IN THE MATTER OF: An interest arbitration under *The Public Schools Act*, C.C.S.M. Chapter P250 ("the Act").

BETWEEN:

THE LOUIS RIEL SCHOOL DIVISION ("the Division"),

- and-

THE LOUIS RIEL TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS' SOCIETY (MTS) ("the Association"),

AWARD

Appearances

For the Division: Morgan Whiteway, Chief Spokesperson, Labour Relations Consultant, Manitoba School Boards Association (MSBA); Christian Michalik, Superintendent; Marna Kenny, Secretary-Treasurer; Lisa Aitken, Assistant Superintendent; Jennifer Hume, Assistant Secretary-Treasurer; Justin Rempel, Alison Bourrier and Elizabeth Mitchell, Labour Relations Consultants, MSBA.

For the Association: Tom Paci, Lead Representative, MTS Assistant General Secretary Operations/Teacher Welfare; Marcela Cabezas, Association President; Scott Wood, Association Vice-President and Collective Bargaining Chair; Jay McGurran, Association Vice-President, Professional Development; Arlyn Filewich, Teacher Welfare Department Head, MTS; Diane Beresford, MTS Staff Officer; Andrew Peters, MTS Staff Officer; Mike Bell, MTS Economic Analyst.

Arbitration Board

Arne Peltz, Chair; Denny Kells, Division Nominee; David Shrom, Association Nominee.

Hearing dates

November 25-28; December 2-6, 2019; additional submissions March 6 & 10, 2020.

Date of award:

April 14, 2020.

TABLE OF CONTENTS

Introduction

The parties entered into a collective agreement for the period July 1, 2014 to June 30, 2018. Due to circumstances not entirely within the control of the parties, bargaining for a new agreement has been truncated and no renewal agreement has been concluded. The Association initiated these arbitration proceedings in July 2018 pursuant to section 100 of the Act. The present board was constituted on or about January 19, 2019. In the meantime, the terms and conditions of the prior agreement continue in effect pending a voluntary renewal or the making of an award.

The Act prohibits teachers from striking and bars school boards from locking out their teachers. If collective bargaining fails to produce an agreement, the dispute must be resolved by arbitration, without stoppage of work. In this respect, the teacher bargaining regime in Manitoba differs from some other jurisdictions in Canada, where job action and economic sanctions may be deployed by the parties, with serious consequences for the community at large. Binding independent arbitration in exchange for ceding the right to strike was an historic compromise reached between MTS and Manitoba school trustees in 1956, when it was enshrined in law. As a result, Manitobans have been spared the adverse impacts of teacher strikes and lockouts. Interest arbitration has been accepted as a key feature of collective bargaining, not often utilized, but available when necessary to settle difficult disputes between teachers' associations and school boards.

At the conclusion of the present hearing, Association Vice-President Scott Wood told the panel that this arbitration represents the membership's only real means of engaging in collective bargaining in the current round. For its part, the Division too expressed, through various presenters, its concern over the situation it faces with restricted financial resources and burgeoning educational challenges. Both parties

are seeking a reasonable outcome as the collective bargaining process comes to an end with the current award. They each attested to a positive history of working together and reaching mutually acceptable agreements. Despite grave apprehensions, both parties said they remain hopeful and believe they can maintain a productive working relationship.

Louis Riel School Division profile

Louis Riel School Division was formed in 2003 after the amalgamation of the former St. Vital and St. Boniface divisions. Prior to that, Norwood School Division had been absorbed by St. Boniface. With over 15,000 students and 40 schools, the Division ranks third in the province, and uniquely, contains the largest Francophone population west of Quebec. Close to 35% of enrolment is in French Immersion. Louis Riel has experienced significant growth over the past decade, especially in its French programs, and these trends are projected to continue. Several new Winnipeg neighbourhoods are located within the Division's boundaries.

The payroll for the Division's 2,149 teachers is $110M and the total annual Division budget is $194M (2019-2020). The teaching complement is an experienced one, with 65% of teachers at nine years of service or more. About 80% of teachers are listed as either Class 5 or Class 6. The average teacher age is 41.2 years old. This year, 40 new graduates were hired, of whom 10 were permanent and the rest were on term contracts.

In introducing itself to the arbitration board, the Division reviewed a number of key documents, including its Multi-Year Strategic Plan, a Report on Continuous Improvement, a report to the community entitled "Our Journey" and the public consultation version of the draft 2019-2020 budget. The Division articulated its

values and dreams, summarized by the motto, "Thriving Learners, Flourishing Communities". Since the Division was formed, said the Superintendent, it has been on a journey to pursue its goals, acting collaboratively with teachers, staff, parents and students. One especially important initiative was an effort to reduce K-3 class size, which has been hindered by funding restraint. In a recent submission to government, the Division advocated broadly for full-day kindergarten, Indigenous inspired learning, a whole-learner expression of success, a lifelong framework for learners, and public education as part of a poverty reduction strategy. While the Division has ambitious programs and plans, it is worried that economic realities will jeopardize the journey.

The Association did not dispute that there are fiscal pressures facing the Division due to government policy but insisted there is room for both good quality educational programming and proper compensation for teachers.

The arbitration board acknowledges the commitment of both the Division and the Association to serving the needs of students and the local community.

The collective bargaining environment

The Association described the current public school education environment as extraordinarily uncertain due to initiatives taken or under consideration by government. The Division shared this perspective.

In 2017, the Legislature passed Bill 28, *The Public Services Sustainability Act*, S.M. 2017, c. 24, establishing a four-year period during which public sector employee compensation is limited to 0 - 0 - 0.75% - 1.0%. If applied to the Division and the Association, the first year under Bill 28 would be 2018-2019. The bill comes into force upon proclamation but has not been proclaimed. The validity of Bill 28 was

challenged under the *Canadian Charter of Rights and Freedoms* ("the Charter") by numerous unions and a decision is pending from the Court of Queen's Bench. Whatever the trial result, at least one appeal is likely.

In February 2018, Government signalled an interest in moving to province-wide collective bargaining after expiry of the agreements ending in June 2018. Subsequently, legislation was placed on the Order Paper (Bill 26, March 2019), raising the prospect of merging 38 teacher collective agreements across the province, but the Bill did not proceed at that time. Meanwhile, the provincial funding increase for school divisions in 2018-2019 was limited to about 0.5% overall, the Tax Incentive Grant Program was phased out (over 6 years) and school division administrative cost caps were reduced by 15%.

Government urged parties to accept the Bill 28 compensation pattern as collective bargaining was slated to commence. On June 12, 2018, the Ministers of Education and Finance jointly wrote to all school board chairs to clarify government's intentions. They stated that while Bill 28 was not law, this does not alter "government's traditional role in setting broad monetary collective bargaining mandates for employers within the public sector." The Ministers asked for local bargaining to proceed with a view to voluntarily achieving the targets set by Bill 28, namely a compensation cap of 0 – 0 – 0.75% - 1.0% over the next four years. In addition, government directed school boards not to impose tax increases exceeding 2 percent on local ratepayers, although no penalties were specified.

In January 2019, Louis Riel School Division received an effective 1.2% funding increase for 2019-2020. This was a deeply disappointing allocation. With rising enrolment and other commitments, the Division had been expecting at least 3.6% as in the previous year. The result was a $4 million budget reduction and a series of

difficult cuts to core needs, including transportation, special needs, technology, staff and three planned new teacher hires. According to the Division, a repeat next year would mean impacts on class size and support services. Again, government directed that local taxation was limited to 2% but this time, divisions were threatened with an additional cut in administrative costs if they exceeded the 2% ceiling.

At this time, government suggested it was considering a complete elimination of school board authority to levy property taxation, with all funding provided directly by the province.

In the fall of 2019, government introduced Bill 2, which amends Bill 28 by allowing "relatively modest" variations in compensation, in the sole discretion of the Minister. Also, Bill 2 retroactively voids any inconsistent collective agreements or arbitration awards. Bill 2 was replaced by Bill 9 in the current legislative session and is still before the assembly. The Association described this latest proposed legislation as an outrageous attack on independent interest arbitration.

The announced intent of these government actions was to provide students with a quality education while creating efficiency and controlling costs within the public education system. However, divisions were reassured by the Minister that Bill 28 would enable them to manage under this restrictive regime because teacher salary increases, the largest single cost item, would be effectively frozen or slowed under the public sector wage pattern.

Beyond these new or contemplated fiscal policies, government established the Manitoba Commission on Kindergarten to Grade 12 Education in 2019, with a broad mandate including student learning, teaching, accountability for student learning, governance and education funding. The report could lead to a major realignment of

school divisions and other changes. Although the report was completed early in 2020, it has not been released and public review has been deferred until 2021.

The parties share a mutual anxiety over the unprecedented degree of uncertainty they face in the current environment, each from its own perspective.

The Association characterized Bill 28 and Bill 9 as a blunt, illegal intervention in free collective bargaining. Despite the absence of proclamation, the bills have had an inappropriate chilling effect on public sector negotiations, said the Association. For its part, the Division recognized that Bill 28 is not law at this time but submitted that the Bill 28 pattern is a relevant consideration for the arbitration board because it represents the environment in which the Division is required to operate. The Division said it feels somewhat like a pawn in a struggle between organized labour and government. The Association repeatedly stated that "the Division is not the problem."

Despite sharing a strong sense of discomfort with the current environment, the parties diverged sharply in their proposals for the new collective agreement. The Association asked for salary protection from inflation and improvement in several contractual rights and benefits. Given such an uncertain future, the award should provide teachers with as much security and clarity as possible. On the other hand, the Division emphasized financial sustainability and management flexibility. The Division has worked hard to be an employer of choice in Manitoba and hopes to continue attracting the best teachers. However, it will be a challenge just to maintain services and programs as enrolment grows and revenues are capped. The Division supported adoption of the Bill 28 pattern, whether it turns out to be law or not.

The parties confirmed that there has been limited negotiation since notice to bargain was given in 2018. While there was some dispute over whether more might have been done despite the difficult bargaining environment, in fact the parties spent little time advancing and discussing potential revisions to the collective agreement.

No teacher collective agreements have been concluded since the passage of Bill 28. By contrast, in the last round, all 38 agreements were finalized within two years. The present case is the first arbitration to be heard and the settlement may set a pattern for the province, although neither side suggested that this fact should affect the board's approach to an award.

After the main arbitration hearings ended in December 2019, the COVID-19 pandemic emerged, causing health and economic impacts which cannot be fully ascertained at this time. As a result, the arbitration board has limited the present award to the 2018-2020 contract years, based on data provided during the hearing process relevant to that time period. Going forward, the parties will need to resume collective bargaining sooner than might be optimal, under circumstances that will reveal themselves over time.

Interest arbitration principles

The unprecedented collective bargaining environment calls for careful attention to interest arbitration principles, beyond the routine recital which often suffices in an award.

Association submission

The Association cited foundational authorities on the purpose of collective bargaining and the role of interest arbitration in achieving fairness for working

people. Professional employee collective bargaining is now well established, and the objectives go beyond compensation to include working conditions, autonomy, safety and security in employment. Teacher bargaining is governed by statute, but the Charter is now an important feature of the regime. The Association referred to the "living tree" doctrine in constitutional law and argued that the same principle can be seen in the evolution of interest arbitration. As an example, the Association pointed to the first comprehensive layoff clause awarded in *St. Boniface School Division No. 4* (Chapman: 1980) at p. 19-23 and the breakthrough award on working conditions in *Transcona-Springfield School Division No. 12* (Freedman: 1989) (duty-free noon hour, limited student contact time and extra-curricular activities). Arbitrators should not hesitate to "give a fresh look at what may be old issues": *Lord Selkirk School Division No. 11* (Teskey:1993) at p. 5.

The Association noted that resort to interest arbitration by teachers in the Division and its predecessors has been modest. Over the last 50 years and 72 rounds of bargaining, only six awards have been issued. In Manitoba, parties have engaged in pattern bargaining on salaries and sometimes other provisions, and typically improvements have been made on a gradual basis. Often there has been a ripple effect, as in the case of adoptive and parental leave top-up, which evolved in a series of cases during the 2000's based on equity and fairness. This was an instance of the "living tree" in action.

Manitoba interest arbitrators have adopted replication as the guiding principle in teacher arbitrations. The award reflects what the parties most likely would have achieved in free collective bargaining: *Kelsey School Division* (Steel: 1995) at p. 4; *Turtle River School Division* (Graham: 2007) at p. 11; *Agassiz School Division* (Bass: 1994) at p. 6. Arbitrators have followed the seminal decision by Justice Halvorson in *CUPE and Saskatchewan Health Care Sector* (1982), which cautioned

against wearing "the mantle of a crusader for social change" and called for consideration of objective evidence as to what could have been obtained in free collective bargaining. In the early leading case on comparability factors, Arbitrator Shime listed cost of living, productivity and comparisons, both within the same industry and externally for similar work: *B.C. Railway* (1979).

The Association cited the following basic description of the interest arbitrator's mandate, as stated in *Kingston Hospital* (Swan; 1979), at p. 12:

> The decision as to whether a specific service should be offered in the public sector or not is an essentially political one, as is the provision of resources is to pay for that service. Arbitrators have no part in that political process, but have a fundamentally different role to play, that of ensuring that the terms and conditions of employment in the public service are fair and equitable.

The Association also asserted that there is longstanding arbitral authority holding that in the public sector, where the employer has the power of taxation, "inability to pay" cannot be considered as it might be in the private sector. Government may be *unwilling* to pay but is never unable to pay. Arbitrators will make an award based on objective terms and conditions of employment in comparable labour markets. Public employees are not required to subsidize the community by accepting substandard wages and conditions. The Association claimed that inability to pay has been "universally rejected in the public sector by an overwhelming number of arbitrators": Cole, *Decision Making in Public Sector Compulsory Interest Arbitration*, at p. 19-27.

In a famous declaration, often repeated and elaborated, Arbitrator Owen Shime wrote that if arbitrators considered the funding level of universities in Ontario for the purpose of salary determination, "they would in effect become handmaidens of

the government": *McMaster University* (1990) 13 L.A.C. (4th) 199. He explained (at para. 18):

> … Arbitrator/selectors have always maintained an independence from government policies in public sector wage determinations and have never adopted positions which would in effect make them agents of the government for the purpose of imposing government policy. Their role is to determine the appropriate salary range for public sector employees regardless of government policy, whether it be funding levels or wage controls.

On the other hand, the *McMaster University* line of authority acknowledges that prevailing economic conditions are taken into account to the extent that they are reflected in wage levels for comparable occupations in the community.

In the present case, said the Association, where there are no Manitoba teacher settlements to compare, the next best factor is cost of living, which has historically been used in teacher bargaining. This was the case in *Fort La Bosse School Division No. 41* (Freedman: 1987), where the board held, in the absence of Manitoba teacher comparators, that a salary adjustment close to the cost of living was fair to both the teachers and the division (at p. 9). The Association distinguished the reasoning in *Saskatchewan Teachers' Federation*, [2018] S.L.A.A. No. 9 (Peltz), where the Western Canadian average salary was accepted as the best comparator although not a mathematical determinant (at para. 66). Bargaining practice and history has been very different in Saskatchewan, said the Association.

The Association submitted that a government policy such as Bill 28 is not relevant in replication analysis. Similarly, public sector settlements reached under duress because of Bill 28 should not be considered for replication purposes. It is notable that adjudication decisions made after Bill 28 have declined to adopt the government's compensation pattern, and instead granted modest wage increases consistent with prevailing labour markets: *City of Winnipeg and WAPSO* (Secter:

2017) at p. 18; *Prairie Mountain Health and PCAM (Physicians and Clinical Assistants)* (Manitoba Labour Board: 2017); *MacDonald Youth Services and MGEU* (2017:Werier); *Winnipeg Regional Health Authority and PARIM (Residents and Interns)* (Freedman: 2019) (hereafter "*PARIM*").

In *PARIM*, the board addressed the significance of Bill 28 as follows (at para. 96):

> We recognise that the government has clearly expressed a policy choice for wage freezes for two years, followed by relatively modest wage increases. This preference has been embodied in legislation which is not yet law, and which may yet, or may not ever, become law. Legal challenges have been mounted to the legislation. The government's policy choice is understandably reflected in the wage submission made by WRHA, which derives its funds from the Province.

The Association submitted that *PARIM* is the most significant and persuasive arbitral authority available to the present board. In the current context, an arbitration board should acknowledge Bill 28 but make its decision independently based on established criteria.

In addition, applying the replication principle, the board should have special regard to the parties' own past bargaining outcomes. Since inception of the Division in 2002, the Division and the Association have generally negotiated salary increases at or above the rate of inflation. Inflation for the period was 29.2% or 1.8% per year. Salaries increased by 43.8% or 2.7% per year. This data includes a market adjustment negotiated in 2009-2010 which allowed the Division to maintain its favourable status compared to other school divisions. In addition, there were improvements in collective agreement language throughout this period.

In conclusion, the Association reiterated that an interest arbitration board must not yield to the kind of political considerations that guide governments. As stated in *River East School Division No. 9* (Scurfield: 1996) at p. 3:

> While there may be taxpayers who do not wish to pay more taxes, an arbitration board cannot embrace the ideological proposition that a tax increase must be rejected. A decision which is supported solely by the object of avoiding a tax increase is inherently a political decision. It is driven by ideology and not by the pursuit of a fair and reasonable compensation package. Clearly the tax burden upon taxpayers in the Division must be a factor in any responsible decision. On the other hand, taxpayers, not teachers, must be prepared to shoulder the burden of educating young people in our community.

Division submission

In its submission, the Division too referred to the bedrock replication principle that has guided interest arbitration boards since early days. As held in *Beacon Hill Lodges*, [1985] B.C.C.A.A.A. No. 270 (Hope), arbitrators are expected to replicate the result which would have occurred if bargaining had not been interrupted. This is achieved by analysis of objective data from the relevant labour markets (para. 56-57). Going back to *Metro Toronto Board of Education* (Dubin: 1976), the main criteria are comparable public and private employees, cost of living, the economic climate and "the financial ability of those who are called upon to pay the cost of the services being rendered."

The primacy of replication was reaffirmed recently in *Saskatchewan Teachers' Federation, supra*, where the board applied the principle as follows (at para. 66):

> What would have been the result if the parties had been able to complete the collective bargaining process and conclude an agreement on salaries and allowances? The analysis is theoretical, by definition, but the answer is to be sought in objective labour market data. The board has considered all the evidence presented by the parties and has applied the replication principle. The best available comparator is the WCA representing teachers working in B.C., Alberta and Manitoba. It is not, however, a mathematical determinant. Also relevant are current settlement patterns in the Saskatchewan public service. <u>We agree with the [employer] that the general economic climate in Saskatchewan, including the government's fiscal position, is an important factor</u>. So is the cost of living, as argued by the Teachers, because it affects the real value of salaries and allowances and has been taken into account by the parties in past bargaining. Finally, an interest award should meet the test of fairness in the particular bargaining context. (Emphasis added)

Arbitrators have emphasized that awards must be "sensitive to the prevailing economic climate" because the public purse is not inexhaustible: *Brandon School Division* (Scurfield:1998) at p. 22. The board will award terms that the parties bargaining in good faith should have agreed upon. A total compensation approach should be used when considering salary and benefits: *HCN-Revera (Birkdale Place)* (Stout: 2019); *Osborne House Inc.* (Hamilton: 2006). Cherry picking items out of a package does not reflect true market forces.

Responding to the Association's argument based on *Fort La Bosse*, where there were no teacher salary comparators for the year in question, the Division noted that the Freedman board still considered data beyond Fort La Bosse itself. Moreover, while cost of living influenced the decision, it was not held to be the only factor or even the primary factor. The board considered other public sector employers and teacher salary levels in other divisions. The arbitration board asked for budget information from the division and made a specific finding that the division was able to pay the salaries awarded (at p. 8). Louis Riel School Division argued that same approach should apply in the present case.

Ability to pay was also included as a relevant factor in *Brandon School Division* (Scurfield:1993) at p. 3-4 and *Fort Garry School Division No. 5* (Fox Decent: 2000). In *Fort Garry*, the arbitrator stated that "an interest arbitrator should always and obviously consider the employer's ability to pay, whether in the private or public sector" (at p. 3). In *Brandon School Division No. 40* (Scurfield: 1998), where ability to pay was a statutory factor at the time, the arbitrator addressed the notion that a public sector employer is never unable to pay, but sometimes simply unwilling to pay. He called this argument "mere sophistry" because evidence may show "a much diminished ability to pay" (at p. 5) and general economic conditions in the division would be relevant.

Transcona-Springfield School Division (Suche-2001) also listed ability to pay as a factor, citing *Lord Selkirk School Division* (Teskey: 1993) at p. 4.

Contrary to the Association's argument that arbitrators have universally rejected inability to pay in the public sector, the Division submitted that the authorities are mixed.

City of Regina and Reginal Police Association, (1994) CanLII 10219 SKLA (Ready) endorsed the traditional view espoused in *McMaster University, supra,* that inability to pay is not a consideration in the context of public sector collective bargaining, but still noted the following important caveat:

> … the general economic situation which surrounds the parties is to be considered as it certainly does affect what the parties would have freely negotiated themselves. The fiscal objectives and taxation policies are for the politicians to develop. A considered application of the replication doctrine cannot, however, be completely blind to the economic situation. At the very least, the economic situation affects other settlements within the same "economic jurisdiction" (e.g., the Province of Saskatchewan, the City of Regina, etc.), and it cannot be seriously argued that these other settlements, or the context in which they are resolved, is irrelevant in determining what the parties would have freely negotiated on their own.
>
> Just because a government's ability to fund a given settlement is a political decision does not necessarily mean that the state of the economy is an indirect consideration for an interest arbitrator whose mandate is to replicate a freely negotiated agreement. It is difficult to think of a proper application of the replication doctrine without any consideration of the economic environment within which collective bargaining is taking place. (Emphasis in original)

The Division insisted that its ability to pay must be, at the very least, a significant consideration in this case. In the present case, the Division is restricted in its ability to raise taxes by local levy due to the 2% directive received from government. Section 41(1)(y) of the Act states that every school board shall comply with directives of the Minister. Moreover, under section 2.1(2)(b)(i) of *The Administrative Cost Control (2015) Regulation*, M.R. 63/2015, if the Division

exceeds the 2% taxation cap, its maximum annual allowed administrative cost will be lowered (from 2.7% to 2.4%). The Division would lose $580,000 and management's ability to operate the Division would be seriously impacted. For these reasons, the trustees could not responsibly consider exceeding the 2% cap on taxation, even if they believed the additional revenue was necessary. Therefore, the underlying premise in the historic authorities that rejected "inability to pay" does not apply to the present facts. It is not a case of simple "unwillingness" to levy the taxpayer.

In addition, provincial funding is at its lowest rate in a decade and is not keeping pace with growth in the Division. In 2013 the province contributed 65.6% of the Division's budget. Now it pays only 58.8%. With growing enrolment, the Division expected at least a 3.6% grant increase for 2019-2020, but the final net result was 1.2%. For 2020-2021, the grant was reduced by 0.9%.

Unlike government *qua* employer, the Division's ability to pay is severely constrained by circumstances beyond its control. The arbitration board cannot ignore this reality in making an award: *Saskatchewan Teachers Federation, supra*; *Winnipeg School Division No. 1* (Chapman: 1991) ("budget constraints are real and pressing" at p. 4). In *Osborne House Inc*., *supra*, where the employer had no taxing authority and depended on provincial funding, the arbitrator held he could not change the parties' legal relationship by awarding increases on the assumption the province would fund them (at p. 89).

While Bill 28 is not law, it forms part of the economic climate in which the Division and other school boards find themselves. As in *Osborne House*, the arbitration board should not assume that if it awards an unaffordable contract, government will provide the funds to meet the cost. The result may be that cuts will be made to vital

services. While these decisions are not the responsibility of an *arbitration* board, as the Association correctly argued, in such a case the arbitration board must be confident that its award is fair and reasonable, and would be supported by a majority of the informed, fair-minded public: *Niagara Regional Police Services Board*, [1997] O.L.A.A. No. 1116 (Jackson).

As for the "living tree" concept advocated by the Association, the Division responded that it is inapplicable to interest arbitration. Arbitrators have long cautioned that they are not crusaders for change. There should be reluctance to introduce new contract language unless the current practice has been shown to be impractical, inequitable or out of step: *Brandon* (Scurfield: 1998).

Association reply

In reply, the Association reiterated that it is not the arbitration board's role to affirm the Division's budget. The Association did not quarrel with any of the Division's educational offerings and plans. There are choices to be made and it is the Division that must make them, while still providing fair salaries and working conditions for teachers based on collective bargaining. Government has set a 2% cap on local taxation, but it is the Division's choice whether to adhere or exceed, depending on the revenue it wishes to raise and the impact of the penalty provisions.

As a legal matter, the Division is a creature of government. In reality, the Division is carrying out provincial government responsibility to provide public school education. Currently school boards carry this obligation, but government could implement a different format at any time. Government is "the puppet master" and has created the current collective bargaining environment, said the Association. In

this context, the arbitration board should not accept inability to pay as a reason to deny teachers fair compensation.

Given there is no teacher right to strike, the arbitration process must remain independent and impartial. In *Saskatchewan Federation of Labour*, [2015] 1 S.C.R. 245, the court upheld a right to meaningful collective bargaining. If a union is deprived of the right to strike due to the essential nature of the services provided, there must be a meaningful alternative mechanism for resolving bargaining disputes, such as arbitration (para. 93). The court stated (at para. 94):

> … The purpose of such a mechanism is to ensure that the loss in bargaining power through legislative prohibition of strikes is balanced by access to a system which is capable of resolving in a fair, effective and expeditious manner disputes which arise between employees and employers.

In the Association's submission, acceptance of inability to pay based on government fiscal restraint policy would make the arbitration process meaningless.

Ruling on interest arbitration principles

To the board's knowledge, this precise set of circumstances has never been considered before in a Manitoba teacher arbitration award. Regarding Bill 28 *per se*, we have little hesitation in following the approach in *PARIM*. Government has expressed a clear policy choice for wage freezes followed by relatively modest salary increases. This preference has not been made law. It reflects the government's collective bargaining mandate to employers in the public sector. The Division has fallen in line. We take note of the mandate but are not bound by it.

What about the Division's ability to pay as a factor in awarding compensation? This is a more complex issue. The board accepts that the Division is significantly constrained in its ability to generate revenue through the special requirement and has

been unable to persuade government to fund the budget it has proposed. Does this mean that "inability to pay" now becomes an overriding consideration, or at least a significant factor, as urged by the Division?

The Division's presenters painted a troubling picture of how important educational and community initiatives have been or may be scaled back due to restricted funding. In addition, the Division decided not to set aside funds to cover potential teacher salary increases for the 2018-2020 period because of severe budgetary pressures. As a result, any award greater than zero will have to be paid out of future revenues. The Division will not have funds on hand for such payments and unless additional resources are offered by government, the Division will be forced to make difficult allocational decisions.

The arbitral case law in Manitoba has never called for arbitrators to ignore economic realities in fashioning an award. The contrary is true. Arbitrators have repeatedly affirmed that this is an element of replication analysis. The present board shares this view.

In its submission, the division showed that ability to pay has been mentioned as a consideration in a number of Manitoba teacher awards over the years. Therefore, the Association is incorrect, at least in a Manitoba context, in asserting that arbitrators have universally rejected ability to pay as a factor in public sector cases. The *McMaster University* line of authority has rarely been discussed in Manitoba awards, although Arbitrator Scurfield did refer to it in passing as "mere sophistry" (*Brandon* 1998). At the time, ability to pay was a mandatory consideration by statute and Arbitrator Scurfield was essentially recognizing that school divisions might well have a demonstrable, diminished ability to pay. In the other Manitoba awards cited by the Division, ability to pay was one of a list of factors mentioned by those boards

without further analysis or comment. The board in *Fort La Bosse* checked its award against the division's financial position but other factors were more prominent. In all prior cases, there was nothing like the present bargaining environment where government enforced a policy of funding restraint combined with restrictions on local taxation. Thus, no Manitoba teacher arbitration board to date has been so starkly confronted by the prospect that it may inadvertently become an agent of government policy.

The other distinction between the present case and the prior awards on ability to pay is the emergence of a constitutional right to collective bargaining in *Health Services and Support-Facilities Subsector Bargaining Association v. B.C.* [2007] 2 S.C.R. 391, reversing the so-called Labour Trilogy from 1987. This constitutional dimension did not exist in 1990's and 2000's when Manitoba arbitration boards included ability to pay as an arbitral factor. Because of *Saskatchewan Federation of Labour* (2015), it is now necessary to consider the integrity and fairness of an arbitration process that replaces the right to strike. For clarity, this board is not presuming to rule on any potential Charter issue, but in the exercise of our discretion, we should take care to ensure the that teacher collective bargaining remains meaningful.

The essence of the *McMaster University* jurisprudence is that an independent arbitration board must *not* allow itself to become an agent of government, implementing public sector fiscal mandates. While Arbitrator Scurfield was somewhat dismissive of "unwillingness to pay" in *Brandon* (1998), two years earlier in *River East School Division* he wrote, "… an arbitration board cannot embrace the ideological proposition that a tax increase must be rejected. A decision which is supported solely by the object of avoiding a tax increase is inherently a political decision."

It is a truism that government has a political mandate from the electorate. It takes responsibility for the effect of its fiscal policies on public services. In *Kingston Hospital*, Arbitrator Swan distinguished between the political and arbitral roles in a passage which we adopt in the present case (at p. 12):

> The decision as to whether a specific service should be offered in the public sector or not is an essentially political one, as is the provision of resources is to pay for that service. Arbitrators have no part in that political process, but have a fundamentally different role to play, that of ensuring that the terms and conditions of employment in the public service are fair and equitable.

Louis Riel School Division is an entity operationally distinct from government but as the evidence before the board established, the Division is subject to close government financial control, when government so chooses. Legally, the Division is a creature of government. At the present time, government has placed a high priority on expenditure restraint and taxpayer relief, both for provincial taxpayers and local ratepayers. The Government has made the Division a vehicle for delivery of this policy. At the same time, the Division's trustees retain the right and the obligation to make educational decisions within the available financial resources. This is no easy task at the best of times, and especially so in the current environment.

Government could, if it wanted, abolish elected school divisions and operate public schools directly or through a new, centralized provincial agency. We were told that some provinces have already taken such a step and that this may lie ahead for Manitoba as well. Also, government could proclaim Bill 28, which would enforce its fiscal mandate directly, subject to the Charter challenge. This context illustrates the reality that the Division is functioning as a *de facto* branch of government and should appropriately be treated as part of government for present arbitral purposes.

For these reasons, the board holds that the *McMaster University* jurisprudence applies. Government does not lack the ability to pay but has decided it is *unwilling* to pay more than a prescribed amount for labour costs at this time, opting instead for taxpayer relief as a policy choice. The level of public services and the provision of resources to pay for them is a political responsibility. The Division will have to live within these constraints, which include the arbitration board's jurisdiction to make an award based on objective labour market data and the established relevant factors.

The present board adopts Arbitrator Ready's caveat in *City of Regina*, where he endorsed the *McMaster* line of authority and stated as follows: "The fiscal objectives and taxation policies are for the politicians to develop. A considered application of the replication doctrine cannot, however, be completely blind to the economic situation." An independent arbitration board must be responsible in fashioning an award but must not allow government's bargaining mandate to dictate the result.

As for the principles governing the introduction of new contact language, the board will address these later in the award, in the context of specific proposals by the parties.

Effective Period: Article 2.00

The previous collective agreement ran for four years and the Division proposed the same duration for the renewal agreement.

The Association proposed a two-year agreement but acknowledged that based on bargaining history and the replication principle, a somewhat longer agreement could also be justified. Since the inception of the Division in 2002, aside from the most recent contract, there have been three 2-year agreements and two 3-year agreements.

The Association said it would be imprudent to go beyond three years given the degree of uncertainty in the public school sector.

The Division pointed out that a two-year agreement would mean a new round of collective bargaining starting very soon, which is not desirable. In the Manitoba public sector, there are many recent four-year agreements. The Division acknowledged that past practice between the parties includes a variety of durations but argued the trend is to longer agreements. The Division uses a four-year strategic plan as one of its main planning tools. A matching collective agreement would provide a measure of labour peace and stability.

But for the COVID-19 virus outbreak, the board would have awarded a three-year agreement, for the following reasons. The second year is nearly over already and notice to bargain under a two-year agreement would have to be given by May 31, 2020. This would put the parties back into negotiations without much respite from a very difficult round. The Bill 28 litigation is still pending and leaves the parties in a state of uncertainty. There might be structural changes to public school labour relations coming in the next year. The parties both sought stability, something this arbitration board has limited ability to provide, but a three-year agreement might help to some degree.

Because the pandemic has created enormous uncertainty about conditions in 2020-2021, the board awards only a two-year agreement, expiring June 30, 2020.

Salaries and Allowances: Article 4:00, 4.02, 4.03, 4.05, 4.06 and 4.07

The evidentiary record

The following review of evidence and submissions is based on the material received by the board during the hearings held in late November and early December 2019. Supplementary written submissions were provided by the parties in March 2020 in response to an invitation from the board relating to certain documents that became publicly available after the close of the hearing. Neither party requested an opportunity to address deteriorating economic conditions triggered by the pandemic. In the board's view, this would not have been useful in any event, given the pace of change and the degree of uncertainty. However, the board has limited its award so as to address salaries and allowances that should reasonably have been negotiated for the 2018-2020 school years, based on information in the parties' hands prior to the COVID-19 outbreak.

Interest arbitration awards are often issued long after the time frame during which collective bargaining took place and sometimes even after the expiry of the agreement being awarded. However, given that interest arbitration is deemed part of the bargaining process, replication requires an assessment of the landscape more or less as it would have appeared to the parties themselves while at the table. In the present case, notice to bargain was originally served in May 2018. By practice, ongoing financial forecasts are filed with an interest arbitration board as the hearing unfolds, and even afterwards, as occurred in the present case. This does not alter the fact that the award is a proxy for the bargained outcome the parties reasonably should have reached at the time they engaged in collective bargaining.

As an example, in *MacDonald Youth Services and MGEU* (Werier: 2016), the collective agreement expired in June 2014 and the arbitration hearing took place in November 2016. It was agreed there should be a new four-year agreement. The award was issued on July 17, 2017. Bill 28 was before the Legislature during the proceedings and received Royal Assent on June 2, 2017, although it was not proclaimed. The parties made submissions on the economic climate including the government's bargaining mandate expressed in Bill 28, with the employer emphasizing the need to reduce the provincial deficit based on current and prospective conditions. The union proposed 2% per year on wages and the employer asked for a 1% limit over the life of the agreement.

The arbitrator awarded a series of increases totalling 6% over the four-year term. Relevant to the circumstances in the present case, Arbitrator Werier stated as follows (at p. 26-27):

> I do accept, as I have stated on many occasions, the general economic conditions are relevant irrespective of any legislation or government policy. I have taken into account the current deficit challenges facing the provincial government.
>
> However, I also must be mindful that to a certain extent the contract years in issue predate the current economic conditions and that the preceding contract increases, both private and public sector, reflected some level of confidence and optimism in the provincial economy's performance.
>
> That leads into a consideration of other settlements, particularly in the public sector for the relevant timeframe, and in particular relating to employees performing similar work period.

The board is therefore satisfied that it has a suitable evidentiary record upon which to base an award for the contract years 2018-2020.

Association submission

The Association originally proposed a 3.9% increase on all salaries, allowances and per diems in the collective agreement (in a one-year agreement), based on the 10-year average rate of inflation (1.7%) and productivity gains (2.2%), defined by Real Gross Domestic Product (GDP) in Manitoba. A long service increment of 2% at 15 years' service was also proposed. Inflation and Real GDP have been used as adjustment factors in some predecessor collective agreements. The Association amended its position at arbitration to reflect protection of teacher purchasing power during the course of a two-year agreement. This translated to annual salary increases of 2.4% and 2.0% on the gross salary scale, based on actual and projected inflation. The long service increment was withdrawn.

The Association emphasized that protection of purchasing power is its key priority. For the period 1983 to 2018, salary increases have exceeded inflation by a cumulative total of 4.3%, but salaries trailed inflation until 2010, and then recovered following voluntarily negotiated collective agreements. It took 27 years to restore teacher purchasing power. If the Bill 28 wage pattern was applied until 2022, as set forth in the legislation, salaries would again fall behind inflation by 2.4%. The Association argued this would be inconsistent with the parties' bargaining history, as the most frequent outcome (35-year modal average) has been an annual increase of zero to 1.0% above inflation.

Manitoba inflation was 2.5% in calendar 2018 with a private sector consensus forecast of 2.0% for 2019. At the time of the arbitration hearing, the most recent data (12 months moving average) was 2.2%, slightly above forecast for 2019. Therefore, the Association said its proposal of 2.4% and 2.0% for salary increases was reasonable and modest.

Turning to labour market data, the Association referred to Manitoba average weekly earnings (AWE) as a relevant comparator. This is a composite of all employees, union and non-union, salary and hourly rated. Over time, AWE tends to run close to inflation, reflecting the reality that all workers seek to maintain their purchasing power. As of August 2019, the Manitoba AWE increase was 2.2%. Louis Riel teacher salaries have corresponded closely to Manitoba employment incomes generally over the last two decades.

The Association also presented detailed forecast information suggesting Canadian wage growth will remain modest to strong, and above inflation, consistent with an economy basically at full employment. The Conference Board and Morneau Shepell predict Manitoba income growth of 2.4% annually in 2019 and 2020.

In the Bill 28 time period, a survey of 45 union settlements covering 30,000 employees generally outside the Manitoba public sector showed an average 2.1% wage increase (City of Winnipeg 2.20%, Federal jurisdiction 2.36%, Manitoba private sector 1.93%). The group included the *PARIM* award at 1.42%, Manitoba Museum at 1.44% and University of Winnipeg Research Unit at 1.5% (averages for the contract period). There were three private sector units with zeros in some years, but all the other agreements exceeded the Bill 28 pattern. A compensation commission awarded provincial judges 1.9% in 2017-2018 plus the AWE rate in 2018-2020, which was approved by government (Bill 28 not applicable).

In the Association's submission, the clear conclusion is that Manitoba employers have agreed to increases resembling the cost of living in free collective bargaining for the 2018-2020 period. Public sector settlements reached under the chill of Bill 28 are tainted and do not represent genuine collective bargaining comparables. An agreement reached under duress is not a true agreement. Therefore, these cases were

excluded from the analysis. Given the absence of any teacher settlements, the group of 45 agreements is the best labour market evidence available to the arbitration board under the replication doctrine.

The Association argued that recruitment and retention needs in the Division justify the salary increases proposed. Enrolment is growing in the Division and more broadly in the education sector. Retirements are creating greater demand. The market is competitive. Teachers look carefully at salaries and working conditions offered by employers. The Division showed its concern to remain an employer of choice when it negotiated a market top-up in 2010 to keep pace with Pembina Trails, resulting in a total 4.8% increase that year. Demand for French immersion teachers and rural specialty teachers is acute in Manitoba. There are similar trends in other provinces and the Division's teachers may be drawn away unless compensation remains attractive.

The Association made a comprehensive submission on the economic climate in Manitoba and across the country. Economic growth is projected to be moderate but steady. There are no signs of a crisis. The Bank of Canada forecasts Real GDP for Canada at 1.9%-1.5%-1.7%-1.8% for 2018-2021 . This is lower than historically, but the new norm is around 2.0%, as the economy is close to full capacity. Labour markets are strong. While the government tried to justify Bill 28 on grounds of economic weakness, the objective data refutes this claim, said the Association. Manitoba businesses have a positive outlook as reported by CFIB in its latest Business Barometer report.

The March 2018 provincial budget speech reported economic growth consistent with other advanced economies, a growing population and labour force, high national rankings for investment and wage growth, record new home construction and the

lowest unemployment in Canada. In the 2019 budget, government reduced the sales tax to 7%, saving an average family more than $3,000, it stated. Government foregone revenue due to various tax measures has totalled $579 million in the last three budgets, including $325 million per year for the sales tax cut. This indicates confidence that the economy is strong. Tax bracket and basic personal indexation will cost government $36 million per year, whereas a 2% teacher salary increase across the province would cost only $25 million (all school divisions). These are deliberate choices, said the Association. The effect of government's policy choices has been austerity in the public sector. In fact, continuing provincial tax cuts have been the norm since 2000, long before the current administration.

In Manitoba, Real GDP growth was 1.0% in 2018, forecast 1.7% in 2019 and forecast 1.5% in 2020. Nominal GDP is forecast to rise 3.6% in both 2019 and 2020. The bank forecasts are similar although the Conference Board is an outlier and reported more pessimistic numbers, which the Association discounted. Budget papers have highlighted the value of Manitoba's stable, diversified economy, with a broad export base. Combined personal and corporate income tax revenue was $193 million higher than forecast, driven primarily by growth in household incomes. Forecast revenue was offset by the decision not to implement the carbon tax, but the overall picture painted by government itself was very favourable.

A review of the City of Winnipeg economic climate showed an equally positive outlook.

Finally, the Association reviewed the government's fiscal capacity and argued there was no basis for claiming "inability to pay" in any sense, assuming that concept is applicable. Teacher salaries are dropping as a percentage of per capita household disposable income. In other words, teacher salaries are becoming more affordable.

Canada and Manitoba have one of the lowest tax burdens in the OECD. Winnipeg property taxes are second lowest in the country among large cities. Manitobans' household debt is nearly the lowest in Canada. In the Louis Riel area, family incomes are 3% to 10% higher than average City of Winnipeg incomes.

Manitoba public debt is still highly rated in the market. The Net Debt to GDP ratio compares favourably to other provinces. Manitoba ranks in the middle. Debt level increases have been mainly due to necessary capital investment in infrastructure. Much of the debt is for Manitoba Hydro and should be considered self-sustaining. Interest rates are low. Debt servicing charges are about 6% of revenue and very manageable.

Annual deficits are decreasing despite revenue reductions due to tax cuts. Manitoba's Auditor General recently reported that the claimed March 31, 2019 deficit was a $9 million surplus and net debt was overstated. As a result, the Auditor issued a qualified audit opinion. In addition, a large transfer ($407 million) was made to the fiscal stabilization fund. The Association said that many economists now argue public debt is a mythical issue. It is not a concern as long as nominal economic growth exceeds the rate of interest on the debt, which has been the case since the 1950's, except for the anomaly of high interest rates in the 1980's. Based on Real GDP per capita, Manitoba has never been wealthier as a society.

In summation, the Association argued that government has made voluntary choices that have affected its fiscal situation, but none of the foregoing establishes inability to pay for teacher collective bargaining. The overall economic climate is favourable.

As for the Division's financial status, the Association noted that property tax increases have been limited to 2% as directed by government, which is a choice

made by the school board. The Division regularly posts an operating surplus and at year end, transfers the surplus to the capital fund. In 2018-2019, the surplus was $1.1 million, and the full amount was transferred. The budget for 2019-2020 states a surplus of $1.0 million, again to be transferred in full to capital. The Division's accumulated surplus is $5.8 million, most of which is undesignated. The Association submitted that if the Division continues to manage prudently, as it has in the past, it can pay the proposed salary increases. If necessary, the Division can even post a deficit for one year, if there is Ministerial approval of a plan to address it and it does not become an accumulated deficit.

Division submission

The Division proposed salary adjustments consistent with the Bill 28 pattern – 0% - 0% - 0.75% - 1.0%, assuming a four-year agreement. In a two-year agreement, it proposed zero-zero. Even the Bill 28 pattern would entail cuts to existing programs so the arbitration board should be wary of any salary increases.

The Division submitted that the analysis should focus on the Manitoba economy, not the national economy, when assessing the Association's compensation proposals. Moreover, the relevant measure is Real GDP, not nominal GDP, because only Real GDP states the rate of pure growth, apart from price escalation. Naturally, the Manitoba government tries to paint a rosy picture in its public pronouncements, playing to its political base, but according to the Division, objective data shows that the provincial economy is fairly stagnant and struggling. The Association is wrong when it says that Manitoba is doing very well.

Real GDP growth in the order of 1.0% is concerning. At the time of the hearing, the government's Real GDP projections for 2018-2020 were 1.0%-1.7%-1.55%, much

lower than nominal GDP at 3.6%. The Conference Board forecast was lower still – 0.5%-0.8%-1.4% - and contrary to the Association's argument, there is no basis to simply discount these unfavourable numbers. The bank forecasts are a bit better, ranging from 1.3% to 1.8%, but they still indicate weakness. The government's Fiscal and Economic Mid-Year Report (December 2019) downgraded forecast GDP and subsequent government reporting in February 2020 indicated actual 2019 GDP was 1.1%.

The Association cited Real GDP per capita as an indicator of wealth in the economy but the best measure is Real GDP itself. Manitoba ranked 5th and 6th in Canada on Real GDP in 2019 and 2020, not a strong performance. The Division conceded that AWE growth in 2018 was third highest in Canada at 2.8% but pointed to a June 2019 Statistics Canada report showing only 1.4% AWE growth since June 2018.

In any case, the government's goals have been to reduce the PST and balance the budget. Government was assisted by some one-time favourable events such as federal transfers, but the economy remains fragile. This has an inevitable effect on public expenditure levels and is a relevant part of the economic climate facing the Division, which must be taken into account by the arbitration board. When economic growth is weak, as it is presently in Manitoba, government cannot be expected to deliver education funding that provides for inflation protection and enrolment growth. As a result, the Association's salary proposal is extremely problematic for the Division.

The Association made much of the Auditor General's qualified opinion in which he concluded there was an actual surplus, not a deficit as claimed by government. This disagreement will be resolved with legislation clarifying the accounting treatment of WCB and Manitoba Agriculture Service Corporation funds. The 2019-2020 Fiscal

and Economic Update (Mid-Year Report) showed a forecast deficit of $350 million, down somewhat from the budgeted deficit of $360 million, but still substantial. The report forecasted flat to moderate decreases in all major expenditure categories except Health. Real GDP was down slightly from the 2019 budget forecast, with 1.2% projected for 2019 and 1.4% for 2020.

The Division cited an S&P Rating announcement (October 4, 2019) in which Manitoba's outlook was revised from stable to positive, and the province's A+ debt rating was affirmed. While this was good news, S&P also outlined scenarios in which its outlook might revert to stable.

> Despite its strong fiscal resolve, Manitoba, like other Canadian provinces, is facing increasingly fragile global economic conditions, which could undermine its revenue growth and require it to re-double its cost control efforts to meet its plan of returning to a balanced budget by fiscal 2023. However, we consider the province's economy to be exceptionally diverse, which should mitigate sector specific external shocks. We also expect its tax-supported debt ratio to begin to plateau in the next several years, albeit at a very high level.

The Division reiterated that with this kind of economic climate, it would be unrealistic to expect generous funding for salary increases at the scale proposed by the Association.

In a post-hearing submission to the arbitration board, the Division advised that its provincial grant for 2020-2021 was announced on January 30, 2020 as a 0.4% increase. When the effect of the Tax Incentive Grant phase-out is included, the next result is a funding decrease of 0.9%.

A review of teacher salary settlement patterns across Canada indicates the Association has fared better than most other teacher unions. For the period 2006 to 2020, only Newfoundland, NWT and Nunavut received higher cumulative increases, even assuming zeros as per Bill 28. The record shows that seven provinces had more

than one zero in recent years (negotiated unless otherwise indicated): BC 2011 to 2013; Alberta 2012 to 2014 (legislated) and 2016-2017; Saskatchewan 2017-2018 (arbitrated); Ontario 2012-2013; Nova Scotia 2015-2016 (legislated); Newfoundland 2013 and 2016-2019; NWT 2016-2017. Thus, zeros have resulted from collective bargaining, arbitration and legislation at various times in those provinces. By contrast, the Association never took a zero during this period and received a market supplement in 2009-2010 for a total increase of 5.48%, as the Division calculates it, moving the Division from last or near the bottom in Metro divisions to first place. Today the Division maintains the highest salaries in Winnipeg. Provincially, only the northern divisions and a handful of others pay more to their teachers.

Comparing teacher salary levels across Canada, the Division ranks third behind Edmonton and Calgary. This shows that the Division has no retention issue related to teachers leaving for better compensation. As for recruitment, there is no labour shortage. New teacher graduates outnumber retiring teachers in Manitoba by 590 to 426 per year (2017 data).

The Division stated it is an employer of choice in Manitoba. In some other provinces, such as BC, there are turbulent relationships and difficulty reaching collective agreements. Alberta has had litigation and arbitration, with government seeking rollbacks, ending with an award of zero for 2018-2020 (*Alberta Teachers' Association*, Jones: January 10, 2020). In Saskatchewan there is a dispute and job action over whether to include class size provisions in the collective agreement. As for salaries, in the past five years (2014-2019), Saskatchewan teachers have received 6.7% whereas the Association will have received 9.0% over the same period, even assuming the Bill 28 pattern. Class size is a major issue in the current Ontario teacher dispute and there has been both litigation and job action. From all this, the

Division drew the conclusion that despite the temper of the times, it must remain committed to excellent teacher compensation, favourable class sizes and quality educational programming. This is a challenge given restricted government funding. To accomplish these goals, teacher salaries must be moderated at this time. The economic climate calls for fiscal sustainability.

Questioned by the board on how legislated or policy driven wage limits in other provinces are relevant under replication theory, the Division responded that we are in a unique era, and the Division is in a very difficult situation. The Division did not argue that teacher salaries across Canada are direct comparables for purposes of this collective bargaining relationship but said the context cannot be ignored. The zero awards in Saskatchewan and Alberta show a Western Canada wage pause trend, said the Division.

Like the Association, the Division referred to the historic relationship between CPI and salary increases. Over the course of numerous bargaining rounds, the Association has fared better than the rate of inflation. From 2002 to 2017, Association settlements exceeded Winnipeg CPI by 16.1%. This period was selected because the Division was created in 2002. In its presentation, the Association reached back to 1983, prior to formation of the Division, which the Division said was inappropriate. Regardless, under board questioning, the Division acknowledged that bargaining history generally supports a settlement pattern greater than inflation, which is relevant under replication theory. However, the Division submitted that given the current economic and labour climate, both in Manitoba and elsewhere, restraint should be shown in making the present award. This is especially so because the Division is already a salary leader. It has been good to its teachers. The current average teacher salary is $88,250, or $92,424 with benefits. Even under

the Bill 28 pattern, the Association's members would still be fairly compensated. As in some other provinces, a zero-wage increase is justifiable in this round.

The Division rejected the Association's group of 45 post-Bill 28 collective agreement settlements as largely irrelevant. The majority are private sector agreements, and several are in the mining and industrial sectors. While the overall private sector average (provincial jurisdiction) was 1.93%, there were zeros in some cases. Six agreements were concluded by the City of Winnipeg. In some years, City units took 1.0% or zero. Only three settlements were in the Manitoba provincial public sector and none were major bargaining groups. As for the judges, under legislation, they are assessed relative to judicial compensation in selected other provinces.

The awards in *PARIM* and *MacDonald Youth Services* were based on different employer circumstances and should not be given weight, said the Division. In *PARIM*, WRHA emphasized the bleak state of Manitoba's economy but did not raise inability to pay, asking only that the board "be mindful of the affordability of an award" (at para. 67). By contrast, the Division is facing a dire necessity to avoid salary increases. The facts are far worse in the present case. Also, while residents and interns are professionals, they perform very different work than teachers. Finally, based on the market for PARIM members, resident salaries in other provinces have been used as the main comparables, whereas neither the Division nor the Association have recommended use of extra-provincial comparators. *PARIM* has limited value.

MacDonald Youth (issued July 2017) was also different in that there had been no collective agreement since 2014 and the arbitration hearing had ended when Bill 28 was introduced. Arbitrator Werier acknowledged government's stated mandate

going forward but mainly considered the economy as of the 2014-2017 period, before Bill 28 (at p. 26). In the present case, by contrast, Bill 28 was introduced during the life of the prior collective agreement and will have application or influence from the beginning of the renewal agreement.

The Division assembled a list of wage settlement comparators in the broader provincial public sector and expanded the time frame to include 2010 to 2022, which the Division said gives a better overall picture of bargaining trends. Collective agreements expire at varied times and run for varied durations. The recent history of each bargaining unit is also relevant. This group contained a number of professional and educational unions, making it more directly comparable than the 45 Association settlements, in the Division's view. Admittedly, the *PARIM* (2019) settlement was not included in this listing.

The Division's data showed that between 2010 and 2013, zeros were negotiated with a number of units – MGEU civil service, MAHCP-WRHA, MGEU-Manitoba Housing, IBEW and CUPE 998-Manitoba Hydro, TEAM-MTS, MGEU-Manitoba Liquor and Lotteries, MGEU-Manitoba Gaming, MGEU-MPIC, Unifor and AESES and CUPE 3909-University of Manitoba, RRCC and ACC (Community Colleges)-MGEU. The Division acknowledged that this pattern reflected a trade-off made by numerous unions to achieve job security (no layoff clauses) in exchange for status quo on wages.

In the current time frame, there are fewer settlements due to the ongoing Bill 28 litigation, but there have been several zeros negotiated. In January 2019, MGEU Direct Service Workers settled a four-year agreement ((2015-2018) at the Bill 28 pattern. Similarly, in the fall of 2018, Main Street Project and WRHA (Trades) settled with MGEU and the Operating Engineers for the four-year Bill 28 pattern.

Also, in the fall of 2018, Manitoba Liquor and Lotteries negotiated the four-year Bill 28 pattern with Unifor and MGEU.

In the education sector, a number of agreements were settled with the Bill 28 pattern, involving both academic and staff bargaining units: UMFA and Unifor at University of Manitoba; three units at University of St. Boniface; and MGEU units at the community colleges and University of the North. Brandon University settled on Bill 28 with PSAC (student research assistants) but not the main unions, and University of Winnipeg has not settled any agreements.

In August 2019, Doctors Manitoba negotiated a master agreement with WRHA resembling the Bill 28 pattern, but the Division conceded this was not a collective agreement, as physicians are not employees of the government. There were other unspecified improvements in the Doctors Manitoba settlement, something permitted under Bill 9. The Doctors membership was told by its leadership that during an "increasingly uneasy" environment, the new agreement would provide "a level of certainty and predictability".

Finally, the Division pointed out that there are still thousands of public sector employees who have not concluded collective agreements. If some or all of these agreements follow the Bill 28 pattern, this would further lower the average settlement rate in the broad public sector, which would be compelling replication evidence. The Division is seeking a degree of financial refuge for the current round and these comparators support such an award, it said.

As internal comparators, the Division pointed to its adoption of the Bill 28 pattern for its non-union salaried and hourly, senior leadership and casual employee groups.

Three school divisions (Lord Selkirk, Pembina Trails, St. James-Assiniboia) have concluded agreements with non-teacher units (bus drivers, EA's and clerical) at the Bill 28 pattern. The Division suggested that this too was strong replication evidence, while conceding that only Lord Selkirk was post-2018. The Pembina Trails-CUPE agreement was ratified in March 2017 and Pembina Trails Trades ratified in October 2016.

The Division responded to Association submissions on the size and availability of the budget surplus. FRAME reported the gross accumulated surplus as $5.8 million in 2018-2019, as the Association said. These figures are adjusted to deduct non-vested sick leave accrual, which was $1.8 million in 2019. The Division stated that government considers 4% of operating budget to be a reasonable level of surplus, and currently the Division's surplus equates to 3%, second lowest in the Metro area. Typically, the surplus is used for capital projects, technology investments, and programs not funded by government, such as poverty prevention and food security, as well as other purposes on a one-time basis. For example, the 2017-2018 deficit was covered using surplus. As of June 30, 2019, the Division designated $3.3 million in expenditures from surplus, leaving only $733,929 available for use. Subsequently there were further commitments made from surplus, leaving $477,000 as the current surplus. The Division said it would be imprudent to rely on surplus finds for recurring financial obligations such as salary and allowances.

The Division was questioned by the board about its decision not to set aside any funds for a potential salary award in 2019-2020, given that the Association filed for arbitration in 2018. Was it a gamble that the Bill 28 pattern would prevail? In reply, the Division said it might be seen as a gamble, but primarily it was a decision to protect class sizes, keep EA's, maintain core operations and generally prioritize student needs under very difficult circumstances.

Association reply

In reply, the Association defended the use of nominal GDP data in assessing the general economic climate. In commenting on the 2019 provincial budget, CIBC stated the following: "In nominal terms, which is more important for fiscal revenues, GDP growth is expected to pick up to 3.6% in both 2019 and 2020 …". Nominal measures also represent the extent to which incomes are growing and this supports the Association's salary proposal.

In a very recent speech delivered on December 5, 2019 (Economic Progress Report), the Bank of Canada's Deputy Governor observed that while there is turmoil in international trade that impacts Canada, we have notable strengths. A strong labour market was highlighted. The Governor described Canada as "resilient, although it is not immune." He added that while oil producing regions are adjusting to lower prices, other provinces have experienced strong growth in employment and wages. The Conference Board has updated the forecasts cited by the Division and now projects 2019 Real GDP of 0.9% and nominal GDP of 2.7% (December 2, 2019). In any event, the Division was cherry picking whereas the accepted method is to look to the consensus view in forecasting. BMO recently projected 1.6% Real GDP in 2019 and 2020 for Manitoba, with steady growth (December 2, 2019). BMO called Manitoba's economy "probably the most stable on the map" due to its diversity. If there is a slowdown, "we'd fully expect Manitoba to weather any storm relatively well." In sum, said the Association about the Manitoba economic climate, it's "steady as she goes".

Turning again to comparables and AWE, the Association refuted the Division's reference to recent June data as more cherry picking, in that the only negative monthly AWE of the year was chosen. The moving average annual rate of about

2% is more accurate for June 2019. Updated on November 29, 2019, the moving average AWE was 2.1%, compared to inflation of 2.1%. This is supportive of the Association's salary proposal of 2.0% for the second year.

In response to various points made by the Division, the Association reiterated that the parties have never negotiated based on teacher salaries across Canada, and such data has never been presented in arbitration. Most other teacher agreements include some employer paid benefits such as extended health and dental, unlike the Division. Also, Manitoba teachers pay full LTD premiums (1.9% of salary) and STD (0.18% of salary). Thus, the salary numbers are not comparable. In the Manitoba public sector, most agreements include some employer paid benefits and zeros may have been taken to make improvements in benefits, layoff and other areas. Recent teacher awards in Saskatchewan and Alberta, relied upon by the Division as evidence of a wage pause trend, were based on vastly different economic circumstances.

As for the Division's finances, despite the constraints placed on it by government, choices remain in operating with a budget of $194 million. Typically, the budget is constructed conservatively, and actual revenue exceeds budgeted revenue, with an average variance of 2.5% between 2014 and 2019. Local taxation revenue growth can be expected given assessment growth in Louis Riel. There is available accumulated surplus and the only question is how the Division will choose to utilize it. Over the past five years, the annual budgeted operating surplus exceeded one million dollars in every year. In 2019-2020, another one million dollar surplus is budgeted. The audited surplus in the last five years was much higher, ranging up to $4.2 million.

The Association acknowledged that the Division cannot transfer surplus from capital to salaries but the financial record shows that there is substantial flexibility. As of

June 30, 2019, the designated surplus was $3.3 million, and the school board then made program allocations totalling $2.7 million. Capital expenditures were directed for furniture and equipment ($1.2M) and computer hardware and software ($0.26M). The Division would not demand that IT suppliers, for example, accept less than the going rate for these services and equipment due to government restraint. Why should employees take less for their work? People are more, not less important, said the Association. There could be a moratorium on capital for a year to provide for people. It was not established that the Association's salary proposal is unaffordable, only that teacher salary increases are not a priority.

Decision on salaries and allowances

As an independent arbitration board, we must be responsible in fashioning an award but, as explained earlier, we must not allow government's bargaining mandate to dictate the result.

Replication is by definition a theoretical exercise, but it is grounded in the objective reality of labour market data. In the present case, there are no Manitoba teacher comparables, but there is evidence of the parties' past bargaining patterns, general earning trends in Manitoba and public sector collective bargaining settlements, all of which the board has taken into account. The board has also taken into consideration the cost of living and the prevailing economic climate, since these factors can reasonably be expected to influence the result that the parties would have reached in bargaining. Recruitment and retention can be a relevant factor, but the board agrees with the Division that there is no such generalized issue at the present time.

The Association said that protection of purchasing power is its top priority in the current round. The record shows that over the years, teachers have often been successful in negotiating to keep ahead of inflation. Salary increases have been zero to 1.0% above inflation 37% of the time. Increases were greater than 1.0% above inflation 20% of the time. As the Association said, its current proposal is reasonable when seen in that context. However, there have also been extended periods when salaries lagged CPI. The Division readily acknowledged the pattern and urged that restraint should prevail at this time because of the economic and bargaining climate. Both parties made arguable points under replication analysis. An increase aligned with inflation is consistent with bargaining history unless another relevant factor suggests a lesser amount in this round.

Manitoba Average Weekly Earnings should be accorded some weight in the present case since Association salaries have tracked provincial income trends over time. Each party picked its preferred data points, but the most recent report was a 2.1% moving average AWE, roughly equal to inflation. It must be noted that this includes both collectively bargained wages and individual employment relationships.

The Association's group of 45 union settlements in Manitoba, covering more than 30,000 employees in both private and public sectors, also averaged out to 2.1% (2018-2021). The federal jurisdiction settlements in Manitoba were generally higher and pushed up the average. The three non-Bill 28 affected settlements in the Manitoba public sector averaged 1.46%. The Manitoba private sector average settlement was 1.93%.

The board accepts the Association's contention that currently, many parties in free collective bargaining are settling at or near the rate of inflation but the pattern is far from universal. Admittedly these are not employees in positions directly comparable

to teachers. Nevertheless, the data is relevant because it is some evidence of what the current economic climate can bear in terms of labour cost.

What about Manitoba public sector collective bargaining settlements that have adopted the Bill 28 pattern, specifically zeros in the first two years? There have been 14 such settlements signed between February 2018 and July 2019, plus the Doctors Manitoba agreement, which was an adjustment of the fee schedule and other terms, not an earnings freeze. The Association is correct that these settlements cannot be construed as completely free collective bargaining outcomes. The parties involved knew that their agreements could be voided by government at any time, even long after execution, if the salary increases exceeded Bill 28, subject to the outcome of the Charter litigation. Even so, the board hesitates to deem these results "tainted", as argued by the Association. They are real agreements reached under difficult circumstances, as collective agreements may be from time to time, for a variety of reasons including economic duress. There are some significant bargaining units on the list. They made the choice to conclude agreements amounting to a wage pause. Under replication analysis, the Bill 28 group is entitled to some weight.

At the same time, about 30 public sector contracts remain unresolved, including the largest employee groups such as the MGEU civil service, MPI, nurses and MAHCP. It cannot be concluded that there is a definitive public sector settlement pattern at this time. However, given the number of zeros already agreed in years one and two, it appears obvious that the ultimate public sector average wage settlement for 2018-2020 will be lower than the Association's group of 45.

Settlements for zero made in the 2010-2013 period reflected non-financial trade-offs and are not true comparables for the purposes of this analysis.

After hearing an exhaustive review of the Manitoba economy by both parties, the board echoes the finding in *PARIM*, reached based on similar but slightly earlier data (at para. 97). The "relatively bleak picture" painted by the Division is more pessimistic than our assessment of the evidence for the 2018-2020 school year period. The Manitoba economy has its challenges, but independent non-political analysts describe modest growth (Real GDP) and significant underlying strength. The board does not accept the Division's characterization of Manitoba's economy as fragile. There are always risks due to international developments and unforeseen events, but as BMO stated very recently, Manitoba has probably the most diverse economy in Canada. If there is a slowdown, said the bank, Manitoba is expected to weather any storm relatively well. Budget 2019 calls Manitoba's economy the most stable in Canada.

We conclude that nothing in the economic climate precludes a salary award commensurate with current labour market trends for the 2018-2020 school years. To repeat the board's earlier caveat, circumstances for the 2020-2021 year and subsequent years may be different due to the pandemic, and this will be taken into account at a future time by the parties in bargaining.

The Division relied heavily on Manitoba government fiscal conditions, especially debt and deficit levels. It is a hotly contested public issue whether public debt and deficit levels are excessive. Being a political question, it is not one the arbitration board will attempt to resolve. Currently, government is pursuing an aggressive policy of deficit, debt and tax reduction, which are all legitimate political choices. The board acknowledges government's policy. Even so, Manitoba bond ratings remain favourable and its Net Debt to GDP ratio ranks in the mid-range of provinces at this time. There is no demonstrated lack of government fiscal capacity to pay for salary increases consistent with the labour market.

As for the Division's ability to pay, the board has already ruled on the applicability of this factor. However, we cannot be blind to economic realities and we recognize that public funds are not unlimited. The evidence shows that the Division does have the ability to make choices within its budget envelope of approximately $200 million, and does have some available surplus, but all choices would be painful. It is clear that some potential program and support service cutbacks would have an adverse impact on teacher working conditions. In reasonable collective bargaining for this round, these circumstances would be understood by the parties and there would likely be a dampening effect on salaries.

As referenced above, in the recent Alberta teachers' award the government sought a rollback and the arbitrator awarded zero. Extra-provincial teacher salaries are not considered comparables in bargaining between the Division and the Association. However, it is instructive to note the contrast between the Alberta economic climate that justified a zero award and the Manitoba evidence, as provided by both the Division and the Association. Arbitrator Jones listed a series of major problems (at para. 69):

> While the ATA points to some growth in Real GDP and GDP per capita and some increase in the Alberta Weekly Earnings Index, which would indicate some recovery from the 2015-16 recession, the overwhelming evidence is that the provincial economy has not yet completely recovered from the recession, and is not forecast to do so until some time after the end date of this collective agreement. After starting to recover a bit in 2018, Alberta almost dipped back into a recession in the early part of 2019 (which is when the parties were involved in the mediation which resulted in this arbitration). The unemployment rate remains very high, both in historical terms and in comparison to the rest of Canada, and that is forecast to continue for the foreseeable future. There have been significant layoffs in the private sector, particularly in the oil and gas sector which is a major component of the Alberta economy. There is no evidence that wages and benefits are generally increasing to any significant extent in the private or public or unionized or non-unionized sectors.

Government also asked for a salary rollback in Saskatchewan. Teachers were awarded zero in 2017-18 and again for 2018-1019, with 1.0% on the final day of the

second contract year. The province's resource economy was just emerging from a significant oil-driven downturn, and the arbitration board held as follows (at p. 32):

> … What emerges from the available information is that bargaining parties may be deciding to ride out the current difficult times by staying with the status quo for a period of time, *i.e.*, zero percent wage increases. The economic outlook is clearly more favourable looking down the road to 2018 and 2019, so it would not be surprising to see positive wage increases begin to reappear around that time. …
>
> On this approach to replication, we observe that the government acting reasonably would accept the reality that it cannot, without unacceptable consequences, force public sector units to roll back wages at this time. The Teachers acting reasonably would accept the reality of an economic downturn and forego their goal of inflation protection, focusing on non-monetary issues and simply waiting while the government's fiscal position improves. These are descriptors of reasonable bargaining positions in the current period and they should guide an interest arbitration board in reaching its decision.

The economic climate in Manitoba for the 2018-2020 contract period, whether one adopts the Division's pessimistic view or the Association's optimistic perspective, is markedly different than the situation that resulted in these zero awards. Specifically, Manitoba has not been marked by recession, high unemployment, significant layoffs and flat wages for the period in question. The board recognizes that the economy will be impacted by the pandemic in the final months of the 2019-2020 school year, but budgeting and hiring for this year was completed in early to mid 2019.

In the past 35 years of bargaining, the present parties have settled for less than inflation 15 times and have exceeded inflation 20 times. Cumulatively, salaries did not exceed CPI until 2009 when there was a market adjustment and Louis Riel became the Winnipeg salary leader. Subsequent bargaining resulted in annual increases both above and below inflation. Considering all factors, the board concludes that in this round, a replicated result should be below inflation, but still

greater than zero, given that average Manitoba earnings, other collective agreement settlements and the economic climate for the period are favourable on balance.

Based on CPI data for 2018-2020, the board's present award will leave cumulative salary increases ahead of inflation by about 3 percent, roughly preserving the recent status quo.

Award on salaries and allowances

The board awards as follows:

July 1, 2018: 1.60%

July 1, 2019: 1.40%

Jurisdiction is retained as may be necessary to implement or clarify the application of the above award.

Interest on Retroactive Pay: Article 5.02

The collective agreement currently provides for interest payable on the gross amount of any retroactive pay less statutory deductions, calculated at the lesser of 9% per annum or the Division's borrowing rate for the previous year. The Division proposed that this article be waived for the current round. The Association proposed status quo, citing *Winnipeg School Division* (1998), where the current chair described this provision as "simple justice" (at p. 31).

The Division noted that in the last round, the parties calculated the average teacher retroactive payment and agreed that a lump sum representing all accrued teacher pay would be remitted to the Association. In the round prior to that, interest was waived

by agreement. The Division estimated that for each 1.0% per annum that the present board might award, about $44,000 Division-wide would be payable retroactively. Based on the award for salaries and allowances, the total potential interest payment would approximate $200,000, or less than $100 per teacher on average.

Based on extraordinary circumstances as described above ("The collective bargaining environment"), the board awards that interest will be waived on retroactive pay in this round, without prejudice to future bargaining. Article 5.02 will remain in the collective agreement, but with a proviso that the payment will not be made in this instance.

Jurisdiction is retained to implement this determination if necessary.

Sick Leave: Article 6.00

Sick leave accrues to teachers at the rate of 20 days per year, with prorating for partial years and part-time service. The maximum accumulation is 130 days under the collective agreement, which exceeds the basic amount set by the Act. Short-Term Disability and Long-Term Disability plans provide coverage after sick leave has been exhausted. These benefits are fully employee paid and are administered by MTS, although by agreement the Division deducts the premiums.

The Division stated that the cost of sick leave is significant and has been growing in recent years. The average cost per teacher in 2018-2019, including absence for medical appointments, was over $3,100 or about 4.5% of payroll (assumed base salary $88,200). Sick leave is by far the most expensive leave under the collective agreement. On average, a teacher is absent 6.36 days per year due to illness and 2.35 days for medical appointments. The Division expressed alarm that over the past four years, total sick days increased by 1,675 days or 23%. In 2018-2019, there were

8,991 sick days, or the equivalent of 46 full-time teachers absent from the classroom. In this context, said the Division, it proposed a series of minor restrictions for reasonable cost control purposes.

WCB benefit payments

Article 6.00(C) provides that sick leave is not payable to a teacher who has suffered a motor vehicle injury and is receiving wage loss replacement from MPI, to the extent that the combined benefits exceed the teacher's normal salary. In such case, the teacher must reimburse the Division for the amount of the MPI benefit. In practice, the Division is the first payer and MPI reimburses the Division, which then credits the teacher's sick leave bank. The purpose is to avoid double recovery by the teacher. Teachers do not have WCB coverage, but the Division proposed to add mirror language dealing with WCB wage loss replacement.

In a recent case, said the Division, a teacher with a second job was injured on the other job and WCB insisted on paying out wage replacement, even when informed that the teacher had received sick leave benefits. In the end, the teacher did repay the sick benefit amount, but the Division submitted that reference to WCB payments should be added to the clause. Double recovery should be avoided in principle, and especially in the case of benefits paid by other public sector programs. The new language would protect the Division's ratepayers and avoid damaging its public image.

The Association opposed the proposal, noting that the problem is largely hypothetical if teachers are not covered by WCB. The Division cited only a single isolated case involving an individual with two jobs, and the double recovery was rectified in that case.

The board declines the proposal.

Sick leave for cosmetic plastic surgery

The Division proposed a new sub-clause precluding sick leave for absence due to plastic surgery performed solely for cosmetic reasons, unless the need for surgery is attributable to illness or injury. This language was included in the old St. Boniface School Division agreement until 2002 but was not carried over when Louis Riel was created. The Division pointed to a small number of other Divisions with similar language on plastic surgery. No data was provided on utilization of sick leave for this purpose, but the Division argued that teachers should not be scheduling such surgery during the school year and claiming paid sick leave. Teachers should be in the classroom.

The Association opposed the proposal and stated that no concern has been raised on this subject in the past. The Association doubted that such a clause could be enforced given the medical privacy rights of employees. It added that, generally speaking, teachers are complying with the spirit of the sick leave provision.

The board declines the proposal.

On the job injury

Article 6.00(K) was awarded in arbitration by the current chair in 2001, with further language added in subsequent bargaining. This clause provides that when a teacher is absent due to an on-the-job injury, the Division will continue to pay salary, limited to the extent of the teacher's accumulated sick leave balance, but the absence will not be charged against the sick leave balance. The Division may also reimburse certain out of pocket medical expenses for a 12-month period. The rationale for

originally awarding this article was that it was reasonable "given the absence of ordinary Workers Compensation benefits."

The Division proposed to add a proviso that Article 6.00(K) shall become null and void if teachers become entitled to WCB coverage.

The Association opposed the change as unnecessary at this time.

The board declines the proposal.

Medical appointments

The Division proposed a new clause in the following terms:

> Teachers shall make every effort to schedule appointments outside of school hours. When medical appointments cannot be made outside of school hours, every effort will be made to schedule the appointment to minimize the time away from school, in such case medical leave shall be granted. Minimizing the time away from school shall mean teachers shall only take the time needed for the appointment and time needed to travel to and from the appointment.

Days taken for medical appointments increased by 47% from 2014-2015 to 2018-2019. This item on its own accounted for 1.2% of payroll cost. Some 70% of half days taken are in the afternoon. The Division argued that the costs incurred for this benefit are shocking. Revised language is required in the collective agreement to mitigate the impact. The Division acknowledged that enforcement would be difficult but said it wants teachers to make every effort to minimize time away from the classroom. The proposed clause would clarify expectations and reassure public stakeholders.

There are five Manitoba teacher collective agreements with this type of clause. Four agreements use the phrase “every effort” and one agreement requires a “reasonable effort”.

In response, the Association stated that this item has not been raised before and there is no necessity for the clause. The reason that more medical appointments are taken in the afternoon is that teachers prefer to get their classes set up for the day before leaving on an appointment. The duration of medical sessions can be uncertain and morning appointments would tend to disrupt the remainder of the school day.

The board makes no comment on whether the cost of medical appointments can be considered “shocking” but clearly, they are a significant expense to the Division. Medical treatment is also an essential need of employees and sometimes it can only reasonably be arranged during working hours. There was no disagreement in principle that a teacher should make reasonable efforts to schedule medical appointments outside of school hours, meaning the instructional day. This is an element of professional responsibility and commitment to students. While some collective agreements use the phrase “every effort”, in practice and in law the obligation would likely be interpreted as calling for a “reasonable effort”.

To clarify expectations, the board is prepared to award a new clause, as follows:

> Teachers shall make a reasonable effort to schedule appointments outside of school hours. When medical appointments cannot be made outside of school hours, a reasonable effort will be made to schedule the appointment so as to minimize the time away from school.

Maternity and Parental Leave: Article 6.01

Article 6.01(D) of the collective agreement provides top-up benefits for teachers taking maternity, adoptive or parental leave, pursuant to a Supplemental Employment Benefits Plan approved under EI legislation. For maternity, the Division pays 90% of a teacher's gross salary for the one week waiting period and then pays the difference between the teacher's EI weekly benefit and 90% of salary for 16 weeks. In addition, the Division pays up to 10 weeks of parental or adoptive leave top-up, again based on the difference between 90% of regular salary and the teacher's EI benefit.

The top-up benefit is not available to a teacher on term contract during the first year of the teacher's employment. All other teachers are eligible for top-up benefits after seven months of employment with the Division. In terms of eligibility, this mirrors the provisions of the *Employment Standards Code*, C.C.S.M. c. E110, which entitles employees to unpaid maternity and parental leave after seven consecutive months of employment (sections 53 and 58(1)).

Maternity, adoptive and parental leave top-up benefits have evolved over the last two decades as a result of arbitration awards, legislative reform and collective bargaining. The first maternity leave top-up was included in the Transcona-Springfield 1990-1991 agreement and covered only the two-week waiting period under Unemployment Insurance legislation. Maternity and adoptive top-up was awarded by the present chair in St. Vital (2001). By 2003, all Manitoba divisions had negotiated similar provisions. In 2014, parental bridging over school breaks was negotiated in Louis Riel. Parental top-up and maternity bridging over breaks were negotiated by Louis Riel in November 2017 following a grievance arbitration award

(MOA effective July 1, 2017). In 2018-2019, the Division had 58 teachers on parental leave top-up at a cost of about $850,000.

In addition, there have been legislative developments over time, most particularly in December 2017 when options were added for extended EI parental benefits. Eligible employees may now opt for 35 weeks of Standard EI over 12 months paid at 55% of salary, or 61 weeks of Extended EI over 18 months paid at 33% of salary.

In March 2019, shared EI parental benefits were introduced, allowing up to 40 weeks (Standard) or 69 Weeks (Extended), although one parent is still limited to a cap of 35 and 61 weeks.

According to the Division, based on the average teacher salary for 2019-2020, a combined maternity-parental leave top-up costs $39,981 under the Standard EI option. When a teacher opts for the Extended EI option with parental benefits topped up from 33% to 90% of salary, the Division incurs a greater expense and the cost is $42, 231. The difference is $2,281. This reflects the fact that the Division pays the difference between 33% and 55% of the teacher's regular salary. A teacher on Extended EI gets the advantage of a longer period at home with the new child but EI benefits are spread out over the leave period. In 2019-2020, 22% of teachers on parental leave took the Extended EI option.

Maternity and parental benefits are significant matters for school divisions and teachers. About 73% of teachers are women. In recent years, the majority of women teachers hired have been in their child-bearing years. EI and related top-up benefits provide important supports for families. At the same time, the Division budgets about $1.9 million for top-up benefits or nearly 2% of payroll.

The Division made three proposals intended to achieve cost reductions while still substantially preserving top-up benefits for teachers. At the board's request, the Division prioritized its proposals as follows.

Exclusion of term teachers

The Division proposed a new clause 6.01(H) as its first priority:

> In order to receive any Top-up Benefits from the Division, as outlined above, the teacher must have been employed by the Division for at least two (2) full consecutive school years on a Teacher General Contract.

This would replace current clause 6.01(d)(iv), which excludes only the first year of term contract employment. The Division's proposal would also render ineligible permanent teachers for their first two years. Over the past five years, this clause would have denied top-up to eight term teachers and 12 junior permanent teachers, with a total saving of $605,481 or about $120,000 per year. The Division argued this was not an undue impact as only 7% of teachers otherwise eligible for maternity/parental leaves would have been excluded.

The Association strongly opposed the proposal. In effect, the youngest and most vulnerable teachers would be treated most harshly. The savings are not substantial, but the exclusion disproportionately affects teachers likely to have the greatest need for the benefit. For these reasons, said the Association, the proposal was unacceptable.

The board declines the proposal.

Return to work obligation

As its second priority, the Division proposed a new clause 6.01(G) requiring that a teacher must return to work for at least 12 months following receipt of top-up benefits. Should the teacher fail to do so, they will be indebted to the Division for the full amount of top-up pay received during their period of leave.

At the present time, there are no such provisions in any Manitoba teacher collective agreement, although return to work is often a condition of sabbatical leave. The Division stated that it has made this proposal in the past and has always regarded it as a priority item, but it has relented in collective bargaining in order to conclude an agreement. A return-to-work obligation is commonplace in the Manitoba public sector among major employers. Most collective agreements require a return for six months or time equivalent to the paid leave. The Division added that on an individual basis, it has arranged extended absences or part-time leaves following maternity/parental leave.

The Division reported that over the 2015-2019 period, five teachers took full maternity/parental leave and then left the Division without returning to work. The cost was $200,000 for the five-year period. However, 98% of teachers returned to the Division after their leaves.

In a 2010 Statistics Canada report entitled *Employer top-ups* (K. Marshall, Perspectives, February 2010), it was stated that top-ups can enhance long-term earnings since they often stipulate a return to employment and thereby encourage job continuity (at p. 5). This is a strong incentive for women to return to the paid workforce and stay with the same employer (at p. 10).

In response, the Association opposed the proposal. Maternity/parental top-up is an earned entitlement and should not be made conditional. The benefit should not be seen as a cost item. Rather it is an investment. The proposal is inconsistent with the Division's proclaimed image as the employer of choice in Manitoba. This is not a "family friendly" position. In any event, the savings are marginal. Finally, no other teacher contract in Manitoba has a return to work obligation.

The board believes that a return to work obligation may be fair and reasonable, given that teachers in the Division receive favourable maternity/parental benefits under the collective agreement and many other public sector employees are obligated to return for a minimum period of time after their leaves. If top-up is an investment, then it is appropriate for the employee to contribute to the payback. It would be inequitable for the Division to provide $40,000 or more to support a teacher's leave, only to have the teacher end the employment relationship, at least in the absence of reasonable grounds for declining to return. On the other hand, return to work has not proven to be an issue outside of a handful of cases over a period of years, and the board received no information on the circumstances in each case. If a teacher fails to return after receiving top-up, it may be justifiable due to their family and personal situation at the time. The Division's proposed language is inflexible and would need to be tailored for individual circumstances, but that is a task the parties should undertake themselves.

The board declines the proposal but suggests that the parties resolve the issue in the next bargaining round, which will begin soon.

Top-up calculated based on Standard EI benefits

As its third priority, the Division proposed that top-up be calculated based on the Standard EI parental benefit rate (55% of salary) even when the teacher in question has opted to take Extended EI at the lower rate of 33%. The justification was that the Division's cost increased when the EI legislation was amended to allow for a longer benefit period at a lower EI payment rate. The incremental cost per teacher is $2,281 over the course of an extended leave. For the period 2014-2019, the difference would have been about $32,000. In 2019-2020, there appears to be a surge of maternity/parental leaves and the cost saving could approach $40,000.

In response, the Association submitted that the top-up was negotiated in good faith and each party bears the risk of subsequent legislative change. The option of Extended EI was a natural evolution in the federal program, with important benefits to employees and their families, and an arbitration board should not undermine progress on equity issues.

The board declines the proposal.

Discretionary Leave: Article 6.10

Paid discretionary leave, sometimes referred to as personal leave, may be granted up to a maximum of two days per school year for a full-time teacher, prorated for part-time and term teachers. The teacher is not required to state a reason for the leave. Such leave cannot be used to extend winter, spring or summer breaks. Requests must be submitted to the superintendent or designate five working days in advance. Prior to 2015, teachers were charged the cost of a substitute for the second day. Once this cost was eliminated in the last round of bargaining, the number of leave days increased dramatically, rising 70% by 2018-2019. Discretionary leave days are

taken disproportionately in May and June. The cost of discretionary leave is 0.63% of teacher payroll.

The Division proposed that the leave entitlement be pro-rated when a teacher returns from an unpaid leave or starts teaching other than on the first day of the Fall Term. This would be consistent with prorating already included in the article as well as practice for sick leave. If this revision had applied in 2018-2019, teachers returning mid-year from unpaid maternity or parental leaves would have been entitled to 13.5 days rather than 22.5 days of leave. The previous year, the revision would only have reduced leaves by 3.5 days.

The Association opposed the proposal as unfair. If a teacher uses their two days and then stops teaching during that school year, no prorating applies. The proposal would create an anomaly. In promotion and recruitment, the Division features discretionary leave and other personal benefits. This benefit is part of enhancing employee emotional well-being and it should not be downgraded.

The board declines the proposal.

Secondly, the Division proposed that discretionary leave shall not be used to extend leave for the Personal Professional Development Fund (PPDF) or Extra-Curricular Leave.

Currently, there is a restriction of this nature in Article 6.12.7, which provides that leave earned for performing extra-curricular duties may not be taken in conjunction with any other leave, unless authorized by the superintendent.

Professional development leaves are covered by substitute teachers, who receive $187/day for the first four days, rising to $450/day retroactively on the fifth day.

Conference attendance including a travel day may extend to five days. As a result, the superintendent's office must always research whether the higher substitute rate will be triggered by a particular leave application, and a decision must be made whether to approve the request. Normally 5-day leaves are denied due to cost. The Division said it hoped teachers will not seek such leaves if the prohibition is adopted as proposed.

In terms of precedent, most other divisions have some restrictions in their collective agreements on use of personal leave. Only one division precludes a teacher from extending extra-curricular leave with personal leave.

In response, the Association submitted that the Division was seeking to impose a blanket solution to an individual problem that rarely arises. The matter should be addressed in the operation of the PPDF, where the parties conduct an annual review and may issue guidelines for professional development leaves.

The board declines the proposal.

Personal Professional Development Fund: Article 9.00

In the first Louis Riel School Division-Teachers' Association collective agreement (2002-2004), the parties established the Personal Professional Development Fund (PPDF), to be administered jointly by the parties with allocations by the PPDF Committee based on an agreed set of guidelines. The purpose of the PPDF is to stimulate individual personal professional growth and provide financial assistance to as many teachers as possible. The collective agreement specifies that the Division's annual contribution to the Fund shall be four times the maximum Class VII teacher salary rate. The Association contributes one-third of the same salary

rate. Thus, Fund income approximates $450,000 per annum. Currently there is an Association Vice President on half release who is responsible for the PPDF.

The Division proposed that effective September 2020, the Association would assume sole administration of the PPDF and determine the guidelines. The Division would continue its current level of contribution, but the Association would cease to make cash contributions. The Division would cut a single cheque to the Association to start the year, and thereafter, the Association would deal with teacher applications and disburse professional development funding. Unused funds would be returned to the Division at year end. There were 408 applications received in 2018-2019.

The Division submitted that the proposal would achieve clarity and simplicity in professional development. Currently the Division representative does not vote on individual applications. Under the proposal, it would be clear that the Division supports the professional development of its teachers but trusts them to manage the PPDF appropriately. The administrative burden on the Division would be lessened, which would be helpful under the present austerity regime. The priority of the Division is directing resources to classrooms.

Across Metro Winnipeg, school divisions have a variety of arrangements for professional development. In St. James Assiniboia, the teachers' association administers the fund and can carry forward unused funds.

In response, the Association opposed the proposal, calling it "a download on teachers". The Association now has two release positions for PPDF and other operations, and there is no time for taking on more obligations. In the Association's view, the legal framework for the arrangement would be unclear. The Division is better suited for this role given its management resources.

The board accepts the Division's rationale for this proposal and awards the revisions to Article 9.00, subject to two points. First, unused funds may be carried forward at the Association's discretion. Second, PPDF funds may be utilized to subsidize release time for Association administration of the fund, based on a formula agreed by the parties, or fixed by the present arbitration board if agreement cannot be reached.

The awarded language is as follows:

A. Effective June 30, 2020, a Personal Professional Development Fund administered by the Association shall exist and the Division's annual contribution shall equal four (4) times the maximum rate of pay of Class VII.

B. The day to day operations of this Fund will be administered by the Association.

C. A reasonable sum from the Fund may be utilized by the Association for release time to support administration of the Fund.

D. Any unused funds as of June 30th may be carried over to the next year.

Jurisdiction is retained to implement this provision if necessary.

Non-Contact Time and Assignable Time: New Article 12:00

Association submission

The Association made a comprehensive presentation on teacher workload and work intensity. Despite the fact that most collective agreements carefully specify the working time of employees, in return for which compensation is paid, teacher time in Manitoba remains an undefined commodity. In *Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society v. Winnipeg School Division* No. 1, [1976] 2 S.C.R. 695, which arose from a "work to rule" over noon hour supervision duties, Chief Justice Laskin held as follows in a passage that has been accepted by arbitrators ever since as authoritative ("the Laskin test"):

> Almost any contract of service or collective agreement which envisages service, especially in a professional enterprise, can be frustrated by insistence on "work to rule" if it be the case that nothing that has not been expressed can be asked of the employee. Before such a position can be taken, I would expect that an express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.

Teachers carry out a multitude of tasks beyond the basic instruction and assessment of students. There is no known workday and no agreed maximum quantity of required work. The Association observed that almost anything teachers do can be deemed "related to the enterprise" and "in furtherance of the principal duties". The only apparent limit on assigned work is the court's caveat that it must be fair to the teacher under a standard of reasonableness.

In practice, said the Association, it has been difficult to maintain fair and reasonable assigned time for teachers. In *Transcona-Springfield School Division No. 12*

(Freedman: 1989), the association made a series of proposals intended to define a realistic aggregate workload. There was no evidence of excessive demands by the division, but the arbitration board accepted that a unilateral employer right to increase workload without recourse "has elements in it of at least potential unfairness" (at p. 44). As a result, the board awarded a 5% cap on any increased student contact time in the 1988-1989 school year. The board added this observation: "Ultimately the Agreement may have a much more detailed provision on contact time; we do not think we should impose such a detailed provision now. We certainly expect that this issue will be the subject of negotiations between the parties for their 1990 agreement" (at p. 46).

In *River East School Division No. 9* (Marr: 1996), a grievance award, participation in extra-curricular activities was held to be an implied contractual duty of teachers. The arbitrator stated, however, that the employer was not entitled to demand unlimited activities and hours of work. The time spent by the grievors on extra-curricular activities was held to be unreasonable, but there was no broader remedy. The parties were urged to negotiate a reasonable balance.

However, there still are no quantified teacher hours of work in collective agreements. Under section 5 of the *School Days, Hours and Vacations Regulation, Regulation 101/95*, the school instructional day must be not less than 5.5 hours including recesses, but there is no prescribed maximum. Also, there are no express regulatory limits on *non*-instructional working hours.

In the Louis Riel collective agreement, Article 10.00 and Article 12.00 are the only provisions that deal with teacher time. Article 10.00 (Meal Period) provides for an uninterrupted 55-minute meal period sometime between 11 am and 2 pm, except in emergencies or unforeseen circumstances. Article 12.00 (Non-Contact Time) states

that non-teaching and/or non-supervisory time for full-time classroom teachers shall be 216 minutes per cycle exclusive of recess, prorated for part-time teachers. There are exceptions where the teacher agrees or where urgent circumstances arise and dictate a temporary reduction in non-contact time. The board was advised that in practice, teachers in the Division receive 270 minutes of what is generically called "prep time".

Article 6.12 defines extra-curricular activities and states that teacher participation in such activities is voluntary. By agreement, teachers are entitled to one-half day of paid leave per 25 hours of extra-curricular activity they perform, to a maximum of two half-days per school year. This echoes the comment by Chief Justice Laskin in *Winnipeg Teachers* that while assigned lunch hour supervision is an inconvenience, it would be reasonable to provide "compensating time off as a *quid pro quo*."

In the present case, the Association argued that the board should award language defining and quantifying teacher working time. The Laskin test grants the Division an essentially unfettered ability to expand teachers' work. As a result, the Association proposed a comprehensive new Article 12.00 (renamed "Assignable Time") defining teacher time categories, setting the instructional day, defining and setting preparation time at 240 minutes per cycle, setting meal time (no change), limiting the frequency and duration of staff meetings, guaranteeing release time for report card writing, limiting attendance at events outside the instructional day and capping the number of days in the school year notwithstanding the Minister's order under regulation.

The Association cited a 2017 workload survey of its members, a subsequent survey in 2019 and the considerable literature on teacher workload in support of its position.

The latest member survey showed that 90% of teachers felt adequate support for students in the classroom was not available. As a result, teachers are working outside of school hours to meet these needs. Most teachers reported they lacked adequate time for course development, planning, collaboration with colleagues and communication with parents/caregivers. A majority come to school even when sick or work at home while sick. Some 67% of teachers don't have enough time for self-care.

The Division's most recent Annual Report to the Community confirmed that due to funding limitations, it is impossible to meet all the system's needs. The School Board said that to balance the budget, it was considering a series of cutbacks, most of which adversely impact the ability of teachers to do their jobs, in the Association's view.

According to research, teachers in Canada commonly work an average of 45-55 hours per week, which includes instructional time, non-instructional time during the school day and largely autonomous work outside the school day. Surveys and research indicate that classrooms are becoming more complex and the work itself is intensifying. Educating special needs students is especially demanding. Under the *Appropriate Educational Programming Regulation, Regulation 155/2005*, students have a legal right to an appropriate education in a regular class of their peers, without undue delay. There are legal rights to specialized assessment, individual education plans, parental participation and dispute resolution. The ministry set out its expectations in *Success for All Learners: A Handbook on Differentiating Instruction* (1996), sometimes known as "the Bible". The Association did not take issue with the contents but argued that the result has been an inability to meet these expectations within reasonable working hours.

The Association said that many hours of work have become “heavy hours”, a phenomenon characterized by rapid professional decision-making, an overload of conflicting demands and a lingering residual effect once the hour has passed. Yet needed resources are diminishing. Teachers are reporting that they cannot manage the cumulative expectations imposed upon them by parents, employers, communities and educational policy makers. They cannot maintain a reasonable work-life balance in their chosen profession.

Three presenters provided the board with detailed, personal accounts of these systemic conditions. Bailey Englot is a Grade 5/6 teacher with 10 years of experience. She described a typical day as intense and all consuming. It is like “plate spinning”. It takes every ounce of her concentration and energy. The job is still her dream job but the inability to exercise a degree of control over her own working time is not acceptable.

Elsie Yip has 35 years of teaching experience and has been providing student support services for the past 19 years. Currently she supports six classrooms with 28 or more students in each room. Every day is a scramble of resource work, planning, meetings, emergencies, covering for other teachers and parent contact. She is managing a large number of Student Specific and Individual Education Plans. She has noticed increased workload and responsibilities over the years. Still, she embraces the work because she can make a difference in a child’s life.

Kim Melvin is a Vice Principal who also works 0.5 FTE in student services. She has 25 years of experience including six years as the Division’s Instructional Technology Coordinator. She confirmed that research reports of work intensification for principals and vice-principals are accurate. The hours are getting longer, the pace of work is increasing, there are fewer resources and the quantity of

work is increasing. After five years in the Vice Principal role, she is still trying to find a reasonable work-life balance.

The Association stated that in presenting its current proposals, the intent was not to change any current practices but only to establish certain limits on teacher working time, as a matter of basic fairness. The Division would retain its full right to assign the kind of work that teachers must perform. There would not be cost consequences to the Division, according to the Association. Admittedly, there is no precedent in Manitoba for the article advanced by the Association.

In Saskatchewan, however, the *Task Force on Teacher Time Final Report* (January 2016) reached a consensus among school boards, government and the Teachers' Federation recommending a maximum of 1,044 assigned hours per year, along with detailed collective agreement language. Notably, beyond assigned time, teacher time also included time spent on professional responsibilities, as well as time spent on voluntary activities beneficial to students and the educational system. The proposed language was implemented in 2019 by arbitral award: *Saskatchewan Teachers' Federation*, cited above.

The Association suggested that but for the interrupted current bargaining round, the present parties could have made similar progress, albeit in a format adapted to local and Manitoba circumstances.

In response to a board question, by agreement of the parties, we were informed that the Association's proposal was not specifically discussed during collective bargaining.

Division submission

The Division characterized the Association's proposal as brand-new territory, with 17 new descriptors and a lack of internal consistency. During bargaining, the Division felt compelled to table a counterproposal, based on a six-day work cycle of 54.6 hours of working time (9.1 hours per day). Open ended teacher responsibilities were listed. However, at arbitration, the Division submitted that neither party's proposal should be entertained, and the status quo should prevail.

The Division stated that the Association's proposed new article would fundamentally change the provision of education and was entirely unacceptable. Some clauses appear to be unworkable as written. There would be a barrage of grievances. The Division questioned the need for such sweeping changes. Responding to the Association's presenters, the Division insisted that teachers have adequate time and reasonable supports in carrying out their responsibilities. If more help is needed, there are strong networks in the schools right now and programs to ensure teacher well-being. The Association proposal would undermine a positive work culture in the Division.

The proposal is not consistent with current practice, according to the Division, notwithstanding the Association's assurance. For example, the current high school instructional day is 6.25 hours and the proposal calls for 5.5 daily hours, a significant change and a major disruption. Travel time would count as instructional time, contrary to present practice. Even though the Association said non-contact time is largely autonomous now, the proposal calls for a newly defined "preparation time", applicable to all teachers, with administrative and cost implications. Meeting time is now scheduled during early dismissals, which are balanced by adding three minutes to each school day. This would change. The proposal limits the basic

management right to meet with employees. The proposals on release time and events outside the instructional day would change practice and do not arise from any demonstrated problems.

Moreover, the notion that teacher time can be contractually prescribed minute by minute contravenes the holding of the court in *Winnipeg Teachers' Association* that duties are governed by standards of reasonableness. Even if not specifically spelled out in the agreement, teacher work may be assigned if it is related to the enterprise, fair to the teacher and in furtherance of the principal duties. As stated by Justice O'Sullivan in *School District of Snow Lake v. Snow Lake Local Association No. 45-4*, [1987] M.J. No. 273 (C.A.), a dispute over assigned noon hour supervision (at p. 6, 9):

> I deplore any tendency to relegate teachers to the sole function of classroom instruction. Education is much more than merely instructing; it is a process of formation. Teachers are not simply servants of the school division; they are professional persons who function as role models and as inspirers as well as providers of information and work skills.
>
> …
>
> I would say rather that the normal or general rule is that the teacher is not confined to any time period for carrying out his or her professional role.

In *Re Winnipeg School Division and Winnipeg Teachers' Association*, [2005] M.G.A.D. No. 28 (Hamilton), where teachers were assigned supervision during opening patriotic exercises, the arbitrator stated (para. 64):

> Neither can "instructional day" be equated with a teacher's working day. The mandatory 5 1/2 hour instructional day does not reflect all of the assignments which may be given to a teacher by the Division. The fact that teachers must be on duty 15 minutes prior to the "... opening hour in the morning" supports this perspective. So, too, does the reasoning in *Wpg. Teachers' Ass'n, Snow Lake* and *Churchill*. While opening exercises *per se* were not the focus of these decisions, the clear principle which emerges from them is that teachers can be given "reasonable" assignments beyond teaching students in the classroom. The template used by the Courts for

> upholding the various supervisory and extra-curricular assignments at issue in those cases was "reasonableness". … So, it is clear that a teacher's working day can encompass assignments beyond those performed during the "instructional day" and such assignments can be broader than both the "instructional day" and the "school day".

Similarly, in *Re Portage La Prairie Teachers' Association and Portage La Prairie School Division* (LaBossiere: 2018), a longstanding directive that all teachers remain available in the school until 4 pm daily was upheld under the Laskin test. The analysis showed how the interests of both employer and employees are carefully balanced, arriving at a reasonable outcome. The Division argued that these arrangements have served the parties for many years and should not be drastically altered as proposed by the Association.

Association reply

The Association denied that its proposal was a venture into new territory. It reflected an evolution based on teacher experience and new developments in education. Aspects of the proposal can be found in other collective agreements in Manitoba. The parties should make an effort to define teacher working time, recognizing that the Division retains the right to determine school hours. As for consistency with current practice, this can be worked out as necessary and there would not be significant changes. It is worth the effort because as a matter of principle, teachers should know their hours of work.

Decision on teacher time

The Association's proposed new language on Assignable Time is complex and, despite expressed intentions, may cause significant departures from current practice and may generate real cost increases. In its reply, the Association acknowledged that its draft clauses would need to be reviewed further to ensure consistency with

current practice. In the board's view, this is a discussion that should take place between the parties.

Both the Association and the Division stated during the current arbitration hearing that they have enjoyed a positive working relationship. The question of teacher time has now been flagged as a major concern of the Association and it deserves to be considered in depth by the parties to see whether some common ground may be found. The board will not make an award on this subject but does expect the parties to undertake serious discussions in advance of future collective bargaining.

It should not be assumed that discussion is futile, despite the obvious differing perspectives of the parties. In Saskatchewan, a tri-partite task force process produced a consensus report on teacher time, which was later awarded in arbitration. The Task Force framed the issue before it in these terms: "What can be expected of a teacher, quantitatively, by their employing board in exchange for their salary?" There is a nexus between salary and working time, although ultimately the award in *Saskatchewan Teachers' Federation* stated as follows (at p. 66-67):

> Much was said about teacher professionalism and the fact that teachers do not work on the clock. This topic was explored at length by the Task Force and we accept its assessment of the issue. A negotiated limit can be put on assignable hours of teacher work, as defined, while still recognizing that professionalism requires teachers to perform the rest of their duties autonomously.

As the Division said, disputes over assigned duties have been governed by the Laskin test for many years. Reasonableness has been the touchstone. However, in *Winnipeg Teachers* the Chief Justice was considering whether the employer "may call for the performance of duties which are not expressly spelled out" in the contract. The question of how much time must be devoted to such assigned duties has been left for the parties to address. In Manitoba, arbitration is available when

teacher bargaining fails. Generally speaking, interest arbitration is not a vehicle for introducing fundamental changes to an existing bargaining relationship, but each case depends on the circumstances.

Before us, teacher presenters described work that has become more intense and difficult to manage within the available time. The Division's leadership described the crushing burden of maintaining vital services while resources are flat or diminishing. The parties should engage on the teacher time issue. The dialogue in the present case was a useful beginning.

The board declines the proposal.

Use of Term Contracts: Article 17.00

Association submission on term contracts

The Association submitted that term contract teachers working under successive contracts are being unfairly treated and should have greater job security under the collective agreement. This has been a longstanding concern in teacher bargaining.

The Association proposed that any teacher hired by the Division for a full school year (defined as 180 teaching days) must be signed to a Teacher-General Contract (Permanent Contract), in the form set out in Schedule A to the *Form of Agreement (School Boards and Teachers) Regulation*, Regulation 218/2004 under the Act. As an exception, a teacher employed for *less* than a full school year could be signed to a Limited Term Teacher-General Contract ("Term Contract"), in the form set out in Schedule B to the Regulation. The Association also proposed retroactive permanent status when a Term Contract is extended during the year and retroactive effect when FTE is increased during the year.

If adopted, the Association's proposal would ban full-year Term Contracts, an arrangement frequently used by the Division both for new and returning teachers. Should there be no available position after one year, the teacher in question would be laid off pursuant to Article 8.00 of the collective agreement, said the Association. Under this article, teachers are retained based on length of service, subject to the teacher having the necessary training, academic qualifications, experience and ability for a specific teaching assignment. The Association did not seek to apply bumping.

Currently, the collective agreement provides that a Term Contract shall be used where a teacher is employed for a term certain of one school year or less. If a teacher is employed for an entire school year under a Term Contract and is hired the next year on a Permanent Contract, seniority and sick leave apply retroactively. The agreement also provides that a teacher who works on Term for two successive entire school years must, if rehired for a third entire year, be signed to a Permanent Contract, with retroactive seniority and sick leave. The right to permanent employment in this context does not apply if there were breaks in service.

The Association submitted that Term Contracts have been overused by the Division to the extent that the practice has become unfair and abusive to affected teachers. A membership survey showed that 67% of teachers in the Division were initially hired on a Term Contract. While 79% achieved permanent status by their third year, others took 4-6 years to gain a Permanent Contract. An unknown number of teachers left the Division without ever getting a permanent position.

One presenter told the arbitration board about the experience of being on recurring Term Contracts with the Division for seven years:

> Despite my years of experience and my familiarity with staff and students, I feel as though I am constantly being passed over for permanent jobs for reasons that I do not understand. I have versatility, experience, good relationships with students and colleagues, and a willingness to teach subjects that are well outside my teachable subjects. Once a term contract ends for me, it feels as though I am discarded, and whatever impact that I had at that school was worth nothing, as I am quickly replaced.

This teacher described a series of part-time appointments, sometimes topped up with appointment letters and sometimes not, depending on whether the Division needed "to plug temporary holes." This form of uncertain employment requires tremendous preparation and commitment. In June 2020, the teacher will finally have completed two successive entire school years on Term, such that they would be entitled to a Permanent Contract the next year, but only if the Division decides to re-hire and only if the offer is for the full year. This example illustrates the tenuous nature of term contract employment.

The Association stated that historically, there were no Term Contracts and short-term teachers were hired on Permanent Contracts. Section 92(4) of the Act provides that just cause protection does not apply until the start of the second year of employment, so the term teacher could be released before that deadline without resort to arbitration, if the employer deemed them unsuitable. In the 1980's, Term Contracts were introduced for the limited purpose of covering teachers replacing a teacher on leave. Draft regulations were produced defining a narrow ambit for such contracts. However, the regulations were never enacted, and school divisions began to use Term Contracts for various situations, leading to teachers working on revolving Terms for years at a time.

The Association considers this practice to be an abuse because the legislative intent of job security and due process after one year has effectively been thwarted, at the employer's discretion. MTS unsuccessfully challenged the legality of Term Contracts in court: *Gadient v. Fort Garry School Division No. 5 et al*, [1994] 96

Man. R. (2d) 219, upheld [1995] M.J. No. 236 (C.A.). The appeal court expressed some doubt about whether the Form 2A (as it then was called) could be used "to cover what was intended to be more than a temporary engagement" (para. 20).

MTS also lobbied government to limit Term Contracts by legislation. In 2004, the present form of Term Contract was adopted by regulation, but without the protections sought by MTS.

The trial judge in *Gadient* stated that the rights of term teachers were bargainable (at para. 16). MTS tried to bargain for restrictions but had minimal success. In *Brandon* (Scurfield: 1998), citing evidence it had received, the board held it was fair and logical to give "some security to teachers with seniority in the Division who are clearly considered competent since the Division continues to offer them successive term contracts." The award granted permanent status after three successive full years, if the teacher is re-hired for a fourth year. The board noted that such teachers can be laid off where it is necessary to do so. There was evidence that it was "clearly injurious to the morale within the Division to have teachers left in a state of uncertainty." In *Fort Garry* (Fox-Decent: 2000), the board awarded permanent status in the third successive year, stating its intent "to provide some protection and certainty to those teachers who are temporary." Both boards allowed for the use of another term contract where the teacher was rehired for less than three months. Finally, in *St. Vital (2001)*, the present chair added a definition of "entire school year" as 180 school days or more, to capture teachers who worked slightly less than a full school year, with the following observation (at p. 23):

> If experience under the new agreement indicates that there are real problems with the utilization of temporary teachers by the Division, then the parties are free to address these issues in bargaining and the Association will have full resort to arbitration …

The Association argued that since the problems have continued, it is now time to develop an arbitral solution. It conceded there is no precedent for its proposed Term Contract language in the Manitoba public school system. Nelson House Education Authority, a First Nation school system under Federal jurisdiction, requires a Permanent Contract be signed after 180 aggregate days on a Term Contract. Limited precedents exist in other provinces. Some Manitoba collective agreements state there shall be no greater number of Term Contracts than there are teachers on leave (AEFM). The Brandon agreement mandates written reasons if a term teacher is not re-hired after two successive full years on Term.

In the Association's view, beginning teachers, who are usually younger people, are being exploited by the lack of job security and seniority accrual inherent in this regime. They feel pressed to volunteer excessively. They are driven to postpone life choices due to financial insecurity. The grievance process has not been an effective form of remedy because these teachers feel vulnerable to blacklisting and have been unwilling to make formal complaints. The Association stated that job security is the issue it hears about most often from members. These general concerns were highlighted in an article by Ms Beresford, published in The Manitoba Teacher (March 2018), entitled "The Circle Game: The Use and Abuse of Term Contracts." While the employers may not be intending to abuse term teachers, said the Association, the flexibility of Term Contracts is simply too convenient for an employer to forego.

The Association cited *United Electrical Workers, Local 512 and Tung-Sol of Canada Ltd*., [1964] O.L.A.A. No. 9 (Reville), a leading authority, where seniority was described as "one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members" in collective

bargaining (at para. 4). The present Article 17.00 allows seniority to be nullified, argued the Association.

In *Turtle River School Division* (Graham: 2007), the board followed *Brandon (1998)* on the subject of when an arbitrator may award provisions representing a significant departure from longstanding practice. The test is as follows (at p. 7). Refusal of one party to agree to the proposed new article is neither logical nor fair, and evidence shows that the current practice is impractical, inequitable or out of step with what is occurring in other divisions. The Association submitted that it met the *Turtle River* test in the present case. The current provisions for term contracts are illogical, unfair, impractical and inequitable.

Division submission on term contracts

In response, the Division stated that by and large, it uses term contracts to replace teachers on leave, but the collective agreement does not restrict term contracts to these situations. There is no evidence teachers are being mistreated in hiring, said the Division, and the Association has not brought forward complaints or grievances prior to the current arbitration process.

The Division argued that the requirement for a permanent contract in every full year hire would be unworkable. It is no answer to say "Just lay off the temporary teacher" when the teacher on leave returns, as the return date can be variable, and the layoff process is geared to December and June staff changes. Term contracts are used when teachers take short-term disability, LTD, deferred salary leave, maternity and parental leave. The Division would find itself regularly overstaffed. The Division has never used the layoff article and prefers not to do so. It is cumbersome and the timing is problematic. Moreover, it would be stressful for term teachers and likely

lead to tensions with permanent teachers over who gets to keep the assignment. Currently, 97% of teachers returning from leave are offered their original position again. The Association's proposal would undermine the integrity of job security expected by holders of permanent contracts. The Division asserted that together, the proposals on Articles 17.00 and 19.00 (see below) are unduly rigid and complex. There would be deliberate overstaffing followed by forced layoffs. Staffing could be brought to a halt.

The Division noted that in 1995, MTS challenged the legality of Form 2A contracts, as referenced by the Association: *Gadient v. Fort Garry*. The court at that time suggested there may be a need for legislation to clarify proper practices. The Division submitted that the remedy, if one is required, may lie with government, not the Division as employer.

Not long after *Gadient*, the local association raised the same set of issues before the present chair in *St. Vital (2001)*, stating a concern that "teachers not be unfairly continued on a succession of Form 2A contracts, thereby undermining their security of employment" (at p. 22). However, the association's proposals were not accepted. The chair acknowledged that St. Vital claimed legitimate reasons for hiring temporary teachers aside from replacing teachers on leave of absence (at p. 23). The chair added that if there were real problems with the utilization of temporary teachers, the parties could address the issues in bargaining, with further potential resort to arbitration. Subsequently, there was bargaining of Article 17.00, and the parties added retroactive sick leave and seniority provisions (2009-2011, 2011-2014). These benefits exceed the terms of the standard contracts specified in regulation under the Act. The parties should be left to address these issues, if necessary, in a future round.

The Division responded to the teacher who presented before the board on their difficulty over seven years in achieving a permanent contract. It was just a series of circumstances that led to the teacher doing successive terms. The teacher only applied for one permanent posting and the Division did not hear any complaint prior to the arbitration. As for the Division's hiring process, it looks at each applicant, including term teachers, and picks the person who is the best fit for the position.

The Division presented data showing its classroom teacher hiring profile for the past four school years. In 2019-2020, there were 235 postings, 61 term contracts, 57 permanent contracts and 16 teachers hired permanently coming off two prior years of contract. The previous year there were 71 term contracts and 83 permanent hires. The year before that there were 61 term and 93 permanent hires. In 2016-2017, the Division hired 101 contract teachers and 107 permanent teachers. Each year there have been 40-50 new graduates and a similar number of experienced external teachers hired. Overall, said the Division, there has been a healthy hiring mix, belying the allegation of teacher mistreatment. The Division argued that it should be entitled to retain its management right to decide on staffing and hiring without further restriction. The *Turtle River* test for imposing a substantial change was not met. The status quo should continue.

Association reply on term contracts

In rebuttal, the Association denied there was any lack of flexibility in using the layoff provisions, where necessary, to reduce overstaffing caused by giving Permanent Contracts to teachers filling temporary positions. Moreover, the notion of tension between teachers over who fills the position was a red herring.

The Association filed rebuttal data on new hires which varied from the Division's evidence. The Association said its information shows an increasing resort to term contracts on the part of the Division in recent years. There were 122 term contracts in 2019-2020, far more than previous years. Total hires increased in 2019-2020 by 34% but usage of term contracts rose by 56%.

Division's further response

Responding to these figures at the close of the hearing, the Division acknowledged the spike in term contracts, and listed the following categories: leave of absence (15), LTD (18), maternity/parental leave (62), sick leave (26) secondment (5) and other (8).

Decision on term contracts

The fundamental thrust of the Association's proposals is to improve job security and seniority rights of teachers working under conditions of employment uncertainty. This is consistent with the legislative intent in broad terms. The Act requires that employment agreements between a teacher and a school board must be in the form and contain the content prescribed by the minister. Where a complaint is made against a teacher, a school board shall not terminate the agreement unless the complaint has been communicated to the teacher and there has been an opportunity to appear and answer the complaint. In the case of a Permanent Contract, employment is ongoing and may be terminated only for cause, subject to review by arbitration. However, review for cause is not applicable to Term Contracts. There is no assurance of continuing employment. There is no limit on the number of successive temporary contracts a division may decide to utilize, at least when there is a break in service.

Teachers working on such contracts do not have the kind of employment security generally expected in a professional teaching career.

For these reasons, teacher associations have been trying for decades to improve job security for term teachers, as described in the Association's submissions to the arbitration board. There have been nominal improvements as a result of collective bargaining. In addition, arbitrators have ruled that it would be fair and logical to give "some security" and "some protection and certainty" to teachers a division continues to employ, albeit on term contracts: *Brandon (1998), Fort Garry (2000)*. As the Division noted, the present chair declined to award a series of proposed improvements in *St. Vital (2001)*, redirecting the parties to the bargaining process. That was nearly 20 years ago, and the same issues appear to have resurfaced in the present case.

The Association's primary proposal was that every teacher should be signed to a Permanent Contract, unless employed for less than a full school year (180 days), in which case a Term Contract may be used. Since most term teachers are replacing a teacher on leave, it is inherent in this proposal that when the first teacher completes her leave, the Division will be overstaffed and the temporary teacher will have to be terminated, barring another available position. The Association readily conceded the point and argued that in these cases, the temporary teacher should be laid off under Article 8.00. The Division was adamant that this was an unworkable arrangement, saying it would be cumbersome and would cause stress for permanent teachers. While the Association challenged these objections, the board is not persuaded that the primary proposal is reasonable and necessary.

The available data suggests that the Division frequently uses term contracts. An Association survey found that 67% of members began employment with the

Division on a term contract. By their third year, 21% still had not achieved permanent status. The Division did not deny the Association's claim that insecure employment can create a sense of vulnerability for these teachers. In the current year, with about 235 postings, there were over 130 term contracts and only 57 permanent hires.

This is not to criticize the Division, as every year it must respond to circumstances as they arise. The Division said it needed Term Contracts to cover 15 leaves of absence, 18 long term disability leaves, 62 maternity/parental leaves, 26 sick leaves, five secondments and eight other cases. The Division's position at arbitration was that by and large, it uses Term Contracts to replace teachers on leave but not exclusively for this purpose. The Association believes the practice is more insidious and claims that term teachers are being hired when there are vacancies that would permit a permanent hire. If true, the practice is certainly not contrary to the collective agreement as it stands. The question is whether there should be further limitations on the Division's resort to Term Contracts.

The board is sympathetic to the view that where an opening exists for a permanent teacher appointment, the Division should normally hire under a Permanent Contract, which carries statutory due process, seniority and employment security rights, rather than an insecure Term Contract. In this regard, the Act provides a balance between the teacher's interest in security and the employer's interest in assessing a new employee for suitability. Due process and just cause protection do not commence until the start of the second year: section 92(4). The Division has a reasonable opportunity to monitor and review the new permanent teacher. If the teacher is deemed not suitable after the initial school year, the Division must give reasons to the teacher but there is no right to arbitration.

At the same time, it is reasonable and justifiable to hire under a Term Contract to replace another teacher on leave. To the extent that the Division says this is largely how it utilizes Term Contracts now, a new collective agreement provision confirming this usage should not interfere with the proper administration of the Division. The evidence led by the Division focussed on the unworkable use of layoffs under the Association's proposal to give every full year hire a Permanent Contract. The Division did not say it was essential to be able to use Term Contracts for permanent positions, although management may prefer such flexibility.

We accept and adopt the test in *Turtle River*, as discussed above, for awarding new language altering a longstanding practice. The board agrees with the spirit of prior arbitral comments that it is illogical and unfair not to allow a degree of security, protection and certainty to term teachers. It would be equitable to confine Term Contract usage to periods of one year or less while the term teacher is replacing a teacher on leave or in other limited circumstances. Reasonable collective bargaining between the parties would generate an agreement of this nature.

The board therefore awards the following revised clause 17:00 (B), as an exception to hiring under a Permanent Contract as per clause 17:00 (A):

> B. The exception to (A) above shall be those term teachers employed for a term certain of one (1) school year or less (i) *to replace a teacher on an approved leave or secondment, or (ii) to replace a teacher who has terminated employment in the Division during the school year due to unforeseen circumstances, or (iii) to supplement classroom resources for a period of less than three (3) months*. Every such term teacher shall be employed by the Division under a form of contract approved by the

Minister known as a Limited Term Teacher-General. (New language in italics.)

The new language should be reviewed in practice to ensure that it achieves the objective of providing greater employment security to teachers who work on Term Contracts. To reiterate the board's earlier observation, repetitive employment under a Term Contract does not provide the kind of security generally expected in a professional teaching career. If there are operational problems, the parties should discuss them with a view to resolution, and either party will have resort if necessary to future bargaining and arbitration.

The other Association proposals under Article 17:00 are declined.

Posting of Vacancies: Article 19.00

Association submission on posting

Along with improvements for term teachers, the Association also proposed a right of first refusal and preferential hiring for existing teachers when positions are posted.

Currently Article 19.00 consists of a single sentence. It provides that after placing returning teachers, surplus teachers and certain transfers, remaining vacancies will be posted. The Association proposed detailed new language covering a series of hiring circumstances.

Teachers with 10 years or more of service would be entitled to an interview.

Right of first refusal to a vacant position would be given to a qualified part-time or full-time permanent teacher over applicants from outside the Division. In the absence of any permanent applicants, right of first refusal would next be given to

qualified term teachers with at least 90 days of aggregate employment, ahead of outside candidates. Finally, absent permanent or term applicants, first refusal would be accorded to qualified substitute teachers with at least 90 days of aggregate employment in the Division.

In each instance, where there is more than one preferred applicant with the necessary qualifications, first refusal would go to the candidate with greatest aggregate service. During the hearing, the Association clarified that "qualified" in this context would mean a teacher has the necessary training, academic qualifications, experience and ability for a specific teaching assignment, as defined in Article 8.00 (D) (the layoff article).

There are limited precedents for preferential hiring in Manitoba teacher collective agreements, mostly in favour of part-time teachers (Park West and Brandon, right of first refusal subject to training, academic qualifications and experience; AEFM, qualified part-time teacher preference over new hires in filling full-time position; Pembina Trails, qualified permanent part-time preference over new hires for any permanent position; Seven Oaks, first consideration to part-time teachers subject to student impact and competence, qualifications and experience; Sunrise, preference to part-time teachers under contract over new hires for full time positions, subject to skill, ability and competence). Newfoundland gives preference to teachers already on a continuing contract. PEI requires priority for term teachers with 370 days of work over the previous three years.

In *Birdtail River School Division* (Scurfield: 1993, Supplementary Award 1994), the board said "it would be fair and reasonable to include a contract provision that is common in other Collective Agreements and does recognize the value of existing teachers" (at p. 14, initial award). As ultimately drafted, the awarded clause gave

the right of first refusal regarding a full-time vacancy to a qualified existing teacher, with seniority governing where more than one current qualified part-time teacher applies. The board added that its intent was to "give some credit to the service" of part-time teachers (at p. 3, supplementary award). This award was followed in *Turtle River (2007)* where the board awarded preference to a qualified permanent part-time teacher over outside applicants (at p. 53-54).

Division submission on posting

The Division forcefully resisted all the Association proposals, calling them sweeping and unprecedented. A right of first refusal would be a drastic, unjustified change to longstanding posting practice, said the Division. It advocated the status quo.

The mandatory interview would be tremendously time consuming as half of the Division's teachers have 10 years of service or more. It is not always necessary to conduct a personal interview.

The Division explained its policy on reassignment and transfer of teachers, which includes posting vacant positions after following the terms of Article 19.00 for placing teachers. The Assistant Superintendent then decides when to post but there are no formal guidelines. The policy provides that vacancies will be posted for a minimum of four teaching days and all internal applicants will be considered. This is initially done based on resumes. For these purposes, term teachers are considered externals. A MOA to the collective agreement provides that FTE's up to 0.20 will be posted internally within the school where the vacancy arises. The Division argued that the proposed right of first refusal contradicts the MOA.

In her presentation to the arbitration board, the Assistant Superintendent was explicit and unapologetic that the Division wants the best person for the job in every case.

This means an external applicant could be hired over a senior teacher currently employed by the Division. The proposed right of first refusal might make sense in a manufacturing plant but not a school division, where such a rule would not consider the needs of students, schools and the community. As well, the Division does not currently keep length of service in its data base so the proposal would require a manual check of all applicant records, which would be an administrative burden.

The Division asserted that there have not been concerns raised by the Association over hiring practices, except an ask for more postings, which has been implemented.

The *Turtle River (2007)* award of a preferential hiring clause is distinguishable because the division did not seriously oppose it, and it was limited to part-time teachers, of whom there were only four working in the division. Turtle River is a smaller operation with only 70 total FTE's. Louis Riel is a large division and there is adamant opposition to first refusal or preferential hiring language. Preferential hiring for part-time teachers was rejected in *Brandon (1998)* on the basis that there was no evidence of a problem and very little precedent in Manitoba. The arbitrator also identified a jurisdictional obstacle to such a clause under the Act as it then stood.

At present, there are nine divisions in Manitoba out of 38 with posting language similar to the Louis Riel article. This approach is well accepted in Manitoba divisions and should not be altered.

The Division pointed to a highly controversial collective bargaining issue in Ontario over Regulation 274, which requires that permanent teacher hires be made from the five most senior applicants on the school's substitute teacher list. The government wishes to repeal the regulation and allow hiring based on merit and equity considerations. The Division characterized the Association's first refusal proposal

as even more restrictive than the contentious Ontario regulation. If awarded, the Association proposals would lead to conflict and grievances, while denying students the best teacher for their classroom.

Based on all the foregoing, said the Division, the test for introducing new language has not been met.

Association reply

In rebuttal, the Association denied that its proposal conflicted with existing Division policy on transfer and hiring. The proposal simply extended the policy with new preferences, which can be melded with Division policy.

Decision on posting

The board agrees that it may be fair and equitable to provide a form of preferential hiring to qualified existing teachers over outside applicants. Here the Association's proposals related to both permanent and term teachers. There is some arbitral precedent based on recognizing the value of existing teachers, especially part-time teachers hoping to secure permanent full-time positions: *Birdtail (1993)* and *Turtle River (2007)*.

However, there are a variety of potential forms of preferential hiring. The current Association proposals involve extensive detailed language that has not been subject to prior discussion between the parties. The board is loath to consider restricting management hiring discretion without fully understanding all the consequences of the language.

The Association's Article 19.00 proposals are declined but they are worthy of further discussion and consideration at a later bargaining round.

Health Spending Account: New Article 24.01

The Association proposed a Division-paid Health Spending Account (HSA) providing $1,000 per annum per FTE teacher, with a total potential cost of $1.1 million per year. In practice, only about 40% of available health spending account funds are utilized by plan members, so the real cost would be significantly less. There would be one year of carry forward for unused benefits. Currently, teachers in Manitoba pay for their own health and extended benefits, unlike many major collective bargaining units in the province, where some coverage is employer paid under various terms and conditions.

The Division acknowledged that utilization rates are less than 100% but noted it would still be required to budget for the full annual cost of a HSA benefit. The proposal failed to state who would administer the account. HSA plans can be complex, especially with a carry forward clause. The Division posed a series of questions about the operation of the proposal that were not addressed by the Association's presentation. Given the fact that the Division's administrative functionality is already under severe pressure due to government cutbacks, a breakthrough award on HSA is unreasonable. Finally, the Division's teachers are currently very well compensated.

In reply, the Association said that it was not expecting the Division to administer the HSA. Blue Cross or a similar entity would be contracted. There would be no additional burden on the Division.

The arbitration board declines to award a Health Spending Account.

Early Notice of Retirement Allowance: New Article 25.00

The Association proposed a gratuity payable to teachers between 55 and 64 years of age, with 10 years or more of continuous service, when they retire and provide notification by February 1 (for June 30 retirement) or by September 30 (for December 31). Since these are earlier dates than the prescribed collective agreement deadlines, the Division would have an advantage in hiring new teachers. The gratuity would be based on a sliding scale from 100% to 10% of the teacher's annual salary amount. At retirement, a portion of the gratuity would be paid, with the remainder paid in the following year or years, depending on the teacher's age. Currently the average age of teacher retirement in the Division is 60 years, according to the Association. Two other divisions in Manitoba have a form of early retirement incentive payment.

The Association argued that the proposal can be a win-win, with workforce rejuvenation and net payroll cost savings. The Association's member survey showed this item was a bargaining priority.

The Division acknowledged that a handful of other divisions have early retirement clauses. The current collective agreement (Article 6.11) provides a five-day paid leave for early notice of retirement. However, the Division challenged the Association's costing evidence as incomplete and inaccurate in several respects. On a net basis, the proposal would not generate real savings. Moreover, teachers are already retiring early. The average age is 59 years and half of Manitoba teacher retirees fall in the 55-59 years age category. The Division stated it has no recruitment or workforce refreshment issue. Finally, it would be problematic if too many senior teachers retired early, as they are needed for some programs. New teachers generally start at lower salaries but not all teachers are interchangeable.

In reply, the Association acknowledged some calculation errors in its original proposal but defended it as showing benefits to the Division under some scenarios.

The arbitration board declines the Association's proposal.

Non-discrimination: New article

The Division proposed the following new language:

> All provisions in the agreement have been negotiated in good faith with the specific understanding that the provisions and their administration contain no elements of discrimination. In the event that any of the provisions are deemed to be discriminatory, the parties will negotiate the necessary adjustments to ensure there is no increased cost to the Division or Association.

The Division argued that historically, there have been arbitral findings of discrimination or awards intended to meet human rights standards, resulting in significant costs. It should not fall solely to the Division to pay the cost resulting from such third-party decisions.

There are no precedents for such a clause in Manitoba teacher collective agreements.

The Association opposed the proposal. While agreeing that the parties negotiate in good faith and generally believe they have concluded non-discriminatory agreements, the Association also has a duty of fair representation and must pursue issues that may trigger cost consequences. General legal principles should apply in the event there is a finding of discrimination.

The board declines the proposal.

Agreed items

The parties agreed on the items as set forth in Appendix "A", which is incorporated in and forms part of this award.

The revisions in Appendix "A" will be included in the new collective agreement.

Jurisdiction retained

The board retains jurisdiction to clarify, correct or implement any part of this award, as may be requested by either party, or acting on the board's own motion.

Conclusion

This award is unanimous and is being issued electronically by the Chair on behalf of the board.

During the deliberative process, the nominees expressed their views candidly and forcefully, while still cooperating in a search for consensus. It should be noted that each respective nominee of the parties has in certain instances agreed with the other two members, despite some reservations regarding the outcome of particular issues. We have done this because we think it is most important to achieve a workable, unanimous award that addresses the fundamental matters raised by the parties in this proceeding.

These are uncertain times. The parties will need to continue working together in a relationship each side described as respectful and productive.

Finally, the board thanks the parties for their comprehensive submissions, their responsiveness to questions and their unfailing courtesy throughout an arduous hearing process.

DATED this 14th day of April 2020.

ARNE PELTZ, Chair

DENNY KELLS, Nominee of the Division

DAVID SHROM, Nominee of the Association

APPENDIX "A"

ITEMS AGREED BETWEEN THE PARTIES

TO BE ADDED WHEN RECEIVED