IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE PORTAGE LA PRAIRIE TEACHERS' ASSOCIATION (the "Association")

- and –

THE PORTAGE LA PRAIRIE SCHOOL DIVISION (the "Division")

Keith D. LaBossiere
David Shrom
Grant Mitchell

COUNSEL

Garth Smorang, Q.C., for the Association
David Simpson, for the Division

AWARD

ISSUES

The grievance submitted by the Association to the Division (Exhibit 2) reads as follows:

> The Portage la Prairie Teachers' Association (hereinafter referred to as "the Association") submits that there is a difference between the Association and the Portage la Prairie School Division (hereinafter referred to as "the Division") with respect to the meaning and/or application and/or violation of the Collective Agreement in force between the Division and the Association, including a violation of the deemed provision set out in s.80(2) of the *Labour Relations Act of Manitoba*.
>
> FACTS
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> The Division has recently mandated that all teaching staff within the Division must remain at school until 4:00 PM each

day, notwithstanding that teachers may not have duties to perform or assigned duties between the end of the last class of the day and 4:00 PM.

THE ASSOCIATION GRIEVES:

1. That the Division has, by instituting its mandate, acted in a manner that is unreasonable and unfair.

THE ASSOCIATION REQUESTS:

1. That the Division rescind the mandate set forth above.
2. Compensation and/or damages to individual teachers.
3. Such other remedies as may be fair and reasonable in the circumstances.

At the outset of the hearing, it was agreed that this Board was properly constituted and had jurisdiction to hear the grievance.

THE POSITION OF THE PARTIES

As noted above, the Association grieves the Division's ability to mandate to teachers specific hours of work, during which they must be present after school concludes each day. In particular, the Association grieves the Division's requirement that teachers be present between the hours of 8:30 a.m. and 4:00 p.m. every day (the "4PM Directive").

The Association acknowledges that this rule has existed for some time, but alleges that until 2017 the rule was not applied consistently at each school and, in fact, was not even enforced in one particular school.

The Association alleges that this all changed in 2017, when the Division reaffirmed its expectation that all teachers adhere strictly to the rule requiring them to attend and stay at work between the above mentioned times.

The Association takes issue with both the start and the end times in the directive in question, but this grievance concerns only the end time, namely 4:00 p.m. The Board was advised that depending on the result of this arbitration, the Association may or may not need to file another grievance.

The Association acknowledges that the authorities are clear that teachers, as professionals, have duties outside of the instructional day. However, the Association takes the position that such duties that might be assigned must be done so reasonably. In order for a duty or a mandate or a directive to perform a duty to be considered reasonable, the Association takes the position that three criteria must be met:

1. It must be related to the enterprise;
2. It must be fair and reasonable;
3. It must be in furtherance of the principle duties to which teachers are expressly committed.

The Association stressed that teachers routinely agree to a number of duties outside of the instructional day, including bus and hallway duty, parent-teacher conferences and events, school and curriculum based committees, school dances,

events and staff and/or budget meetings. However, the Association submits that all of those duties meet the reasonableness principle, described above. Moreover, the Association submits that teachers routinely volunteer for other extra-curricular activities that are not specifically mandated, including coaching and other extra-curricular activities.

The Association submits that teachers regularly do much on their own, including frequent communication with parents by phone, text and e-mail, evening and weekend course preparation, the marking of exams, papers, preparing report cards, shopping for school supplies and coming in during the summer months to prepare their classrooms. As professionals, the Association acknowledges that teachers ought to be taking part in such activities.

However, the Association submits that the 4PM Directive makes them nothing more than "clock punchers". The Association submits that no specific duties are assigned to the teachers after school and the assignment is insulting, in addition to being unfair and unreasonable. Moreover, the Association takes the position that this directive is arbitrary and ignores the reality that teachers, as professionals, ought to be entitled to decide how to discharge their duties as teachers.

This directive interferes with a teacher's familial responsibilities and medical needs and if teachers need to leave before 4:00 p.m. to discharge either, they must beg the indulgence of a principal, sign a log book, outlining the rationale for leaving early in a manner which the Association finds inappropriate. The Association submits that of thirty-

eight school divisions within the province, the Division is the only one that has such a directive. In the Association's view, this comes as no surprise as it submits the law is well settled in all school divisions, but this one.

In all of the circumstances, the Association is requesting that the grievance be upheld and the remedies described in the grievance be ordered.

For its part, the Division submits that this issue relates to the right of the Division to set school hours. The Division disputes that school hours are limited to the instructional day and takes the position that the Division's school trustees are responsible for setting the school day.

The Division points to a long standing practice within the Division for teachers to be at the school for school hours between 8:30 a.m. to 4:00 p.m. In short, the Division's "school day" is between 8:30 a.m. and 4:00 p.m.

The Division submits that it has the right to set school hours under the Collective Agreement's management rights clause, the legislated rights which authorizes the school board to set open and closing hours of school and, in the alternative, submits that imposing these school hours is reasonable and should be upheld.

Moreover, the Division takes the position that given the long-standing practice that has been in place, the Association is estopped until the Division has an opportunity to collectively bargain.

Aside from pointing out its position as to the rights set out in both the Collective Agreement and legislation, the Division maintains that the 4PM Directive is reasonable. The Division points to the fact that the requirement in question is for teachers to stay for only 20 to 33 minutes beyond the instructional day and that one of the primary duties of a teacher is to maintain order and discipline and provide supervision in schools. In the Division's view, these critical elements of the duties of a teacher do not end simply because the instructional day has ended as students remain in class, in the hallways and outside on the school grounds. The Division takes the position that it needs teachers present to provide this supervision. Given the wide age range within the Division (6-18 years), it is not unreasonable to expect that teachers be present to provide supervision.

The Division points to the differing needs at each school given the different school hours, bussing schedules and needs that exist which may also all vary from season to season.

The Division acknowledges that this directive may not be perfect, but it is reasonable. In addition to general supervision described above, the short time frame allows teachers to perform other duties, to meet with students, parents, local administration and other teachers and allows them to deal with issues that arose during

the day. From the Division's perspective, these are the duties of a teacher and they centre around their availability and, more importantly, their consistent availability.

The Division maintains that it has instituted a process which would allow any teacher to leave before 4:00 p.m. if need be and submit that teachers are allowed to leave if they ask to do so and have a reason. From its perspective, this is not insulting and is evidence of the reasonableness of the Division's approach.

Given how long this practice has been in place, the Division submits that such practice is, in and of itself, evidence of its reasonableness and for all of the reasons noted above, the grievance should be denied.

THE EVIDENCE

The parties called seven witnesses in total. The Association called four and the Division, three. We do not intend to set out the evidence of each of the witnesses in detail in this Award, but have considered it all. It is the Board's intention to outline some of the evidence the parties relied upon in their submissions and which assisted the Board in reaching its decision.

The Association's Witnesses

Arlyn Filewich, a Manitoba Teachers' Society staff officer and former long term teacher and local union president described the basis for the terms and conditions

of employment of teachers in Manitoba. In particular, she took the Board through the *Public Schools Act* (Exhibit 3) and its regulations (Exhibit 4), along with the regulations under the *Education Administration Act* (Exhibit 5), the requirement for a code of conduct under the *Manitoba Teachers' Society Act* (Exhibit 6), the Code of Conduct (Exhibit 7) that has been developed by the Manitoba Teachers' Society and the Collective Agreement (Exhibit 1) that governs the parties in this case.

She outlined that no teacher collective agreements in the Province have provisions which outline when a teacher must arrive or leave work each day. She acknowledged that there was nothing in the Collective Agreement between the parties that limits the Division's ability to set school hours.

She outlined the many duties teachers perform outside of the instructional day, whether assigned or performed on their own. Those duties that are assigned include attending staff meetings, parent-teacher meetings/conferences, open houses, general supervision, bus, hall and recess duty. The expectation on teachers is that they also do work on certain committees.

In the Collective Agreement between these parties (Exhibit 1), there are provisions that have been negotiated that prescribe thirty minutes per day of preparation time (Article 33), a duty free meal period, which precludes the assignment of duties (Article 24) and provides some benefit for the provision of extra-curricular activities that are performed (Article 29). Ms Filewich acknowledged that the Association has the ability

to negotiate limitations on hours of work if it were so inclined, but she does not believe that is necessary.

Ms Filewich pointed out that a number of duties that teachers perform are not assigned, including extra-curricular activities such as coaching, but also reviewing the curriculum which is constantly evolving, adjusting and adapting to plan and support student learning, assessment planning, grading work, tests and assignments, preparing report cards, the ongoing communication with parents, whether it be in person, on phone, email or text and tutoring. She was clear that most, if not all, of this is done outside of the instructional day as there is insufficient time during the instructional day or during the thirty minutes of preparation time that has been negotiated.

Ms Filewich painted a picture of teachers' workloads being well beyond the instructional day and the need to balance competing interests including family obligations. Ms Filewich pointed out that in the regulations under the *Education Administration Act*, there is a prescription when a teacher must begin their duties each day (at least ten minutes before morning session and at least five minutes before the afternoon session), but the end of the day is not prescribed in the legislation at all. She described teachers as professionals who leave work when the professional believes it is "appropriate" to do so. In her view, this occurs after a number of duties and tasks are undertaking, including ensuring students are safe and no longer under their control or charge.

Although some teachers may leave shortly after the students do, most stay later. She described teachers as being generally exhausted at the end of each day and each teacher has a different way of managing that exhaustion and finding the appropriate time to discharge their professional duties.

Ms Filewich went on to describe the eighteen schools in the Division that range from a high school to elementary school to Hutterian schools which are served by 260 teachers and administrators.

Ms Filewich explained that she first became aware of the 4PM Directive in early January 2017. She acknowledged that she had been aware that some schools were requiring teachers to stay at school until 4:00 p.m., but she did not realize there was school division mandate to do so until January of 2017. She pointed to the administrators' council minutes of March 15, 2017 (Exhibit 9) when Superintendent Cuddington discussed, amongst other things, what she called a directive to have teachers work between 8:30 a.m. and 4:00 p.m. each day. The local union and MTS then met with the Division on May 16, 2017 and requested an explanation for the 4PM Directive. At that meeting, and as recorded in the minutes (Exhibit 10), they were advised that "supervision is required throughout the school past the bell time, use time to meet with students, parents, colleagues, and opportunity for professional development."

The Division explained that this was consistent with their past practice. Ms Filewich re-iterated that she was aware that some schools had such a practice, but did not realize this was a division wide mandate.

In cross-examination, Ms Filewich acknowledged that she was aware that some schools were insisting that teachers stay until 4:00 p.m. as early as 2014 during collective bargaining of the existing Collective Agreement, but felt that it was not a bargaining issue and, in any event, it would have been too late to introduce a new issue at the table. Ms Filewich did acknowledge, as outlined above, that the Association has previously negotiated limitations on work and benefits to be provided to teachers for additional work in prior collective bargaining sessions.

The next day at the Association annual general meeting, the Union advised its members as outlined in the minutes of the annual general meeting (Exhibit 11) that "granted principals can expect teachers to fulfill their duties before and after school in a reasonable manner but cannot make this a daily routine...."

In Ms Filewich's view, the position of the Association has been that if the Division wishes teachers to do work beyond the instructional day, it must be assigned in a fair and reasonable manner. In the Association's view, insisting on a blanket rule that teachers stay until 4:00 p.m. without assigning specific duties does not accord with the reality that teachers are professionals and ought to be able to decide when to discharge their duties. The Association does not dispute that there would be a lot to do between

the end of the instructional day and 4:00 p.m., but believes it is unreasonable and unfair for the Division to insist that teachers perform their professional duties at that time, rather than when it might suit them best.

The Association and Ms Filewich were insulted at the idea that the teachers would not discharge their professional duties appropriately and were being painted as "knocking kids down on the way out to their cars".

The Association points out that from their understanding this is the only Division that mandates a 4:00 p.m. end to a workday and re-iterated that if there was an issue in any particular school in the Division, duties could be assigned fairly and reasonably to teachers and they could be disciplined if they did not discharge their obligations appropriately. Moreover, Ms Filewich suggested that setting a time of 4:00 p.m. is arbitrary as there may well be things that have to be done beyond 4:00 p.m.

Ms Filewich advised the Division by email that a grievance would be filed if the mandate was not withdrawn. She received no response to her email and the grievance, which is the subject of this arbitration, was then filed.

The Association called three teachers who worked in different schools within the Division with different levels of experience and who have different personal situations. Each of these teachers described in detail the work that they perform outside of the instructional day, both assigned or otherwise, including many of the types of work

described by Ms Filewich. It was clear to the Board that each of these teachers were dedicated professionals who care deeply for the students in their charge and their role as educators. Each of them had family responsibilities which were strained by the requirement to stay at school until 4:00 p.m. Each of them had responsibilities which could be more easily discharged and certainly enjoyed more, if they were entitled to leave once their work was done following the instructional day. Each of them acknowledged that if there was work to do, and that work had to be done immediately following the instructional day, they would and have on many occasions stayed to do so. However, each of them bristled at the suggestion that they must stay and each of them, in their own way, described the feeling of not being trusted by the Division to discharge their professional obligations as teachers. This is obviously not a feeling they enjoyed. As to the 4PM Directive, with one exception, they generally acknowledged that the rule had been in place for some time, but each of them expressed a consistent view that while there historically had been a rule in place that required teachers to stay until 4:00 p.m., its enforcement was more relaxed than when it was, in their words, reinstituted in 2017.

The first teacher, Ms Walld, who gave evidence, acknowledged that, for approximately a decade, the rule was in place at the school she worked at, requiring teachers to stay until 4:00 p.m. She recalled that sometime in 2016, that rule was dispensed with only to be reinstituted in a much more rigid way in 2017 after her return from a parental leave.

Ms Murray, another teacher who gave evidence, acknowledged that there was an expectation that teachers stay until 4:00 p.m. since she began her employment in 2008, but it was not strictly enforced. She said that changed some time in 2017 when teachers were told they now must stay.

The last teacher to give evidence on behalf of the Association was Ms Myron and in her evidence, her recollection was that in the three years that she was there in the first year (2015), there was no expectation, in 2016, she was told the Division wanted the teachers to stay, but she was told by local administrators that they couldn't be legally required to do so and then in 2017, teachers were told that they had to stay until 4:00 p.m.

All of the teachers said that they complied with the rules, but often either chose not to, or did not have work to be appropriately done for the entire time period between the end of the instructional day and 4:00 p.m. One of the teachers even said that on most Fridays teachers gathered in the staff room to socialize. Having said this, each of the teachers acknowledged that there was a lot of work to be done and that time could be used for such work, if they were so included to use that time. For a variety of reasons, each preferred to choose when to do such work and it may have been at different times.

The teachers were clear that they took issue with the requirement to sign a sign out book and provide a rationale in the event they had an exceptional circumstance

that required them to leave early. In their collective view, this was both insulting and a breach of their privacy.

The Division for its part called three witnesses, the first of which was the Superintendent and Secretary-Treasurer of the Division, Todd Cuddington. Mr. Cuddington started in this position in 2016 and transitioned into his role when he fully took over in October of 2017. Generally speaking, Mr. Cuddington is in charge of overseeing all of the educational programming in the Division and to follow the directives of the elected Board of Trustees. He explained that the day to day operations of the schools are led by principals and communication is provided to those principals through regular meetings.

Mr. Cuddington outlined his understanding that the elected Board of Trustees had set the school hours in the Division between 8:30 a.m. and 4:00 p.m. each day. He is familiar with the Collective Agreement and confirmed that nothing in that Collective Agreement from his perspective limited the ability of the Trustees to do so. It was his understanding that these school hours had been in place for many years. His expectation is that teachers be present, supervising and teaching between those school hours.

He was first made aware that the Association had concerns with these school hours in the fall of 2016 through informal conversation with the local Association executive. He understood there was some confusion surrounding the school hours and

was made aware that at the Association's AGM, comments were made to the teachers that they did not have to stay until 4:00 p.m.

Given the confusion that appeared to exist, he met in January of 2017 with the executive of the Association. At that meeting, a number of issues were discussed, including the issue of school hours. At that meeting, Mr. Cuddington said that he reiterated the long standing practice of an 8:30 a.m. to 4:00 p.m. school day. Mr. Cuddington explained that he felt that given the confusion that appeared to exist as a result of the Association's position articulated at its AGM, he felt the need to clarify for his administrators that the school hours were still in effect. He says this is what he did at the administrators' council meeting on Wednesday, March 15, 2017 (Exhibit 9).

He explained that he met again with the Association on March 23, 2017 (Exhibit 29) and the Division reiterated once again the expectation that teachers stay until 4:00 p.m. as supervision was required, it allowed for professional development opportunities, a time to meet with administration and other staff, and time to meet with students and parents.

He described a subsequent meeting in the spring with Ms Filewich in the Division office and others from the Association when this issue was raised once again by the Association (Exhibit 10). During that meeting, Mr. Cuddington said he discussed the expectation that staff stay until 4:00 p.m. and that he wanted to be consistent throughout the Division as has been the case for a long period of time.

Given the comments that were being made to teachers from union representatives, he felt it was important to continue to reiterate that the long standing practice remained in place.

When asked specifically why a 4:00 p.m. end time was required, Mr. Cuddington explained that supervision was required and the time was to be used to meet with students, parents, colleagues and for professional development. He explained further that his understanding for the rationale for the rule was that the elected Board of Trustees felt it was important to have teachers available to supervise the departure of students as this takes some time to do, that all schools are different in the specific times that they end and when buses depart and there are seasonal differences that affect how quickly or how late students leave. He also understands that the Board of Trustees believes it is important for teachers to be present and available for the community and to give opportunities for teachers to meet with students, parents and other colleagues. Moreover, there is cleaning and organizing that is always required, the requirement to gather material for the next morning and it allows an opportunity for administration to meet with teachers after the instructional day ends if required. Lastly, this provides for further professional development.

He reiterated that not only is it the expectation of the elected Board of Trustees, it is his expectation that the teachers stay until 4:00 p.m.

Mr. Cuddington explained anecdotally that there were some challenges that arose after the confusion began about the end of day time. In short, he explained that there were examples of teachers leaving the school grounds prior to all of the students having an opportunity to leave.

Mr. Cuddington agreed with the Association witnesses that there are many occasions in which teachers are performing work outside of the instructional day and doing all of the kinds of things described by those witnesses. In cross-examination, Mr. Cuddington was pointed to the regulation under the *Public Schools Act* (Exhibit 30), and in particular, the authority that is provided to the School Board under regulation 5(2) to "by resolution recorded in its minutes, determine the hours of opening and closing of the school day and, subject to this section, the time and duration of the mid day intermission and recesses". He acknowledged that he is unaware of any minutes or resolutions specifically setting the hours. He indicated that the elected Board of Trustees was prepared to issue such a resolution, but did not. However, he insisted the Division was clear that school hours were between 8:30 a.m. and 4:00 p.m.

Mr. Cuddington was challenged on the rationale for the requirement to stay until 4:00 p.m. every day and acknowledged that every teacher and every school may have different requirements at the end of the day. It was pointed out and he agreed that there are ten Hutterian schools in the Division and those teachers are also required to stay until 4:00 p.m. He acknowledged that, in some cases, those teachers head back to Portage Collegiate Institute where they must stay until 4:00 p.m. as it is the headquarters

for their program, but they would not be in a position to meet with parents and students when they do so. The crux of the cross-examination was to point out to Mr. Cuddington that even if teachers felt they had nothing to usefully do following the instructional day and 4:00 p.m., they were required to stay until 4:00 p.m. Ultimately, Mr. Cuddington did not dispute that this was, in fact, the case. However, on balance, Mr. Cuddington reiterated the reasons noted above for the 4PM Directive and the various tasks that could and should be done during the relevant time.

It was suggested to him that teachers felt that his reiterating of the rule amounted to a significant change in the rule and that in the past, although this rule existed, it was dealt with much less rigidly, he disagreed and did not think the witnesses at the arbitration were reflective of all teachers, they were but a small sample.

Mr. Cuddington acknowledged in cross-examination that schools do specifically assign on a rotational basis both bus and hallway duties following the instructional day.

In cross-examination it was suggested to Mr. Cuddington that establishing an end day at 4:00 p.m. was somewhat arbitrary. It was suggested that that time could be 5:00 p.m. or 6:00 p.m., for example. Mr. Cuddington explained that this was not his position, that in his view 4:00 p.m. was reasonable for the reasons that he previously outlined and that if the Division ever did move that time beyond 4:00 p.m., they would have to justify that it was reasonable.

Mr. Cuddington suggested that if teachers needed to leave early, that could be dealt with by the principal and he believes that administrators are willing to grant requests to leave where appropriate. He acknowledged that one of the previous witnesses, Ms Murray, would likely not be granted the opportunity to leave twice a week in order to get her child to hockey as that would not be the kind of regular request that could be accommodated.

The Division also called the Assistant Superintendent of the Division, Pamela Garnham, who has worked in the Division for many years, dating back to the late 1980's. After leaving for BC for five years in 1992, she returned as a teacher in 1997 when she taught until 2010. In 2010, she became the vice-principal at Portage Collegiate Institute which position she occupied until 2017 when she accepted the position as Assistant Superintendent of the Division. She explained that the 4PM Directive had always been in place and had been the expectation throughout her time in the Division. This was so despite the fact that instructional days ended at different times at different schools throughout the years. Ms Garnham took the Board through a variety of school handbooks or minutes from meetings at various schools (which were all filed as exhibits) which all outlined essentially a rule that required teachers to stay until 4:00 p.m.

Ms Garnham explained that from her perspective, the teachers' expectations after the final bell differed from school to school, but essentially were the same as described by the previous witnesses – general supervisions, meeting with

students, parents, teachers, local administration, guidance and resource personnel, cleaning and organizing the classroom and planning for the next day.

Ms Garnham took the Board through the school bell schedule at the end of the day and the bus route schedule which differed from school to school.

Ms Garnham also explained that, on occasion, if she had a sick child and she could not find an accommodation, she would ask to leave early and would be granted permission to leave following the instructional day, but before 4:00 p.m.

From her perspective, this issue surrounding the end of the school day arose because of the position being advocated by both Maxine Geller, who is the President of the Council of School Leaders ("COSL") and the Association in the spring of 2016, that they did not agree or accept the ability of the Division to mandate hours for teachers at the end of the day beyond the instructional day. In her view, this created confusion as to the school hours and resulted in the only inconsistency in the long standing practice in the Division. That is, Ms Garnham essentially was saying that the practice had only wavered because of the actions of the Association and Ms Geller in advising their members that they did not need to comply with the 4PM Directive. As Mr. Cuddington did, Ms Garnham explained this was the rationale for the reiteration of the rule in the exhibits provided to the Board. Ms Garnham was pressed on the requirement for all teachers to stay until 4:00 p.m., rather than assigning only some of the teachers on a rota system. She resisted the suggestion that would address the Division's concerns

and explained that without all teachers being present, it could not be assured that the unique needs of the Division could be met.

She explained that teachers are sometimes away, different needs arise at different times at different schools, some teachers are performing other tasks (including meetings) which does not allow them to supervise. As a result, not having all teachers available until 4:00 p.m. to do the myriad of things required, does not provide the Division with the flexibility they require to manage and supervise. Ms Garnham stressed that issues arise before school, at breaks and after school. Given the amount of students who are coming and going at different times in different places, she believes it is necessary to have all teachers present.

It was suggested to Ms Garnham in cross-examination as it was suggested to other witnesses that the form of communication has changed over the last decade and that face to face meetings are not as typical as they might have been in the past. In today's day and age, it was suggested that many communications are done over the phone, by text or email. Ms Garnham resisted this suggestion and said that in the Division, they happen to be a high poverty area and many parents and students do not always have access to smartphones. She acknowledged that the wide spectrum of socio-economic activity is not unique to the Division, but the reality is that in the Division they deal with a high number of First Nation students and students who are dealing with poverty who don't have the resources to use smartphones. Moreover, the Division has a high number of students in care where a lot of transiency exists. All of this, in Ms

Garnham's view, makes the Division unique in some of the challenges it has to deal with as it relates to the supervision of their students after school.

Lastly, the Division called Mr. Rod Brownlee who has been a school trustee in the Division for the past seven years. Prior to becoming a school trustee, he was employed in the Division for thirty-six years, dating back to May of 1971. Mr. Brownlee explained that the teachers have been required to stay until 4:00 p.m. since he started in 1971 and that has always been the rule in the Division.

He explained that as vice-chair of the Board, he is aware that the expectation of the trustees is that teachers continue to stay in the school until 4:00 p.m. He said this direction was given verbally to administrators and has not changed in the seven years he has been a school trustee. He also explained that he is not aware of the issue ever being raised in collective bargaining between the parties.

THE POSITION OF THE PARTIES

The Association's Position

The Association's position is outlined at the outset of this Award. However, in addition, Mr. Smorang forcefully argued that the ability of the Division to mandate a directive that teachers must stay until 4:00 p.m., notwithstanding that classes are dismissed as early as 3:20 p.m., was both unique in Manitoba and unfair. Mr. Smorang

fairly acknowledged that there is authority for the proposition that the Division may prescribe duties to teachers outside of their instructional day, but pointed out that nothing in the law specifically deals with departure times.

Mr. Smorang took the Board through the governing legislation and regulations and focused our attention on the duties that can be assigned to teachers.

Mr. Smorang argued that both very specific and very broad duties are listed in section 96 of *The Public Schools Act* (Exhibit 3):

> **Duties of teacher**
>
> 96(1) Every teacher shall
>
> (a) teach diligently and faithfully according to the terms of his agreement with the school board and according to this Act and the regulations;
>
> (b) keep a record of attendance in the manner and in such form as required by the school board;
>
> (c) maintain order and discipline in the school;
>
> (d) furnish to the minister, or to a field representative, any information that it may be in his power to give respecting anything connected with the operations of the school or in any way affecting its interests;
>
> (e) notify the principal who shall notify the appropriate local health authority of the area in which the school is situated or where there is no local health authority the school board that he has reason to believe that a pupil attending the school has been exposed to or is suffering from a communicable disease as defined in *The Public Health Act* and regulations made thereunder;
>
> (f) seize or cause to be seized and take possession of any offensive or dangerous weapon that is brought to school by a pupil and hand over any such weapon to the principal who

> shall notify the parent or guardian warning him that the pupil may be suspended or expelled from the school;
>
> (g) deliver or cause to be delivered or provide the parent or guardian of each pupil taught by him reports of the pupil at the times and in the manner determined by the school board;
>
> (h) admit to his classroom student teachers enrolled in a teacher education institution approved by the minister, for the purpose of practice teaching and of observing instruction.

The Board was taken through section 92 of *The Public Schools Act* which contemplates a form of teacher agreement to be prescribed by the Minister of Education and that teachers are required to sign that contract outside and separate from any collective agreement that might be entered into by their bargaining agent and employer.

Mr. Smorang pointed out that each contract contains a provision that reads as follows:

> The teacher agrees to diligently and faithfully carry out the teaching assignment and other duties he or she is assigned by the School Board in accordance with the Acts and regulations of Manitoba.

Mr. Smorang acknowledged that it is clear that the Division can assign other duties, but the question is what are those duties?

Mr. Smorang took the Board through the regulations under *The Education Administration Act* (Exhibit 5) which outline, in part, that the responsibilities of teachers are as follows:

> General responsibilities

> 39 A teacher is responsible for
>
> (a) teaching the curriculum prescribed or approved by the minister;
>
> (b) providing an effective classroom learning environment;
>
> (c) maintaining order and discipline among pupils attending or participating in activities that are sponsored or approved by the school, whether inside or outside the school;
>
> (d) advising pupils as to what is expected of them in school, reviewing their assessments with them, and evaluating their progress and reporting on that progress to parents;
>
> (e) administering and marking any assessment of pupil performance that the minister may direct, in the manner that the minister directs;
>
> (f) ongoing professional development.

That same regulation does prescribe the beginning of the school day in section 40 (as noted above), but does not speak to the end of the day.

Accordingly, the Association's position is that the school day is from "bell to bell".

Mr. Smorang took some time to take the Board through the professional obligations teachers have as members of the Manitoba Teachers' Society and the Code of Conduct they are bound by (Exhibit 7) which include that "members have an obligation to support and enhance the professional standing and reputation of all teachers and the status of the profession of teaching through academic and professional preparation and by engaging in ongoing professional development" and to "act with integrity and diligence in carrying out professional responsibilities".

Mr. Smorang pointed out that the Collective Agreement does not contain any provisions relating to the hours of work, but does have some of the limitations and benefits as described above in Articles 33, 24 and 29. Mr. Smorang relied on a number of authorities to advance the Association's position that the requirement for teachers to stay at school until 4:00 p.m. is unreasonable.

In *Winnipeg Teachers' Association* v. *Winnipeg School Division No. 1*, [1976] 2 SCR 695, the Supreme Court of Canada dealt with the Winnipeg Teachers' Association's assertion that they could not be compelled to perform noon-hour supervision as it was not "teaching" or part of their duties as teachers.

In this seminal decision, then Chief Justice Laskin dissented on the main issue, but Mr. Smorang submitted that his rationale for doing so has been followed since that time (at page 9):

> 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.
>
> On this view of the matter, and having regard to the provision quoted above from the Code of Rules and Regulations, I find it entirely consistent with the duties of principals and of teachers that the latter should carry out reasonable directions of the former to provide on a rotation basis noon-hour supervision of students who stay on school premises during the noon-hour, so long as the school premises are kept open at such time for the convenience of students who bring their lunches, or who purchase food at a school canteen, if there

> be one. It was not suggested in the course of argument that the rotation system was itself unreason-
>
> *[Page 706]*
>
> able, nor did the issue of compensatory time off arise in this context.
>
> Teachers are, no doubt, inconvenienced if they have to supervise students during their common lunch hour, and I should have thought it not unreasonable that consideration be shown to them by way of compensating time off as a *quid pro quo*. This issue is not before this Court and I say no more about it. I dispose of the first point on the simple ground that the parties' collective relations envisage that directions will be given from time to time by the principals of the schools which may, when issued, become part of the duties to be discharged under the collective agreement. I do not agree with the Association's contention that any such directions to be valid must be limited to instructional duties during the instructional day. At the same time, nothing said here should be taken as endorsing the right of the respondent to impose duties upon the teachers either in the early morning before they are required to report or in the late afternoon after the close of the school day, at least where those duties do not relate directly to instructional matters. [Emphasis added]

A number of years later, in Manitoba, the issue of the imposition of noon hour supervision on a rotational basis was considered by the Manitoba Court of Appeal in the *School District of Snow Lake No. 2309 v. Snow Lake Local Association No. 45-4 of Manitoba Teachers' Society*, 1987 CarswellMan 196.

The parties in that case agreed that the rotation was assigned fairly, but the Teachers' Association was concerned that if it was not established that supervision is a voluntary activity, then the Division would have carte blanche to impose unreasonable assignments.

In accepting Chief Justice Laskin's dissent in the *Winnipeg Teachers' Association* case, the Manitoba Court of Appeal found that the assignment was reasonable:

> 12 By these tests, I think it is clear that noon-hour supervision is related to the enterprise of education, that it may be fair to require teachers on a rotation basis to supervise during the noon hour provided each teacher has adequate time off for lunch, and that the supervision of children during the noon hour is in furtherance of the duty of education to which the teacher is expressly committed.

Moreover, the Manitoba Court of Appeal found that:

> 14 The essential question for the arbitrators in this case was not to construe law, but to find whether the rota system in force in Snow Lake was or was not reasonable. [Emphasis mine]

In that case, the Court of Appeal found that it was, in fact, reasonable.

In laying out the test of reasonableness, the Court stressed that "what is reasonable will be governed by all of the circumstances" (paragraph 19).

In the *Churchill Local Association No. 37-3 of The Manitoba Teachers' Society and The School District of Churchill No. 2264* case, the Association took the position that all work outside of the school day ("bell to bell") was voluntary. In citing and relying upon both *The Winnipeg Teachers' Association* and *Snow Lake* decisions, Arbitrator Baizley and his board held for neither party. The board held that the extra-

curricular activities of the kind described can be, but are not necessarily, part of a teachers work assessment. The board came to this conclusion for a number of reasons.

The board accepted that work done outside of the school day or extra-curricular activities can have education value, can relate to the enterprise and are thus in furtherance of the principal duties of teachers. The board concluded that education is more than just classroom teaching and that outside activities are educational in nature and help students develop personalities. However, the board held at page 14 that:

> We believe that teachers can be required to offer what are commonly called extra-curricular activities, but that such requirement must be made in a way that deals with both the issue of fairness and the issues of what the principal duties of the teacher are.
>
> We believe that the concept of "principal duties" is broader than the narrow concept advanced by the Association. We believe that elected school boards have the right to set out in broader terms than the Regulations the roles and responsibilities of teachers.
>
> It is possible, for instance, to imagine a situation where teachers can be required to do janitorial work and participate in extra-curricular activities. That situation would exist where the School Board is able to establish aims of the School Division that clearly show an approach to education which includes more than simply teaching the curriculum.
>
> One can imagine schools which are run on a cooperative basis in which both staff and students are required to clean up, cook meals, run the various programmed; one can imagine schools which expect students to participate in extra-curricular activities; one can imagine schools which expect teachers to offer certain activities outside of the school date which are clear supplements to the classroom education.
>
> In those schools, it would clearly be in furtherance of the principal duties, because the schools will have clearly spelled out an approach to education which expects things both from the students and the teachers.

Thus as clearly held by the courts we interpret the concept of "principal duties" in a broader way than does the Association. Teachers are at the forefront of education; they do act as role models, as educators in a very broad sense. It is to enhance their very professionalism that we believe it would be wrong to narrow their responsibilities.

At the same time, since the principal duties are broad the concept of "fairness" becomes all that more important.

C. Seen as fair to the teacher:

There is a sub-text of the Association argument that we must clearly reject. In the grievance itself (modified in large measure by the position taken by the Association before this Board), and in some remarks made on behalf of the Association, there is the notion that the School Day in some way provides a demarcation of what is extra-curricular. We reject that completely. The School Day is no measure whatsoever of what is a fair amount of time. Teachers must be in school during the school day, but they clearly have other duties which require them to spend many hours outside of the school day. Thus the School Day marks at least the minimum time that must be spent by a teacher, but not the maximum: nor does it represent a demarcation line for what is extra-curricular.

... [at page 16]

This provides us with the ability to develop criteria for fairness given our finding of a broad sense of the "principal duties" of a teacher.

In order for extra-curricular activities of the kind described above to be considered as part of the duties of a teacher, the following criteria should, inter alla, be followed:

> 1. The School Board must be able to establish aims that clearly show an approach to education which includes more than simply teaching the curriculum.
>
> Mr. Cherniack believes that an assignment would not be reasonable if some student participation is not required as part of that approach. Mr. Parkinson does not agree. He does consider that in areas where participation of students is to be voluntary on a case by case basis, insufficient participation could justify a withdrawal by the teachers from voluntary participation

on what would ordinarily be less than reasonable notice and could similarly render a mandatory assignment to a teacher unreasonable. For purposes of this Award, the Chair does not find it necessary to determine this question.

2. The School Board must work out a method of equitable and reasonable distribution of responsibilities on the part of teachers, and must not act unreasonably, discriminatorily, or in bad faith in so distributing the responsibilities. This means that there must be consultation with the Association and with teachers, and that a plan of implementation should be drawn up.

3. The work-load on any individual teacher should not be unreasonable in the circumstances.

5. Conclusion:

In making this award we are mindful of the importance of teachers to the educational system. We do not want to demean their role by suggesting that their only place is in the classroom. Because of their special relationship to their students, we expect and we receive a professional standard of conduct wherein the individual teacher has the freedom to educate in his or her own way.

At the same time we are also mindful of the importance of the policy-makers - the elected representatives of the local School Board. Within the minimum guidelines set out by the Minister of Education, the local School Board has the right to set out its educational approach and to expect the professionals they hire to adhere to that approach. That approach can include expectations of students and teachers that deviate from the norm, so long as these expectations are reasonable, do not infringe on the rights of students or teachers, do not run contrary to the guidelines set out by the Minister, and are not administered in such a way as to harm individuals.

Thus on the evidence we hold that the extra-curricular activities performed by the teachers would not be fairly assigned if the teachers were simply required to do them, and that the extra-curricular activities performed by the teachers are not necessarily part of their principal duties.

> We also hold that those activities could become part of their principal duties and could be assigned in a fair manner under those circumstances set out above. [Emphasis added]

Lastly, Mr. Smorang provided the Board with the decision in *Re School Division No. 9 and River East Teachers' Assn. No. 9,* 1996 CarswellMan 726, an arbitration chaired by David Marr where once again the issue of extra-curricular activities was in debate and in particular, whether such duties were voluntary or compulsory. The board framed the issue before them as follows:

> 15 In other words, the issue is not whether or not teachers are never legally obligated to work outside the instructional day, but, rather, whether, in law and the circumstances of the grievances before us, the School Divisions are entitled to order teachers to perform extra-curricular duties outside the normal instructional day. Further, we are required to decide whether, if the School Divisions do have such power to assign extracurricular activities, they have done so reasonably in all the circumstances.

The board concluded that teachers do have, if not expressed, then implied contractual duties to perform work assigned to them outside of the school day (paragraph 29):

> 29 ...However, any such assignments must be fair and reasonable, and relate to the enterprise or function of education. In determining what assignments qualify in the circumstances, as O'Sullivan, J.A., stated in *Snow Lake*, such matters as the history of teaching in this province and the practices that have gown up, not only in the schools in these three Division, but also elsewhere in the province, should be considered.

Moreover, the board held that:

> 52 Absent specific obligations and duties expressly provided by contract or statute, we are only prepared to hold that there are implied obligations on teachers to participate in some activities beyond the normal School Day, but always in the context of reasonableness and fairness, and in relation to the enterprise or function of education.
>
> 54 This is not to mean that School Divisions can expect teachers to devote exorbitant amounts of time to such extracurricular activities without some form of *quid pro quo*. Teachers are professionals who are engaged in services vital to the very existence of civilized society. Almost by definition, professionals rarely work a "9-to-5" day, or even 5 days a week. Teachers, of course, have, for the most part, a 2-month summer vacation, as well as lengthy winter and spring breaks. While it does not follow, therefore, that School Divisions are justified in expecting teachers to put in unlimited hours during the 10-month term because of their lengthy holiday entitlements, it is not unreasonable for teachers to expect to devote some of their time outside the School Day to those activities which enrich and enhance students' "learning experiences" and promote their social development. Again, it comes down to a question of reasonableness and fairness in all of the circumstances.

Mr. Smorang then turned to the Association's main submission that the 4PM Directive was not fair or reasonable. Mr. Smorang was clear that the Association was not saying that a Division could not assess the needs it has related to students and supervision and once reasonably assessed, assign supervision such as bus, hallway duty or otherwise, but that setting a blanket mandate that all teachers, regardless of the circumstances that might exist in any particular school on any particular day, must stay until 4:00 p.m. is unreasonable. Mr. Smorang, while acknowledging that the rule was in place for a long period of time, argued that this does not mean it is fair and reasonable or even if it was at some point, that it continues to be.

In Mr. Smorang's view, the rationale for the rule is lacking. Mr. Smorang argued that there was no evidence from teachers in the Division as to the requirement to stay until 4:00 p.m. and that the justifications that were given were conflicting. He pointed out that in some of the exhibits before us, there were different rationales given as to the rule, whether it be "equity and balance" or "consistency in the Division" or "supervision is required and opportunity to meet with students, teachers and colleagues", along with "professional development".

The Association's strongly held view and forcefully argued position is that there must be a specific need before assigning a duty. In other words, there must a problem, before creating a solution. Mr. Smorang categorized the evidence of their witnesses as confirming that, for the most part, there were times when no work was being performed and that all of the witnesses, as professionals, were prepared to do the work at other times. He pointed out that the Association's witnesses as professional teachers do significant amount of work outside of the instructional day and do so willingly on their own time. He pointed out the evidence of the Association's witnesses that the time period in question is a time period when those witnesses found themselves exhausted, would need the time to recharge, all had family issues to take care of, that this time was non-productive, that there were rarely meetings with parents and that, at times, teachers were even forced to socialize as there was nothing, in their view, to do. All of them resented the practice and all of them were insulted in the manner in which they were treated as committed professionals. Not only did they resent the practice, they resented the

requirement to have to ask to leave and use a public log book to explain the rationale if an exceptional circumstance arose.

Mr. Smorang categorized the Division's position as essentially being "we've always done it and there is always work to do." In his view, this leads to a slippery slope and may mean that the time moves from 4:00 p.m. to 5:00 p.m., or even 6:00 p.m.

In his view, teachers, as professionals, ought to be allowed to make the choice as to what is best in order to discharge their professional duties. While the Division says this ensures equity and balance, the Association says it is arbitrary and unfair. Moreover, if the Division had a specific need, they could address it by assigning duties on a fair and rotational basis to teachers across the Division. In short, Mr. Smorang urged us to conclude that a rule that is based on being there "just in case" is not a reasonable rule.

In addressing the long history of the rule, Mr. Smorang urged us to consider the evidence and conclude that it was not consistent, that there have been some changes to the rule over the years and that in some schools, the evidence was that it had been repealed and reinstituted some time in late 2015 or 2016 and 207. Mr. Smorang urged us to conclude that all the Association was doing in communicating with its teachers in 2016 was advising them of their rights, that is that they had no requirement to stay until 4:00 p.m. as such a rule was unreasonable.

In summary, Mr. Smorang argued the Division has not given the Board the factual underpinning to show that its mandate to require teachers to stay until 4:00 p.m. meets the tests as set out in law. Moreover, he argued forcefully that the evidence of the witnesses of the Association establishes that the rule is unfair and unreasonable and the grievance ought to be upheld.

The Position of the Division

The Division's position is outlined at the outset of this Award. However, in addition, Mr. Simpson, on behalf of the Division, categorized this grievance as being about the requirement to stay until 4:00 p.m., nothing more. Mr. Simpson pointed out that all Divisions are separate and distinct. They each have their own collective agreements and their own practices. He began by pointing out that:

1. The Collective Agreement is silent on hours and on that basis, it is within the authority of the Division to impose hours of work;

2. In the alternative, legislation grants the authority to open and close the school day to the Board of Trustees and therefore the Divisions;

3. There is a long-standing practice of school hours in the Division between 8:30 a.m. and 4:00 p.m.;

4. Absent any limitation in the Collective Agreement, the Board can set the work hours. As there is no language that limits the ability to set work hours, this is an issue that should be the subject of collective bargaining.

Mr. Simpson urged the Board not to read any terms into the Collective Agreement and that we should consider the long-standing practice akin to contractual in nature. That is, we ought to be implying the hours of work as a contractual term between the parties.

Mr. Simpson argued the duties in question are related to the enterprise and are fair to teachers and even if we were not inclined to accept all of the above, an estoppel exists given the long-standing past practice.

Mr. Simpson, as Mr. Smorang did, took us through the legislative framework and the duties of teachers and the ability to assign duties to teachers that are set out in that legislation.

Mr. Simpson pointed out that supervision, availability to meet students' parents, teachers and administrators and ancillary duties including marking and lesson planning and staying until 4:00 p.m. are all the types of duties contemplated in the legislative scheme. Without any limitation in the Collective Agreement, he urged the Board to accept that the Board could set these hours. While acknowledging that there was no formal resolution, the evidence was clear that the direction was given by the trustees to the Division and a long-standing practice has existed to have hours set

between 8:30 a.m. and 4:00 p.m. The Division relies on *The Winnipeg School Division* v. *Winnipeg Teachers' Association of the Manitoba Teachers' Society*, 2005 CarswellMan 948, which involved the concept of the instructional day. In that case, the Division wanted to move school announcements before the instructional day and the collective agreement limited instruction to 5 ½ hours per day.

Mr. Simpson pointed out that in that case the Association did not challenge the ability of the Division to determine the opening and/or closing hours of the school day and that the Board found that:

> 68 The "instructional day" is narrower than the "school day". The Division is entitled to determine "....the hours of opening and closing of the school day" [see Section 5(2) of *PSA Regulation* and Article 20.05 of the Agreement).
>
> 69 Neither can "instructional day" be equated with a teacher's working day. The mandatory 5 ½ hour instructional day does not reflect all of the assignments which may be given to a teacher by the Division."

Ultimately, Arbitrator Hamilton concluded that a teacher's work day is not limited to the instructional day and that the division can set school hours if not limited by the collective agreement. Mr. Simpson argued that if a school division can set hours, how can a modest extension of the instructional day be unreasonable?

Mr. Simpson argued that Chief Justice Laskin's comments in the Supreme Court of Canada should be considered in their context. In particular, he argued that in the decision before the Supreme Court of Canada, there was no provision in the collective agreement or legislation that expressly contemplated lunch time supervision. Mr.

Simpson pointed out that in our case, there is legislation that contemplates the kinds of duties that are being assigned and, more importantly, the ability of a school division to set school hours.

Mr. Simpson stressed that there is common ground that teachers are expected to be present when students are present.

Mr. Simpson argued as forcefully as Mr. Smorang, but took the opposite view. He argued the 4PM Directive is reasonable. Mr. Simpson pointed to the long standing past practice that was in place without challenge or concern being raised until 2016 when Ms Geller and the Association raised its concerns that teachers were not required to stay until 4:00 p.m. Mr. Simpson reminded the Board that the evidence was that the rationale for this rule was not just for consistency and fairness, but also so that teachers could provide supervision, use time to meet with students, parents and colleagues and take advantage of professional development opportunities.

Mr. Simpson acknowledged that the only change that could be noted on the documents is that in some of them, the rule is accompanied by the phrase "or at the discretion of the principal". Mr. Simpson argues that this is not a change at all and that it has always been the case that is that if a teacher has a reason for not being able to stay, they may approach the principal who, in his or her discretion, may allow the teacher to leave early.

In Mr. Simpson's view the Association created confusion by instructing members not to follow a long standing practice and then relied on that confusion it created to say that the rule was inconsistent. He argued it clearly was not.

Mr. Simpson pointed out that Ms Filewich was aware of this rule as early as 2014, but did not object to the rule or take any steps to address the issue until the events that have led to this grievance. Mr. Simpson urged us to consider Chief Justice Laskin's words in *The Winnipeg Teachers' Association* decision in the Supreme Court of Canada as follows:

> 44 I am satisfied that there is nothing in the collective agreement, nor in any of the documents or legislation which are made part thereof or to which it is subject, that expressly puts upon the teachers a duty of noon-hour supervision. That, however, is not the end of the matter, as the trial judge appears to have thought. I can agree with him that if services were voluntarily performed, they cannot on that ground alone become terms of a teacher's contract of employment by implication of fact. It follows, of course, that advice to or request of teachers that they work to contract or work to rule does not involve the teachers in any breach of contract if they cease to perform the voluntary services.
>
> 45 It is, however, a different matter if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period of time, recognized as part of the obligations of service upon which the relationship has developed. I do not say that this is reflected in the present case. What is, however, evident to me, under the collective agreement relations between the parties here, is that the agreement, as extended by the referential documents, contemplates the assignment of duties to carry out the principal objects of the enterprise in which the parties are engaged and which they have agreed to promote under terms both general and specific. [Emphasis mine]

Mr. Simpson points out that teachers have been working these hours for forty years and just as Chief Justice Laskin found that "if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period time, recognized as part of the obligations of service upon which the relations has developed", these hours of work could be considered as such. Mr. Simpson reviewed all of the evidence we heard as to the long-standing practice and addressed the different perspectives provided to that rule from the Association and Division's witnesses. Mr. Simpson argued that the difference may have been in the Association's witnesses' minds, but it was not reality. He pointed out that the numerous exhibits filed as documentary evidence support the Division's evidence as to the practice and that the Association's witnesses did not suggest, with one exception, that the practice did not exist, but their feeling was that it was being dealt with more rigidly now than before. In addressing the one exception, Ms Myron, Mr. Simpson points out that she has only been there for a few years and her evidence was inconsistent with the others. He acknowledges that she said she did not know of the rule, but all but her acknowledged the long-standing past practice. Mr. Simpson took us through the various staff minutes and staff handbooks that were tendered into evidence which all contained provisions relating to the requirement to stay at work until 4:00 p.m.

Mr. Simpson acknowledged that the three Association witnesses were motivated to leave before 4:00 p.m. because of legitimate familial obligations, but urged us to conclude that their personal and unique circumstances were not representative of all teachers. Two of them recently had children and the other has an aged mother who

she cares for. In his view, if there is a legitimate family status accommodation required, then that could be assessed and dealt with in that fashion.

While acknowledging the legitimacy of the need to deal with familial matters, Mr. Simpson argued that this is a reality for all persons in all works of life. Work interferes with familial obligations and while we may be sympathetic to these individual teachers and their needs, it does not change the reasonableness of the requirement for teachers to stay until 4:00 p.m.

Mr. Simpson argued that these hours of work were "related to the enterprise and fair". He urged us to conclude that it was not realistic to accept that there was nothing for these teachers to do in the short time after the instructional day ends until 4:00 p.m. as all teachers said they had numbers of things to do and gave detailed evidence as to the amount of work required to be done after hours. Moreover, Mr. Simpson argued that we ought to conclude that supervision is a required duty which arises at the end of the instructional day and that the Division witnesses were clear that supervision is needed in addition to the teachers who are assigned it specifically on a rotational basis.

Lastly, the additional duties discussed including meeting with parents, teachers, students and administration are all part of assigned duties and teachers need to be available to be able to complete those duties. In Mr. Simpson's view these are all clearly related to the enterprise.

Mr. Simpson urged us to consider that once the confusion arose (as Mr. Simpson urges us to conclude which confusion arose because of the Association and not the Division), that some teachers left immediately at the bell and this caused issues at various schools. Mr. Simpson also argued that we ought to consider the fact that if teachers do need to leave prior to 4:00 p.m. because of some exceptional circumstance, they could ask to do so and there is no evidence of anyone ever being denied a request to leave early. This, in and of itself, is evidence of reasonableness in Mr. Simpson's view.

Mr. Simpson urged us to take a similar path as the Manitoba Court of Appeal did in in *The Winnipeg School Division No. 1 v. Winnipeg Teachers' Association No. 1 of Manitoba Teachers' Society and Manitoba Teachers Society*, 1973 CarswellMan 38. He submitted that just as noon-hour supervision was an issue to be bargained, so should the issue of hours of work if the Association has a concern. In the *Snow Lake* decision noted above, Mr. Simpson pointed out:

> 13 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.
>
> 15 During the course of argument there was some suggestion that noon-hour supervision is a form of baby-sitting which is beneath the dignity of a professional. I deplore such a suggestion. Participation with pupils during noon-hour can be an effective method of formation by professional people. I do not say that such work is exclusive to professionals, but I think it would not be in the public interest to say that supervision should be automatically excluded from the teacher's role. I am sure the public is very grateful to the teachers who, acting professionally, devote much time and

> effort outside the classroom setting to preparation, correcting, coaching, leading and supervising pupils.
>
> 21 The responsibility of the school division, of the principal and of the teachers corporatively is not limited to the instructional hours of the day. Parents who entrust their children to the school to act in loco parentis are entitled to expect their children will be looked after during the entire school day if the children do not go home for lunch.

Mr. Simpson also provided us with the *Durham Catholic district School Board v. O.E.C.T.A.,* 1999 CarswellOnt 4560 decision, which recognizes that teachers are required to attend parent teacher interviews after school hours.

In that decision, counsel for the union argued that while teachers had a duty to report to parents, there was no specific requirement, either in the collective agreement, the legislation, the regulations or the employer's policies, that this be achieved through evening parent teacher interviews. The duty can be fulfilled in other ways. Mr. Simpson urged us to conclude that this was essentially the argument being advanced by the Association in this case. That is, the duties that are expected to be performed following the instructional day and before 4:00 p.m. are duties that the Association claims can be done otherwise.

This decision referred to a line of judicial and arbitral decisions where it had been held that teachers were obliged to perform various ancillary tasks related to their main duties, if they were fair and reasonable, as well as tasks that had become part of

their duties through a course of conduct, including noon-hour supervision, "attendance calls, and various extra-curricular activities" (paragraph 12).

Ultimately, the board concluded:

> 19 In my view, it is impossible to avoid the conclusion that these services have become mandatory "by course of conduct and renewal of relationships over a period of time" (to quote from *Winnipeg Teachers' Assn. Local 1 v. Winnipeg School Division No. 1, supra*). Teachers of this employer have been performing these after-hours services for at least 31 years (according to the evidence of Mr. Whyte). Until the fall of 1998, no challenge had been made to the practice. Originally, perhaps these services were voluntary, but they have now undoubtedly become recognized, in my view, as among the duties of teachers as a result of the process described by Laskin, C.J.C. [Emphasis mine]

Mr. Simpson stressed that this is exactly the case before us in that through a "course of conduct and a renewal of relationship over a period of time", the requirement to stay at work until 4:00 p.m. in the school division has been established.

In *Avon Maitland District School Board v. E.T.F.O.*, 2007 CarswellOnt 8023, the decision dealt with the mandatory divisional meetings outside of the instructional day and the board found that:

> 9 I cannot agree that the onus is on the Employer to show that it is reasonably necessary for the enterprise to have divisional meetings outside the instructional day where attendance is mandatory. Rather, I think that once it is accepted that attendance at divisional meeting is "related to the enterprise" and in "furtherance of the principal duties" of the teacher, then the aspect of mandatory attendance at meetings held outside the instructional day must be examined to determine if it is "fair to the employee".

> 12 The question of "unfairness" as contemplated by the *Winnipeg* test is one which cannot be answered in the absence of specific facts. Given that there is no contractual or legislative prohibition against holding such mandatory meetings outside of the instructional day, and given that such meetings, if they meet what may be called the "relevance" aspects of the *Winnipeg* tests, are not made unfair simply by virtue of the fact that they are held outside the instructional day, what then can result in unfairness?

Mr. Simpson argues that, in the circumstances, as long as the Division shows the imposed rule is related to the enterprise, the obligation shifts to the union to prove that it is unfair.

Mr. Simpson reiterated that there was nothing limiting the Division in setting school hours, that they are related to the enterprise and they are not unfair. He acknowledges they may be inconvenient, but they are not unfair.

Mr. Simpson pointed to the reality of collective bargaining that the Association has attempted and succeeded over time to remove duties or reduce the scope of work by negotiating provisions relating to noon-hour supervision, extra-curricular activities and preparation time. There is no reason, Mr. Simpson argues, that the Association could not attempt to do so with hours of work in this case if they were so inclined.

Lastly, Mr. Simpson argued that if we are not inclined to accept the Division's position, that we find that the Association is estopped from relying on their strict rights as they were aware of this issue prior to the last round of bargaining and did not

raise it at the bargaining table. Given the long-standing practice that has existed, Mr. Simpson went through a series of authorities, including the following, as authority for the proposition that an estoppel exists:

1. Brown & Beatty, S. 2:2211;

2. *Morris-MacDonald Teachers' Association No. 19 v. Mountain Teachers' Association No. 28,* 1995 CarswellMan 870;

3. *Windsor Western Hospital Centre Inc. v. Ontario Nurses' Association, 1989 CarswellOnt 5021;*

4. Certified Brakes, Division of Lear Siegler Industries Ltd. v. United Steelworkers of America, Local 14831, 1986 CarswellOnt 3710; and

5. British Columbia Timber Ltd. v. Pulp, Paper and Woodworkers of Canada, Local 1, 1983 CarswellBC 2400.

The Association's Reply

Mr. Smorang argued in reply that while the Division may be entitled to assign duties in this case, they are not assigning duties, but instituting a rule which is time based. Mr. Smorang attempted to distinguish the cases relied upon by Mr. Simpson.

Mr. Smorang pointed out that regardless of how long an extension of time it may be beyond the instructional day, if there is no good reason for it, it is not reasonable and, in his view, there is no good reason for it and therefore, it is unreasonable.

Lastly, Mr. Smorang argued that the analogy being drawn by Mr. Simpson to Chief Justice Laskin's comments about duties that were "initially voluntary" is not appropriate since the hours of work in question were never voluntary, but always mandated. Moreover, in his view, even if we were to conclude that the practice rendered it contractual in nature, at best that may give rise to an estoppel, but does not make it a term and condition of the contract.

ANALYSIS

The Board has considered all of the legislation, the Collective Agreement and the authorities presented, along with the submissions of both parties. In doing so and applying all of the evidence that was presented, it is our view that there is no doubt that:

1. Teachers are professionals who generally perform their role as educators, both during and after the instructional day out of a commitment to their profession;

2. The legislative scheme is comprehensive and broad enough to contemplate the ability of a school division to assign duties to teachers that extend beyond the instructional day (s.96 of *The Public Schools Act*, Exhibit 3, s.39 of *The Education Administration Act*, Exhibit 5 and the form of teacher's agreements contemplated in s.92 of *The Public Schools Act,* Exhibit 4*)* The authorities of both the parties are also clear that is so;

3. This includes the ability to set school hours specifically (s. 5(2) of *The School Days, Hours and Vacation Regulation* under *The Public Schools Act, Exhibit 30*), but even in the absence of this specific provision, the legislative scheme and authorities are clear that teachers can be required to perform duties after the instructional day;

4. Although there is no formal written resolution, the School Board has made it clear that school hours in the Division are to be between 8:30 a.m. and 4:00 p.m.;

5. It is understood by both parties and the Association's members that the school hours are as noted above;

6. Nevertheless, the authorities are clear that in setting school hours, a division must do so reasonably;

7. In the unique circumstances of this case, the 4PM Directive has essentially been in place for many years (as many as 40). Although there has been some different language used to describe it and different views as to how rigidly the 4PM Directive was enforced, for many years it is clear that the Division is unique in having a requirement on teachers to stay until 4:00 p.m., unless excused by the principal; and

8. Although some confusion arose prior to the filing of the Grievance when the Association expressed its views as to the validity of the 4PM Directive, that

does not change the reality that the 4PM Directive has been in place for many, many years.

The Test

The Board accepts the submissions of both parties that the test of "reasonableness" in these situations has been laid out in the authorities noted earlier in the Award and in the parties' submissions. In short, the "rule" or "directive" in question must be related to the enterprise, be seen as fair to the employee and in furtherance of the principal duties to which he/she is expressly committed, in order to be found to be reasonable.

The *Winnipeg Teachers' Association* Test

At its core, and with this backdrop, the issue before us is whether the Division can impose an implied contractual term on the members of the Association, namely the 4PM Directive. In the absence of any express contractual or legislated term or limitation, the Board is left to determine whether the imposition of the 4PM Directive is a reasonably imposed implied contractual term.

The leading authority on the imposition of implied contractual terms in the employment context is *Winnipeg Teachers' Association No. 1 of Manitoba Teachers' Society v. Winnipeg School Division No. 1*, 1975 CarswellMan 65 (SCC).

In *Winnipeg Teachers' Association*, Chief Justice Laskin's dissenting reasons set out the circumstances in which teachers may be under implied obligations to perform certain functions and duties which are not expressly contained in applicable legislation or their collective agreement. Specifically, he said (para. 46):

> 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 relate to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.

Laskin C.J.C. found that voluntary services, by reason of their voluntariness alone, cannot become terms of a teacher's contract of employment (para. 44). However, it is a "different matter if services, originally voluntary, become, by course of conduct and of renewal of relationships over a period of time, recognized as part of the obligations of service upon which the relationship has developed" (para. 45). Laskin C.J.C. did not elaborate upon the criteria that would have turned such voluntary services into contractual ones over time, nor would he say that such circumstances were "reflected in [that] case" (*ibid*).

We note that in *Durham Catholic District School Board v. O.E.C.T.A.*, 1999 CarswellOnt 4560 at para. 17, Member Bendel interpreted Laskin C.J.C.'s reasons in *Winnipeg Teachers' Association* to give rise to two distinct tests:

> According to Laskin, C.J.C., then, there are two situations in which teachers might find themselves obliged to perform ancillary activities for which there is no express statutory or contractual basis: (a) where they have performed them voluntarily over a period of time, and (b) where the duties are related to the employer's enterprise, they are fair to the teachers, and the request is reasonable.

Before us, the Division relied briefly upon this statement in *Durham* to suggest that it was not required to show that the 4 PM Directive was reasonable if, instead, it can show that it was performed voluntarily over a period of time. With respect, we disagree.

In Manitoba, a practice's history has not been treated as a sufficient basis to impose the practice as an implied contractual term. The history of a practice may, however, be considered as a factor in the determination of the practice's reasonableness. In *Snow Lake School District 2309 v. M.T.S., Snow Lake Local Assn. 45-4*, 1987 CarswellMan 196 (MB CA), for example, O'Sullivan J.A. states (at paras. 14 and 20):

> The essential question for the arbitrators in this case was not to construe law, but to find whether the rota system in force in Snow Lake was or was not reasonable. In determining what is reasonable in the circumstances, no doubt an arbitration board may take into account matters such as the history of teaching in this province, the practices that have grown up not only in this school but elsewhere in the province, the

> importance of each teacher having an appropriate break during the day for lunch and relaxation, the availability of teacher aides, and so on. In some cases, the parties may think it reasonable that an extra stipend or other quid pro quo should be given for the supervision ...
>
> ...
>
> One test of whether an arrangement is reasonable or not is to see if the parties have agreed upon it, for what is agreed will usually be accepted as reasonable. However if agreement is not possible, then the school division has the right to impose by assignment the duty of supervision during the noon intermission provided that it does so in a reasonable way.

Subsequently, in *School Division No. 9 and River East Teachers' Assn. No. 9, re*, 1996 CarswellMan 726 (Man. Arb.), Members Marr and Gabbert expressly rejected the School Division's argument that teachers' voluntary participation in extracurricular activities rendered such participation a part of teachers' duties. Instead, the Members found that any implied obligation outside of the normal School Day *must* meet the test of reasonableness in order to be validly imposed (at paras. 51-52):

> Counsel for the School Divisions urges upon us to find that all of these so-called "extra-curricular activities" (which, as Superintendent Wall of the River East School Division No. 9 and some of the teachers who testified before us stated, have commonly been offered to students over a long period of time) are part of the teachers' duties. Therefore, it matters not whether teachers' participation in those activities was originally voluntary because, "by course of conduct and of renewal of relationships over a period of time, those services became recognized as part of the obligations of service upon which the relationship (between the teachers and the School Divisions) has developed", as was commented upon by Laskin, C.J.C., in *Winnipeg School Division No. 1*, at page 235. That may be so in regard to those activities which are related to "the principal objects of the enterprise in which the parties are engaged and which they have agreed to promote under terms both general and specific" (again, per Laskin, C.J.C., at page 235). However, in the absence of evidence

> which establishes a clear and unequivocal link to the teachers' professional functions, we are not prepared to hold teachers responsible for any and all extra-curricular activities adopted by School Divisions or high schools without regard to tests of reasonableness and fairness in all of the circumstances.
>
> Absent specific obligations and duties expressly provided by contract or statute, we are only prepared to hold that there are implied obligations on teachers to participate in some activities beyond the normal School Day, but *always* in the context of *reasonableness* and *fairness*, and *in relation to the enterprise or function of education.*

In all of the circumstances, the Board has determined that an implied contractual duty must be reasonable. The history of the practice, as described by Laskin C.J.C., is a valid consideration in that assessment.

> Application of *Winnipeg Teachers' Association*: "[R]elated to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed"

In *Winnipeg Teachers' Association*, Laskin C.J.C. concluded, Martland J. concurring on this point, that the imposition of a rotating schedule of lunch-hour supervision was reasonable in the circumstances. However, he qualified that holding:

> At the same time, nothing said here should be taken as endorsing the right of the respondent to impose duties upon the teachers either in the early morning before they are required to report or in the late afternoon after the close of the school day, at least where those duties do not relate directly to instructional matters" (para. 48).

In other words, Laskin C.J.C. specifically contemplated cases such as this and ensured that his ruling did not extend to apply here. Therefore, and because there is no entirely

analogous authority, if we are to find that the imposition of the 4PM Directive is reasonable, a full and novel analysis under the test set out in *Winnipeg Teachers' Association* will be necessary. Our analysis follows.

Under the *Winnipeg Teachers' Association* test, where a request or obligation is related to the enterprise, is in furtherance of the principal duties and is fair to the employee, it will satisfy the standard of reasonableness that Laskin C.J.C. enunciated: see *Avon*, at para. 9. In determining whether an obligation meets those standards, and is therefore reasonable, an arbitrator may take into consideration all the circumstances of the case including the history of teaching and the practices that have developed both in the school(s) at issue and elsewhere in the province: *Snow Lake*, at paras. 13 and 19; see also, *River East Teachers'*, at para. 29.

(i) Statutory and contractual obligations

The first step in the *Winnipeg Teachers' Association* analysis is to determine whether the duty or rule at issue is found in a statutory or contractual obligation of the parties. As the parties have indicated in their authorities, the relevant terms of the teachers' employment are set out in *The Public Schools Act*, C.C.S.M. c. P250, *The Education Administration Act*, C.C.S.M. c. E10, and numerous regulations under both. None of the relevant statutory provisions or regulations speak expressly, one way or another, to the 4PM Directive. In other words, there is "nothing in the collective agreement, nor in any of the documents or legislation which are made part thereof or to

which it is subject, that expressly puts upon the teachers" an obligation to remain at school until 4:00 pm (*Winnipeg Teachers' Association*, at para. 44).

Under s. 41(1)(d) of the *Public Schools Act*, the School Board has the obligation to "subject to this Act and the regulations, prescribe the duties that teachers and other personnel are to perform". Teachers, under the *Education Administration Miscellaneous Provisions Regulation*, 468/88, are tasked with the following:

> 39. A teacher is responsible for
>
> (a) teaching the curriculum prescribed or approved by the minister;
>
> (b) providing an effective classroom learning environment;
>
> (c) Maintain order and discipline among pupils attending or participating in activities that are sponsored or approved by school, whether inside or outside the school;
>
> (d) advising pupils as to what is expected of them in school, reviewing their assessments with them, and evaluating their progress and reporting on that progress to parents;
>
> ...

Similarly, under s. 96(1) of *The Public Schools Act*, a teacher has a number of additional express duties which relate to the health and safety of the students:

> (e) notify the principal ... that he has reason to believe that a pupil attending the school has been exposed to or is suffering from a communicable disease as defined in *The Public Health Act* and regulations made thereunder;
>
> (f) seize or cause to be seized and take possession of any offensive or dangerous weapon that is brought to school by a pupil and hand over any such weapon to the principal ...

It is clear from these provisions that the Division has the authority to prescribe a teacher's duties. And, those duties may extend *beyond* the provision of classroom instruction: see, for example, Regulation 468/88, ss. 39(c) and (d) and *The Public Schools Act,* ss. 96(1)(e) and 96(1)(f).

Much debate between the parties arose as to whether specific duties must be assigned, rather than assigning hours of work in which a number of different duties may be performed.

There is no debate as to the reasonableness of the duties that are expected to be performed following the instructional day which are the subject of this Grievance. It is clear that supervision, meeting and communicating with students, parents, teachers, administrators, preparing and marking assignments, tests and exams etc. are all duties the parties agree are reasonable assignments for teachers. If assigned during the instructional day, they are clearly reasonable. The question is whether they can be assigned outside of the instructional day, at a particular time. We say this as it is also clear that the parties agree that these duties are expected to be performed after the instructional day and, in fact, there was ample evidence by the witnesses that the types of duties discussed in this Award are routinely performed in the evenings and on weekends, for example. The dispute is whether the Division can insist that teachers stay until 4:00 p.m., during which time they may perform some or all of these duties.

For all of the reasons set out in this Award, we have concluded that the Division has the authority to prescribe a teacher's duties and they may extend beyond the provision of classroom instruction. The real question is whether the 4PM Directive which is the subject of this Grievance is reasonable.

(ii) Related to the enterprise

In order to assess whether it is reasonable, the Division must establish that the requirement that teachers remain at school until 4:00 pm each day is "related to the enterprise of education" (*Snow Lake*, at para. 12). As O'Sullivan J.A. described that enterprise in *Snow Lake* (paras. 13, 15 and 21):

> 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.
>
> ...
>
> During the course of argument there was some suggestion that noon-hour supervision is a form of baby-sitting which is beneath the dignity of a professional. I deplore such a suggestion. Participation with pupils during noon-hour can be an effective method of formation by professional people ...
>
> ...
>
> ... Parents who entrust their children to the school to act in loco parentis are entitled to expect their children will be looked after during the entire school day if the children do not go home for lunch.

Thus, the "enterprise of education" involves more than mere instruction. "[E]ducation is much more than the subject matter set out in the curriculum": *River East Teachers'*, at para. 53. It has also been found to involve supervision and participation with students outside of the classroom: *Snow Lake*; *River East Teachers'*. In our view, although the supervisory component of the 4PM Directive can be distinguished from the supervisory component of lunch hour duty, insomuch as the 4PM Directive is not intended to serve the exclusive purpose of supervision, the same principles can be extended to the circumstances of this case. The 4PM Directive is related to the enterprise of education because that enterprise requires teachers to act as role models who are available for the supervision of, and participation with, students who are within their care and instruction. Given the possibility that students may remain at the schools within the division afterhours, the availability of teachers during that time period for supervision and participation is related to the enterprise of education. Moreover, being available to meet with other teachers, local administration is an important component of the enterprise of education.

Additionally, the enterprise of education involves a teacher's obligation to evaluate students' progress and report on that progress to their parents: Regulation 468/88, s. 36(d). That reporting function may take many forms as the evidence was clear that it does. We accept the Division's evidence that because of the particular characteristics of the Division and its students, communicating with teachers through technological methods such as email and smartphones may not be possible for all families. Given that one of the purposes of the 4PM Directive is to ensure that parents

who arrive to discuss matters with teachers have the ability to do so, the 4PM Directive is related to the enterprise of education as it ensures a means of face-to-face communication with parents.

It also seems obvious that if students may remain at school after the end of the school day, safety concerns regarding those students may arise. This is consistent with the duties of teachers under s. 96(1) of the *Public Schools Act* as set out above. Therefore, we would further find that the 4PM Directive is related to the educational enterprise insomuch as it plays a role in ensuring the safety of students after the school day has ended.

Lastly, the other duties that the Division suggests it expects its teachers to perform after the end of the instructional day and before 4PM, such as cleaning and organizing the classroom, preparing for the next day, marking course work and professional development are all clearly related to the enterprise of education. The question remains whether the Division can reasonably insist that the teachers in Portage La Prairie must stay at school until 4PM to do so.

(iii) In furtherance of the principal duties

For the reasons listed above, the Board concludes that the 4PM Directive is also in furtherance of the principal duties of a teacher. Teaching the curriculum is not the only duty of an educator: see *Churchill*, at pp. 13-14. By regulation, the principal duties

of teachers in this case involve reporting to parents on the status of their children. As this was one of the main reasons the Division said it required teachers to stay at school until 4:00 pm each day, the 4PM Directive is in furtherance of the teachers' principal duties. Additionally, the 4PM Directive is in furtherance of the teachers' duty to promote the health and safety of their students. Additionally, as the Arbitration Panel recognized in *Churchill* (p. 14):

> [E]lected school boards have the right to set out in broader terms than the Regulations the roles and responsibilities of teachers.
>
> It is possible, for instance, to imagine a situation where teachers can be required to do janitorial work and participate in extra-curricular activities. That situation would exist where the School Board is able to establish aims of the School Division that clearly show an approach to education which includes more than simply teaching the curriculum.
>
> In those schools, it would clearly be in furtherance of the principal duties, because the schools will have clearly spelled out an approach to education which expects things both from the students and the teachers.

The Division argued that, as a rural division, the principal duties of teachers may be broader than those who work in an urban environment. We are not intending to extend our rationale beyond the Division to other rural divisions, but the evidence in this case was that specifically, teachers in the Division are tasked with a greater supervisory role, given the potential for students to remain at school after hours due to the location of the school and the need for students to take buses. In other words, the rural location of the school gives rise to an expectation that teachers be present at the school after hours so as to provide a resource for the students and the community at large. Moreover, the

particular socioeconomic challenges facing many in this Division, along with the number of students in care, the transient nature of their home situations and the physical separation of schools in a large geographic area make the challenges in the Division unique. For these reasons, we would also find that the 4PM Directive is in furtherance of the principal duties of the teachers within this particular Division. As with the previous factor, the question still remains whether the Division can reasonably insist that the teachers in Portage La Prairie must stay at school until 4PM to do so.

(iv) Seen as fair to the employee

As noted above, notwithstanding our findings above, this does not end matters.

The final factor in considering whether the 4PM Directive is reasonable is that it must be seen to be fair to the teachers. Given the breadth of the principal duties of teachers and the enterprise of education, the "concept of 'fairness'" plays an important role in the assessment of reasonableness: *Churchill*, p. 15. The fairness requirement has led courts and arbitrators to recognize a number of factors that may be considered in determining what is objectively "fair". In *Snow Lake*, O'Sullivan J.A. stated that "the history of teaching in the province, the practices that have grown up not only in this school but elsewhere in the province, the importance of each teacher having an appropriate break during the day for lunch and relaxation, the availability of teacher aides" could all be relevant considerations in determining whether a lunch hour supervision requirement was

reasonable (paras. 13 and 19). It is noteworthy, however, that the history of a practice is only one indicator of its reasonability. In any given case, past practice may not be conclusive of the matter (*River East Teachers,* at para. 57; see also *Churchill*, at p. 15).In *Ottawa-Carleton District School Board and E.T.F.O. Ottawa-Carleton Teachers'*, 2004 CarswellOnt 10359 (Ont. Arb.), a requirement that teachers produce additional interim report cards was at issue. Member Tacon recognized, as relevant to the fairness assessment, the workload of teachers, timing and context (paras. 49 and 55) as well as the "expectations of the community" given that the issuance of interim report cards had been in place for over a decade (para. 50). In *Churchill*, the manner in which extracurricular activities were assigned – that is, whether the process was voluntary or mandatory – was considered relevant (pp. 15-16). And finally, in *River East*, the quantitative amount of time that teachers were obligated to spend participating in extracurricular activities was relevant (paras. 59-60).

Applying these factors to the circumstances of this case leads, in our view, to the conclusion that the 4PM Directive is "fair" and, therefore, reasonable.

First, the 4PM Directive has been in place for 40 years without objection (until the events that led to this Grievance). The long history of the practice within this Division without objection can be considered evidence of its fairness to the teachers. We have done so. As O'Sullivan J.A. recognized in *Snow Lake*, "[o]ne test of whether an arrangement is reasonable or not is to see if the parties have agreed upon it, for what is agreed will usually be accepted as reasonable" (para. 20). While an express agreement

did not exist in this case regarding the 4PM Directive, it appears that it was commonly understood until the events that led to this grievance being filed that the teachers would abide by that requirement. And, while the practice may be unique to the Division and therefore distinct from the obligations which other teachers in the province may be under, the particular circumstances of Portage la Prairie and the Division are unique and it has long been accepted that the teachers must remain at school until 4:00 pm.

Mr. Smorang ably argued that the Board ought not accept this rationale as the 4PM Directive was never, in his words, "voluntary" as contemplated in the above decisions. Although an interesting argument, the Board has concluded that regardless of how the directive was initially framed, there is no doubt that teachers in Portage La Prairie have complied with that directive for decades. Whether voluntary or not, this directive has become the practice in the Division for many years. In any event, the Board has concluded that a close reading of the above decisions makes it clear that we ought to take into account the practice that has existed as O'Sullivan said in *Snow Lake* at paragraph 14:

> "In determining what is reasonable in the circumstances, no doubt an arbitration board may take into account matters such as history of teaching in this province, the practices that have grown up not only in this school but elsewhere...." [Emphasis mine]

We have considered the practice in Portage La Prairie and find it very relevant.

Additionally, given the lengthy history of the practice, we find that there is likely an expectation within the community that teachers will be available to care for

students who may remain at school afterhours or to meet to discuss matters with parents who may arrive before 4:00 pm. This was the evidence before us and we accept that is the case. Community expectations are a relevant consideration in determining whether a requirement is fair: *Ottawa-Carleton Teachers',* 2004, at para. 50. Parents and families who entrust their children to the Division are entitled to expect that their children will be looked after until they return home from school (*Snow Lake*, at para. 21). In our view, this is particularly so here, where it can be inferred that the long history of the 4PM Directive has given rise to a communal expectation that teachers will be available to carry out this duty.

There is no dispute that the 4PM Directive is unique to the Division. No other school division in the province requires all of its teachers to stay until 4:00 pm each day. This, the Association argued, is evidence of the unfairness of the 4:00 PM Directive. The Board acknowledges that the practices of other divisions within the province are relevant considerations in the fairness assessment (*Snow Lake*, at para. 14). However, the Board heard no evidence as to why this practice does not exist elsewhere and we are loathe to make determinations without understanding the full context of what might be occurring elsewhere. What we did hear is evidence as to the reasons the 4PM Directive has been in place in Portage la Prairie for 40 years. Moreover, and in any event, where there is adequate justification for the imposition of a duty, its imposition is not unfair solely because it results in differential treatment as amongst teachers in the province (*Ottawa-Carleton Teachers',* 2004, at para. 51). In the Board's view, to hold otherwise would amount to a failure to properly consider "all the circumstances" because relevant

circumstances must include those factors which differentiate one school division from another. In this case, we accept that the particular circumstances of Portage la Prairie and the Division – specifically, its rural location, the characteristics of its student population, the importance of after hours availability of teachers, the flexibility this particular division requires, and the community expectation that it is reasonable to infer exists are unique and support a finding that the 4:00 PM Directive is fair.

Parenthetically, we note that the Association had the ability at any time throughout the 40 years of past practice to raise the 4:00 PM Directive in the context of collective bargaining. In those circumstances, had the matter gone to interest arbitration, the Association's reliance upon the practices of other divisions may have weighed heavily in favour of the elimination or modification of the 4:00 PM Directive. Having failed to do so, however, the Association has left the Board to determine the rule's fairness in light of its longstanding history.

The Board struggled with one factor which may support a finding of unfairness in this case. Specifically, the need for *all* teachers to be present, on a non-voluntary basis, until 4:00 pm was argued to be unreasonably restrictive. This requirement can be distinguished from *Winnipeg Teachers' Association* in which a rotation system for lunch-hour supervision was found to be reasonable. It was argued that, in order to satisfy the purposes of supervision, safety and parental communication, the Division could have utilized a rotation system which would have been fairer to the teaching staff. It also could have asked for teachers to self assign the days on which they would be willing to stay

until 4:00 pm: see *Churchill*, p. 16. However, the Board accepts the Divisions' evidence (as described above) in this case as to why it was important in the unique circumstances that exist in Portage la Prairie that *all* teachers be present *every* day so as to be available to discharge supervision duties and allow any parent, student or administrator to meet with any particular teacher on any given day. The Board also accepts that equity and fairness are advanced within the Division by requiring all teachers to abide by the 4:00 PM Directive. Moreover, given the long practice that cannot be ignored, the community expectation that may exist pointed us towards it being reasonable. However, the fact of the long history was evidence of its reasonableness and evidence we felt we could not avoid. In the circumstances, the requirement that *all* teachers stay until 4:00 pm is not arbitrary, but justifiable in the circumstances.

Additionally, the Board finds that the 4:00 PM Directive is not enforced tyrannically. In exceptional circumstances, where a teacher is required to leave early to tend to personal or health matters, the evidence reveals that arrangements have been, and should be, made to allow them to do so. In fact, there were no examples given of teachers being denied requests to leave early. The ability of teachers to request exemptions from the 4:00 PM Directive is further evidence of its fairness.

In a number of decisions involving extra-curricular activities, the quantitative time required of a teacher who is obligated to oversee such activities has been found to be highly relevant to the fairness analysis: see, for example, *Churchill*, at pp. 15-16 and *River East Teachers'*, at para. 65-66. In the case of extra-curricular involvement, teachers

must presumably remain constantly aware and in control of the children who are under their supervision. In this case, on the other hand, it is our understanding that where teachers are not required to supervise students or meet with parents, teachers are permitted to use the time between the end of the instructional day and their 4:00 pm departure however they see fit. This flexibility supports the conclusion that the 4:00 PM Directive is not an "unduly onerous or ... unfair additional burden on the workload of teachers" (see *Ottawa-Carleton Teachers'*, 2004 at para. 55).

Moreover, as recognized in *Re St. Clair*, "[g]iven the nature of [teachers'] professional obligations, it is difficult to speak in terms of a regular or clearly defined workday" (para. 37). In other words, the "instructional day" as it is defined in M.R. 101/95, s. 5(1) does not define the workday of professional teachers. As we have noted above, the Association does not dispute that a number of the tasks which can be undertaken during the time between the end of the school day and 4:00 p.m. – for example, student supervision, preparation for the next work day, meeting with parents and colleagues – are in furtherance of the enterprise of education and a part of the principal duties of teachers. Since a teacher's workday is not defined by the instructional day, it is not unfair or unreasonable to ask teachers to be available shortly beyond the instructional day to perform the very tasks which are incidental to their profession.

A forceful theme in the Association's submissions was the argument that, in its view, the Division did not have to require <u>all</u> teachers to stay and could have implemented less onerous rules, such as an assignment of some teachers on a rota

system each day. While the Board acknowledges there are other methods that could be considered, we have concluded that is not the test. In *Avon Maitland*, Member Brent addressed the issue in this way, in paragraph 9:

> I cannot agree that the onus is on the Employer to show that it is reasonably necessary for the enterprise to have divisional meetings outside the instructional day where attendance is mandatory. Rather, I think that once it is accepted that attendance at divisional meetings is "related to the enterprise" and in "furtherance of the principal duties" of the teacher, then the aspect of mandatory attendance at meetings held outside the instructional day must be examined to determine if it is "fair to the employee".

In the case at hand, the Board finds that the Division does not have the onus to show the 4PM Directive is "reasonably necessary" (in that there may be other options available which are more reasonable to the employees), but having concluded that the 4PM Directive is both "related to the enterprise" and "in furtherance of the principal duties", we must examine the 4PM Directive to determine if it is "fair to the employee" as that phrase has been interpreted in the authorities.

For all of the above reasons, we have found that it is reasonable.

The Board also notes the Association's argument that the 4PM Directive essentially makes the teachers "clock punchers". While the Board understands why teachers may feel that way, we do not share that view. Having hours of work does not make one a "clock puncher" per se. Many professionals, including lawyers, physicians, pharmacists, police officers and psychologists, all have hours of work. While some professionals in private practice may have more flexibility as to their hours of work, any

of the above, like teachers, who work in a structured environment, have hours of work, even if there are times during those hours when they may feel they would rather do the work they have at a later time.

Finally, the Board wishes to stress that its finding in this case is restricted to the unique factual matrix that exists in the Division, and in particular, the long history of the 4PM Directive. The 40 years of practice described above was ultimately the determining factor in concluding that the 4PM Directive is reasonable. In the absence of that lengthy practice, the Board would likely not have concluded that the 4PM Directive was "seen to be fair to the employee" and would have upheld the Grievance. We have no doubt that in the absence of the 4:00 PM Directive, the work would be done and the teachers would fulfill their professional obligations. However, the long and consistent practice that exists is something this Board must take into account in assessing fairness and reasonableness.

This is not to say, however, that wherever an employer attempts to impose an implicit duty of employment, a 40 year history of past practice will be necessary to find that the imposition of that duty was reasonable. Rather, having considered all the circumstances in *this* case – including the nature of the duty, the Division's justification for it, the quantitative time involved, the availability of an exemption, the practices of other schools in the province, and the expectations of the community – the Board finds that the 40 years of past practice ultimately tipped *these* scales in favour of a reasonableness

finding. In other cases, there may well be different factors which ultimately tend to prove that the imposition of a different duty is or is not reasonable.

Additionally, the Board notes that were the Division to revise this longstanding practice in an attempt to lengthen the departure time, this Award does not stand for the proposition that such a change would be reasonable. For all the reasons which the Board has set out, the 4:00 PM Directive is fair to the teachers and is reasonable in the circumstances. Were the 4:00 PM Directive amended, to require the teachers to stay until 5:00 p.m. or 6:00 p.m., the lack of any past practice and the quantitative time involved in such an extension may well have led to a different result than the Board has reached here. However, as that issue is not before us, we make no further comment upon it.

The "Log Book"

Finally, the Board is of the view that the practice of requiring a public log book to be filled out is inappropriate. As a professional, any request for absences should be dealt with discretely and between professionals, in this case, between the teacher and the appropriate administrators. To the extent the "log book" practice continues to exist, it should be discontinued immediately.

CONCLUSION

It follows from the foregoing the Board has found that the 4 PM Directive meets the standard of reasonableness under the *Winnipeg Teachers' Association* test. While the requirement does not relate directly to specific duties being assigned, there are sufficient reasons as to why, in this particular Division, the requirement is related to the enterprise of education and is in furtherance of the principal duties of the teachers in question. Moreover and most importantly, the obligation is not unduly onerous and its fairness to teachers in the Division is evidenced by a number of factors including its unique longstanding history. While it may be overly inclusive insomuch as it requires all teachers to stay at school every day until 4:00 pm, the ability of teachers to use the time as they see fit balances any unfairness created by the breadth of the requirement.

ESTOPPEL

Given our findings above, it is not necessary for the Board to make a determination as to where there is a claim in estoppel. The Board does note that the Collective Agreement has expired and we would urge the parties to consider whether the issue of the school day departure time is a matter that ought not be better dealt with in collective bargaining.

For all of the reasons articulated above, the Grievance is dismissed.

DATED at the City of Winnipeg, this 1st day of November, 2018.

KEITH D. LABOSSIERE

GRANT MITCHELL

IN THE MATTER OF AN ARBITRATION BETWEEN:

PORTAGE LA PRAIRIE SCHOOL DIVISION,

Employer,

-and-

PORTAGE LA PRAIRIE TEACHERS' ASSOCIATION,

Association.

Grievance re: Departure Time

DISSENT OF DAVID M. SHROM

NOMINEE OF PORTAGE LA PRAIRIE TEACHERS' ASSOCIATION

I have read the majority award in this matter, and feel compelled to dissent and explain my reasoning.

The majority award, in my respectful opinion, is based upon fundamental legal errors in that findings have been made without the necessary factual under-pinning and without legal basis.

The issues in this case can be refined to the following three questions:

1. Does the Division have the ability - when it it not expressly provided for in the collective agreement - to mandate specific hours of work for teachers to be present at school after the end of the school day?

2. If the Division has such an ability, has the Division done so properly in this case in accordance with the jurisprudence that exists regarding such assignments?

3. Is the challenged assignment in this case (for every teacher to stay everyday until 4pm) fair and reasonable to the teachers in all of the factual circumstances?

I begin by acknowledging that the Division does have the ability to assign certain duties to teachers at the end of the school day that are not spelled out specifically in the collective agreement, but that in this particular case, this Division hasn't done it properly.

The challenged mandatory directive (in Exhibit 9) is and was not shown to be fair and reasonable to teachers in all of the circumstances. I would uphold the grievance and rescind this particular directive by finding it to be arbitrary and unreasonable.

Before explaining my reasoning, I would like to point out certain realities. By rescinding this directive, I am not suggesting that all teachers can or will bolt immediately at the final bell. Nor am I suggesting that all of the duties that the Division referred to as required duties or ancillary duties for teachers, such as meet-

ing with students, meeting with parents, meeting with administrators, meeting with other teachers, don't have to be done. Nor am I suggesting that the Division can't direct or assign specific teachers to do some or all of them. Further, I am not discounting or disagreeing with the Division's position that students require supervision, and that teachers have the responsibility to provide supervision both before and after the school day, and both in and outside of the school. All of these duties will still be done and students will still be supervised, and the Division has the ability to assess the needs and reasonably assign duties as required. But in this particular case, based on the evidence, the Division has not done a proper and full analysis. The Division has therefore not acted fairly and reasonably in mandating that all teachers stay until 4:00 p.m. every day.

It is important to understand the legal framework for this case. This case is not an estoppel case, and it is not a legislative right case. Rather, it is a case about whether the Division is acting in accordance with clear Supreme Court of Canada jurisprudence regarding assignment of duties not spelled out in a collective agreement. Does this assignment meet the three tests set out in the Winnipeg Teachers' Association Supreme Court of Canada decision - that is, is the assignment in furtherance of the principal duties of the teachers, is it related to the enterprise, and can it be seen to be fair and reasonable to the teachers.

Before moving to an analysis of whether this assignment meets the tests, I will address why this case is not an estoppel case, nor a legislative right case.

Although the Division asserted as an alternative position an estoppel argument, it is clear that there is no estoppel in this case because a fundamental constituent element is not present. There was no knowing, clear acquiescence or rep-

resentation made by the Association. It is not as if the Association knew the Division was wrong in making this assignment and went along knowingly for years and has now decided to try and challenge the mandate. Rather, the Association only recently realized that the Division's requirement to stay until 4:00 p.m. is not in accordance with the jurisprudence and law, and therefore challenged it. Therefore there is no basis to make an estoppel argument.

This case is also not a legislative right case, which was another one of the Division's alternative arguments. There is no express provision in the *Public Schools Act* nor in the *Education Administration Act* nor in any Regulation attached to either of those pieces of legislation giving the Division clear authority to set teachers' working hours. The only provision in the legislation that might have been relevant was section 5(2) of the Public Schools Act School Days, Hours, Vacations Regulation, which provides authority to a school board to set the opening and closing of the school day. But in my view, this authority is limited to setting the opening and closing of the school day for pupils. The school board can do that by Resolution, and in fact the evidence was that there was no such Resolution passed by this particular Division in any event. But again, this authority has nothing to do with teachers' working hours. Further, the only other possibly relevant legislative provision was a Regulation to the *Education Administration Act,* which contains a section (40), that provides that a teacher must be on duty in the school at least 10 minutes before the morning session begins, and at least 5 minutes before the afternoon session begins. It is relevant to note that nothing in that particular Regulation contains any requirement to be on duty at the end of the school day. Clearly, if the Legislature had intended to provide a requirement for teachers to be on duty at the end of the school day, it could have provided for same. On the basis of the *expressio* rule of interpretation, it appears that the Legislature did not intend

to provide any statutory requirement for teachers to be on duty at the end of the school day.

I also think it is clear in Manitoba that school divisions do not have the ability to set specific hours of work for teachers because if they did have such clear legislative authority, all other 37 divisions in the province would have done so. Yet the evidence in this case was that no other division in the province has mandated teachers' working hours and there were no provisions in collective agreements dealing with teachers' working hours.

As noted earlier, this case comes down to the jurisprudence (S.C.C. and Man. C. A.) regarding public school teachers' assignments. There is a legal regime that has existed for years in Manitoba and is well known and understood in all other 37 divisions in the province. Teachers are not clock punchers. They are professional employees with a collective agreement that does not contain any specific hours of work. Teachers do what has to be done. As was pointed out during the hearing, there are 3 categories of duties to be considered. First, duties assigned by the division outside the school day – things like staff meetings, parent teacher interviews and supervision. Secondly, there are extra-curricular activities which have been recognized as voluntary, but the collective agreement contains certain negotiated *quid pro quos* in exchange for providing extra-curricular supervision. Thirdly, there are duties performed by teachers as professionals simply to get the job done – things like lesson planning and marking which is done on evenings and weekends, etc. All three of these duties are done outside of the instructional day. The focus of this case, however, is on category 1, that is, duties that the division assigns outside of the school day. According to the jurisprudence, an employer has the ability to assign certain duties to professional employees like teachers outside

of the school day provided it is done in accordance with Laskin's enumeration of the 3 tests. That is, whether the assignment is in furtherance of the principal duties of the teacher, whether the assignment is related to the enterprise, and thirdly whether it is fair and reasonable to the employees.

According to the jurisprudence, each case requires a careful analysis of the factual circumstances to determine whether a particular assignment is fair and reasonable. In the Winnipeg Teachers' Association case, Laskin said that contract relations of the kind in existence here must surely be governed by standards of reasonableness. Mr. Justice O'Sullivan in the Snow Lake decision said what is reasonable will be governed by all the circumstances. In the River East arbitration case, the Board said it comes down to a question of reasonableness and fairness in all of the circumstances.

It must be remembered that in the Winnipeg Teachers' Association and Snow Lake cases, the assignments in question were for noon hour supervision on a rota basis. Not every single teacher was required to provide noon hour supervision every day. And in that case, given that it was a carefully structured assignment based on specific evidence as to specific needs in the division, it was determined on the facts to be fair and reasonable. Similarly in the Churchill arbitration award, there was focus on factual circumstances to determine whether a particular assignment was or was not fair and reasonable. But in this particular case, Portage School Division has done no such careful analysis, and therefore in my opinion, the necessary factual underpinning has not been provided. The Division has simply said, we have always required or expected the teachers to stay until 4:00 p.m. Yet there was no proof of any problem with the various duties they wanted done not getting done. There was no proof, therefore, of a need for such an all-encom-

passing mandatory directive for all teachers either initially (when the expectation was first created) or now. In other words, the Division has not justified this mandatory directive. Further, the Division has not provided an explanation why other means to ensure the duties are done were not sufficient. For example, Assistant Superintendent Pam Garnham acknowledged that she, as an administrator, could direct a teacher who was leaving after the final bell and leaving students unsupervised, to stay. She indicated that she could counsel that teacher to change that teacher's behavior and if that didn't work, she could ultimately refer the matter to senior administration for possible disciplinary action. She testified that she could do that with or without the mandatory directive in question. This, of course, undermined, in my view, the Division's position that this mandatory directive was required since the evidence of the Assistant Superintendent was that she could address the issue with or without such a directive. The Assistant Superintendent also failed to provide any explanation why the teachers Professional Code of Conduct was not sufficient to ensure that proper supervision and duties were performed by teachers.

How could this mandatory directive (that all teachers are required to stay every day until 4 pm) be found to be fair and reasonable when there was never proof of a problem, and no proof that it was ultimately needed in the first place.

The Division's witnesses acknowledged that different supervision was required for students depending on their age and the time of year. Yet this particular directive is for all teachers regardless of grade levels to stay every day all year. This is just another example of the directive not being fair and reasonable because it is not carefully crafted and applicable only as needed.

The Division has asserted that we have always expected teachers to stay until 4:00 p.m. There are a number of duties that they can and should perform and supervision is one of the most important aspects of this requirement to stay until 4:00 p.m., as well as availability for various meetings. Yet, as I have noted, there was no proof that supervision was not being properly provided and there was no proof that the various duties that they want to be performed were not being performed by teachers. There was never proof of a problem to warrant or justify this mandate.

An analogy may be appropriate involving caselaw that deals with a unilaterally imposed management rule that involves an invasion of employees' privacy. Although the jurisprudence has been evolving more recently, there was a lot of jurisprudence that indicated that if an employer unilaterally introduced a rule for surveillance in the workplace or searches of employees' personal possessions, an employer would first have to prove that there was a problem in the workplace, and further prove that other means were not sufficient to deal with it. Although this situation is completely different from a rule involving an invasion of privacy, I do draw the analogy in the sense that this Division, in introducing this mandatory directive, has not proven that there was a problem, nor has it proven that other means were not sufficient to deal with the problem.

The Division had suggested that a rationale for the mandate was a need for consistency and equity in the sense that all teachers were required to stay until 4:00 p.m. Yet in my view there were holes in that position since the evidence revealed that teachers at the Hutterian schools could leave their particular school and were allowed to return to the Portage office. In this sense, these teachers were not available for meetings with students or parents at the particular school, which was sug-

gested as one of the main components of the requirement for teachers at other schools to stay.

None of the three witnesses called by the Division in this case – the superintendent, the trustee, and the assistant superintendent – provided any evidence to prove a problem with the duties not being done in the first place. In fact, the assistant superintendent made certain critical admissions and acknowledgements in her evidence. First (and I referred to this earlier) she indicated that she could as an administrator deal with a teacher leaving early at the bell, and acknowledged that she could do this with or without the directive. Further, Ms. Garnham acknowledged that nothing prevented the Division from assessing the specific needs in the School Division and assigning supervision to bus duty or hallway duty as needed on a rota basis. So, in considering the jurisprudence and whether this particular assignment was fair and reasonable to teachers, you have no evidence of a problem, you have no evidence that the duties were not being done, and you have evidence that the Division could deal with individual cases and had other means available to ensure that the duties were performed. Yet, we are being asked to accept that this requirement or expectation which has been around for some 35 years, is fair and reasonable. This, despite an acknowledgment that the means of communication in society have changed substantially since this expectation was first created. It is no longer necessary for a teacher to be assigned to sit in a school by a fax machine, for example, and wait just in case a fax might come in from someone. I appreciate that the evidence was not that teachers were required to sit by a fax machine, but I am using the statement to underline the Association's argument that this directive does not take into account the changed means of communication. The Division was requiring teachers to stay in the school to be available in case a parent or administrator wanted to communicate with the teacher, yet the evidence is clear that

teachers communicate by text or email easily with parents or administrators. Another basis upon which I question whether this mandate was fair and reasonable to teachers was the evidence of the teachers themselves. The evidence was that they were exhausted at the end of the day and that they do these various duties in any event as professionals when they choose to do it, and the Division cannot and should not direct them to do it. The evidence was from the current teachers that often teachers will simply sit in the schools between the final bell and 4:00 p.m. and do personal emails or socialize in the staff room. The evidence from one teacher was that she has never had a meeting with a parent, with an administrator nor a professional development opportunity between the final bell and 4:00 p.m. Given the evidence, or more accurately the lack thereof, I cannot find this particular mandate to be fair and reasonable to the teachers. The majority award makes reference to "community expectations" as a basis for the reasonableness of the rule and yet there was absolutely no evidence from any member of the community as to availing themselves of the opportunity to meet at this time.

It must be remembered, however, that the Portage School Division will function without this directive. Teachers will still provide supervision as required and as reasonably assigned, and the various duties will be performed and the Division can address situations where it is not being done properly. Life will go on this Division and the Division is fully equipped to deal with problems if necessary; just as happens in all other 37 divisions in this province. For decades in Manitoba, and in all other divisions, there has not been an issue or dispute, yet there is no language in collective agreements for teachers providing for specific hours of work. The same issues or needs arise in these other divisions for teachers to meet with administrators, with students, with parents or colleagues. As well, the same needs exist in other divisions for supervision of students. Yet somehow, with either the Code

of Conduct or the division's acknowledged right to make fair and reasonable assignments, life goes on.

In this case, in my view, the evidence was clear that this all-encompassing mandatory directive was not fair and reasonable in all of the factual circumstances presented. To summarize, I would not find the mandatory directive for all teachers to stay in the school until 4:00 p.m. every day to be fair and reasonable in all of the circumstances because:

1. The mandate was never shown to be necessary, i.e. there was never proof of a problem originally with these duties not being performed.

2. The mandate is not the result of a careful analysis regarding specific needs in the Division. The assistant superintendent acknowledged that the Division could do an assessment of specific needs in each school and make assignments on a rota basis, but instead we have this all-encompassing mandatory directive for all teachers every day.

3. The mandate doesn't take into account the changed methods of communication.

4. The mandate is not like the factual circumstances of the Winnipeg Teachers' Association and Snow Lake cases where the particular assignment was on a rota basis based on specific evidence as to specific needs. This is an all-encompassing mandate for all teachers every day without regard to specific needs that have been proven.

5. This directive is different from other cases where a specific duty was assigned; this mandate involves a time based assignment. There is no specific direction exactly what is to be done. There was simply a suggestion that a number of things can and could be done. Yet the evidence was not much in fact was done by teachers during this time.

6. This mandate is not fair and reasonable because it was not consistent and equitable in the sense that Hutterian teachers could leave the schools and therefore were not available to meet with parents or students.

7. This mandate was not fair and reasonable because it is not consistent with the whole status quo and regime that exists in Manitoba for professional teachers where there are no specific hours of work set out in collective agreements. Mr. Justice O'Sullivan in the Snow Lake case suggested that it is relevant to consider "the history of teaching in this province" and "practices that have grown up…in the province".

8. The mandate is not fair and reasonable because it was not shown to be necessary. Everything the Division wanted to get done would be done, and the Division can specifically assign teachers to do them reasonably based on proving specific needs. As is often the case in labour relations, there must be a balance.

Given that there was no risk or downside to the Division in the sense that all the duties that they say needed to be done could and would be done, I would find that there was no need for this particular mandate. The challenged mandate constitutes a huge interference with the existing regime that exists for public school

teachers in Manitoba and further, constitutes the Division unilaterally and arbitrarily setting hours of work for teachers.

At the outset of my dissenting comments, I suggested that the majority erred in making findings without the necessary factual underpinning, and without a proper legal basis. I have addressed the findings that were made without the necessary factual underpinning and now I will deal with the findings that were made (in my respectful opinion) without any legal basis.

The majority award seems to have found that the fact that the Division's expectation (that all teachers stay until 4 pm) existed for some 35 plus years was legally significant to a determination that it constituted a fair and reasonable assignment. I question the legal relevance of this evidence.

What is the legal relevance that the Division may have had this expectation for years? It is not for the purpose of establishing an estoppel that the Association is prevented from challenging the requirement now. We know from the evidence that there was no knowing acquiescence by the Association, so a constituent element to create an estoppel was not present. The Division may have expected teachers to stay until 4:00 p.m., but the Association did not know or appreciate its legal ability to challenge this expectation, and therefore there is no basis for an argument for an estoppel.

The evidence of the Division's expectation to stay until 4:00 p.m. is not evidence of a past practice to be used somehow as an aid to interpretation of the collective agreement since we are not called upon to interpret any particular provision of the collective agreement. In this case, we are simply asked to rule on a unilater-

al management directive that teachers stay until 4:00 p.m. and determine whether such an assignment is fair and reasonable in accordance with Supreme Court of Canada jurisprudence.

In that Winnipeg Teachers' Association case, Justice Laskin did refer to certain duties that were voluntary services becoming contractual obligations and suggested that over a course of time and years of conduct a voluntary service could be considered to become a contractual obligation. In my opinion, this analysis is not applicable in the circumstances of this case since the expectation to stay until 4:00 p.m. was never a "voluntary service" provided by teachers, but rather, it was always an expectation of the Division.

In my view, therefore, the evidence of years of a Division expectation to stay until 4:00 p.m. does not provide a basis for an estoppel, does not provide evidence of past practice to aid in the interpretation of the collective agreement, and does not constitute a voluntary service becoming a contractual obligation over a course of conduct and renewal of relationships. Therefore I question the legal significance of this evidence; yet, the majority has, in large measure, based its decision on this. The majority says, at page 66, "The long history of the practice within this Division without objection can be considered evidence of its fairness to the teachers", and at pages 72-73, "The 40 years of practice…was ultimately the determining factor in concluding that the 4pm Directive is reasonable." In my respectful opinion, the majority has erred and misinterpreted the evidence of mere compliance with the Division's rule as somehow constituting acceptance of that rule as a reasonable working condition. The Division may well have expected teachers to stay until 4:00 p.m. for years. The Association did not at that point challenge the requirement, but, is at this stage challenging the requirement. A rule is not reasonable

simply because it's been rule or practice for years. In my opinion a rule has to be seen to be reasonable to teachers on its merits - whether there's a need for the rule, whether there was proof of a problem, whether the rule was carefully crafted to fit the circumstances, whether the rule conforms to the practices in the Province, whether the Division's needs could be met without such an all encompassing directive, etc. A rule is not reasonable simply and only because it's been a rule for years. And in this particular case, given the analysis required by the clear SCC jurisprudence, mere compliance with an employer's rule cannot be determinative evidence of the fairness of the challenged mandate.

Taking into account the three tests in the WTA SCC case, the focus in this case is on whether the assignment was fair and reasonable in all of the circumstances. Given the evidence or lack thereof, I do not find that this mandatory directive was fair and reasonable in all of the circumstances.

Accordingly I would have allowed the grievance and rescinded the challenged directive.

All of which is respectfully submitted this 2nd day of November, 2018.

David Shrom -Nominee of Portage La Prairie Teachers' Association