Mark Gabbert

I dissent from the above Award, and I am attaching my reasons.
Robert Simpson

IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF GRIEVANCES FILED BY ALLAN STEVEN APPEL, SHELDON GOLDBERG, GARY NORMAN SHAPIRA AND SHIRLEY WEINSTEIN, EACH DATED NOVEMBER 15, 1999

BETWEEN:

ALLAN STEVEN APPEL, SHELDON GOLDBERT,
GARY NORMAN SHAPIRA AND SHIRLEY WEINSTEIN,
(hereinafter referred to as the "Grievors"),
THE ST. JAMES ASSINIBOIA TEACHERS' ASSOCIATION
(hereinafter referred to as the "Association"),

- and –
THE ST. JAMES ASSINIBOIA SCHOOL DIVISION NO. 2
(hereinafter referred to as the "Division"),

DISSENT

I dissented from the majority Award dated February 28, 2001 in that I would have granted the preliminary objection of the Division on the basis that an estoppel had been established. While accepting that the parties could not contract out of The Human Rights Code, the Division and the Association could negotiate and include a provision in their Collective Agreement to reasonably accommodate those adversely affected by discrimination, and thereby comply with the Code. As the Association had not established that the challenged article was contrary to the Code, and therefore illegal, and as the estoppel had been established, the Association was estopped from pursuing the grievances.

The majority dismissed the Division's preliminary objection and the matter proceeded on its "merits". Having reviewed the majority Award, I must, again, dissent.

The majority notes at page 7 of the Award the stipulation of the Association that it was aware of the law, including the decision of the Supreme Court of Canada in Chambly when it negotiated with the Division the inclusion of Article 5.08 in the Collective Agreement. It is also noted that the Association stipulated that it was aware that other School Divisions and Local Teacher Associations had negotiated provisions with respect to religious leaves in their Collective Agreements which were different from Article 5.08, and for the most part provided for periods of religious leave with pay. Knowing what the Supreme Court of Canada had said and knowing what other School Divisions had done, the Association concluded a Collective Agreement with the Division which included Article 5.08.

At page 11 of the Award, the majority notes that what constitutes reasonable accommodation is factually specific, and that a particular arrangement or agreement between an employer and a union may constitute reasonable accommodation in one situation but not in another depending on the particular set of circumstances that apply in a specific work environment. The majority then proceeds at pages 12 and 13 to review judicial and arbitrable jurisprudence wherein various factors to be considered in assessing reasonable accommodation have been identified. Given the nature and variety of factors that may be considered in assessing reasonable accommodation, and that what constitutes reasonable accommodation is specific to the particular work environment, who is in a better position to make that determination than the employer and the union in arts length negotiation.

The Courts have recognized the significance of the collective bargaining process in determining what is reasonable accommodation (the majority refers to examples of this jurisprudence at pages 14 and 15 of the Award). Although the majority accepts that the terms of the Collective Agreement are relevant in assessing reasonable accommodation, they find "that the terms of the collective agreement are not necessarily determinative of the issue". The majority then finds that in the absence of other evidence "it is impossible to conclude the article 5.08 (b) represents a reasonable accommodation to the point of undue hardship".

While I accept that what the parties have negotiated is not "necessarily determinative of the issue", I find that it is determinative on the facts before this Board. The Division and the Association are experienced parties who were engaged in arms length protracted negotiations. Article 5.08 was agreed upon and included in the Collective Agreement with knowledge of the legal requirements for reasonable accommodation and with the knowledge that different arrangements had been concluded in other School Divisions. Rather than critiquing the evidence adduced by the Division on other factors to be considered in assessing reasonably notice, the Board should consider the fact that no evidence was adduced by the Association to suggest that the negotiated agreement to Article 5.08 was anything other than an acknowledgement and agreement that Article 5.08 constituted reasonable accommodation with respect to religious leaves. While I can accept that there is an onus upon the Division upon a finding of adverse effect discrimination to show that it has provided reasonable accommodation, where it is established that the Division and Association have negotiated and agreed upon the terms of the reasonable accommodation, if the Association thereafter wishes to challenge the very terms to which it has agreed (assuming for the moment that it is not estopped from doing so), surely there must be some onus upon the Association to lead evidence as to why it ought not to be bound by its agreement and why the provisions to which it agreed do not constitute reasonable accommodation.

I would dismiss the grievances.

The majority having allowed the grievances, I would agree that the remedy should be limited to a declaration and that a financial order is not warranted. I also agree that the needs and interests of the grievors relating to religious leave may be reasonably accommodated in other ways than providing such leave with pay. Scheduling of work may certainly be an appropriate alternative to paid leave. The Chairman has noted the comment of Cory, J. in Chambly to the effect that a teacher can only teach when the school is open and the pupils are in attendance. That comment does not accord with the evidence before this Board, where the Grievors who testified confirmed that there was work to do and services to be performed in the absence of students. If we accept that teaching extends to duties beyond actual instructional contact time with students, clearly there are duties that can be assigned and work that can be performed when students are not in attendance.

February 5th, 2002

R.A. Simpson, Nominee for the Division.

IN THE MATTER OF AN ARBITRATION
BETWEEN:
THE ST. JAMES ASSINIBOIA TEACHERS' ASSOCIATION
AND
THE ST. JAMES ASSINIBOIA SCHOOL DIVISION NO. 2

GRIEVANCES OF

Allan Steven Appel
Sheldon Goldberg
Gary Norman Shapira
Shirley Weinstein
PARTIAL DISSENT OF MARK GABBERT
Nominee of the Association

I concur with the Award in its decision to allow the grievances. Specifically, I agree that Article 5.08 (b) of the collective agreement in question is discriminatory in its effect, that it does not represent a reasonable accommodation in the matter of religious leave for the Grievors (Award pp. 14 and 18), and that the last sentence of the Article should be declared null and of no effect (Award p. 18).

With respect, I must dissent from the decision not to award the Grievors any financial relief. As the Association argued, "where there has been a wrong there must be a remedy" (Award p. 15). In this case, the Award has limited itself to a declaration that the employer has failed to make a reasonable accommodation and that a portion of the collective agreement must be struck down as illegal. This declaration has the great virtue of preventing future discrimination and is a fundamental element in any remedy in this case. It is, however, only a partial remedy in that it denies the Grievors' request that their lost pay be restored.

With respect, I do not find that the reasons given for this denial to restore lost pay are compelling.

First, it is gratuitous to conclude as the Award does at p. 17 that, because the request for monetary compensation did not include a demand for restoration of all lost wages due to unpaid religious leave taken over several years, therefore the Grievors were not entirely serious in their request for financial compensation. Moreover, while the Grievors did not come before us "solely in order to receive compensation for one day of leave taken on September 20, 1999", that was nevertheless one of the reasons they filed their grievances. Having found that the Grievors were the victims of adverse effect discrimination, it now behooves us to order the Division to pay the wages that were unjustly deducted. This is even more the case given that the Division provided no evidence at all that payment would be a hardship and that we heard evidence that the exercise of the Grievors' religious duties was importantly restricted by financial to pay the Grievors the wages claimed for September 20, 1999, thereby compensating them for the wages lost due to discrimination. Since this Board has accepted the Grievors' claim that 'Article 5.08 (b) of the Collective Agreement is discriminatory in its effect upon Jewish teachers, and other teachers, with respect to an aspect of their employment, *namely their remuneration*" (Award p. 7, emphasis mine) it is only reasonable that the wages in question be paid. I would have made this order without prejudice to any subsequent reasonable accommodation that might have been achieved that did not involve paid leave.

Aside from the matter of wages, with respect, I note that whether or not the parties negotiate a new provision of the collective agreement governing religious leave, the employer still has a legal duty to achieve a reasonable accommodation on the matter of religious leave. In the words of Chambly quoted at p. 11 of the Award "The provisions of a collective bargaining agreement

cannot absolve either the employer or the union from the duty to accommodate." (Indeed, in cases where a collective agreement contains a discriminatory clause, individual employees may have recourse to the courts as in *McIntyre*.) This point is relevant to the comments in the Award at p. 16 to the effect that during negotiations prior to the filing of this grievance "the issue of reasonable accommodation could still have been the proper subject of negotiations between the parties." No doubt there is much to be said for having contract language that represents a reasonable accommodation; but with or without such language, there must be a reasonable accommodation achieved. With respect, it is not up to this Board to suggest how the parties might proceed, whether through negotiations or otherwise. Even less is it our place to imply that the union should have negotiated an adequate clause during the course of collective bargaining that preceded the grievances before us.

Further on this matter, with respect, I find quite troubling the passages of the Award at pp. 15-17 where the behavior of the union during negotiations is dis cussed. These matters were resolved in our decision published on February 28, 2001 in which we denied the Division's preliminary objection that the union was estopped from bringing these grievances since it had recently signed a collective agreement that contained Article 5.08 (b). It is, therefore, inappropriate to return to these matters now. Rather than taking these arguments by the Division on board once again and potentially allowing them to influence the remedy in this case, the Award should simply have dismissed them as inadmissible given our previous decision on the preliminary objection.

All of which is respectfully submitted.
Mark Gabbert
Nominee of the Association
Dates this 1st day of February, 2002