

IN THE MATTER OF: An Arbitration under Part VIII of The Public Schools Act RSM

BETWEEN:

TURTLE RIVER TEACHERS' ASSOCIATION
OF THE MANITOBA TEACHERS' SOCIETY,

(hereinafter referred to as the "Association"),

- and -

TURTLE RIVER SCHOOL DIVISION,

(hereinafter referred to as the "Division").

AWARD

Arbitration Board

Blair Graham - Chairperson

John Collins - Nominee of the Association

Gerald Parkinson - Nominee of the Division

Appearances:

For the Association: Saul Leibl
 Tom Paci
 Mike Bell

For the Division: Craig Wallis
 Marcie MacDonald

AWARD

INTRODUCTION

This arbitration proceeded pursuant to the provisions contained in Part VIII of *The Public Schools Act RSM* entitled: "ARBITRATION OF COLLECTIVE BARGAINING DISPUTES". On March 1, 2005, the Association gave notice to the Division of the Association's desire to refer collective bargaining matters then in dispute between the parties to an Arbitration Board. The parties appointed their respective nominees to the Arbitration Board (Mr. Collins, on behalf of the Association, and Mr. Parkinson, on behalf of the Division). The parties' nominees were unable to agree upon a Chairperson, and accordingly upon the request of the Association, the Manitoba Labour Board appointed me as Chairperson of the Arbitration Board (hereinafter referred to as the "Board") on October 13, 2005.

Scheduling delays were encountered, but the Board ultimately convened in McCreary, Manitoba, from Monday, September 11 to Wednesday, September 13, 2006, inclusive, and again from Monday, September 25 to Thursday, September 28, 2006, inclusive, in the presence of the parties, and their representatives, for the purpose of receiving the parties' materials and submissions. The parties agreed that the Board was properly constituted and had jurisdiction to determine the matters in dispute with respect to the terms of a new collective agreement between the parties to take effect from July 1, 2004.

The parties presented extensive materials and made very thorough and able submissions to the Board during the September 2006 hearings. Several representatives of both parties were in attendance throughout some or all of the hearings.

Various teachers employed by the Division attended periodically throughout the hearings. Three teachers were regularly in attendance and also made very helpful and moving presentations, namely Alanna Madsen, Leanne Elder, and Linda Henry.

Representatives of the Division who were frequently in attendance included Bill Main, the Superintendent of the Division, Richard Bidzinski, the Secretary-Treasurer of the Division, and several Trustees, including Lorna Marr, Gwen McLean, Donna Parthenay, and Gordon Wilson. In addition, Pat Denovan, a Labour Relations Consultant with the Manitoba Association of School Trustees, attended the hearings.

Initially there were 25 issues to be determined by arbitration. However, prior to the hearings convening, and as the hearings progressed, the parties were able to reach agreement on some of those issues, reducing the number of contentious issues to 17. One of the issues remaining in dispute is the period during which the new collective agreement will be in effect.

On the basis of the parties' submissions and the Board's review of the material submitted, it is clear that there are at least 2 issues of overriding significance to the parties, namely the salary schedule which ought to apply during the term of the new collective agreement and proposal by the Association with respect to a new Article relating to "hours of work". Linked to the Board's approach to those two matters is the issue of the effective period of the new collective agreement.

Furthermore, there is an additional issue which has proven vexing, not only to these parties, but to many other teachers' associations and school divisions in the province, namely devising a fair and reasonable provision for paid maternity and adoptive leave, and potentially paid parental leave.

Accordingly, those four issues will be dealt with by the Board at the outset of the Award. The remaining items in dispute will be considered and determined in the order in which the disputed Articles will appear in the new collective agreement, with proposals for new Articles being dealt with at the end of this Award.

ITEMS IN DISPUTE

1. Effective Period (Article 2)

Article 2 of the previous collective agreement provided that the agreement came into force and took effect on July 1, 2002, and remained in force until June 30, 2004.

The Association's amended proposal is that the new collective agreement take effect from July 1, 2004, and remain in force to June 30, 2006, namely a period of two years. The Division's proposal is that the new collective agreement take effect from July 1, 2004, and remain in force to June 30, 2007, namely a period of three years.

The Association articulated several logical reasons for preferring a shorter effective period, including:

- (i) The desire to get back to the bargaining table relatively promptly with respect to any problematic issues which may arise during the currency of the new agreement;
- (ii) Changes are occurring rapidly in the current educational environment, both legislatively and otherwise, and shorter agreements are generally to be preferred over longer agreements in order to enable the parties to bargain expeditiously with respect to new developments and issues;

- (iii) A concern that a longer agreement may result in teachers in the Turtle River School Division falling further behind teachers in other divisions in terms of salary and other benefits.

The Association readily acknowledged however that depending on the terms and conditions to be included in the new agreement, a longer effective period will not necessarily be detrimental to the interests of the teachers in the Division.

The Board notes that the majority of the collective agreements currently in force between teachers' associations and school divisions in Manitoba, remain in force until June 30, 2007.

The Board is also conscious that even if the Division's proposal for an effective period ending on June 30, 2007, is adopted, the parties will nonetheless be engaged in collective bargaining with respect to the next collective agreement relatively soon.

More importantly, in view of the decisions of this Board with respect to the salary schedule which will apply during the term of the new collective agreement and with respect to hours of work, it is our belief that a three year effective period is appropriate at this time.

Article 2 in the new collective agreement will therefore be as follows:

"This agreement shall come into force and take effect July 1, 2004, and shall remain in force until June 30, 2007. Thereafter, it shall remain in force unless either party gives the other a written notice by registered mail of a desire to terminate or amend the agreement."

2. **Basic Salary Schedule (Article 3.12)**

A great deal of information was submitted by the parties, particularly by Mr. Bell, on behalf of the Association, with respect to prevailing economic conditions both locally, (that is to say in the Turtle River area), and provincially. The Association stressed that the provincial data was more relevant because the Division obtains approximately 75% of its funding from the provincial government. Indeed, the Association pointed out that when appropriate adjustments are made to account for provincial contributions to pensions and other funds or allowances, the provincial government's contributions to the Division's revenues are approximately 85% of the total revenues.

The economic information submitted by the Association was extensive and informative. It involved a great deal of data with respect to key economic indicators with respect to the past performance and projected future performance of the Manitoba economy. A great deal of sectoral information was included with emphasis on the agricultural sector, which was further broken down to provide information with respect to the livestock, grain, and mixed farming components of the agricultural economy.

The Association's conclusion was that the Manitoba economy is growing and will continue to grow in the short and medium terms.

The information submitted by the Association on the economic conditions prevailing in the Turtle River area was also detailed, including data on the important economic activities in the area. Material was also submitted on the fiscal position of the Division, including information on operating surpluses and reserves, including capital reserves.

The Association also included an interesting analysis of the mill rate prevailing in the Turtle River area in their material. On the basis of that analysis, the Association vigorously argued that:

- (i) The Division has made a conscious decision to keep its mill rate down;
- (ii) There is room for a mill rate increase which would not be overly burdensome on local taxpayers; and,
- (iii) The Division's policy with respect to taxation is not consistent with maintaining high educational quality and standards.

While providing its analysis and arguments on mill rates, the Association emphasized that it does not accept that "ability to pay" is a relevant consideration for interest arbitrators when resolving public sector bargaining disputes. Nonetheless, the Association argued that the Division does have an ability to pay the salary and benefits being sought by the Association, and that if a modest tax increase is necessary, local ratepayers have the capacity to absorb such an increase.

The information submitted by the Division with respect to economic conditions was less extensive but equally informative. The Division's information stressed that the Division has a very small budget and a declining enrolment. It also stressed that the local economy is dependent on agriculture, and particularly livestock production, given the marginal quality of most of the lands in the area. The Division emphasized the extremely difficult times that have been experienced by the agricultural economy generally, and by cattle producers, in particular, in the last several years. A corollary of the above information was the lack of any significant industrial or commercial tax base in the area, the low average income in the area, and the limited opportunities available to the Division to raise further revenue through local taxes.

This Board will not be commenting further on the details of the information which was submitted to it with respect to economic conditions, except to assure the parties that the information was reviewed and carefully considered in reaching its decision, and that the Board found the information interesting, relevant, and helpful.

In addition to their respective submissions relating to economic conditions both provincially and locally, the parties supported their respective positions by referring to the pattern rate of settlements between school divisions and teachers' associations throughout the province which has been established over the last several years, and by comparing the salary schedules that they were proposing to the salary schedules currently in effect in other divisions.

The parties were in agreement that the pattern rate of settlements has been a 3% annual salary increase at each step and within each class of the basic salary schedule.

The Association's proposal is to adopt the higher salary scale of the Mountain View School Division effective July 1, 2004, to June 30, 2005, and thereafter to follow the pattern settlement rate of an annual 3% increase at each step on the scale and within each class in the salary schedule.

The Division takes a significantly different approach, and proposes that:

- (i) effective the first day of the fall term of 2004, \$1,700.00 be added at each step within each class of the salary scale;
- (ii) effective the first day of the fall term of 2005, an additional \$1,750.00 be added at each step within each class of the salary scale;

- (iii) effective the first day of the fall term of 2006, an additional \$1,750.00 be added at each step within each class of the salary scale; and,
- (iv) on June 30, 2007, an additional \$250.00 be added at each step within each class of the salary scale.

The Association readily acknowledges that its proposal exceeds the pattern rate for settlements by seeking wage parity with teachers in the Mountain View School Division as at July 1, 2004, and by seeking annual salary increases of 3% thereafter. The Association supports its proposal by relying on the following principles:

- (i) Wage parity - Teachers in Turtle River are essentially performing the same work and duties as other teachers, in other divisions, the majority of whom are paid more than teachers in Turtle River;
- (ii) Catch up - The salaries being paid to teachers in Turtle River have not kept up with inflation, nor have they kept up with increases being received by teachers employed in most other school divisions in the province;
- (iii) Recruitment and retention - The Turtle River School Division must pay competitive salaries in order to recruit and retain skilled and dedicated teachers. If not, teachers will leave to pursue teaching opportunities elsewhere, and educational quality will suffer. Approximately 25% of teachers employed in the public education system in Manitoba are expected to retire between 2005 and 2010, underscoring the importance of recruitment and retention over the next several years.

To further buttress its position, the Association points out that one of the effects of the amalgamations of school divisions in Manitoba which took place in July 2002 was that many school divisions have increased teacher salaries above the 3% pattern rate. Forty percent of Manitoba's teachers taught in amalgamating school divisions and approximately one-half of those teachers received salary increases above 3%. The Association also calculates that since 2002/2003, eight settlements, and one interest arbitration Award, covering approximately 32% of Manitoba teachers have resulted in increases greater than the pattern rate of 3%.

The Association also emphasized the reasonableness of its proposal, pointing to several other factors, two of which are particularly noteworthy:

- (i) The Association identified three neighbouring school divisions as reasonable comparisons, namely the Mountain View, Beautiful Plains, and Pine Creek divisions. The Association eliminated Pine Creek, which had the highest salary scale of the three, and Beautiful Plains, which had the lowest salary scale of the three, and settled upon Mountain View as being the fairest and most reasonable comparison;
- (ii) According to the Association, the extra cost to the Division of exceeding the pattern rate (i.e. the extra costs associated with achieving parity with Mountain View) is only \$18,238.00 per annum.

The Division also outlined a logical and reasonable basis for its position, emphasizing the following features of its proposal:

- (i) It will essentially keep Turtle River teachers in the same position relative to teachers in other divisions in Manitoba. In contrast,

moving to parity with the teachers in Mountain View will simply encourage more “leapfrogging” in future collective bargaining (e.g. Mountain View teachers will argue that they have historically enjoyed a higher salary scale than their Turtle River colleagues, and that their higher scale should be restored in the next round of collective bargaining);

- (ii) Teachers are part of their local communities, and teachers are among the highest salaried individuals in the Turtle River area. The Division’s proposal is generally consistent with the agreement it has entered into with its other employee groups;
- (iii) At the initial steps of the salary scale in each class, the Division’s proposal will result in higher salaries for the teachers employed at those steps than the Mountain View scale;
- (iv) The Division’s proposal will narrow the gap between the salaries of more junior teachers in each class, and the more senior teachers in that class, thereby reducing income disparities between teachers within the same class;
- (v) The relatively higher salaries at the initial steps of each class will assist in the recruitment of teachers;
- (vi) The Turtle River School Division is a small division, lacking economies of scale and requiring flexibility in terms of things such as scheduling, class size, the overall size of the teaching staff, and program and course options. The higher the salary schedule, the less flexibility the Division will have in those areas;

- (vii) The Division's proposal assures the Division's fiscal stability, thereby preserving its ability to meet the educational needs of its students.

There are persuasive aspects to the arguments of both the Association and the Division. The task of an interest arbitration is not to come to a decision solely on the basis of which party has the better arguments in the abstract. Rather, the task of this Board is to assess the respective positions of the parties with a view to achieving a fair and equitable outcome for both parties. Many interest arbitrators have defined their role as being to fashion an Award which represents what the parties would have agreed to themselves, if they had been able to successfully conclude an agreement. At least one arbitrator (John Scurfield) has expressed the same general proposition in another way by describing an interest arbitrator's task as attempting to create the agreement "that the parties bargaining in good faith should have agreed to".

In terms of attempting to fashion a fair and equitable outcome which is what these parties would have, or should have, agreed to, there are three factors that warrant mention:

- (i) The Division's proposal treats junior teachers relatively well, thereby addressing the recruitment problem, but treats more senior teachers less well, and therefore does not adequately address the potential retention problem. Furthermore, according to the Association (whose figures in this regard were not disputed by the Division), in 2006 only 9% of teachers employed in the Division were first year teachers, whereas 57% of the teachers employed in the Division were at the maximum scale in their class by virtue of their years of service. Therefore, the Division's proposal does not adequately address the interests of the majority of its teachers. Furthermore, the flat rate proposed by the Division will likely

increase the actual discrepancies between the salaries being paid by the Division to teachers at the higher steps in each class of the salary scale, and the salaries being paid by most other divisions to teachers in equivalent categories. For those reasons, it is difficult to conclude that there would have been, or should have been, acceptance of the Division's proposal by the Association;

- (ii) Among different bargaining groups, such as teachers' associations, in which the members of the various groups are performing substantially similar work with substantially similar levels of education and experience, interest arbitrators appear to allow for some "catch up" for those groups whose salary scale is lower than the salary scale applicable to members of other associations in comparable school divisions, as long as the employer has the financial and other resources to provide for some "catch up". Indeed, from a review of the material submitted to the Board, many rural divisions, including the Turtle River Division, have agreed to some catch up in recent years by providing for straight dollar increases at various intervals at all steps and in each class of the salary schedule. Similarly, the recent interest arbitration Award relating to the Brandon School Division and the Brandon Teachers' Association provided for "catch up" by implementing additional increments of \$250.00 effective the first day of the fall term in 2006, and the first day of January, 2007, in addition to 3% increases on the first day of the fall term in each of 2003, 2004, 2005, and 2006. Interest arbitrators often refrain from articulating the reasons underlying their decision to provide for some catch up, and it is also difficult to precisely identify the basis upon which certain divisions and teachers' associations have agreed to incorporate some catch up into their salary schedules. However, it is undoubtedly true that

in Manitoba, the amalgamations of various school divisions which occurred in 2002 have had the effect of increasing the salaries of teachers, including the salaries of teachers in some non-amalgamating divisions. Amalgamation has therefore contributed to the "catch up" phenomenon;

- (iii) Although the Association made several sound arguments to establish Mountain View as a reasonable comparison to the Division, there is at least one way in which the two divisions are dramatically different, namely student enrolment. In 2005, the Division had an enrolment of 805 students, whereas the enrolment of Mountain View, a recently amalgamated division, was 3,369 students. This Board is concerned that a significantly smaller division may have less flexibility in many areas. Therefore, the goal of achieving immediate parity with a much larger division is not one which this Board is willing to embrace.

Accordingly, the Board has decided that in terms of salary schedule, a fair and equitable agreement would be one that fits within the pattern settlement rate and allows for some catch up, but does not attempt to achieve parity with Mountain View. The Board has also decided that the catch up should be accomplished by an across the board, straight dollar increase in the last year of the three year term of the new collective agreement.

Therefore, the salary schedule in the new collective agreement will provide for increases at all steps in each class of the salary scale on a compounded basis as follows:

- (i) A 3% increase retroactive to the first day of July 2004;

- (ii) A 3% increase retroactive to the first day of July 2005;
- (iii) A \$250.00 increase retroactive to the first day of the fall term 2006;
- (iv) A 3% increase retroactive to the first day of the fall term 2006 (compounded, i.e. after application of the \$250.00).

In deciding upon the salary schedule, and particularly the \$250.00 increase retroactive to the first day of the fall term 2006, the Board has attempted to put the teachers in the Division in a more equitable position in relation to teachers in other comparable rural divisions, by providing for some “catch up”. At the same time, the Board has been mindful that the Division, unlike many other divisions in the province, had previously given its teachers an across the board increase of \$250.00 effective June 30, 2003.

Moreover, the Board would have seriously considered a further increase of a specified amount at all steps in each class of the salary scale effective June 30, 2007, but for its decision with respect to the issue of “hours of work” as outlined in the following subsection of this Award. In view of that decision, the Board specifically reserves its jurisdiction to reconsider whether or not to award an additional salary increase of a specified amount at all steps in each class of the salary scale, effective June 30, 2007, depending on the results of the negotiating process described in the following subsection of this Award.

3. Hours of Work (A New Article)

Section 5(1) of the *Public Schools Act RSM* provides that the “instructional day in a school must be not less than five and one-half hours including recesses but not including the midday intermission, . . .”. In other words, the *Public Schools Act* sets a mandatory minimum standard with respect to the length of the instructional day.

Teachers enter into written contracts with their employing divisions, the terms of which are prescribed by regulation under the *Public Schools Act*. One of the contractual terms is that the “teacher agrees to diligently and faithfully carry out the teaching assignment and other duties he or she is assigned by the school board in accordance with the Acts and regulations of Manitoba”.

Teachers also have duties prescribed by the *Public Schools Act*, one of which is to “teach diligently and faithfully according to the terms of his agreement with the school board and according to this Act and the regulations.”

The Association has proposed that a new article be included in the collective agreement which, if adopted, among other things, would provide that:

- (i) within the instructional day, the Division shall provide a minimum of 200 minutes of preparation time for each full-time teacher per five day cycle, and that preparation time shall be scheduled in blocks of not less than 20 minutes;
- (ii) part time teachers shall be provided with preparation time on a pro-rata basis; and,
- (iii) the instructional day, exclusive of the midday intermission shall be five and a half hours or such time as may be determined by the

Minister of Education and shall be worked consecutively except where alternative arrangements are agreed to.

The Division has countered with a proposal which, if adopted, among other things, would provide that:

- (i) a normal work day for full time teachers shall be nine hours per day, 45 hours per week, exclusive of the lunch period;
- (ii) it is the responsibility of each teacher to provide the highest quality education program practicable for every student and such a responsibility includes careful daily preparation, attendance at staff meetings, and participation in various activities of this school, including a series of specifically enumerated activities; and,
- (iii) the Division shall be entitled to assign evening, or after school hours or weekend assignments for the purpose of providing supervision of extra-curricular activities or other events in addition to regular duties.

The Division's submission to the Board was that neither its proposal, nor the Association's proposal ought to be accepted and that the status quo ought to be preserved, that is to say no Article ought to be included in the collective agreement with respect to hours of work.

It was my impression that the Division's proposal was intended to emphasize:

- (a) the significant differences between the parties with respect to an "hours of work" article in general and a non-contact time provision in particular;

- (b) whereas the *Public Schools Act* provides that the instructional day is to be a minimum of five and a half hours, the Association is seeking an agreement whereby the instructional day shall be limited to five and a half hours; and,
- (c) that the Division has an expectation that teachers will be adequately prepared and will engage in a variety of other necessary educational activities in addition to instructing students, and that a significant portion of the work associated with adequate preparation and participation in other educational activities will necessarily be performed outside of the regular instructional day.

Both parties stressed the critical importance of this issue. A significant portion of all of the material filed, and of the submissions presented, were directed to this issue. It became clear as the submissions progressed that although the parties frequently used the terms “preparation time” and “non-contact time” interchangeably, the two terms are not synonymous. Non-contact time refers to time in which teachers do not have any contact whatsoever with students. In other words, non-contact time is time during which teachers are not instructing, counselling, or supervising students. The Association’s proposal is not actually for 200 minutes of preparation time because the Association acknowledges that teachers will not be obliged to devote all of that time to preparation. For example, teachers would use this time to do things such as consult with other teaching colleagues or resource teachers, call parents, meet with principals or vice-principals, or to simply think or reflect on various matters. The Association’s proposal is actually for 200 minutes of non-contact time within the instructional day for each full time teacher per five day cycle.

The Board will not attempt to analyze or comment upon all of the materials which were filed or all of the submissions which were made on this issue. Nonetheless,

it is usefully to distil some fundamentally important points from each of the parties' presentations.

From the Association's perspective, the fundamentally important points were:

- (i) Proper and adequate preparation is absolutely essential in order for teachers to properly instruct and educate their students. All teachers and educational administrators recognize that adequate preparation requires time, and that adequate preparation by teachers significantly enhances the quality of education provided to students. Teachers spend significantly more time than the hours of the instructional day devoted to educational activities other than direct instruction, including preparation. Several studies filed, or referred to by the Association, found that the average amount of time spent by teachers in Canada and the United States on teaching and other work-related duties, including preparation, is between 47 and 52 hours per week.
- (ii) Teaching has become increasingly complex and those complexities are likely to continue to increase in the future. The breakdown of other social institutions and the challenges associated with enabling students to succeed in contemporary society have placed enormous demands on the public education system and the teachers employed within it. The demands on teachers are significant and expanding. Non-contact time within the instructional day is essential for the wellbeing of teachers, and thereby enhances the wellbeing of students.

From the Division's perspective, the fundamentally important points were:

- (i) Adequate preparation time is essential to good teaching. It has always been expected that teachers would be adequately prepared. It has also always been expected that teachers will participate in a variety of educational activities other than direct instruction of students. Those activities, which include preparation, will necessarily be undertaken, at least to some extent, outside the limits of the instructional day.

- (ii) A provision guaranteeing a specified minimum amount of non-contact time within the instructional day is not a matter that should be the subject of collective bargaining. Rather, it is a matter that should be left within the managerial discretion and authority of school divisions. This is particularly so in the case of a small rural division such as Turtle River. The costs of the Association's proposal are significant. The Division suggests that acceptance of the Association's proposal would add 8.3% to its payroll costs, and the Association and the Division are in agreement that the Association's proposal, if adopted, with no other steps being taking would require that five additional teachers be hired. The Division, because of its small size, low enrolment, and the large distances between schools, does not have the flexibility to handle the Association's proposal in any other way, such as by increasing class sizes. Therefore, if the new collective agreement contains a provision requiring a guaranteed minimum of non-contact time within the instructional day, the Division will be required to hire more teachers and to increase taxes.

The hours of work issue has been of significant interest to teachers' associations and school divisions within Manitoba for approximately 20 years. The materials filed with the Board included copies of excerpts of Awards from various interest arbitrators and arbitration boards. Interest arbitrators have dealt with this issue in several different ways, including:

- (a) setting an actual limit on the amount of contact time that may be assigned by divisions to teachers subject to a 5% variation;
- (b) setting a limit on the amount of contact time that may be assigned to teachers with reference to a base year and subject to a 5% variation;
- (c) inserting clauses in collective agreements which recognize the value of preparation or non-contact time, but which make no other allowance for preparation or non-contact time;
- (d) drafting provisions which guarantee a minimum amount of non-contact time within the instructional day per teaching cycle. Those provisions vary as to the amount of the guaranteed minimum amount of non-contact minutes, depending on several factors, including the grade level of the courses being taught; and,
- (e) refusing to include anything in the applicable collective agreement with respect to hours of work or non-contact time.

Collective agreements reached through negotiations between school divisions and teachers' associations have also dealt with the issue in several different ways.

In the result, the collective agreements currently in force in the province comprise a patchwork quilt of provisions relating to this issue. There are 38 agreements currently in force between teachers and school divisions in the province. Eighteen of those agreements (including the agreement now in force in Turtle River pending the issuance of this Award) contain no provision relating to hours of work or preparation/non-contact time. Five of those agreements contain some form of guaranteed minimum preparation or non-contact time within the instructional day. The balance of the agreements contain one of the other variations referred to above.

The instructional day within the Division is presently five and a half hours, or in some cases five hours and thirty-five minutes. Teachers' timetables were submitted to the Board from all of the schools in the division. The timetables were from most of the teachers teaching at those schools. In some cases, the timetables covered the school years 2003 to 2004, 2004 to 2005, and 2005 to 2006. In other cases, the 2003 to 2004 year was not included and in some cases information from the 2006 to 2007 year was available and included.

The individual timetables were interesting. In some of them, teachers had non-contact time which would meet or exceed the amount of non-contact time contemplated by the Association's proposal. In others, there was no non-contact time whatsoever, and in others, there was some non-contact time, but the amount of the non-contact time was less, sometimes significantly less, than the amount of non-contact time contemplated by the Association's proposal. One particular timetable caught the Board's attention. In one semester, it provided for an amount of non-contact time for the teacher which met or exceeded the amount of non-contact time contemplated by the Association's proposal, but in the other semester it allowed for no non-contact time at all.

As part of the Division's submission, Mr. Wallis indicated that the Division's position was that the issue relating to hours of work and non-contact time was

not an issue that ought to be the subject of collective bargaining between the parties. If Mr. Wallis meant that issues relating to hours of work cannot be the subject of collective bargaining between teachers' associations and school divisions in Manitoba, the Board respectfully disagrees. If instead Mr. Wallis meant that the issue of hours of work should be left out of the next collective agreement between these parties, and should not be dealt with at all in this Interest Arbitration Award, his comments are worthy of serious consideration.

As noted earlier, the Division is small, both in terms of revenues and enrolment. Class sizes are small. Small class sizes are beneficial to both teachers and students in some respects. However, as the Association pointed out, some of those benefits are negated by the frequent practice in the Division of combining students from two grade levels within one class.

However, the significance of small class sizes in the context of the issue of non-contact time is that in a small division, covering a large geographic area, there may be a limit on a division's ability to expand class sizes as a means of providing more non-contact time for teachers.

Furthermore, it is clear that the Division recognizes the value of non-contact time. Within its current operating constraints the Division attempts to include adequate amounts of non-contact time in its teachers' timetables. Admittedly, it is not always able to do so. This Board recognizes that providing adequate non-contact time for all teachers in the Division is a very challenging undertaking given the size of the current teaching staff, the number and location of schools within the Division, the budget of the Division, and the courses and programs which the Division is required or decides to offer.

In addition to recognizing the difficult scheduling challenges which confront the Division, the Board is aware that it does not have the detailed information

which is required to properly assess the nature and extent of all of the financial, staffing, and scheduling implications of including a guaranteed minimum amount of non-contact time during the instructional day in the collective agreement. Accordingly, the Board has decided that we will not make an Award requiring that a specific provision relating to hours of work or non-contact time be included in the collective agreement.

However, given the acknowledged importance of adequate preparation/ non-contact time to the quality of education provided to students, and the risk of unfair and inequitable schedules being assigned to some teachers if matters are left entirely to the managerial discretion of the Division, the Board is unwilling to be entirely passive on this issue.

The Board would like to provide both a framework and an incentive to encourage the parties to make a concerted effort to achieve a negotiated agreement with respect to the issue of non-contact time before the parties are required to embark on another round of comprehensive collective bargaining for the next collective agreement.

Accordingly, the Board directs that the parties meet as may be required, and as soon as practicable, in a good faith attempt to negotiate a collateral agreement or letter of understanding no later than May 30, 2007, whereby the Division will provide to all of the full time teachers employed by the Division, a guaranteed minimum number of minutes of non-contact time within the instructional day per five day cycle, commencing on the first day of the 2007 fall term. The Board suggests that the issue of non-contact time within the instructional day for part time teachers should also be part of those negotiations.

The Board very seriously considered providing the parties with specific direction as to the number of minutes which would represent the guaranteed minimum amount of non-contact time within the instructional day. However, the Board decided

against doing so, because a specific number might fail to take into account differences between such things as the types of courses or grade levels being taught (e.g. high school versus elementary), which the parties might be better able to address in their negotiations. Furthermore, the Board was concerned that setting a specific number of minutes as a guaranteed amount of non-contact time might distort the negotiations by creating an artificial line below which the Association might not be prepared to drop, and above which the Division might not attempt to reach.

Although the Board has suggested that a guaranteed minimum number of minutes of non-contact time within the instructional day is a realistic objective, it is to be expected that the Division may resist either the inclusion in the collective agreement of any guaranteed minimum amount of non-contact time within the instructional day, or may disagree with the Association as to the appropriate number of minutes of non-contact time per five day cycle to be included, or both. Whatever positions the Division ultimately decides to advance, the Board strongly urges the Division to provide as much information and data to the Association as possible with respect to the financial, staffing, class size, and scheduling issues which may be associated with providing a guaranteed minimum number of minutes of non-contact time within the instructional day in order to enable the Association to understand and assess the implications and difficulties associated with the inclusion of a guaranteed minimum amount of non-contact time within the instructional day.

It is also likely that the Division will assert in any upcoming negotiations relating to non-contact time, that in order to provide a guaranteed minimum of non-contact time within the instructional day, other amendments to the collective agreement, effective on the first day of the 2007 fall term may be required, such as adjustments to the salary schedule. Accordingly, it will be open to the Division in the upcoming negotiations to attempt to convince the Association that consequential amendments to the collective agreement will be necessary, or alternatively, that it would be preferable to leave the issue of non-contact time out of the collective agreement altogether, and to

rely instead on the Division's best efforts to provide reasonable amounts of non-contact time during the instructional day for as many teachers as possible.

In referring to a potential adjustment to the salary schedule, the Board is fully aware that the Association will likely argue that the issues of non-contact time and the salary schedule should not be linked, because to do so places the burden of improving the quality of education for the students of Turtle River on the backs of teachers, when that burden should be spread throughout the entire community. The Board does not intend to limit the Association's ability to make that argument in the negotiations. Indeed the Board is mindful of the Association's position that this issue should be one of equity and fairness, not cost.

However, providing a minimum amount of non-contact time within the instructional day will come at a cost, and such cost may be disproportionately high in a small rural division relative to a large urban division. Identifying the appropriate source of funds to meet that cost can be the subject of both theoretical and practical debate, and such a debate may be part of the negotiations with respect to a guaranteed amount of non-contact time within the instructional day. In that regard, the parties are reminded of the Board's earlier comments in this Award that, but for its decision on the hours of work/non-contact time issue, the Board would have seriously considered an additional increase of a specified amount at all steps in each class of the salary scale, effective June 30, 2007.

In view of all of the foregoing, if the parties are unable to reach an agreement with respect to an article providing a guaranteed minimum amount of non-contact time for teachers during the instructional day, commencing on the first day of the 2007 fall term, the Board will reconvene to determine that issue, having also retained jurisdiction to reconsider whether or not to award an additional increase of a specified amount at all steps in each class of the salary scale, effective June 30, 2007.

While the parties are negotiating with respect to an article providing a guaranteed minimum amount of non-contact time for teachers during the instructional day, neither of them should make any presumptions with respect to what, if any, award this Board may make with respect to that issue, or with respect to whether or not to award an additional salary increase effective June 30, 2007, in the event the parties' negotiations break down.

The parties should consider their upcoming negotiations to be "without prejudice" in the sense that their respective negotiating positions, proposals, and counter-proposals will not be disclosed to this Board, except with the express agreement of both of the parties. However, all of the data and information exchanged between the parties with respect to the issue of non-contact time should be available to the Board if the parties are unable to reach an agreement, and the Board is required to determine that issue.

In summary, the Board's decision with respect to an "hours of work" article in the collective agreement, and specifically a provision providing for a guaranteed minimum amount of non-contact time for teachers within the instructional day, is:

- (a) to decline to make an award at this time for any provision relating to hours of work or non-contact time in the collective agreement;
- (b) to direct the parties to meet, as soon as practicable, in a good faith attempt to negotiate a collateral agreement or letter of understanding, whereby the Division will provide to all full time teachers employed by the Division, a guaranteed minimum number of minutes of non-contact time within the instructional day, per five day cycle, commencing on the first day of the 2007 fall term, and that the parties attempt to conclude their negotiations with respect to these matters no later than May 31, 2007; and,

- (c) if the parties are unable to reach an agreement with respect to a guaranteed minimum amount of non-contact time for teachers within the instructional day by May 31, 2007, this Board will retain jurisdiction with respect to that issue while also retaining jurisdiction to reconsider the issue of whether or not to award an additional salary increase of a specified amount at all steps in each class of the salary scale effective June 30, 2007.

4. Maternity and Adoptive Leave (Article 9.02)

The provision in the existing collective agreement provides for maternity leave for female teachers on the basis that the teachers in question are entitled to receive 90% of their salaries, inclusive of the employment insurance benefits from Human Resources Development Canada, pursuant to a Supplemental Unemployment Benefits (SUB) Plan for a period up to 17 weeks. In other words, the Division “tops up” the employment insurance benefits in order to provide the teachers on maternity leaves with 90% of their salaries.

The existing collective agreement similarly provides for a “top up” to 90% of salary for a teacher (male or female) who takes adoptive leave for a period of up to 10 weeks.

Under the current collective agreement, teachers are entitled to an unpaid parental leave.

Similar provisions are in place in a substantial majority of collective agreements currently in force between teachers’ associations and school divisions throughout the province.

The Association proposes that the provision in the new collective agreement be expanded to include a paid parental leave, which would parallel the adoptive leave provisions, namely it would feature a "top up" to 90% of salary (inclusive of Employment Insurance benefits) for a period of up to 10 weeks.

The type of provision proposed by the Association is currently in force in three collective agreements between teachers' associations and school divisions in Manitoba, namely the River East Transcona, Seven Oaks, and Sunrise school divisions.

The collective bargaining and arbitral history of maternity/adoptive/parental leave provisions in collective agreements between teachers' associations and school divisions in Manitoba is interesting, and was reviewed in detail by the parties, both in their written materials and in their oral submissions. That history need not be outlined here, because the parties are very familiar with it.

There is a significant controversy associated with articles in collective agreements which provide for 10 weeks of paid (topped up) adoptive leave benefits, but which do not provide for paid parental benefits. The controversy relates to whether or not such differing treatment of natural parents relative to adoptive parents constitutes discrimination.

A relatively recent decision in a grievance arbitration between the Louis Riel Teachers' Association and the Louis Riel School Division considered that issue. A teacher employed by the Louis Riel School Division, Christopher Chapman, was denied paid parental leave benefits. The Louis Riel Teachers' Association grieved that denial on behalf of Mr. Chapman, alleging that the effect of the article in the applicable collective agreement providing for paid adoptive leave benefits was discriminatory against natural parents. The article in the

Louis Riel collective agreement was substantially similar to the article in the existing Turtle River collective agreement. In an award issued in December 2005, the arbitration board, chaired by Michael Werier, found that the article did have a discriminatory effect on natural parents relative to adoptive parents. In view of the potential financial implications of extending topped up leave benefits to natural parents, Arbitrator Werier referred the issue of remedy back to the parties in order to provide them with an opportunity to negotiate an acceptable resolution. However, the parties were unable to reach agreement, and as a result, after receiving further submissions, the arbitration board issued a supplementary award dated December 13, 2006. The supplementary award ordered that a provision for top up benefits for natural parents be inserted into the applicable collective agreement, but that those provisions would be limited in duration to the life of the existing collective agreement and would not survive the expiry date of that agreement, which was June 30, 2006.

In that context this Board must decide upon the type of provision which is to be included in the new collective agreement in Turtle River.

Based on the submissions of the parties, the Board was left with the impression that although this is an issue of genuine interest to the parties, it has not been problematic in Turtle River on a practical level. For example, the Board was advised that there had been five maternity leaves among teachers in the recent past, and no requests for adoptive leaves. The Board presumes that there have also been no requests for paid parental leaves.

It is noteworthy, based on a review of the interest arbitration awards of Arbitrator Peltz in 2001, involving the St. Vital School Division, and Arbitrator Suche, in 2001, involving the Transcona-Springfield School Division, that concerns were expressed by both arbitrators as to the potentially significant costs that would be incurred if benefits were extended to natural parents, which were

equivalent to the benefits enjoyed by adoptive parents. However in these proceedings, no evidence was introduced as to the cost implications in Turtle River of including paid parental leave benefits in the collective agreement.

The Association submits that the negotiating history with respect to these types of benefits has been incremental and evolutionary, and in many respects has reflected societal trends and attitudes. Interest arbitrators have served to prod the process along when the parties have reached negotiating impasses. Hence the first maternity leave benefits for teachers simply reflected employment insurance benefits, with no top up. Somewhat later, employment insurance waiting periods were paid by employing divisions. Thereafter, Arbitrator Fox-Decent ordered a 17 week top up of benefits during maternity leaves to be included in the Fort Garry collective agreement (June 2000), followed by Arbitrator Peltz awarding the inclusion of a ten week top up for adoptive leaves in addition to the maternity leave benefits, in the St. Vital agreement (March 2001). Finally, Arbitrator Suche, in the Transcona-Springfield collective agreement added a further 10 week top up for parental leaves (May 2001).

On the basis of that history, the Association argues that “the time is right” for the teachers in Turtle River to enjoy the same rights with respect to maternity, adoptive, and parental leave as their colleagues in River East Transcona, Seven Oaks, and Sunrise. Moreover the Association points out that an award providing for paid (topped up) maternity leaves of up to 17 weeks and paid (topped up) adoptive and parental leaves of up to 10 weeks, avoids the risk of a challenge to the provision on the basis that it discriminates against natural parents relative to adoptive parents.

The Division, says that the River East Transcona, Seven Oaks, and Sunrise agreements comprise a very small minority of the agreements currently

in effect between teachers associations and school divisions in Manitoba. The Division also submits that if there is a concern that the current provision in the Turtle River collective agreement is, or may be found to be discriminatory against natural parents, the most sensible and fiscally responsible approach would be to remove the adoptive leave benefit, particularly since the adoptive leaves in the Division have been, and are likely to continue to be very rare.

In any event, the Division cautions the Board against making an award providing for any type of paid parental leave, given the potentially significant financial repercussions associated with such an award.

The Board is reluctant to issue an award taking away a benefit (paid adoptive leave) which has been freely negotiated by the parties and which has not caused the parties any problems to date. However the Board is equally reluctant to grant a benefit (a paid parental leave) without having a proper understanding of the financial implications of doing so. With respect to the issue of the potential discriminatory effect of the current clause, it is hoped that the controversy surrounding that clause will be resolved elsewhere in another forum by other parties.

In the result this Board will follow the example recently set by the Board of Arbitration in the interest arbitration between the Brandon School Division and the Brandon Teachers' Association, who decided to remain with the status quo.

Accordingly there will be no change to the existing Article 9.02 (Maternity and Adoptive Leave).

5. Interest on Retroactive Pay (Article 3.08)

This is not a particularly significant financial issue for the parties, given the relatively small differential at each step on the scale between the former salary schedule and the salary schedule awarded hereunder.

The article in the new collective agreement will be as follows:

“The Division shall pay to the members of the Association, interest on the gross amount of any retroactive pay which may be paid to such members less the amount of any statutory deduction for Canada Pension, Employment Insurance, and Income Tax due with respect to that pay. The interest is to be calculated from the dates on which the monies would have been due, to the date of actual payment.

The interest shall be computed at the premium savings account rate of the Division’s banker, which is in effect on the date of the signing of the Collective Agreement.”

6. Substitute Teachers (Article 3.10)

Immediately prior to the hearing, the contentious issues between the parties with respect to this article were:

- (i) The rate of pay to be paid per day to substitutes. The Association proposed a rate of \$105.00 per day; the Division proposed a lesser rate;
- (ii) The Association wanted only one rate for substitute teachers, namely \$105.00 per day; whereas the Division proposed two rates,

one for “certified personnel” and a separate lower rate for “non-certified personnel”;

- (iii) The Association wanted the article to specify that if a substitute teacher remains in the same teaching position for more than five days, the substitute should be paid according to the basic salary schedule, retroactive to the first day. In contrast the Division wanted the basic salary schedule only to apply at the beginning of the sixth day (i.e. not retroactively to the first day).

By the time the hearings had convened, the parties had narrowed their differences. The Division was agreeable to a substitute rate for “certified personnel” at \$105.00 per day, but wanted to maintain a separate lower scale of \$74.10 per day for “non-certified personnel”. With respect to retroactivity, the Division suggested a compromise, namely that if a substitute teacher remained in the same teaching position for more than three days, beginning on the fourth day, the substitute teacher would be paid according to the basic schedule.

The most contentious of the remaining points of difference between the parties relates to the use of “non-certified personnel”. The Association’s position is that in Manitoba there is no such thing as an uncertified teacher. The Association asserts that individuals who do not have the proper educational background and credentials should not be teaching in the schools. The Association recognizes that *The Public Schools Act* and the regulations thereunder permit individuals who lack the appropriate educational background to be utilized as substitutes in certain “emergency” situations. The Association is opposed in principle to the inclusion of a reference in the collective agreement to “non-certified personnel” because the Association is concerned that such a reference creates both an opening and an incentive for the use of unqualified individuals as substitutes.

The Division was insistent that reference to a lower non-certified rate should be maintained in the collective agreement for legitimate and practical reasons. School Divisions, particularly smaller rural divisions have trouble maintaining an adequately sized roster of fully qualified substitute teachers. The Division indicated that its own substitute list consisted of 26 individuals, 16 of whom were certified teachers, and 10 of whom were not. The Division also advised the Board that 9 divisions, all of them rural divisions, maintained a separate lower rate for uncertified individuals who periodically but regularly act as substitute teachers.

Recognizing these practical realities, the Association suggested a further compromise, whereby the Association would accept two separate rates, namely \$105.00 per day and \$74.10 per day, but sought to eliminate any wording in the collective agreement which would serve as an encouragement to the utilization of unqualified individuals as substitute teachers. Accordingly the Association proposed a rate of \$105.00 per day for teachers acting as substitutes who are Class 4 to 7 teachers, and a rate of \$74.10 per day for teachers acting as substitutes who are Class 1 to 3 teachers. The Association referred to a sheet in the Division's Brief (at page 249) which indicates that there are many collective agreements currently in force between school divisions and teachers' associations which provide for differential substitute rates on the basis of the classification of the teacher in question.

The Board received a letter from the Association after the hearings were concluded (a copy was also sent to the Division's representative) in which the Association stated that the Division had acknowledged that it obtains Limited Teaching Permits for all of its substitute teachers. The Association also stated that it had confirmed that such Permits are always issued with a classification

designation, and accordingly its proposal should be workable, and any reference to "non-certified" personnel should be removed from the article.

Accordingly the Board directs that the article in the new collective agreement with respect to substitute teachers will be as follows:

"Effective the date of the signing of this collective agreement, substitute teachers will be paid at the rate of \$105.00 per day for certified personnel and \$74.10 per day for personnel on Limited Teacher Certificates.

Effective the date of the signing of this collective agreement, if a substitute teacher remains in the same teaching position for more than three days, beginning on the fourth day, he/she shall be paid according to the basic schedule. The above rates include vacation pay credits that should become effective the date on which the Agreement is signed."

7. Coordinators' Allowance (Article 3.11)

The differences between the parties on this issue are small. The Division advised the Board that at various points in the parties' negotiating relationship, the Coordinator position has been within the scope of the bargaining unit, while at other times the position has been beyond the scope of the bargaining unit. Effective August 1, 2006, the position was removed from the bargaining unit, without objection from the Association.

The Division acknowledges that any retroactive pay increase for the period from July 1, 2004 to August 1, 2006, plus interest, will be paid to the individual who was in that position. On the basis of that acknowledgement, the Division initially proposed the removal of Article 3.11 from the collective agreement.

The Association correctly pointed out that there may be Coordinators in the future who will be within the scope of the bargaining unit. Some constructive discussions took place between the parties thereafter, and the Board was left with the impression that the parties had made substantial progress towards an agreement on the issue.

The Board's decision is to retain Article 3.11 in the collective agreement and to direct the parties to draft a mutually acceptable article incorporating the following features:

- (a) A mutual acknowledgement that effective August 1, 2006, the Coordinator position is no longer within the scope of the bargaining unit, but in the future the Coordinator position may be within the scope of the bargaining unit;
- (b) If Coordinators are brought within the scope of the bargaining unit during the term of the new collective agreement or any extension thereof, they shall be paid according to the basic salary schedule. In addition they shall receive a supervisory allowance equal to the allowance which was being paid to the Coordinator on the first day of the fall term 2003, with annual increases thereafter of 3% on a compounded basis, effective on the first day of the fall term of each year during which the new collective agreement is in force.

8. Settlement of Differences (Article 8)

The Division proposed an extensive amendment to this article. The Association indicated that it was content with the existing article, and opposed the Division's suggested amendment.

The Board is not convinced that any change to the article will be useful. Indeed the Board is concerned that the Division's proposal would not serve the parties as effectively as the existing article.

The Board directs that the existing article form part of the new collective agreement.

9. Personal Leave (Article 9)

The existing article stipulates that when teachers are absent from work for more than one day during a school year for reasons other than illness or compassionate leave, the salary paid to the substitute teacher is deducted from the absent teacher's pay for the first two days. The existing article also provides that commencing on the third day of the absence, and for each consecutive day of absence thereafter, the Division is to deduct from the absent teacher's salary an amount equal to $1/200^{\text{th}}$ of the teacher's annual salary.

The Association proposes that the article remain unchanged in the new collective agreement.

The Division wants a change to the article, pursuant to which the deduction made for the third and following days of the teacher's absence would be proportionate to the number of actual school days in the school year. For example, if there were 197 days in that particular school year, the deduction for the third and following days of the absence would be $1/197^{\text{th}}$ of the teacher's annual salary. Since the 2002-2003 school year, the actual number of school days in the school year has been less than 200 days. It is expected that the number of actual school days in the school year will be less than 200 in each school year to which the new collective agreement will apply.

The Association acknowledges that “on its face”, the Division’s proposal is logical. However the Association has raised a concern, namely that the Division’s proposal will have a detrimental impact on affected teachers’ pensions. The Association acknowledges that the potentially negative impact is unintended on the part of the Division.

Following the hearing, and to supplement their rebuttal remarks, the Association provided the Board, and the Division with copies of an exchange of correspondence between the Association and the Teachers’ Retirement Allowances Fund (TRAF). The Association submitted that the exchange of correspondence establishes that the Division’s proposal, if accepted, will have detrimental consequences for teachers’ pensions.

The Board is not certain, based on the letters provided by the Association, that the change proposed by the Division will cause a detrimental pension impact; the letter from TRAF does not address whether a teacher will get credit for pensionable service for the days in question if the Division’s proposal is adopted. Moreover, it is certainly arguable that if there is a detrimental pension impact, any such impact will result from the application of the legislation, namely *The Teachers’ Pensions Act*, and not from the Division’s proposal. Furthermore, the extent of any detrimental impact is difficult to determine, but may not be large, and may affect only a limited number of teachers.

The Board is of the view that the Division’s proposal has merit. The Article in the new collective agreement will therefore be as follows:

- “(A) Teachers shall be entitled to one day leave of absence for personal reasons at substitute rate deduction in any one school year provided that a substitute satisfactory to the Division can be secured.

The one day leave of absence may be carried forward to be used in the subsequent school year for a maximum of two days in any one school year.

Personal leave cannot be used to extend the Christmas, Spring or Summer breaks nor can it be taken on days designated for teacher inservice, parent teacher conferences, administration or pupil evaluation. No more than one teacher in any one school shall be entitled to leave at the same time unless approved by the Superintendent. Teachers shall, if possible, notify the principal at least one week in advance of taking such leave.

- (B) In all cases of absence from teaching duties other than for illness (Section 93, sub paragraphs 1, 2, 3 and 4, Sections 94 and 95 of the Public Schools Act), personal leave as provided in paragraph "A" and compassionate leave, authorization of the Division shall be obtained and any teacher thus absent from duty shall have the substitute rate deducted from his/her pay for the first two days. Commencing on the third and for each consecutive day thereafter, the Division shall deduct the per diem rate of the teacher's annual salary.

Wherever in this Agreement deduction of salary during a leave of absence or payment of salary is to be made at the per diem rate, the amount of the

deduction or payment shall be calculated in accordance with the appropriate formula set out below:

a. Payment at Per Diem Rate

<u>No. of days which payment is due</u>	
No. of school days in the school year as defined by the Minister of Education	x. Teachers' Current Salary

b. Deduction at Per Diem Rate

<u>No. of days without pay</u>	
No. of school days in the school year as defined by the Minister of Education	x. Teachers' Current Salary

(C) The Division recognizes that situations other than those referred to may arise in which leave of absence may be required. In such cases, the Division will consider the request on application by the teacher and the amount of salary deduction shall be determined prior to the leave being granted.

(D) In all cases of absence, the substitute shall be approved and paid by the Division.”

10. **Compassionate Leave (Article 9.01)**

The Article in the new collective agreement will be:

“9.01 Compassionate and Bereavement Leave

9.01(a) Compassionate Leave Each teacher shall be allowed Compassionate Leave without loss of salary up to but not exceeding three days in each case of terminal illness of any member of the immediate family of the teacher; immediate family to include: father, mother, sister, brother, son, daughter, wife or husband, mother-in-law, father-in-law, grandparents. Leave beyond this amount on compassionate grounds may be granted at the discretion of the Division. In all cases, the teacher shall notify the Division prior to taking leave.

(b) Bereavement Leave For a Bereavement Leave, full salary of the teacher will be paid during the absence as follows:

- | | |
|--|--------|
| (i) Death of a spouse, common law spouse or same gender partner: | 4 days |
| (ii) Death of a child or grandchild: | 4 days |
| (iii) Death of a parent or step-parent: | 4 days |
| (iv) Death of a sister, brother, mother-in-law or father-in-law: | 3 days |
| (v) Death of a grandparent: | 3 days |
| (vi) Death of a brother-in-law or sister-in-law: | 1 day |
| (vi) Death of a spouse's grandparent: | 1 day" |

11. Sick Leave (Article 9.03)

There were five contentious issues in relation to the sick leave article. They were:

- (i) The manner in which teachers accumulate paid sick leave. The Division favours a continuation of the system now in place whereby

teachers accumulate one paid sick day for every nine days of actual teaching service. The Association prefers a system which is in place in a significant majority of the Divisions in Manitoba, pursuant to which teachers have an immediate entitlement to a paid sick leave of 20 days and can "carry forward" the unused portion of the sick leave in any year at the rate of 20 days per year up to a specified maximum. The Association argues that while the difference in the two systems will not be significant on an overall basis, the system favoured by the Association is much more equitable for first year teachers who become ill for an extended period in their first year of teaching, and for more senior teachers who have a series of illnesses throughout their career;

- (ii) The maximum number of days of paid sick leave which may be accumulated;
- (iii) The manner in which paid sick leave may be accumulated, if at all, through successive fixed term contracts;
- (iv) The circumstances in which sick leave benefits will not be payable to a teacher who is in receipt of other wages, profits, or accident benefits;
- (v) Whether it is necessary and appropriate to include a provision in the article with respect to a requirement on the part of teachers to produce medical reports or certificates if requested by the Division.

During the course of the hearing the parties reached agreement as to the maximum number of paid sick leave days which may be accumulated, namely 110.

The issue relating to the manner in which paid sick leave may be accumulated through successive fixed term contracts is interesting. As a result of a regulation under the *Public Schools Act* passed in 2004 relating to the form of agreements with respect to teachers and school divisions, there are now provisions in both the Teacher-General agreement and in the Limited Term Teacher-General agreement, which set forth the circumstances, and provide for the manner in which unused sick leave may be accumulated by teachers who have taught, for some period of time, under Limited Term Teacher-General agreements. However, nothing prevents school divisions and teachers' associations from including more generous provisions in their respective collective agreements.

From a review of the sick leave articles in many of the collective agreements currently in force in the province, it appears that the majority of them do not contain provisions which are more generous than the provisions in the standard form agreements. However, some collective agreements, including the current collective agreement in Turtle River, do contain more generous provisions.

The Association has proposed an even more generous provision, while the Division seeks an elimination of the existing provision. Such an elimination would reduce the benefits with respect to the accumulation of sick leave currently enjoyed by teachers employed by the Division on fixed term contracts.

The provision which this Board has decided upon is less generous than the article proposed by the Association but is more generous than the provisions of the standard form agreements.

The Board has also considered the submissions of the parties on the remaining contentious issues with respect to this article. The sick leave article in the new collective agreement will be:

“9.03 SICK LEAVE

1. a) Where a teacher is sick, he or she shall be entitled to sick leave during his or her sickness and be paid his or her salary during such sick leave; but such leave shall not exceed twenty (20) teaching days in any school year.
- b) Where the employment of a teacher is continued for more than one year, the non-used portion of the sick leave in any year(s) shall be carried forward and accumulated from year to year to a maximum of forty (40) days in the second year; sixty (60) days in the third year; eighty (80) days in the fourth, one hundred (100) in the fifth, and 110 in the sixth and subsequent years.
2. Teachers employed on a part-time basis with the Division shall be granted sick leave with pay prorated based on full-time equivalents.
3. Teachers employed on a fixed term contract shall be entitled to sick leave during the term of the contract under the same terms and conditions as a teacher regularly employed by the Division. Sick leave shall accrue to a maximum of one hundred ten (110) days, when a teacher is employed by the Division on successive term contracts. Contracts shall be deemed to be successive when:
 - a) a teacher is employed under separate fixed term contracts in successive school years;
 - b) the interruption between term contracts is less than a school year.

4. Sick Leave is not payable to a teacher:
 - a) who, while receiving sick leave benefits, is engaged in employment for wage or profit with another employer, except when such employment occurs as a result of a program of rehabilitative employment approved by the Disability Benefits Plan; or
 - b) who, in respect of injury resulting from a motor vehicle accident, is receiving wage-loss replacement benefits from the Manitoba Public Insurance ("M.P.I.") to the extent that such benefits and paid sick leave exceed the teacher's normal salary and up to the maximum number of sick leave days accumulated by the teacher. In such cases, the teacher shall reimburse the Division the amount of benefit received from M.P.I.
5. The Unemployment Insurance Commission rebate shall be shared between the Division and the Association with the Division receiving 7/12 and the Association receiving 5/12 effective January 1, 1978.
6. The Division shall provide sick leave entitlement to a pregnant teacher who, as a result of her condition either before or after delivery, is unable to be at work and perform her regular duties for a valid health related reason(s). The pregnant teacher shall follow claim procedures for sick leave entitlement as determined by the Division.
7. The Division may require teachers to produce reports from a duly qualified health care practitioner(s) on matters related to their sickness or injury and absence from the workplace.

12. Leave for MTS Executive Duties (Article 9.05)

The Board has decided that a small modification to this article is warranted to deal with attendance at interest arbitrations.

This article in the new collective agreement therefore will be:

"9.05 LEAVE FOR MTS EXECUTIVE DUTIES

A teacher, being a member of The Manitoba Teachers' Society Executive Committee or of the Executive of any branch thereof, or of any special committee of the Society, or being appointed as an official representative or delegate of the Society or any branch thereof, and being authorized by the Executive Committee of the Society to attend the meetings of the Committee of which he/she is a member, or to act as a delegate or representative, shall be excused from school duties for either purpose or both purposes for not more than a total of five (5) teaching days in any one school year, provided that a substitute satisfactory to the Division can be secured and that the cost of the substitute teacher be borne by the Society.

Maximum days allowed the Association in combined total shall not exceed forty (40) days in any school year. One teacher for every ten (10) teachers per school or fraction thereof, will be allowed leave on any given day.

Leave of absence up to 20 days in the school year shall be granted to the President of the Association and not be counted within the 40 day overall maximum.

The above notwithstanding, Leaves of Absence from school duties for the purpose of attendance at interest arbitration hearings shall not be counted in the individual or group maximum days of leave of absence.

The teacher shall notify the Division a minimum of seven (7) days prior to taking such leave. In exceptional circumstances, the Division has the right to waive the limitation on the number of teachers per school and the notice period.

13. Management Rights (New Article)

The Division proposes an entirely new article, being an extremely broad management rights provision.

The Association says that the proposed article is unnecessary because *The Public Schools Act* (particularly Sections 41 and 48 thereof) and the regulations thereunder, and the statutorily prescribed teachers' contracts, adequately set forth the management rights of the Division. Moreover, the Association argues that there has never been a management rights clause in any of the previous collective agreements between the parties, that management rights clauses are very rare in collective agreements between school boards and teachers' associations in Manitoba, and that in any event, the clause proposed by the Division is too broad and over-reaching.

The Board agrees that the clause proposed by the Division would not be appropriate for inclusion in the new collective agreement. The Division has not demonstrated that there is a need for any type of management rights clause to be included in the collective agreement.

Accordingly, there will be no specific article with respect to management rights in the new collective agreement.

14. **Just Cause (New Article)**

Collective agreements in Manitoba between school divisions and teachers' associations contain a wide variety of clauses relating to the discipline of teachers. However matters relating to the dismissal of teachers are covered by subsection 92(4) of *The Public Schools Act*. Therefore collective agreements between school divisions and teachers' associations in Manitoba do not include provisions with respect to the dismissal of teachers.

There is no article in the existing collective agreement in Turtle River specifically relating to the discipline of teachers, although Article 7 deals with complaints respecting the competency or character of a teacher.

The Association proposes that a just cause provision be specifically included in the new collective agreement, and that it reflect the deemed just cause provision in the *Labour Relations Act*, but amended to delete any references to dismissal. The Association's proposal is for a provision which would state:

"The employer shall not discipline any teacher bound by this agreement except for just cause."

In relation to this provision, the Association submits that inasmuch as the *Labour Relations Act* stipulates that collective agreements are deemed to contain such a provision with respect to the discipline of teachers, the collective agreement itself should contain the provision because:

- (i) including it does not adversely affect the rights of the parties; and,

- (ii) teachers and potentially other interested individuals or groups, will be able to refer to one document, namely the collective agreement, for a comprehensive outline of the employment rights which obtain between the Division and the teachers whom the Division employs.

The Division takes the opposite position and says:

- (i) It is not necessary to include the provision, as it is deemed to be part of the collective agreement in any event; and
- (ii) If the legislation changes and the provision has been specifically included in the collective agreement, the provision will continue to apply, even though the parties had not negotiated it freely through a normal collective bargaining process.

The practical advantage of including the proposed new article, namely that it will form part of a comprehensive document which will be a readily available reference for all interested parties, is diminished somewhat because there are provisions in the *Public Schools Act* and regulations, and the statutorily prescribed teachers' contracts, which are not specifically identified in the collective agreement, but which affect the employment rights and obligations of employing divisions and teachers.

On balance, the Board has concluded that the potential advantage of specifically including an article with respect to just cause for discipline in the collective agreement is outweighed by the potential disadvantage associated with including it. Whether the article is included or not will likely have little or no practical effect on the parties during the term of the new collective agreement.

Accordingly there will be no new article with respect to “just cause for discipline” in the new collective agreement.

15. Obligation to Act Fairly (New Article)

The Association seeks the inclusion of a new article which would provide:

“In administering the agreement, the Division shall act reasonably, fairly, in good faith and in a manner consistent with the agreement as a whole.”

This provision is deemed by the *Labour Relations Act* to be included in all collective agreements which do not expressly so provide.

The arguments with respect to the inclusion or non-inclusion of this proposed article are substantially similar to the arguments relating to the “just cause for discipline” provision.

Further, the possibility of including an “obligation to act fairly” clause gives rise to two additional arguments on the part of the Division, namely that:

- (i) If such a clause is to be included, a residual management rights clause ought also to be included. The Division points out that in the recent interest arbitration award in Brandon, such an article was included. However the Board in that case also stated that “we recognize the Division nevertheless retains all management rights that are not otherwise fettered by the terms of the collective agreement or applicable legislation.”

- (ii) If the clause is included, and the legislation is subsequently amended, an argument could be advanced during the next round of negotiations that the clause should be retained because the parties must have intended it to mean something because they had specifically included it in the previous collective agreement, although it was deemed to be part of the agreement in any event.

On balance, the Board does not believe that it is necessary to specifically include this provision. Accordingly there will be no specific article with respect to “an obligation to act fairly” in the new collective agreement.

16. Interest Arbitration (New Article)

The Association seeks the inclusion of a new article which would be identical to the provisions deemed to be contained in the collective agreement as outlined in Section 103 of the *Public Schools Act*.

The Division opposes the specific inclusion of such an article on the same basis as it opposed the inclusion of the other “deemed” provisions (“just cause” and “obligation to act fairly”).

It is worth noting that if the legislation changes with respect to settlement of collective bargaining disputes between teachers and divisions, and that teachers are given the right to strike, any amending legislation may contain the proviso “unless the parties otherwise agree”.

Accordingly, if a specific interest arbitration provision is included in the Turtle River collective agreement, on the basis that it is deemed to be there in any event, there is a risk, however slight, of the legislation being amended and

the parties being bound to proceed to interest arbitration notwithstanding that one or other or both of them may have no desire to do so.

In view of that consideration, and the other considerations referred to in the immediately preceding two subsections of this Award, there will be no specific article with respect to interest arbitration in the new collective agreement.

17. Preferential Hiring (New Article)

The Association has asked for a new article to be included in the collective agreement dealing with preferential hiring to teaching positions which become vacant within the Division.

Initially the Association sought an article which would provide for a right of first refusal to be given to any full time teacher and any part time teacher, already employed by the division, who apply for a vacant teaching position.

Subsequently, the Association dropped its request relating to full time teachers and limited its proposal to part time teachers. Currently there are only four part time teachers employed in the Division.

The Division did not adamantly oppose the inclusion of an article with respect to preferential hiring for part time teachers already employed by the Division, but expressed reservations regarding the Association's amended proposal. Those reservations were that:

- (i) There is a significant difference between a preference and a right of first refusal. While the Division does not object to a properly defined preferential clause, it strenuously objects to a right of first refusal;

- (ii) The Division wants to preserve its ability to fill any vacant positions with the individuals whom it assesses as being the most competent and best suited to the position;
- (iii) The clause ought not to apply to all vacancies occurring in the Division, but only to consequential vacancies occurring after internal transfers;
- (iv) The clause ought not to apply to teachers on Limited Term agreements but only to part time teachers employed on Teacher-General agreements.

The Board agrees with the Division's concerns noted as (i) and (iv) above. With respect to (ii) above, the Board believes that the Division's concern can be adequately addressed through appropriate drafting of the provision.

Therefore, an article will be included in the new collective agreement, which will be as follows:

"Preferential Hiring

When a teaching position becomes vacant within the Division, preference shall be given to any part time teacher currently employed by the Division pursuant to a Teacher-General agreement who applies for the vacant position (the internal applicant) over any applicant from outside the Division provided the internal applicant has the training, academic qualifications and experience to fill the position and has training, academic qualifications and experience which are equal, or superior to any outside applicants.

When more than one part time teacher from the Division applies for a full time vacant position, and all of those part time teachers have the necessary training, academic qualifications, and experience to fill

the position, preference shall be given to the teacher having the most seniority in accordance with Article 10.”

INTERIM ORDER

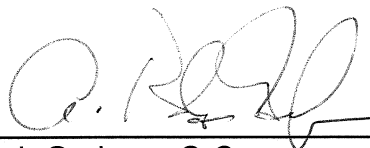
The Board is mindful of the fact that certain delays were encountered in having this matter brought forward to hearing, and that the Board has taken several months to prepare and issue this Award. The Board is also mindful that this Award contemplates further negotiations, and potentially a further hearing, before all outstanding issues will be finalized. In view of those delays, the Board hereby orders an interim payment to be made as soon as reasonably possible to all affected teachers, of any principal monies payable to them pursuant to this Award with respect to the period from July 1, 2004, to the day before the first day of the fall term of 2006.

CONCLUSION

The parties have advised that they have resolved the wording of all articles of the collective agreement with the exception of the items in dispute dealt with by this Award. The Board orders that all portions of the collective agreement which the parties have agreed upon as revised, and all portions of the collective agreement which the parties have agreed will remain unchanged, together with the clauses ordered by this Award with respect to the items in dispute, will comprise the new collective agreement. The Board reserves jurisdiction to settle any question of wording, if the parties are unable to agree upon the final form and content of any article. The Board also reserves jurisdiction to determine any other issues which may arise with respect to the implementation of this Award.

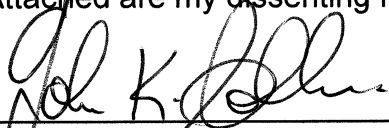
The Board expresses its sincere appreciation to the parties, and all of their representatives, for their very thorough and thoughtful presentations which were of great assistance to us.

DATED at Winnipeg, this 15th day of March, 2007.



A. Blair Graham, Q.C.
Chairperson

I concur in part and I dissent in part.
Attached are my dissenting reasons.



John Collins
Nominee on behalf of the Association

I concur in part and I dissent in part.
Attached are my dissenting reasons.



Gerald Parkinson
Nominee on behalf of the Division

IN THE MATTER OF: AN INTEREST ARBITRATION

BETWEEN:

The Turtle River School Division

(hereinafter called the "Division")

- and -

**The Turtle River Teachers' Association of
the Manitoba Teachers' Society**

(hereinafter called the "Association")

PARTIAL DISSENT

I have reviewed the Chairperson's Award in this matter and I concur with the exception of the matters hereinafter set forth.

1. Basic Salary Schedule (Article 3.12)

I would not have ordered the further \$250.00 increase retroactive to the first day of the fall term. I understand that the Chairperson is struck by the need for a "catch-up" due to gains achieved by other teachers due to amalgamation in that unique situation. However, this Division has already made that payment and indeed was the first to do so in 2002. They are now being singled out for a unique double payment which is not consistent with the overall pattern of provincial settlements. They should not be required to make a further \$250.00 payment unless it is in conjunction with the overall proposal the Division made – i.e. three flat dollar increases and \$250.00 on June 30, 2007.

Further, I would have preferred the flat dollar payments based on average teachers' salaries since that would have applied the money where it is arguably most needed – at the start rates.

2. Hours of Work (New Article)

I would have preferred to have not left this matter unresolved.

I would have preferred that the Board was clear as to the provincial pattern. In all cases where the facts can be ascertained Boards ordered or parties agreed that there ought to be no material increase in contact time during the life of a Collective Agreement since that could skew the terms and conditions which drove the financial settlement. I would have ordered that the parties go with the pattern of being ordered that the Division cannot increase contact time by more than 5% above the average prior to the contract on an overall basis; without applying the guarantee to individual teachers who circumstances may change – i.e. a switch from elementary to senior school or vice versa.

3. Management Rights

I would not have retained jurisdiction to deal with contact time without also retaining jurisdiction to deal with further with management rights.

4. Interim Order

I would not have made an interim Order in this matter. I believe that such an interim Order removes the impetus to resolve outstanding issues. Since the Board has chosen to leave some issues to be resolved, I would have left the obligation to commence payments under the new Agreement to pend resolution of those matters.

I wish to thank the parties for their able and thorough submissions which were most helpful.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at the City of Winnipeg in the Province of Manitoba this 14th day of March, 2007.



G.D. Parkinson, Board Member

IN THE MATTER OF
AN ARBITRATION BETWEEN
THE TURTLE RIVER TEACHERS' ASSOCIATION OF THE MANITOBA TEACHERS'
SOCIETY

(hereinafter referred to as the "Association")

and

THE TURTLE RIVER SCHOOL DIVISION

(hereinafter referred to as the "Division")

PARTIAL DISSENT OF JOHN K. COLLINS, NOMINEE OF THE ASSOCIATION

I concur with the chairperson's award except for the items set out below on which I must, with respect, dissent.

ITEM 2: Basic Salary Schedule (Article 3.12)

ITEM 3: Hours of Work (New Article)

I concur with the approach taken by the Chairperson on items 2 and 3. However, in some respects, I perhaps hold a different opinion from the reasons given and would like to note these differences for the record.

Firstly, I agree with the much quoted remarks of arbitrators Swan (Kingston Hospital, 1979) and Shime (McMaster University, 1990) on the inappropriateness of "ability to pay" as a criterion in public sector arbitration. Accordingly, I do not agree that the employer's "having the financial and other resources" (page 12) should be a consideration.

Secondly, I do not find the size of the Division persuasive in this case (page13, page 22). If the Division believed that it did not have the economies of scale to provide the employment conditions in question to its teachers, it could have amalgamated with other divisions. It chose not to do so. Furthermore, indicators such as its special levy mill rate and surplus would suggest that, in these areas, the Division has held itself to a more advantageous position than others with much greater economies of scale.

Having said that, I am otherwise in agreement with the Chairperson on items 2 and 3 and concur with his decisions and instructions to the parties.

ITEM 11: Sick Leave (Article 9.03)

I concur with the award on this article except for section 4(b). The effect of this section is to relieve the Division of its obligation to pay all or part of a teacher's sick leave entitlement if the teacher receives wage-loss replacement benefits from the Manitoba Public Insurance Corporation. These are two discrete and unrelated benefits. One is a benefit arising out of the collective agreement as a result of a bargain between the Association and the Division. The other is a separate and private contract made by the teacher as a private individual with the Manitoba

Public Insurance Corporation and is absolutely unconnected with his or her employment with the Division. The teacher has paid for the former through the bargain between the Association and the Division and for the latter through his or her premiums to the MPIC. It is not fair that the Division as an employer should profit from a personal arrangement made by the teacher in his or her capacity as a private citizen. I would not have awarded section 4(b).

ITEM 14: Just Cause (New Article)

ITEM 15: Obligation to Act Fairly (New Article)

ITEM 16: Interest Arbitration (New Article)

I would have awarded the Association's proposals on Items 14, 15 and 16. Items 14 and 15 are not unusual provisions and are common to many collective agreements. Their importance is reflected in the fact that they are deemed to be part of all collective agreements by *the Labour Relations Act*.

Item 16 describes the interest arbitration process available to teachers and trustees and is deemed by *the Public Schools Act* to be part of all teacher collective agreements.

The Chairperson correctly notes that some of the employment rights and obligations of teachers are contained not in the collective agreement but in the individual teacher's contract and the relevant statutes. However, it does not follow that because all those rights and obligations cannot be reproduced in the collective agreement, none of them should.

The Association's point was that teachers who might not have easy access to the statutes in question should have easy access to a document that would be a comprehensive outline of their employment rights including the process for settling collective bargaining disputes about what their salaries and working conditions should be. As it happens, a teacher's individual statutory contract clearly expresses the substance of the Division's authority over the teacher. Every teacher has a copy of the collective agreement as well as his or her own individual contract. If items 14, 15 and 16 were included in the collective agreement, it and the individual contract would provide to every teacher an accessible and comprehensive outline of his or her employment rights and obligations.

Finally, with respect, I would give no weight to the Division's argument that the legislation in question might at some future time be amended. No evidence was advanced that any such amendments are likely in the immediate future.

All of which is respectfully submitted.

Dated at the City of Winnipeg in the Province of Manitoba this ¹⁴ day of March, 2007



John K. Collins, Nominee of the Association