IN THE MATTER OF AN ARBITRATION

BETWEEN:

THE RIVER EAST TRANSCONA SCHOOL DIVISION,

EMPLOYER,

-AND-

THE RIVER EAST TRANSCONA TEACHERS' ASSOCIATION,

UNION.

RE: GRIEVANCE re ARTICLE 6.04 – CONSULTANTS' ALLOWANCE

AWARD

BEFORE: MICHAEL D. WERIER, Arbitrator
GRANT L. MITCHELL, Q.C., Nominee for the Employer
DAVID M. SHROM, Nominee for the Union

APPEARANCES: DAVID A. SIMPSON, Counsel for the Employer
TONY MARQUES, Counsel for the Union

DATES OF ARBITRATION: October 17, 18 and 19, 2017

LOCATION OF ARBITRATION: WINNIPEG, MANITOBA

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INTRODUCTION

The River East Transcona Teachers' Association ("The Association") of the Manitoba Teachers' Society disputes The River East Transcona School Division's ("The Division") application of Article 6.04 of the collective agreement between the parties.

Section 6.04 deals with the amount of the annual administrative allowance paid to teachers who serve as a consultant. The Association says that since 2002 the Division has not been paying consultants the allowance set out in Article 6.04, but rather has been paying half-time consultants half of the allowance set out in the agreement.

The Association's position is that the agreement is clear and unambiguous and the full allowance should be paid. Past practice is therefore not a relevant consideration.

The Association states that even if the agreement is ambiguous, the past practice doesn't confirm that the Association accepted the Division's interpretation of the agreement.

Lastly, the Association states if it is determined that half-time consultants are entitled to the full allowance, then the issue of estoppel arises. The Association states that the Division was put on notice (at the very latest by June 18, 2015) that the Association would be grieving the Division's interpretation of Article 6.04.

The Division counters that the consultants have been paid for the amount of time put in for the work performed. The consultants are all teachers who are paid a full-time teacher's salary, and work half-time as a consultant and get paid half the full allowance.

The Division says if it is not determined that it is plain and obvious that their interpretation is correct, then they argue that the agreement is ambiguous. There is a latent ambiguity and evidence of past practice is admissible. In this case, the past practice is established by looking at the history of five successive agreements during which there was no concern expressed by the Association.

The Division states that there is a difference between the parties on what transpired at the last round of bargaining.

The Division disputes that the Association (when they couldn't reach agreement) put them on notice that they would be grieving the Division's application of the agreement.

The Division maintains that the parties agreed that existing language and practice would remain as is, and the parties agreed to an increase in the amount of the annual allowance.

In the alternative, the Division argues that estoppel should preclude any change in practice until the next round of bargaining.

THE GRIEVANCE

The Association's grievance was filed on October 5, 2015 and is reproduced below:

ASSOCIATION GRIEVANCE

> **THE RIVER EAST TRANSCONA TEACHERS' ASSOCIATION** of the Manitoba teachers' Society (the "Association") submits that there is a dispute between the Association and **THE RIVER EAST TRANSCONA SCHOOL DIVISION** ("the Division") about the meaning, and/or application and/or violation of the collective agreement as a whole between the Association and the Division, and without restricting the generality of the foregoing, Article 6.04 thereof and section 80 of *The Labour Relations Act*.
>
> The Association grieves that from approximately July 1, 2002 to the current time the Division has misapplied and/or violated the collective agreement and/or legislation by not paying to consultants employed by the Division the full administrative allowance payable to them in accordance with Article 6.04 of the collective agreement.
>
> **REMEDY SOUGHT**:
>
> 1. A declaration that the Division has misapplied and/or misinterpreted and/or violated the collective agreement and/or the legislation;

2. An order that the Division cease and desist from violating the collective agreement and the legislation;

3. An order that all consultants who have not been paid the full administrative allowance in accordance with Article 6.04 be made whole and compensated for all damages arising from the improper payments, including all lost wages, allowances and benefits, together with interest at a commercially reasonable rate;

4. Such other remedies as may be fair and reasonable.

DATED AT "Winnipeg", Manitoba this "5" day of October, 2015.

THE RIVER EAST TRANSCONA TEACHERS' ASSOCIATION of the Manitoba Teachers' Society

"Frank Reeves"
President

RELEVANT ARTICLES OF THE AGREEMENT

The relevant articles are reproduced below:

ARTICLE 6. ADMINISTRATIVE ALLOWANCES

6.02 Vice-Principal

a) A Vice-Principal shall be paid in accordance with educational qualifications and experience as per Article 3, plus an allowance of fifty percent (50%) of the administrative allowance for that school.

6.03

a) Principals and Vice-Principals on leave shall return to same or equivalent position.

b) Change in salary shall be effective upon date of appointment.

c) In the event of a change in position by a principal or a vice-principal to another administrative position for which the allowance is less,

his/her allowance shall remain the same for a period not greater than two years, or until it is exceeded by the new allowance.

6.04 Consultants

Consultants shall be paid an annual allowance above and beyond the salary outlined in Article 3 of this Agreement as follows:

Fall Term 2014	$7,110
Fall Term 2015	$7,824
Fall Term 2016	$7,981
Fall Term 2017	$8,519
January 2018	$8,647

ARTICLE 7. DEPARTMENT HEAD/TEAM LEADER

7.01 Department Heads

a) Department Heads in Senior High Schools may be appointed in any subject area or program area having a minimum of three full time teachers. For the purpose of this Article, teacher count shall be determined by the sum of the FTEs for all teachers assigned to the department.

		Fall Term 2014	Fall Term 2015	Fall Term 2016	Fall Term 2017	January 2018
Class A	3 to 6 teachers	$2,878	$2,936	$2,995	$3,040	$3,085
Class B	7 to 9 teachers	$3,937	$4,016	$4,096	$4,158	$4,220
Class C	10 or more teachers	$4,954	$5,053	$5,154	$5,232	$5,310

For the purposes of this article, a teacher shall be deemed to be assigned to the Department in which the teacher has the majority of his/her teaching assignment for which there is a Department Head appointed.

b) The position of the department head will be a term position of not more than three years, the length of the term to be determined by the

Superintendent in consultation with the Principal. At the end of this term, the position will be bulletined.

7.02 Team Leaders

a) Team Leaders at the Junior High/Middle Years Schools may be appointed in any grade level and/or program area. The Team Leader Allowance will be calculated as follows:

Fall Term 2014	$2,226 base plus $157 per FTE teacher on the team.
Fall Term 2015	$2,270 base plus $160 per FTE teacher on the team.
Fall Term 2016	$2,316 base plus $163 per FTE teacher on the team.
Fall Term 2017	$2,350 base plus $166 per FTE teacher on the team.
Fall Term 2018	$2,386 base plus $168 per FTE teacher on the team.

For the purposes of this article:

1. A school's total FTE shall be defined as the total teaching staff, excluding the administrator(s) and appointed team leaders.

2. Each FTE will be assigned to only one team.

3. After the total FTE has been calculated, a partial FTE of less than 2/3 will not be counted; a partial FTE of 2/3 or greater will count as 1.

4. The position of team leader will be a term position of not more than three years, the length of the term to be determined by the Superintendent in consultation with the principal. At the end of this term, the position will be bulletined.

7.03 Elementary/Early Years Coordinators

a) Elementary/Early Years Coordinators may be appointed; one for Kindergarten to Grade Three, one for Grades Four to Six, in each elementary school.

b) The Elementary Coordinator allowance will be:

Fall Term 2014	$707
Fall Term 2015	$721
Fall Term 2016	$735
Fall Term 2017	$746
January 2018	$758

c) The position of Elementary/Early Years Coordinator will be a term position of not more than two years, the length of the term to be determined by the Superintendent in consultation with the Principal.

ARTICLE 9. PART-TIME TEACHERS

9.01

b) Part-time teachers shall be paid an annual salary based upon the percentage that the workload contracted for bears to a full-time workload.

ARTICLE 10. LEAVES OF ABSENCE

10.08 Sick Leave

b) -----

Teachers employed on a part-time basis who have a Form 2, Teacher General, or Limited Term Teacher-General contract with the Division shall be granted sick leave with pay pro-rated based on full time equivalence.

EVIDENCE

The Board heard a great deal of evidence at the hearing, particularly relating to the 2015 negotiations. The issue at negotiations, as indicated, related to the discussions and resolution relating to the application of Article 6.04.

The following witnesses testified for the Association:

(a) Tim Breen, President, River East Transcona Teachers' Association;

(b) Frank Reeves, Vice-President (Past President), River East Transcona Teachers' Association;

(c) Tom Paci, Staff Officer, Manitoba Teachers' Society; Department Head/ Teacher Welfare,

(d) David Woitowicz, Teacher/Consultant Industrial Arts, Vocational Programming Home Economics

(e) Bev Ilchena, Teacher/Consultant, Physical Education and Health

The following witnesses testified for the Division:

(a) Vince Mariani, Secretary Treasurer/CFO, River East Transcona School Division;

(b) Rod Giesbrecht, Trustee, River East Transcona School Division;

(c) Pat Denovan, Labour Relations Consultant, Manitoba School Boards Association.

Evidence of the Association

Tim Breen is the President of the Teachers' Association. His predecessor was Frank Reeves. Breen explained that consultants are curriculum experts who oversee teachers and provide leadership in curriculum areas. They report to the Assistant Superintendent. Their role includes providing professional development to teachers in their area.

Consultants who work in a half-time position can either work alternating days or half-time within a day. Consultants can receive questions from teachers on their off days. They are appointed to three-year terms.

River East Transcona Division started hiring consultants half-time for sure in or about 2006. The first time there was a concern raised about half-time consultants receiving half-time pay was in or about 2011 and 2012 by one of the consultants. The Association

sought advice from the Teachers' Society and was told they were in an estoppel position and to put the Division on notice.

Ultimately during negotiations a proposal was put forward to deal with respect to the part-time consultant receiving full-time pay. Breen explained that the Association wanted to make sure there was no misconstruing of the relevant Article in the future. The Association thought the Article was explicit but wanted no misconstruing.

Breen reviewed a series of documents that were put together with respect to the various proposals that were exchanged by the parties. The last day of negotiations was June 18, 2015. At one point in the negotiations there was talk about setting a further date for negotiations in September or October and Tom Paci said, "hold on let's talk". Further discussions in caucus were held.

Rod Giesbrecht, a Division Trustee and a member of their Negotiating Team, had left the meeting earlier and had to be brought back. A meeting occurred without the full teams. The Association team discussed the concessions that they could make and discussed the consultants article. The team felt that it meant that the same amount would be paid to full-time and part-time and they agreed that they would tell them that this was their interpretation and if there is a breach there would be a grievance by the Association. Frank Reeves spoke to the issue when they met together with the Division and indicated that the Association was withdrawing its proposal on the pro-rating article for consultants, but if the Division should continue paying them on a half-time basis there would be a grievance.

Breen confirmed that no notes were being taken by the Association. He was referred to notes made by Pat Denovan. At 11:40 there was a reference that the Association had indicated that they agreed with the current language in the agreement with respect to consultants and the practice and that they had a request for more money. Breen confirmed that this was not consistent with the actual position taken by the Association.

Breen explained that the consultant pay issue was resolved by the Association withdrawing the proposed change in language with the caveat that they would grieve, and also receiving an increase in the allowance.

Breen stated that he was not involved in communications with the Division subsequent to the negotiations. He was not involved in any email sent to the Division by Frank Reeves or in putting the grievance together.

Breen confirmed that Vice-Principals were paid an allowance for being a Vice-Principal even if they did it on a part-time basis. Breen confirmed that the practice of the Division was to put on the posting a consultant position is a half-time position.

On cross-examination Breen confirmed that he had been a teacher since 2006 but has never worked as a consultant. He confirmed that while he had requested that members of his negotiating team take notes, none had been taken at the bargaining session. The committee took body language notes.

Breen confirmed that in 2011, that while the issue of part-time pay for part-time consultants was raised, no complaint was put forward because of the estoppel issue. The Association was advised by the Teachers' Society that they would have to put the Division on notice at bargaining and that nothing stopped them from doing so. He confirmed that there was no notice and there was no document that any such notice was given, but reiterated that Frank Reeves said that they would grieve. He confirmed that no letter was sent by the Association indicating that they would grieve and the email sent in September 2015 by the Association made no specific reference to a grievance being filed by them.

Breen confirmed that the Association's position is that the language dealing with consultants is clear but that they tried to modify it for clarity purposes. He reconfirmed that the proposal was withdrawn but with the caveat that they would grieve.

Breen confirmed that the practice for paying consultants has been consistent throughout the years and that has been according to the Division's interpretation of the relevant article.

Breen confirmed that there was a sense of urgency for the Association to negotiate a new collective agreement before the end of June as there were maternity benefits at stake. He did maintain that the Association did not want to give away the house. Breen was asked as to whether the Association had to withdraw the language. He stated that the Association felt clear about the language and they would grieve if they had to. They preferred to have it resolved by the end of June. Breen confirmed that the Association did not want to have negotiations continue into the fall. Certain nonbinding committees were struck to move forward with issues that they didn't need to get resolved. Four issues were left to negotiate for the last day of negotiations.

Breen stated that he recalled that Giesbrecht left the meeting and then returned. Breen stated that the Association withdrew its proposal and they did receive additional money. The increase was 2%.

Frank Reeves testified for the Association. He has been a teacher since 1996 and was employed by the Division before amalgamation. He has never worked as a consultant but was President of the Teachers' Association and on the Executive since 2006. Reeves explained that the Association introduced a proposal in the 2015 bargaining dealing with allowance payments for consultants. It was clear to him that consultants were not being paid according to the language in the agreement. Discussions were held with the Division prior to bargaining and it was decided to bring it up at bargaining.

Reeves had never worked at Transcona Springfield. He was informed that consultants were paid on a pro-rata basis.

Reeves described the bargaining on June 18. He said that there was a lot of pressure to get a deal because if a further meeting had to be held it wouldn't be until September. The

last issue was the one dealing with consultants. There were a couple of issues outstanding and the group broke off to meet to try to resolve this last issue. His representatives came back and were told that bargaining would have to continue in September.

Reeves stated that they had to keep working at it. They were able to settle the monetary amount but couldn't resolve the issue of clarification of the language. Reeves testified that the Association stated that they can solve this in another way. If consultants will continue to be paid in the way they are presently, they indicated they would grieve based on the language.

Reeves testified that the Division's Board Chair said that he didn't like being threatened. Reeves testified that he told him that this is what they were going to do and they were simply giving him a heads up. It was not a threat. Reeves stated the parties came to an agreement and said they would grieve if the practice was continued.

Reeves was shown Exhibit 23, being the notes of the June 18 meeting taken by the Division. He stated that he'd never seen it. He acknowledged that the notes correctly indicated four issues remaining outstanding as of 11:40. The notes relating to the consultants "did not mean anything to him".

Reeves reiterated that the Association's position at the meeting was that they wished to clarify the language dealing with the consultants' allowance. The Association asked for more money. Reeves said he told them that he didn't have to resolve the issue of the language at the bargaining table and they could resolve it another way by going to arbitration.

Reeves testified the Association did not agree to the practice being continued but agreed to monetary increases.

Reeves was referred to Exhibit 17, being a series of emails in or about September and October 2015 between himself and members of the Division. In that series of emails it was confirmed by the Division that they would continue to pay half-time consultants in the same manner as they had before.

This relevant email exchange is reproduced below:

> "Frank Reeves
>
> From: Greg Daniels <gdaniels@retsd.mb.ca>
> Sent: September 18, 2015 4:45 PM
> To: Frank Reeves
> Subject: RE: Consultant pay
>
> Hi Frank,
>
> Vince popped into the office later this afternoon after all. I was able to speak with him on this matter and the division intends to continue to pay the half time consultants half of the allowance stated in the collective agreement.
>
> Greg
>
> -----Original Message-----
> From: Frank Reeves [mailto:freeves@retta.ca]
> Sent: September-17-15 7:03 PM
> To: Greg Daniels
> Subject: Consultant pay
>
> Hi Greg, just following up on the heads up I gave you yesterday. Please let me know after your conversation with Vince et al, if the division intends to continue to pay the half time consultants half of the allowance stated in the collective agreement so that I have accurate information. Thanks Greg.
>
> Have a great day,
>
> Frank Reeves"

As a result the Association moved forward with their grievance right away. Reeves confirmed that the Association didn't grieve prior to bargaining in 2015 because of advice

received from their Staff Officer. While they felt the language was clear, they had to wait for the expiration of the agreement because of the estoppel argument.

On cross-examination Reeves confirmed that he was not a consultant. Reeves confirmed that an agreement on maternity leave had to be achieved before the end of June if it was to be operational. He confirmed that it had been relayed to the Association's team that if a deal could not be made they would have to wait until at least September 2015. Reeves didn't like that and he didn't think that they should leave the table as they still had a half day to bargain on June 18. He didn't think they should give up. Reeves confirmed that it was made clear to the Division that they would grieve if the Division continued the practice. No notes were made of having conveyed that to the Division. Reeves also confirmed that there was no reference in Exhibit 23 to the Association's intention to file a grievance.

Reeves was referred to the four items that were outstanding at the end of negotiations.

The notes are reproduced below:

1140 Assn

1 Consultants – agree – current lang &
practice – Assn $

2 Admin Allow. Cttee.
- can't solve today -open
- current agmt ended
- propose Joint Cttee – non-bind

3 Personal - want unrestricted access
- not opposed to concept of pro-rat
(don't want people to not access)

4 Bereavement - will drop aunt/uncle

1230 Assn resp –

10.11 1 use 1st sentence of DIV proposal
2 no more than 2 days may be
used conse w/o appr of Supt/
L of 3 Joint Cttee – non binding
Agmt -pro
rat

The notes on Exhibit 23 with respect to the administrative allowance, bereavement, and personal leave were accurate. Reeves stated the notes with respect to consultants do not reflect the conversation that took place.

Reeves stated that the Division agreed to pay more money for the consultants' allowance. There was not an agreement to maintain the current language and practice. Reeves confirmed that after the meetings with the Division in 2013 the Association never grieved or gave notice in writing. This was done because they were advised not to do so until after bargaining. Reeves stated that the pro-rata issue was brought to his attention in 2013 and he believes the practice has been in place for a while and for sure since amalgamation. He was unaware of how long it had been in place prior to that time.

Tom Paci, the Department Head of Teacher Welfare for the Manitoba Teachers' Society testified. He has been a Staff Officer since 1999. Paci testified about the events of June 18. He related that the parties had scheduled a morning meeting and there were a few "thorny" issues remaining. At approximately 11:00 a.m. after an exchange, Pat Denovan came downstairs to say that "we don't think we can get a deal done and will have to reschedule for September or October of that year".

Paci replied that he wanted to speak to his committee and that they should wait a few minutes. He spoke with his caucus and then indicated to Denovan that they were prepared to look at issues to make a deal. There were four outstanding issues and a sidebar discussion occurred between himself, Reeves, Breen, Giesbrecht and Denovan. When it came to the issue of the consultants, Reeves indicated that they leave the language as is or words to that effect. He further stated that if the practice doesn't change they would file a grievance. Giesbrecht replied that this was a threat and Reeves said it was not a threat, "we will have to do it". Paci did not take any notes at the negotiations that day. He was one of the spokespeople for the Association.

Paci was referred to Exhibit 23 being the notes taken by Denovan at the June 18 negotiations. In particular he disagreed with the notes that were taken at 11:40 relating

to the consultants. The notes were incorrect and the Association's representatives never stated that they would accept the current practice with regards to pay for part-time consultants.

Paci said that he agreed with the earlier evidence of Reeves and Burns with respect to the issue of estoppel. The Association had been advised that they could not deal in any substantial way with consultants pay prior to bargaining.

Paci indicated that they did not sell the consultants down the river in order to get a deal on maternity leave. The Association was never prepared to agree to the practice. Paci was at all bargaining meetings and has been involved in bargaining since 1985.

On cross-examination Paci stated that there would not be any point in giving notice to end the estoppel in 2013. He confirmed that there were no notes from anyone from the Association taken at the June 18 meeting. He stated that things were moving very quickly at the closing of negotiations. The parties were focused on getting a deal and trying to solve problems. Paci agreed that the language in the notes with respect to the other items that were resolved were accurate and that was no reason to contest these words. The Association took issue with the wording on the consultants' allowance. Paci stated that he clearly had a different recollection than Denovan.

It was suggested to Paci that the Association had to get a deal on maternity leave provisions that day. Paci said it wasn't necessarily true as the Association could go to interest arbitration and obtain the maternity leave retroactively. It was suggested to him that if a deal was made on June 18 there would be certainty as it related to the maternity leave provisions. Paci said the Association was not prepared to agree to provisions at all costs. Paci made it clear that the Association's position was that they wouldn't accept the past practice relating to the consultants' allowance and that they would grieve.

David Woitowicz testified for the Association. He has been employed as an Industrial Arts teacher for 28 years and also functions as a consultant in Industrial Arts, Vocational

Programming, and Home Economics. He is involved in a variety of tasks including assisting teachers with new curriculum, assisting in buying equipment and installation work and is involved with career education. At the time of the hearing he had been employed for 12 years as a consultant nearing the end of his fourth three-year term.

He consults with approximately 75 teachers. He teaches three sections and when he is finished teaching he moves into his consultant role. He teaches at River East School and his consultant office is at Bernie Wolfe school. He is not always at the consultants' office if he is going to the school where teachers are located. He gets calls when he is teaching and also attends conferences. He was absent in the past calendar year for eight days for consultant obligations. He is also involved in out of school committees and on occasion attends out of the city for consulting. When he is required to leave the classroom he has to book off sick and prepare leave material for the classroom.

Woitowicz testified that he was one of a number of consultants that brought forth the issue of a concern about half-time consultants only getting half-time pay. He acknowledged that they were told they would get half the allowance when assuming the position. Everyone said that that's the way it was in the contract. He had been in the job for about six years when he learned certain part-time consultants were getting the full allowance such as Vice-Principals or Department Heads. He indicated that it didn't seem like they were being treated in the same fashion. He made some inquiries and was told that that was the way the Division did it. He also spoke to the Union President who said that it wasn't fair and that she would contact MTS which she did. Woitowicz was informed that there was an estoppel argument and nothing could be done at the time. He was informed that the way to achieve the change was through the 2015 negotiations.

He was not involved in the negotiations. He was led to believe it would be grieved and that is where we are today.

Woitowicz stated that he was unlike other consultants in that he did work for the whole Division. He believes he is consulting at all times during the day and that it is not fair that there be a payment of only one-half of the allowance.

On cross-examination Woitowicz confirmed that as an Industrial Arts teacher he works with dangerous equipment. When he is in the classroom he doesn't normally leave and tries not to text or answer calls. This semester he taught two of the five slots to the five slots he was consulting and one of the slots he was involved in preparation.

He confirmed that part-time consultants have been getting part-time pay for as long as he can remember. He applied because he wanted the job and one of the benefits is to get money over and above what is received in compensation for teaching. For him it was a way for the Division of recognizing leadership. He acknowledged that the allowance is shown on each paycheck and he was aware that he was getting one-half of the allowance. He stated that it was equitable for a part-time consultant to receive the same as a full-time consultant because he believes he's a consultant all the time. He can't do the job unless he is consulting all the time. Woitowicz was informed after negotiations that the language request was not accepted.

On cross-examination he confirmed that the allowance he receives is in addition to his full-time salary as a teacher. He was asked to clarify what he meant by saying that he was a consultant all the time. The days are not divided as has been suggested. He teaches students and during that time he's a consultant because he's drawing on his knowledge and people are accessing him all the time because of his knowledge.

Bev Ilchena testified for the Association. She has been a full-time teacher for the Division for 12 years and prior to that was part-time. She also functions as a half-time consultant and is responsible for 27 elementary schools and works with 35 Physical Education teachers.

She services the teachers in many ways and meets with all of them and also conducts three and a half days of professional development annually. She also sets up large Division events. This is her 12th year as a consultant. She was hired as a half-time consultant and this has not changed during the 12 years.

Her schedule is that she works one day as a teacher and the next day she is a consultant. She has eight periods in a day. She has always had a teaching partner and she receives preparation periods. During the day while she's in the classroom she deals with issues as they come up and they always do. She gets phone calls, emails, and attends to them when she can. Last year she took 12 days absence on teaching days to do consulting work. She identified a work plan summary which set out the days. It is difficult to work and consult and during the early years she had to spend a lot of extra hours doing it. She does stuff during the day while teaching and she will leave her prep time to attend the meeting. She also tends to things on her lunch hours.

She testified that she was requesting that the pay be full-time because when she accepted the position she didn't think about it and had accepted it because of the passion she had for leadership in health. She found the time commitment to be overwhelming and she doesn't feel she is doing the job on a part-time basis.

On cross-examination she confirmed that she has three preparation periods every two days. She gets calls from all teachers. She has enjoyed the job but she's thinking about whether she'll continue to do it. Things are changing, but never has there been any less responsibility. She always understood when she applied for the position that she was going to be getting half the allowance set out in the agreement. She applied for the positions and was successful.

Evidence of the Division

Vince Mariani is the Secretary-Treasurer/CFO of the Division and has been so employed since amalgamation in 2002. He has been with the River East Division since 1985 and

began employment as an Assistant Treasurer. He is a Corporate Secretary for the Board and the Division and manages and oversees all operations and maintenance including IT and HR and is involved in budgeting. He prepares a budget which ultimately has to be approved by the Board. He acts as a lead resource for the Division's committee on bargaining and sits on all the committees. With amalgamation there was a process undertaken to harmonize the collective agreements which took a number of years and ultimately a new agreement was arrived at which drew from both prior agreements.

Mariani explained the role of a consultant. They are subject matter experts who provide the lead role in professional development, staff training and curriculum. Their consultant role is separate from the teaching duties. The Division identifies areas where they require only a half-time consultant. Senior management identifies those areas and makes decisions which are approved by the Board of Trustees.

The Division has employed consultants since amalgamation and there were consultants working since he started in 1985. This included part-time consultants. Consultants are hired on three-year terms. This is an administrative decision. The rationale for the term is to allow flexibility to deal with emerging matters. It also gives the consultants an idea of how long they'll be functioning in the position. Part-time consultants have been paid on a part-time basis since the process was implemented in 1985. Part-time allowance payment is identified on each paystub.

Mariani confirmed that the language in Article 6.04 has not been changed since amalgamation in 2002. The language from Article 6.04 was adopted from the prior River East collective agreement.

If all part-time consultants were paid on a full-time basis it would cost the Division approximately $33,000 a year. The Division can eliminate part-time consultants if they wish to do so.

Mariani confirmed that he was involved in the recent bargaining with respect to the quantum and language issues. He was at the bargaining session on June 18 but left early due to a prior commitment. He spoke to Pat Denovan, who shared with him the disposition on the four outstanding items. She did not mention anything about the Union threatening to file a grievance. Any agreement would have to be ratified by the Board and it was at their meeting on June 30.

Mariani testified that he was not aware beforehand that the Association intended to grieve. Mariani testified that there were proposals with respect to the quantum of the consultants allowance over time but never one dealing with the language or the practice until 2015.

Mariani addressed the issue of Vice-Principals being paid a full-time allowance even if they were functioning in a part-time basis. He explained that a Vice-Principal may be required to teach one course, but the full-time job is that of a Vice-Principal. A Vice-Principal may have a varied amount of teaching as part of an overall assignment given to them. Mariani stated that he regards the Vice-Principal situation as completely different. As to Coordinators, all receive the full allowance except those who are employed as part-time Coordinators.

On cross-examination, Mariani acknowledged that there was nothing in the agreement which refers to a consultant working half-time. The posting indicated there were half-time jobs which received half-time pay. With respect to Vice-Principals, they function as Vice-Principals all the time. The Department Heads positions are limited to three full-time teachers, but increased with the size of the staff.

He confirmed that he was not present at the time the deal was finalized on June 18. He spoke to Pat Denovan who informed him as to what took place. Mariani confirmed that Denovan told him that the Association was prepared to abide by the practice with respect to part-time consultants.

He had a conversation with Daniels of the Association when he was walking by his office. Daniels inquired as to whether the Division was still paying consultants as they had in the past. Mariani stated that he told him that he saw no reason to change. Mariani agreed that it seemed odd that he was asked about them and he simply told him no. Mariani stated if the email had come to him with respect to the inquiry about payment he would have had a different response. Mariani was not aware that Reeves had met with the Assistant Superintendent Barkman until he saw the communications after the fact.

Mariani confirmed that one of his concerns is the budget of the Division and he agreed that the sum of $27,000 is miniscule compared to the entire amount of the budget.

Mariani confirmed that the Division's position is that they have the right to pay half of the allowance set out in the agreement because they have been doing it that way for the last 30 years. It has been an accepted practice. He could not agree that there was nothing in the agreement authorizing that payment. He did agree it was the same language as appears in the agreement for Vice-Principals.

Rod Giesbrecht is a Division Trustee and Chair of the bargaining committee. He was involved in all aspects of bargaining from January to June, 2015. He confirmed that the consulting allowance was an item for discussion and he was present at the June 18 negotiations.

There was no urgency for the Division to conclude the deal. The Association was in a rush as they were seeking maternity benefits top up and these would be lost if the agreement was not concluded in June.

There was a lot of outstanding items and they had asked the Association to identify the core issues by June and the list was longer than reasonable. One of the items was a consultant allowance. The Association wished to have part-timers get the full-time allowance. Giesbrecht testified that the Division never wavered and would not pay it. The

past practice was that the half-time consultants got a prorated allowance. The Division never agreed to the Association proposal.

Giesbrecht identified Exhibit 23 and agreed that the four items that were shown there were outstanding at 11:10. At 11:10 a.m. the Division made a proposal and the Union came back indicating everything was back on the table. Giesbrecht stated that he thought he would leave and began to depart. Pat Denovan stopped him in the parking lot and ultimately the Association came back with four issues.

With respect to the consultants the Association wanted money increases and did not want to have the allowance prorated. An agreement was reached and the practice and wording as is remains status quo. The allowance would be prorated for part-timers and the Division agreed to a percentage increase in the amount of the allowance.

The Association never told the Division representatives at that time they would grieve the past practice. Giesbrecht maintained he was 100% certain of this because he would have taken this as a threat and he would have walked out. He did not leave because they had an agreement. There is no downside for the Division to wait until the fall to further negotiations.

On cross-examination Giesbrecht confirmed that the maternity leave issue was of some urgency to the Association. He agreed that the Division would have to pay the top up sooner or later.

Giesbrecht stated that any notes that he made were all destroyed. He agreed that the Association had the right to proceed to interest arbitration. He indicated that Pat Denovan had showed him the notes that she made (Exhibit 23) for the first time that morning in the coffee shop. He confirmed that the filing of the grievance was contradictory to what he understood to be the deal. He stated the grievance came out of the blue. He stated that he was not aware of the email exchange in September 2018 between Daniels and Reeves with respect to the payment of the allowance.

Giesbrecht maintained that it was never said that there would be the filing of a grievance. The grievance was a total shock to him. It was put to him that every witness from the Association said that he took it as a threat. He said he would not have said that. He would have walked out. He did not want to call the Association witnesses liars. He confirmed that Pat Denovan took the notes on the morning of June 18.

It was put to Giesbrecht that Vice-Principals were in no different position than the consultants. He indicated that if you walked into a school to speak to a Principal who is busy, the Vice-Principal who is teaching would leave and come and talk to him. If it is an issue of urgency someone would cover. He can't imagine that a teacher would ever leave the classroom, but he didn't have any specific knowledge of whether they have ever left the classroom.

Pat Denovan is a Labour Relations consultant with Manitoba School Boards. She performs some Labour Relations and some Human Resources functions. She speaks for School Divisions when she is involved in collective bargaining and she is the only spokesperson. She was one of six consultants and works for six Divisions, doing the bargaining for five. She has been involved in negotiations for almost 12 years.

She confirmed that she was present at all bargaining sessions in 2015. The Union presented an initial proposal in January 2015. The Association sought clarification of the consulting allowance and wished to have it confirmed that both part-time and full-time consultants would receive the same allowance. The Division declined the Association proposal.

The consultants allowance was listed as an item on all the negotiation days but was not discussed every day. Quite often the Division put decline. Ultimately an agreement was reached. The agreement was to maintain the current language in the collective agreement and the current practice. There was an agreement to increase the amounts paid for the consultants' allowance.

Denovan identified the notes (Exhibit 23) that she made with respect to the last one and a half hours of the negotiations which took place on June 18, 2015. Denovan described what took place in the last one and a half hours. The Association gave the Division a written document at 10:30 a.m. which still demonstrated that the parties were close to an agreement in the Division's opinion. The Association committee left the boardroom and went to a separate room downstairs to discuss. The Division committee discussed the outstanding items and recognized that there were certain things such as the consultants' allowance where they could not agree to the Association's proposal.

At 11:10 there was a small group meeting with representatives from both sides. Four outstanding issues were outlined by the Association. Those are the four items outlined on Exhibit 23 with respect to the consultants' allowance. The Association indicated that if the current language doesn't change, could the Division do a little more with respect to the monetary issue. Denovan explained that her understanding was that if they could provide an increase to the allowance, the Association did not want this issue to hold up the deal.

She explained what is written in the margin of Exhibit 23 are her "scribbles". She and Giesbrecht went back to the room at 11:30 a.m. In the margin on Exhibit 23 are the Division's verbal proposals to the Association. With respect to the consultants' allowance, the Division indicated they could agree to the proposal on money but they would continue to pro-rate part-time. The Association people went back to their room at 11:30 a.m. and returned at 11:40 a.m. The Association representatives gave a verbal response to the Division's comments, and page 2 of Exhibit 23 is the Association's proposal.

The writing reflects the agreement that was reached. The Association agreed to the current language in Article 6.04 and the current practice would continue. They agreed to an increase in the allowance. Ultimately an agreement was concluded. She confirmed that she was never advised that the Association would grieve Article 6.04. If she had been advised of that, it would appear in her notes.

On cross-examination she confirmed that she had no decision-making authority but functioned as the Chief Spokesperson for Divisions for which she acted. She made notes for herself and no one else was taking notes. She had prepared a summary based on her notes taken at the time. This was done around September 2016. When the parties first met on June 18 she confirmed that there were 68 issues on the table. She confirmed that there was a last-ditch effort to conclude an agreement because of the school year. The Division made the first proposal on June 18 which was reacting to a final proposal that the Association had made on June 8 when they met.

At 11:30 a.m. she confirmed that the Division gave a verbal proposal which is outlined in the notes. She confirmed that the notes on Exhibit 23 started at 11:10 because she felt they were making movement and felt it was important to keep track of what was going on.

The context of the 11:30 a.m. meeting was that it was a small group. Her notes were the only notes. She said her recollection of what took place was based on what happened which is set out in the notes. She could recall the mood in the room. It was one of frustration.

She acknowledged that there were two small group discussions and while her notes don't reflect another small group discussion, she maintained that her notes reflected what she felt was important to write down. She confirmed that the second small group meeting involved the Association's 11:40 proposal. This was a meeting that occurred between 11:40 and 12:30 for which she had no notes.

Denovan clarified that there was a small caucus meeting held at 11:10 a.m. There was an indication that there were four outstanding issues. The Association comments refer to what Breen and Paci told the Division. After that the Division met and at 11:30 they gave a verbal proposal which was highlighted in the margin of the notes.

Denovan agreed that the Association came back at 11:40 and there were two components to their position on the allowance, being the language and the monetary

amount. Denovan reiterated that the Division said that they would need to have the current language and that they would continue to pro-rate, and then agreed to an increase in the monetary amount. Denovan stated that if the Association had stated that they would grieve, that would be in the notes and would be totally contrary to the direction given by the Division with respect to this issue.

It was put to Denovan the three Association witnesses said regardless of the past practice, the Association would grieve the payment of a half-time allowance. Denovan stated she did not hear that said. If that had been stated, the Division would have had to have taken pause and would have to report to the whole committee. She stated that it wouldn't make sense for the Division to give more money and then have a grievance subsequent to the agreement.

Denovan confirmed that her recollection was that Giesbrecht left the meeting at 11:30. He was frustrated and he also had other committee responsibilities to attend to.

SUBMISSION OF THE ASSOCIATION

On behalf of the Association Mr. Marques indicated that the Association was not seeking a remedy starting in 2002. The Association's position is that the remedy ought to go back to the commencement of the current collective agreement being July 1, 2014, or at least June 18, 2015. Estoppel is an equitable remedy and the parties ought not to be disadvantaged.

The issue before the arbitration board concerns the interpretation of the agreement. If the language is clear that is the end of the matter and it doesn't matter if there is past practice or the interpretation leads to a burden on one party. The Association submitted only if there is some ambiguity should one look to extrinsic evidence. If there is clear language then the parties have to deal with the issue of estoppel and the question is how far back the estoppel extends.

The Association referred to the following authorities in support of their submission:

1. *Brown & Beatty Canadian Labour Arbitration* – 4:2100 – The Object of *Construction*: Intention of the Parties;

2. *Brown & Beatty Canadian Labour Arbitration – 4:2110* – Normal or Ordinary Meaning;

3. *Brown & Beatty Canadian Labour Arbitration – 4:2150* – The Context of the Agreement;

4. Excerpts from Lancaster House (17.6 and 17.5);

5. *Simcoe (County) v. S.E.J.U., Local 1*, 2009 CarswellOnt 5089;

6. *Fort St. John General Hospital and BCNU, Re*, 1994 CarswellBC 3291;

7. *British Columbia Public School Employers' Assn. and BCFT (Mccleary), Re*, 2009 CarswellBC 4022, 99 C.L.A.S. 162;

8. *Brown & Beatty Canadian Labour Arbitration – 2:2211* – The Basic Elements;

9. *Brown & Beatty Canadian Labour Arbitration – 2:2221* – Past Practice;

   Brown & Beatty Canadian Labour Arbitration – 3:4430 – Past Practice;

10. *Brown & Beatty Canadian Labour Arbitration – 2:2213* – Duration of an Estoppel;

11. *Agassiz School Division No. 13 (Re)*, [1997] M.G.A.D. No. 61;

14. *St. Michael's Hospital v. Service Employees International Union, Local 1 Canada (Collective Agreement Grievance)*, [2012] O.L.A.A. No. 79;

15. *Brown & Beatty Canadian Labour Arbitration – 2:1518* – Temporal Limitations;

16. Manitoba v. Manitoba Government and General Employees' Union (Muster Employee Compensation Grievance), [2008] M.G.A.D. No. 34;

The Association argued that one has to look at the entirety of the agreement and the context in which the agreement was negotiated. One of the principles of contract interpretation is that there is an assumption that you didn't mean to limit language. Article 6.04 is included under the Administrative Allowance section. The placement is important

because all of the employees get a predetermined allowance. The Association stressed that nowhere does it say in the agreement that there is any prorating other than limits on designated teachers. The Association acknowledged that the Division was candid in stating that there was nothing in the agreement specifically providing for pro-rating and that they were relying on past practice.

The Association submitted that there wasn't any language in the agreement which would allow for prorating of consultants' allowances. There is for other positions. For example, Article 9.01(b) provides that part-time teachers are paid a salary based on the percentage that the workload contracted bears to a full-time workload. Article 9.05 provides for the prorating of sick leave entitlement for part-time teachers. Prorating of sick leave is also dealt with in article 10.08.

The Association stated that we are dealing with an allowance that comes from the clear language in the agreement. How can the agreement be interpreted in any other way? If an employee is a consultant, they receive an allowance as set out in the agreement. The only difference with Vice-Principals is that the Division appointed consultants on a half-time basis, and if one follows the Division's logic, if they appointed Vice-Principals as half-time Vice-Principals they would then be in a position to pay these employees one half of the allowance set out in the agreement.

The Association commented on the testimony of the two half-time consultants. They pointed out that the witnesses were credible, unshaken, and forthright in their testimony. They acknowledged that they received and accepted the pay. The fact that they accepted payment as they did doesn't change anything if the language in the agreement is clear. Over time they came to realize that they were no different than Vice-Principals.

While the Division argued that the Vice-Principal is always a Vice-Principal and a consultant is not always a consultant, that is not what the evidence from the consultants was. The job extends past artificial time restrictions created by the Employer. The

consultants' evidence was that they are always a consultant and that they know they are not just part-time. It's an assignment that needs to be done.

The consultants give flexibility to the Division but the Division has to be mindful of the contract between the parties. The employees are to receive an allowance and there is no evidence that the Division did an analysis of the relationship between the workload and how the employees were paid. It's quite clear that under the agreement that was never the intent. Their duties and expertise are not half-time and they do all the same things as a full-time individual. There is no direct relationship between the allowance and the time spent as a consultant.

The Association submitted that the language in the collective agreement is clear on its face and no word creates any doubt as to its meaning. Just because a certain practice has carried on for a number of years, doesn't mean that one can't interpret the agreement properly. The Association's position is that the agreement has been interpreted in the wrong fashion. The Division will argue that the agreement is capable of more than one interpretation and therefore is ambiguous. The Association responded that just because it is capable of more than one interpretation does not mean that it is ambiguous.

The Association stated that it is necessary to look at the purpose and the context in which the clause in the agreement exists. The context of Article 6 is that there are people who get recognition for doing something. The context is that this extra thing is not measured in time or in skills. The exception is where the number of students or teachers supervised comes into play. The Association pointed out that any limiting language in Article 6 and 7 of the agreement is specifically stated. So for example in Article 6.06 designated teachers get an allowance even if they never step into the shoes of the Principal.

There are no limitations imposed on the Early Years Coordinators who work part-time and there will be a grievance with respect to these positions. At the end of the day, there is no difference between Principals and consultants. The Association insisted that that is

an important point because it informs us that the intention was the same with respect to both of these positions.

The Association argued that there was nothing unreasonable in their interpretation of Article 6.04. The Association stated that their interpretation would not lead to an anomaly. The amount in issue is miniscule and is easy for the Division to pay. The part-time consultants have a tremendous amount of responsibility and this is recognized by the Division. They always are a consultant and their consultant role does not shut off when they enter a classroom.

As to the past practice, the Association stated that there was no evidence that the employees ever accepted terminology of a half-time allowance for a half-time position. The evidence is that the Association never believed that they were only entitled to half-time pay. The Association always believed that they were entitled to the full allowance. He brought the issue forward so as to not have trouble in the future and to bring certainty to the provisions. In their minds it was already certain.

The Association submitted that the past practice is of limited use in this case and is of no assistance in determining the intention of the parties.

The Union referred to Arbitrator Paula Knopf's decision in *County of Simcoe* referred to above. In dealing with a grievance surrounding a uniform allowance, Arbitrator Knopf stated that the language was clear in the collective agreement and there were no conditions placed on the entitlement to the allowance. She went on to say that nothing in the agreement gave the Employer the right to pro-rate that allowance. The Association argued that this kind of reasoning is applicable to the case at hand.

As to the issue of estoppel, the Association stated that if one accepts that the Division had notice as to the Association's position, then the estoppel should end at the end of 2014. Reference was made to the *Fort St. John General Hospital* case (cited above). In that case a particular article in the collective agreement provided that part-time employees

were entitled to benefits on a proportionate basis with certain specific exceptions. The Association stated that there was nothing in the applicable agreement in this case. It is like the article referred to in the *Fort St. John* decision.

The Association argued that estoppel is based on fact. The question arises as to whether the Association at the end of the day on June 18 agreed to be bound by the Division's interpretation of Article 6.04. The Association states that they told the Division that they wanted to keep their options open and that they let the Division know their position. They indicated they would not be continuing to be bound by the Division's interpretation. The Association maintained that the onus is on the Division to establish an estoppel.

The Association submitted their witnesses always acted consistent with what they said about the notice. They provided a foundation as to why the proposed language changes and they were consistent on their testimony. They were consistent in their evidence that if the Division wouldn't agree to the proposal, that they would reserve the right to grieve. Reeves' email to Daniels in September is consistent with this position and is critical. It directly supports the Association's position and if they had agreed to be bound to the past practice then this email makes no sense.

The Division's response is to say that the Association's position is outrageous. Daniels did not testify and an adverse inference should be drawn with respect to the failure of his testifying. This is extremely unusual if Denovan's evidence is accurate.

The Association argued that Giesbrecht's evidence was not credible. The Association's evidence should be preferred and it is difficult to accept his testimony. There are so many issues with respect to his testimony that didn't ring true. All three witnesses stated that when they indicated that they would grieve, his response was are you threatening me. He says he'd take it as a threat if it had been said. Reeves testified that he indicated that they were not threatening but this is what they would do. Overall Giesbrecht's evidence is of no use.

The Association stated that it is easy to say that because the Division produced notes of the June 18 meeting, that their evidence should be preferred over that of the Association which did not have notes of the last negotiations. The Association stated that the fact that there were no notes was not unusual. The Association was involved in a pressure cooker situation and it was Breen's first experience bargaining. Merely because there are no notes does not make the rest of the evidence worthless. The Association reiterated that there were three witnesses whose testimony was unshaken as to what happened that day.

Denovan was honest in her testimony. She didn't take verbatim notes. She allowed that she didn't hear certain evidence. By withdrawing language she concluded that the Association was agreeable to past practice. The Association maintained that Denovan was mistaken.

The Association referred to Arbitrator Blair Graham's decision in the *Agassiz School Division Number 13* decision. The Association stated that when an employee functions as a consultant, even though they are not doing it all the time they are still a consultant. There is a clear analogy between the *Agassiz* decision and the case at hand. In *Agassiz* Arbitrator Graham reviewed the issue of the duration of the estoppel. The test is fairness – that it is appropriate to give the other side the opportunity to correct its position.

The Association submitted that the grievance should be upheld.

SUBMISSION OF THE DIVISION

On behalf of the Division, Mr. Simpson stated that this case is not about good work, fairness, or whether teachers work as consultants all the time. It is not the role of an arbitrator to determine that issue or to determine how principals are paid. While the Association argues that one has to interpret consultants in the same way as Vice-Principals, this is not a proper interpretation.

Vice-Principals are not equivalent to consultants. Consultants are teachers who do some consulting. The consultants who testified at the hearing are half-time, the position was advertised as such, and the teachers apply for the positions and were accepted into them as half-time positions.

The Division noted that there has never been a grievance filed about its ability to create a part-time position and the Division has had part-time consultants since 1985. The Division therefore can create these positions and there is evidence about the workload being appropriate. The Assistant Superintendent assesses the needs of the school and a budget is created for the position. Both part-time and full-time jobs are set up based on the need to fill the job.

The Division argued that this grievance is about language (whether it is ambiguous), past practice, and estoppel. The Division maintains that it is logical that if employees are working part-time that the compensation is adjusted accordingly. The teachers applying for these consultant positions knew that they were part-time and that they were going to be receiving a pro-rated allowance.

The Division referred to the following authorities in support of its submission:

1. *Wire Rope Industries Ltd. v. U.S.W.A., Local 3910*, 1982 CarswellBC 2620
2. *Westfair Foods Co. and UFCW, Local 832, Re*, 1996 CarswellMan 710
3. *Brown & Beatty, Extrinsic Evidence*, 3:4400
4. *Brown & Beatty, Ambiguity*, 3:4401
5. *Ipsco Inc. v. B.S.O.I.W., Local 805*, 2004 CarswellAlta 984
6. *Leitch Gold Mines Ltd. v. Texas Gulf Sulphur Co.*, 1968 CarswellOnt 318 (Excerpt)
7. *Brown & Beatty, Past Practice*, 3:4430
8. *I.A.M., Local 1740 v. John Bertram & Sons Co.*, 1967 CarswellOnt 782
9. *Brown & Beatty, Estoppel: The Basic Elements*, 2:2211
10. *St. Catharines Standard v. St. Catharines Typographical Union*, 1998 CarswellOnt 5325

11. *Red River Valley School Division and Red River Valley Teachers' Assn., Re*, 2006 CarswellMan 901

The decision in *Re Wire Rope Industries Limited* is authority for the principle that the party seeking to establish a greater monetary benefit bears the onus of so establishing. The Association is asking for an interpretation of the clause which would give half-time consultants full-time pay.

The Association referred to authorities that stand for the principle that it would be an egregious error on the part of the board of arbitration to take language in the collective agreement and to increase significantly an employer's cost by reading into that language what was neither contained or intended by the parties at the time the language was drafted. The Division noted that the Association is asking the arbitration board to read in language into the collective agreement which they actually sought at bargaining.

The Division stated that the Association is seeking to have all part-time and full-time employees treated in the same fashion and the Division's position is that part-time employees should be paid a pro-rated allowance. Therefore there are two different interpretations of the agreement and that's what gives rise to an ambiguity. The parties are both trying to insert certain language into the agreement to support their interpretation. The Division noted that the issue in this case had never been raised by the consultants who came from the Transcona Division and who had pro-rated language in their agreement. They have gone from this language to an agreement where there was not any pro-rata language included in the agreement. Yet they did not file a grievance.

The Division submitted that there is either a patent or latent ambiguity. An ambiguity is patent when it appears on the face of the agreement. Where an ambiguity is latent and not apparent on the face of the agreement an arbitrator is entitled to rely upon extrinsic evidence to disclose the ambiguity and also as an aid to resolving the ambiguity. The Division referred to *Brown and Beatty Canadian Labor Arbitration* as an authority for these principles.

The Division submitted there is an ambiguity in this agreement with respect to the amount to be paid to consultants. The onus is on the Association to prove if there is an entitlement as alleged in the grievance.

As to the issue of past practice, the Division stated the evidence is clear that consultants were paid an allowance based on their either being part-time or full-time. This is not in dispute between the parties. The Association has conceded that there is an estoppel. The Division's position is that past practice resolves the ambiguity in the agreement. The Division highlighted that they were not hearing an argument from the Association that they were not aware of the past practice. The payments were clearly set out on the pay stubs issued to the employees.

The issue of whether notice was given by the Association to the Division does not have a bearing on changing the meaning of Article 6.04. Notice is only relevant to the issue of estoppel, but not relevant for the interpretation of the agreement. The negotiating history and the evidence of same is of help to the Employer. The reason is that the Association attempted to clarify the language. They were at the very least trying to change the way the article was being interpreted. At negotiations, an increase in the amount of allowance was agreed to by the Division.

The Division commented on certain of the evidence tendered at the arbitration hearing. In particular Pat Denovan was an impressive witness. She did not have a vested interest in the proceedings and was brought in to negotiate on behalf of the Division. She is retiring from her job and was forthright in giving her evidence. She was not argumentative and is an experienced negotiator and is trustworthy. She made notes contemporaneously with the negotiations. It was not known at the time of the note taking that there would be a dispute. There is no suggestion that her notes taken by her during negotiations were fabricated. Her evidence at the hearing was consistent with the written proposals and passes which were tendered into evidence.

The Division referred to what took place at the end of bargaining. There were four issues outstanding. The parties went to committee to come up with proposals. In the margin of Denovan's notes was a notation which stated "agree to the dollars will continue to prorate". To suggest that prorating was not discussed doesn't make sense. That was the specific issue that the Association was seeking to have addressed. When the Division questioned other witnesses no one challenged this point.

At 11:40 a.m. of the last bargaining session the Association came back to meet with the Division and agreed to the dollar figure and to the long standing practice of prorating. The Division insisted that this creates a brand-new estoppel when the Association continues to agree to the practice based on negotiating history. The Division submitted that the long-standing practice was agreed upon as continuing. Alternatively the Division stated there simply is a binding agreement on the meaning of article 6.04.

The Division turned to the issue of whether notice was given with respect to the termination of the past practice. The Division stated that the onus was on the Association to prove that notice was given. The Division argued that the Association witnesses were not credible. Which evidence is more probable? It was submitted that the Association did not meet the onus on it to prove that the notice was given.

Denovan testified that the Association had agreed to the past practice of paying half-time consultants pro-rata allowance. Why then would they give notice to grieve? The Division argued that there was nothing in the notes tendered into evidence of anything referencing an intention to grieve. The Division stated that one party has clear notes with respect to what transpired at the negotiations versus the other party's lack of any notes or documentation with respect to what transpired. The Division stated that the Association submission doesn't make sense. Witnesses referred to related body language and the Division stated that this evidence is incredible. It is hard to know what body language is. The Division stated that if the notice with respect to meeting was critical and was made at the time of the negotiations someone would've written it down and made a note. The

Association's witnesses rely solely upon their recollection of events which took place some time ago.

The Division stressed that it is important to look at the context of the discussions and negotiations. The evidence is clear that the Association wanted to conclude an agreement. Paci testified that the Association was working in a pressure cooker and they needed to make a deal that day in order to get the agreement ratified in time to provide for certain benefits for their membership. They wanted a deal done because of the maternity leave benefits that would accrue to their members. The Association representatives knew very well that if they said that they'd grieve, the Division would walk out and that this would push continuing negotiations to the fall. That is consistent with people leaving the negotiations. The Division asked the question as to why they would agree to pay more money for the allowance if they knew that they were going to be fighting over the whole issue. The Division submitted that the evidence of the Division's witnesses should be preferred over that given by the Association's witnesses.

The Division argued that the only conclusion one can draw is that the Association didn't give notice of an intention to grieve. The Association wanted a deal and withdrew their position on a bereavement claim and agreed to continuing the application of the current practice with regards to consultants. The other two issues of the remaining four were referred to nonbinding committees.

Further, the Division maintained that there was no notice given subsequent to that meeting. While the Association refers to and relies upon a subsequent email, there is nothing in that email to suggest there was an intention to file a grievance. The Division's witnesses were clear that if there had been any mention of an intention to file a grievance after negotiations that negotiations would've been broken down. Denovan testified that if this had been brought up she would've had to obtain further instructions.

As to the issue of estoppel the Division argued that it should continue until June 2018. Preferably the matter should be left for the parties to bargain as the Division needs time to arrange its affairs.

The Division submitted that the grievance should be dismissed.

REPLY SUBMISSION OF THE ASSOCIATION

The Association argued that the cases are fact driven. The facts in the *Red River* decision are substantially different from those in the *Agassiz* decision. The Association reiterated that the intention of the parties is easy to determine based on the wording of the agreement. With respect to ambiguity, the Division argued that even in the case of clear language, it may not be clear that the language applies to every situation. The Association stated that the issue to be addressed is whether the provision on its own in the context of the agreement is clear or is it ambiguous. If one follows the Employer's reasoning, everything can potentially be ambiguous.

As to the Division's argument that the Association is asking language to be read into the collective agreement, the Association replied that this is not a proper characterization. The Association's interpretation is 100% consistent with the existing language in the agreement.

As to Denovan's testimony the Association conceded that she was a good witness. However she was mistaken in some areas such as when Giesbrecht left the meeting. Also she didn't take complete notes of what transpired at the negotiations. The Association maintained that she wrote down what she felt was going to happen as opposed to what was stated to have happened regarding the discussion about the continuation of the past practise.

On the issue of notice with respect to the past practices termination, the Association insisted the email of September 18 is critical for a number of reasons. Reeves testified

about the email and his conversation the day before. Reeves testified that Daniels knew about it because he knew that they were going to file a grievance. Daniels was not produced to testify at the hearing. This leaves a gap in what one would normally expect. As to Denovan's evidence she must have been mistaken. The Association acknowledged that they could have done things differently, taken notes and given written notice. This doesn't mean things didn't happen the way they said they did. As to the increased payment by the Division, one can only speculate as to why they agreed to pay more. It was clear that both parties wanted to resolve matters.

Analysis and Decision

The dispute between the parties is over the interpretation of Article 6.04 of the collective agreement. Are half-time consultants entitled to the full allowance set out in Article 6.04 of the agreement?

The Association argues that the language is clear. There is not language which provides for a pro-rating of the allowance set out in the agreement. While some articles in the agreement pro-rate compensation based on hours, the parties chose not to do so in this case. That ends the matter.

The Association fairly acknowledges the long-standing practice by the Division to pro-rate without objection by them and agrees they should be estopped from asserting their interpretation until June, 2014.

The Division counters that there is a latent ambiguity as that term is defined in the case law. Extrinsic evidence is therefore admissible to disclose and resolve the ambiguity. The past practice in this case resolves it unequivocally. That also ends the matter.

The Division, in the alternative, says that if the Association's position is upheld, they should be estopped from receiving any benefits until at least the expiration of the current agreement.

The parties' initial position eliminated the need to delve into what exactly took place in bargaining and whether the Union abandoned its position on amending the Article or put the Division on notice of its intention to file a grievance.

In the alternative, the Association says that they put the Division on notice at bargaining that they intended to grieve the application of Article 6.0.

The Division denies that the Association gave such notice.

The law dealing with the interpretation of collective agreements has been the subject of endless commentary by arbitrators and the Courts.

Ultimately the goal is to determine the intention of the parties by examining the ordinary meaning of the words used in the context of the article. The agreement must be read as a whole. Over time arbitrators have moved from a strict literal interpretation and have been more inclined to look beyond the four corners of the agreement to determine its meaning.

In cases where there is or may be an ambiguity, arbitrators have taken into account extrinsic evidence, often evidence of past practice, to assist in the interpretation of the agreement.

The seminal case of *John Bertram & Sons Co.*, relied on by the Division, provides a useful foundation for deciding this case. At paragraph 12 of the decision Arbitrator Weiler stated:

> "A second use of "past practice" is quite different and occurs even where there is no detrimental reliance. If a provision in an agreement, as applied to a labour relations problem is ambiguous in its requirements, the arbitrator may utilize the conduct of the parties as an aid to clarifying the ambiguity. The theory requires that there be conduct of either one of the parties, as an aid to clarifying the ambiguity. The theory requires that there

> be conduct of either one of the parties, which explicitly involves the interpretation of the agreement according to one meaning, and that this conduct (and, inferentially, this interpretation) be acquiesced in by the other party. If these facts obtain, the arbitrator is justified in attributing this particular meaning to the ambiguous provision. The principal reason for this is that the best evidence of the meaning most consistent with the agreement is that mutually accepted by the parties."

As Palmer set out in *Collective Agreement Arbitration in Canada* (4th ed.) at page 44, what the party relying on past practice is claiming reveals a tacit understanding between the two parties regarding the meaning of the disputed provision of the agreement. As a result such an arrangement can be accepted if consistently followed for a period of time and not challenged.

Applying this law to the facts, it is clear that the uncontradicted evidence is that the Division for years created and posted half-time consultant positions and paid them one-half of the allowance set out in Article 6.04. Teachers applying for the position were aware of the salary. No one raised questions about it until 2013.

The compelling evidence of past practice extending over thirty years reflects the parties' intentions that the allowance would be pro-rated for a half-time position and this clearly establishes there is an ambiguity in Article 6.04.

This is not the case of the parties making a mistake in interpretation. The interpretation placed on the article was reasonable.

What if the Division posted a .25 consultant position? Would the Association's position be that the consultant receives the full allowance? This would not be a reasonable interpretation of the agreement in that a consultant would get the same allowance for one-fourth of the work.

Something triggered the Association to take issue with the application of Article 6.04. It may very well have been when teachers discovered how the Vice-Principals were paid. In any event, this does not impact the decision in this case.

In light of my finding that there was a common intention as to the meaning of the words, it is not necessary to make specific findings on whether there was an estoppel or what was said and agreed to at the negotiations in June of 2015.

In light of the above determination, I do not intend to get into a detailed analysis of what transpired at the bargaining table.

Suffice it to say, that I am satisfied on balance that the Association did not raise the issue of filing a grievance at the end of bargaining. I do not accept that the Division, while facing the threat of a grievance, would agree to an increase in the allowance.

Secondly, the Division had the only written record of the proceedings. These notes confirm their position. The notes were accompanied by Denovan's evidence which I find to be credible and trustworthy.

The Association must be mistaken about raising the issue of filing a grievance and their recollection may be in error due to the pressure they were under to conclude a deal.

In addition, I do not place much weight on the fact that the Association inquired 3 months after the agreement as to whether the Division intended to continue to pay half-time consultants half of the allowance set out in the agreement. There is no reference in the email to a grievance being filed nor any reference to what was said at the negotiations.

If I had not found that the agreement was ambiguous and found as I did, I would have determined that the Association was estopped from maintaining its position until the end of the current agreement.

In sum, the grievance is dismissed.

I wish to thank the parties for the way this case was presented and argued.

DATED at the City of Winnipeg, in Manitoba, this 20th day of June, 2018.

MICHAEL D. WERIER

I concur with the above Award.

GRANT L. MITCHELL, Q.C.
Nominee of the Division

I dissent from the above Award
(Reasons attached).

DAVID M. SHROM
Nominee of the Association

IN THE MATTER OF AN ARBITRATION BETWEEN:

RIVER EAST TRANSCONA SCHOOL DIVISION,

Employer,

— and —

RIVER EAST TRANSCONA TEACHERS' ASSOCIATION,

Association.

Grievance re: Article 6.04 – Consultants' Allowance

DISSENT OF DAVID M. SHROM

NOMINEE OF RIVER EAST TRANSCONA TEACHERS' ASSOCIATION

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

Although I agree that there was an estoppel against the Association for the period from 2002 until the 2015 negotiations, I do not agree that there was any further estoppel created in the negotiations to conclude the 2014 – 2018 collective agreement, and therefore based on my interpretation of Article 6.04, I would have provided the remedies sought in the grievance.

The issue in this grievance was relatively straightforward. It involved the interpretation of Article 6.04 of the collective agreement and whether the Division was paying consultants properly, that is, the correct allowance in accordance with Article 6.04 of the agreement. More specifically, the issue was whether consultants that still do some teaching (which the Division characterized as "part-time consultants") should get the allowance called for in the collective agreement, or whether they should get a pro-rated allowance.

There was a longstanding practice of pro-rating the pay for these consultants which the Association acquiesced to and therefore created an estoppel. This prevented the Association from claiming any remedy for the period prior to 2015 and was in fact conceded by the Association at the arbitration hearing.

This evidence of pro-rating the consultants' allowance, however, was not evidence as to the intention of the parties. And in this regard, I specifically disagree with the majority finding that this extrinsic evidence could be utilized as an aid to interpret latently ambiguous language. The language of the collective agreement was and is not ambiguous. In my view the past practice evidence was simply evidence that the Division misapplied this collective agreement for years[1] and the Association did not challenge it, therefore creating an estoppel.

The Association, however, gave notice in the 2015 round of negotiations that it did not accept the Division's interpretation and application of the Article. This was done in Exhibit 20, Tim Breen's statement read in negotiations advising the Division as to the rationale for the Association's proposal. In reading that statement

[1] Exactly the same as the finding by Arbitrator Graham in the *Agassiz School Division* case [1997] M.G.A.D. No. 61.

it was made clear to the Division that the Association no longer accepted the Division's interpretation, and therefore the Division was no longer misled or deceived into believing that they were applying the collective agreement correctly. The Division knew exactly how the Association interpreted the Article. Given that notice was provided to end the estoppel, there were two issues left for the Board to deal with. First, what happened in the negotiations in June of 2015 that resulted in the 2014 – 2018 collective agreement, and whether any new estoppel was created by virtue of what occurred in those negotiations. And secondly, what was the proper interpretation of Article 6.04 (the interpretive issue on the merits).

In my view, there was no "agreement" in negotiations by the Association to accept the practice of pro-rating these consultants' allowances. Nor was there any representation intended to affect legal relations that could create a further estoppel. There was simply a misunderstanding or assumption by the Division. The trade-off in negotiations was withdrawal of the language proposal by the Association for the Association's money on the allowance. There was never an agreement to accept the continuation of the practice. To reach this conclusion it is necessary to carefully analyze the specific evidence given from the negotiation meeting on June 18, 2015, specifically, the exchanges between the parties at 11:10 a.m., 11:30 a.m. and 11:40 a.m. At 11:10 a.m. the Association asked if the current language didn't change, i.e. if they withdrew their language proposal, could they get more money on the consultants' allowance. At 11:30 the Division advised as to its position and said that it could agree to increased money and stated that the Division would continue with its practice to pro-rate the allowance. At 11:40 all the Association simply did was agree to withdraw the language proposal and leave the current language unchanged, and agreed to the increased money on the allowance. The Association did not expressly agree to accept the continuation of the practice. In fact, no such words

were ever attributed to any Association negotiator. If you review carefully the evidence of the Division's witnesses on this point, neither said that Frank Reeves (the Association spokesperson on this particular issue), ever said those exact words. Trustee Rod Giesbrecht simply said, "our understanding was . . . and Pat Denovan simply recorded in her notes 'agreed - current language and practice – Association money' ".

The Division assumed, given the context of the Division's position at 11:30 a.m. that the practice would continue, but that was simply an assumption; in fact, an incorrect assumption. And whether the Division's witnesses heard the Association reserve the right to grieve or not is almost irrelevant in the sense that the Association did not have to expressly say that they were going to reserve the right to grieve if the practice continued. Notice ending the estoppel had already been given through Exhibit 20 earlier in negotiations. The Association merely withdrew its language proposal and the Division was fully aware that the Association disputed its interpretation of Article 6.04. Therefore there was no estoppel and no proof of any agreement to continue the practice.

The reasons I find it difficult to conclude that the Association agreed to accept the continuation of the practice of pro-rating are as follows. First, the issue of proper pay for these consultants was an important issue. It was raised years earlier – according to the evidence in 2013 – but the Association learned when they went to MTS for advice that they were estopped by virtue of having acquiesced to a longstanding practice. They were advised that they would have to wait to deal with the issue in negotiations. Secondly, the issue of pay for these consultants was an important issue and that is proven by the fact that it was not an issue thrown away earlier in negotiations. It was an important issue and was one of four remaining

issues outstanding at the end of negotiations. Thirdly, strategically the Association knew if it simply withdrew its clarifying language proposal, it could still grieve now that the notice had been given that they did not accept the Division's longstanding "wrong" interpretation. So the Association would not have agreed to continue the practice. There is no question, however, that the Division assumed or misunderstood that they were accepting the practice and that seems to be reflected in Pat Denovan's notes. But that is entirely different from the Association actually accepting the practice. Proof that the Association did not accept the practice comes by virtue of Exhibit 17, the email sent in September, 2015 from Frank Reeves to Assistant Superintendent Greg Daniels inquiring as to whether the Division would be continuing the practice of pro-rating these consultants' allowances. Why would the Association possibly write that if they knew that they had agreed to the continuation of the practice? That would require a finding of intentional deception, and I do not accept that the Association operates in that fashion. Tom Paci, the Chief Negotiator for the Association in this matter, is an experienced collective bargaining negotiator and he testified that the Association never agreed to accept the continuation of the Division's practice, and I accept that evidence. As mentioned earlier, it is easy to understand how the Division may have believed that the practice would continue given the exchange at 11:10 a.m., 11:30 a.m. and 11:40 a.m., but that is entirely different from finding that the Association did in fact agree to accept the practice.

It is also easy to reconcile the evidence regarding whether the Association made reference to filing a grievance. Although in my view, as noted earlier, it is not necessary for the Association to have done so, because notice had already been given to end the estoppel.

Three witnesses from the Association gave *viva voce* testimony that reference was made to grieving. The Division, on the other hand, only had two individuals testify.[2] Rod Giesbrecht, a Trustee in the Division testified, but his evidence was not evidence that was sufficient on this point to contest the Association's evidence. He testified that he was frustrated at this last negotiations meeting. In fact he left the negotiating meeting feeling that they weren't going to get an agreement. He came back at Pat Denovan's urging for one last effort, but without his binders and papers and therefore had no notes from this particular portion of the meeting. He did not correctly recall the terms of the financial settlement on the consultants' allowance, and therefore his memory regarding details of what might have been said at that final stage of the negotiation meeting was not reliable.[3] Pat Denovan also testified on behalf of the Division and she was the spokesperson on behalf of the Division in negotiations, and was a credible witness. However, she said honestly at least three times in her testimony, that when asked about whether the Association made reference to grieving, that she didn't hear it – not that it wasn't said necessarily, but that she didn't hear it. It is possible, therefore, in the heat of the deal, she didn't hear such reference nor note it down.

Given that in my view there was no agreement in negotiations to accept the practice of pro-rating, and no representation to create any new estoppel, we then deal with the merits of the issue – the interpretation issue. I don't think there is any doubt that the language of the collective agreement is very clear. A consultant is entitled to the allowance provided for in the collective agreement. There is no express

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[2] The Division could have called Assistant Superintendent Daniels who was present at the final negotiating meeting and chose not to, and the Association invited an adverse inference from this failure to testify.

[3] There is also the whole "coincidence" of the three Association witnesses testifying that Trustee Giesbrecht made reference to whether the Association was threatening the Division and Trustee Giesbrecht used similar terminology in his direct testimony before the Board.

restriction or pro-rating language and it can't be read into the agreement. It is no different than the Vice-Principal situation. The evidence before the Board was that there are part-time Vice-Principals who do some teaching and are Vice-Principals, and get the allowance provided for in the collective agreement, i.e. no pro-ration of the allowance. Further, if you look at Exhibit 28 (which is a listing of various individuals who may hold positions on a part-time basis and do some teaching as well, and whether their allowance is pro-rated or not), everyone referred to in Article 6 dealing with Administrative Allowances receives their allowance by virtue of their status, and they all get the allowance provided without pro-ration. The only example on Exhibit 28 that provided for some pro-ration was in Article 7 dealing with Early Years Coordinators, and yet the evidence was that the Association was unaware of the pro-ration and indicated that it would investigate the matter further and grieve if necessary.

It is necessary to understand the nature of the employment of teachers and allowances to get over the oversimplified view that if you don't work full time as a consultant, you don't get the consultants' allowance. All consultants are teachers. All these individuals work full time for the Division and are all paid differently based on their qualifications and experience, i.e. on the teachers' salary grid.[4] Some teachers achieve a certain status. They are recognized as curricular leaders and resources for other teachers and that is based on their knowledge and leadership skills, and therefore they get an additional allowance in recognition of that status. The appointment as a consultant is not a separate job or does not constitute separate employment. It is not as if you have a teacher's job with a salary and certain hours and then separately you have a consultant's job with a separate salary and defined

[4] You could even have a part-time Consultant being paid more overall than a full time Consultant because that teacher is much higher on the salary scale.

hours. They are all teachers who get their full regular teacher's salary on the grid. Some are assigned to be curricular leaders all the time, and therefore get the allowance provided for in the collective agreement.[5] The evidence of the two consultants, Dave Woitowicz and Bev Ilchena, was consistent and clear – they are curricular leaders, they have achieved that status, that role does not turn on and off neatly, they do consultants work all the time, they each took time from their teaching assignment to do consulting work, they do what has to be done to get the job done. They are consultants and therefore they should get the additional allowance.

Basic principles of interpretation suggest that an arbitration board has to give the language of the collective agreement its plain and ordinary meaning. Article 6.04 provides, "Consultants shall be paid an annual allowance above and beyond the salary outlined in Article 3 of this collective agreement as follows:". These individuals are consultants and therefore they should be paid the allowance provided for in the collective agreement in recognition of their status. There is no restriction or pro-rating clause in the collective agreement and it can't be read into the agreement. (See the *Simcoe* case [2009] 182 LAC (4th) 170). Where these parties intend to pro-rate a benefit they say so expressly, i.e. in Article 9.01(b) for part-time teachers' salaries are pro-rated. In Article 10.08(b) sick leave for part-time teachers is pro-rated, and in Article 10.11, personal leave benefits for part-time teachers are pro-rated. Just as part-time Vice-Principals who do some teaching get their proper Vice-Principal's allowance, so too should these consultants. A consultant is a consultant. They have certain status and it is recognized in the collective agreement

[5] Note: They still get their full teacher's salary, but they are not teaching at all. And some teach still and are also curricular leaders and resourcists, just not all of their time. They should still, however, receive the allowance because they have that status and the collective agreement does not expressly restrict or pro-rate the allowance.

by way of an allowance; and even those that still have a teaching assignment should receive this allowance – not on a pro-rated basis.

Accordingly I would have allowed the grievance and provided remedies for any such "part-time consultants" for the period June 18, 2015 to date.

All of which is respectfully submitted this 18th day of June, 2018.

Nominee of River East Transcona
Teachers' Association