

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

**BETWEEN:**

**THE PEMBINA TRAILS SCHOOL DIVISION (“the Division”),**

**- and -**

**THE PEMBINA TRAILS TEACHERS’ ASSOCIATION OF THE  
MANITOBA TEACHERS’ SOCIETY (MTS) (“the Association”),**

**AWARD**

**Appearances**

For the Division: Morgan Whiteway, A/Director Labour Relations, Manitoba School Boards Association (MSBA), Lead Spokesperson; Ted Fransen, Superintendent/CEO; Nora Wood, Secretary-Treasurer; Janet Tomy, Assistant Superintendent, Curriculum & Learning Services; Elaine Egan, Assistant Superintendent, Human Resources and Policy; Elizabeth Mitchell, Justin Rempel, Alison Bourrier and Shannon Pilon, Labour Relations Consultants (MSBA); Greg Mason, PhD, CE, Professor of Economics.

For the Association: Tom Paci, MTS Staff Officer and Lead Representative; Lise Legal, Association President; Sean Giesbrecht, Association Vice-President and Collective Bargaining Chair; Debra Morrissey, Association Vice-President and Professional Development Chair; Arlyn Filewich, Teacher Welfare Department Head; Darren Hardy, MTS Staff Officer; Zac Saltis, MTS Economic Analyst.

**Arbitration Board**

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

**Hearing and award dates**

January 4-8 & 11, 2021, by video conference. Supplementary written submissions January 18, 20 and February 12, 2021.

Award issued February 15, 2021.

## **TABLE OF CONTENTS**

|   |            |
|---|------------|
| <b>Introduction</b>                                       | <b>3</b>   |
| <b>Pembina Trails School Division Profile</b>             | <b>5</b>   |
| <b>The collective bargaining environment</b>              | <b>7</b>   |
| <b>Interest arbitration principles</b>                    | <b>12</b>  |
| <b>Effective period: Article 1.4</b>                      | <b>20</b>  |
| <b>Salaries and Allowances: Article 3</b>                 | <b>23</b>  |
| <b>Teachers on Limited Term Contracts: Article 4.6</b>    | <b>53</b>  |
| <b>Working Conditions: Article 5</b>                      | <b>69</b>  |
| <b>Leave of Absence for Executive Duties: Article 6.3</b> | <b>90</b>  |
| <b>Bereavement Leave: Article 6.7</b>                     | <b>92</b>  |
| <b>Maternity/Parental/Adoptive Leave: Article 6.8</b>     | <b>95</b>  |
| <b>Personal Leave: Article 6.11</b>                       | <b>105</b> |
| <b>Professional Development Fund: Article 7.5</b>         | <b>106</b> |
| <b>Health Spending Account: New Article</b>               | <b>108</b> |
| <b>Exceptional Students: New Article</b>                  | <b>110</b> |
| <b>Agreed Items</b>                                       | <b>110</b> |
| <b>Conclusion</b>   | <b>110</b> |
| <b>Jurisdiction retained</b>                              | <b>111</b> |
| <b>Appendix A</b>   | <b>112</b> |

## **Introduction**

1. The parties entered into a negotiated collective agreement for the period July 1, 2014 to June 30, 2018, which was the fifth agreement voluntarily negotiated between the Division and the Association since 2002. The average elapsed time to reach a new agreement over this period was 16 months. The Association was certified as bargaining agent for Pembina Trails teachers after the former Assiniboine South and Fort Garry school divisions were amalgamated. Notice to amend the 2014-2018 collective agreement was given in May 2018 but there was virtually no bargaining conducted. The same was true at every other teacher table in the province.
2. On July 27, 2018, the Association declared impasse and referred all matters in dispute to binding interest arbitration under the Act.
3. The failure to bargain was not attributable to the parties themselves. Even when the present arbitration hearing opened, not one of Manitoba's 38 teacher collective agreements had been voluntarily renewed through collective bargaining for the period post-2018.
4. The present board was constituted on or about January 19, 2019. On February 27, 2019, by agreement of the parties, the hearing was scheduled for April 2020, but with the emergence of the COVID-19 pandemic, it was necessary to adjourn and consider alternate approaches to conducting the hearing. Ultimately, the parties agreed to convene by video conference in January 2021. Briefs were pre-filed and a full hearing was held in the usual fashion,

albeit remotely. There were no concerns or objections raised regarding the hearing format.

5. In parallel with the present case, the current panel was also appointed to settle a new collective agreement between the Louis Riel School Division and the Louis Riel Teachers' Association. The hearing in that case took place in November-December 2019, and a unanimous award was issued on April 14, 2020: see [2020] M.G.A.D. No. 1, 2020 CanLII 30360 (MB LA) (hereafter referred to as "*Louis Riel*"). The bargaining context and some of the issues were similar to the present case. As a result, frequent reference will be made to *Louis Riel* in the course of this award.
6. The *Louis Riel* board stated as follows regarding the historic legal context in which teacher interest arbitration is conducted in Manitoba (at p. 3):

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

7. While it is regrettable that the parties were unable to conclude another voluntary agreement, and thereby reach their own resolution of outstanding differences, the board believes it must face its responsibility to consider the issues and render an award consistent with governing principles.

8. In opening the hearing, the Association acknowledged a longstanding, productive working relationship with the Division, which has always yielded a liveable collective agreement. The current round has been different because of government intervention in public sector labour relations since 2017, as detailed in *Louis Riel*. In the Association's view, government is now hiding behind the pandemic in a continuing effort to suppress teacher salaries and benefits. The Association identified three priorities in a new agreement: inflation protection, defined teacher working time and improved job security for term teachers. It emphasized that these objectives are especially important now. COVID has meant unprecedented demands and risks for teachers as they persevere to deliver education during an ongoing pandemic, but without the extra compensation offered to other front-line workers.
  
9. For its part, the Division highlighted its motto, "Accomplish Anything", and three lofty expectations: student engagement in learning, meeting key curricular standards by the end of Grade 8, and a 100% high school graduation rate. Pembina Trails is considered one of the top divisions in the province. In opening comments, the Division stated bluntly that the Association's proposals, if granted, will imperil its high level of operation and achievement. The danger is especially grave while the Division struggles to maintain services during the pandemic. The Division asked the board to avoid imposing any new financial obligations, to grant relief where possible and to maintain much needed management flexibility.

### **Pembina Trails School Division Profile**

10. The Division consists of Charleswood, Tuxedo, Linden Woods, Linden Ridge, Whyte Ridge, North Fort Garry, Fort Richmond, Richmond West and

Waverly West. These are relatively affluent neighbourhoods in Winnipeg. The Association described the Division as “wealthy and growing”, with the highest property assessment per resident pupil in Metro Winnipeg. There is ongoing significant new home construction in the Division, as well as substantial immigration, resulting in projected growth of 500 new students per year. The Division said it is Manitoba’s fastest growing school division. It also has the second largest EAL student population. There are currently 35 schools, with plans to build four new K-8 schools as well as a centrally located new high school. The Division has struggled to meet classroom space needs and there have been tensions over requirements to bus students out of their local neighbourhoods.

11. The Division employs 1,075 FTE teachers (2020-2021 school year). About 60% are at Class 4 and 5, while 38% have attained higher teaching credentials and are at Class 6 and 7. Two thirds of teachers have reached the top of the experience scale (9 years). The teacher payroll is approximately \$100M (2020-2021 budget). According to the Division, the average annual teacher salary is \$86,909 and average total compensation is \$96,448 (2019-2020). The average principal salary is \$121,645. The Association questioned the methodology used in arriving at these figures and stated that average teacher salary cost was \$88,448. It said the Division’s calculation of average total compensation was overstated.
12. The Division asserted that it has no teacher recruitment or retention issues, a point not contested by the Association at this time.

## **The collective bargaining environment**

13. In April 2020, the *Louis Riel* board summarized the collective bargaining environment facing those parties (at p. 5-8). The description was largely generic to Manitoba school divisions as a whole and therefore it is also applicable to Pembina Trails, except as noted:

In 2017, the Legislature passed Bill 28, *The Public Services Sustainability Act*, S.M. 2017, c. 24, establishing a four-year period during which public sector employee compensation is limited to 0 - 0 - 0.75% - 1.0%. If applied to the Division and the Association, the first year under Bill 28 would be 2018-2019. The bill comes into force upon proclamation but has not been proclaimed. The validity of Bill 28 was challenged under the *Canadian Charter of Rights and Freedoms* (“the Charter”) by numerous unions and a decision is pending from the Court of Queen’s Bench. Whatever the trial result, at least one appeal is likely.

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

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

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

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

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

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

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

Beyond these new or contemplated fiscal policies, government established the Manitoba Commission on Kindergarten to Grade 12 Education in 2019, with a broad mandate including student learning, teaching, accountability for student learning, governance and education funding. The report could lead to a major realignment of school divisions and other changes. Although the report was completed early in 2020, it has not been released and public review has been deferred until 2021.

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

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

14. The *Louis Riel* board concluded that the school division was functioning as a *de facto* branch of government and should be treated as such for arbitral purposes. The board made its decision independent of the government's mandate, applying the well-established replication principle, based on objective labour market data, declining to consider "ability to pay" but remaining attentive to the economic situation. In a two-year agreement (2018-2020), the board awarded salary increases of 1.6% and 1.4%, as well as several operational changes.
15. There have been significant new developments since the issuance of the *Louis Riel* award, although the nature of the challenge facing the current parties remains essentially the same. Pembina Trails funding was increased 1.8% for the 2018-2019 school year but this did not account for enrolment growth, inflation, staff merit increases and payroll remittances. For 2019-2020, government directed further administrative cuts and granted the Division a 2.3% increase, which again was inadequate. The Division was surprised to receive a funding cut of -0.2% for 2020-2021, despite ongoing student population growth. The 2% cap on local taxation increases remained in place and a series of further administrative cost and staff reductions was ordered, applicable to all divisions. In February 2020, the Minister froze new management positions and instituted an outside review of organizational charts. The Division was forced to lay off a number of administrative staff, including an Assistant Superintendent and a Director of Clinical Services. No teachers have been laid off.
16. The Division stated that these provincial policies have led to cuts in educational programs, staff and services across the province. In a public

statement made in early 2020, MTS said this was the fourth consecutive year of real dollar funding reductions for public schools, and cautioned there could be program cuts, school closures, teacher layoffs and fewer supports for special needs students.

17. Then on June 11, 2020, the court issued its decision on the constitutional validity of *The Public Services Sustainability Act* (the PSSA): *Manitoba Federation of Labour et al v. The Government of Manitoba*, [2020] M.J. No. 138, 2020 MBQB 92 (hereafter “*MFL*”). MTS was one of the plaintiffs. The court struck down the PSSA, concluding as follows (at para. 431-433):

431 The PSSA, despite the fact that it has not been proclaimed, is effectively in force in the Province of Manitoba. It is clear from the "mandates" and policies utilized by the Government that the wage levels of zero per cent, zero per cent, 0.75 per cent and 1.0 per cent have been the applicable standards when dealing with unions. Further, the proclamation of the PSSA represents a looming presence for union representatives -- particularly with regard to the claw back and debt due provisions of the legislation. The PSSA has been enacted and its application has clearly been impactful in this Province. It has created substantial interference with collective bargaining.

432 The PSSA has made it impossible for the Plaintiffs to achieve their collective goals and limits the right to freedom of association. The s. 2(d) right cannot be exercised in a meaningful fashion. The PSSA is not saved by virtue of s. 1 of the Charter.

433 I have concluded:

1. this court has the requisite jurisdiction to rule on the constitutionality of the PSSA;
  2. the Government has violated the unions' s. 2(d) of the Charter with respect to the rights of public sector employees and the collective bargaining process;
  3. the violation of s. 2(d) Charter rights was not justified pursuant to s. 1;
- ...

18. A hearing is currently pending before the trial judge to determine detailed remedies, which may include the voiding of collective agreements settled under the influence of the PSSA and damages. Simultaneously, the government is pursuing an appeal before the Manitoba Court of Appeal.
19. In the October 2020 Throne Speech, the government announced that it would begin phasing out school division authority to levy local property taxation effective 2021, but without any assurance of funding for the 2021-2022 school year.
20. In order to comply with the government bargaining mandate as described above, the Division did not budget for any staff wage and salary increases between 2018 and 2020. It is understandably concerned about a potential salary award similar to *Louis Riel*.
21. On November 2, 2020, the government tabled Bill 45, *The Public Schools Amendment & Manitoba Teachers' Society Amendment Act*, which will roll all expired teacher collective agreements into a single provincial contract to be negotiated between MTS and the Manitoba School Boards Association. Collective agreements which have expired by the effective date of Bill 45 will remain frozen until the new provincial contract has been concluded.
22. Meanwhile, release of the K-12 Education Review was deferred until early 2021. The education sector is expecting, at a minimum, significant school division amalgamations, and perhaps even more sweeping changes, such as the elimination of local boards.

23. For parties hoping to reach an agreement, it is difficult to imagine a more challenging collective bargaining environment.
24. On February 5, 2021, government announced its 2021-2022 funding for school divisions, continuing the pattern of an overall 0.5% increase. In addition, school divisions were ordered to freeze local property taxation at last year's rate. Government will give each division a 2.0% increase to replace lost local revenue. However, control over local taxation has now been lost. Shortfalls can no longer be made up from the ratepayer. For Pembina Trails, all this will mean a net revenue increase of \$3.05M, which will be insufficient to meet incremental staffing costs and a *Louis Riel* scale salary award. In its last filing with the arbitration board, the Division said it will need to reduce programming and classroom based supports by \$6.7M in order to balance the budget. "The Division will have to make severe choices for their budget, which is due March 31, 2021."

### **Interest arbitration principles**

25. Given the unprecedented bargaining environment, the *Louis Riel* Board heard extensive submissions on interest arbitration principles and issued a lengthy ruling addressing ability to pay. This ruling was not challenged by either of the present parties. *Louis Riel* accepted the analysis of Arbitrator Shime in *Re McMaster University and McMaster University Faculty Association* (1990), 13 L.A.C. (4<sup>th</sup>) 199.
26. The board therefore adopts the analysis and conclusions in *Louis Riel* as follows (at p.19-23):

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

What about the Division's ability to pay as a factor in awarding compensation? This is a more complex issue. The board accepts that the Division is significantly constrained in its ability to generate revenue through the special requirement and has been unable to persuade government to fund the budget it has proposed. Does this mean that "inability to pay" now becomes an overriding consideration, or at least a significant factor, as urged by the Division?

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

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

In its submission, the division showed that ability to pay has been mentioned as a consideration in a number of Manitoba teacher awards over the years. Therefore, the Association is incorrect, at least in a Manitoba context, in asserting that arbitrators have universally rejected ability to pay as a factor in public sector cases. The *McMaster University* line of authority has rarely been discussed in Manitoba awards, although Arbitrator Scurfield did refer to it in passing as "mere sophistry" (*Brandon* 1998). At the time, ability to pay was a mandatory consideration by statute and Arbitrator Scurfield was essentially recognizing that school divisions might well have a demonstrable, diminished ability to pay. In the other Manitoba awards cited by the Division, ability to pay was one of a list of factors mentioned by those boards without further analysis or comment. The board in *Fort La Bosse* checked its award against the division's financial position but other factors were more prominent. In all prior cases, there was nothing like the present bargaining environment where government enforced a policy of funding restraint combined with restrictions

on local taxation. Thus, no Manitoba teacher arbitration board to date has been so starkly confronted by the prospect that it may inadvertently become an agent of government policy.

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

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

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

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

Louis Riel School Division is an entity operationally distinct from government but as the evidence before the board established, the Division is subject to close government financial control, when government so chooses. Legally, the Division is a creature of government. At the present time, government has placed a high priority on expenditure restraint and taxpayer relief, both for provincial taxpayers and local ratepayers. The Government has made the Division a vehicle for delivery of this policy. At the same time, the Division's trustees retain the right and the obligation to make educational decisions within

the available financial resources. This is no easy task at the best of times, and especially so in the current environment.

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

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

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

27. The present board also adopts the *Louis Riel* statement of the replication principle, as follows (at p. 43):

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

28. Given the issuance of the *Louis Riel* award, there is now *one* Manitoba teacher settlement comparable, which the present parties agreed was relevant to replication. However, there was disagreement on the weight that should be given to *Louis Riel* as compared to other factors. The Division said it does not represent a pattern. It is a single settlement. The Association noted that historically in Manitoba teacher bargaining, once the first settlement is reached, it *is* treated as setting the pattern and virtually all other divisions follow suit. The record supports this assertion, but the board acknowledges that no single factor is determinative under replication analysis.
29. It is well established that the best comparator for replication purposes is other employees performing the same or similar work in a comparable market environment: *Teachers' Bargaining Committee (Saskatchewan Teachers' Federation) and Government-Trustee Bargaining Committee*, [2018] S.L.A.A. No. 9 (at p. 17, para. 36). However, ever since the leading case of *General Truck Drivers v. B.C. Rail Co.* (Shime: 1973), arbitrators have considered a number of comparables in public sector wage determination, which *B.C. Rail* listed as follows: (a) internal, (b)(i) external in the same industry; (ii) external, not in the same industry, but similar work. As “internal” comparators, the Division pointed to settlements it has reached with its non-teacher bargaining units following the Bill 28 pattern and argued that this is the most compelling factor in the absence of teacher comparables. The Association responded that no teacher arbitration award has given weight to settlements with bus drivers, clerks, tradespersons or educational assistants employed by a school division.

30. In *McMaster University*, applying his own formulation from *B.C. Rail*, Arbitrator Shime listed the following sequence of comparators: (1) other Ontario university faculty salaries, (2) university faculty outside Ontario, (3) the education sector, *ie*, high school teachers and community college faculty, and (4) other professional salaries, *ie*, lawyers, doctors, engineers, social workers. There was no reference to non-faculty bargaining units at McMaster University as a comparator.
  
31. In *Fort La Bosse School Division No. 41 and Fort La Bosse Association No. 41 of the Manitoba Teachers Society* (Chapman: 1994), the board rejected comparability with the division's non-teaching employees, whose unions had settled for lower wages. The board held that it was "not satisfied that a comparison with individuals with different qualifications is as valid as the salaries paid to teachers in the immediately surrounding areas. There are different qualifications, responsibilities and duties incumbent on teachers" (at p. 6). It appears that no Manitoba teacher arbitration board in the past 25 years has qualified this finding.
  
32. From an equity perspective, it is understandable that the Division prefers to treat all its employees the same in this round. The board has taken note of the non-teacher agreements. However, the replication principle sets a price for labour based on market realities, and teachers do not share the same market with non-teaching employees. As *Fort La Bosse* said, teachers have different qualifications, responsibilities and duties. It may be arguable that well paid teachers can and should get by with the wage restraint accepted by the Division's support staff. However, that is a value judgement. Interest arbitrators have long avoided wearing "the mantle of a crusader for social

change”, imposing a personal notion of fairness: *City of Regina and Regina Police Association* (Ready: 1994), citing Mr. Justice Halvorsen in *Saskatchewan Health Care Association and CUPE*. Replication is the governing principle.

33. Both parties made proposals for operational changes to longstanding practices. As in *Louis Riel* (at p. 86), the board adopts the approach in *Turtle River Teachers’ Association of the Manitoba Teachers’ Society and Turtle River School Division (Supplementary Award)* (Graham: 2007) (“the *Turtle River test*”), where the board wrote (at p.6-7):

... interest arbitrators in this province have frequently cautioned against dramatic departures from established norms and patterns. For example, John Scurfield, writing as the Chair of an interest arbitration board settling the terms of a collective agreement between the Birdtail School Division and its teachers in the mid-1990s stated:

... suffice it to say that departures from a well-established body of precedents are more often characterized as ill-advised than as bold initiatives.

Similarly, in the context of interest arbitration proceedings involved in the Brandon School Division and the Brandon Teachers Association in 1998, Scurfield said:

... arbitrators should be reluctant to unilaterally introduce entirely new articles into collective agreements which have been developed over a longer history of bargaining.

Other interest arbitrations have properly emphasized that it is important to carefully consider the “overall package”, and a new initiative in one area may be problematic for the parties if it is not counterbalanced by an adjustment in another area.

While such statements may reflect a thoughtful and prudent approach by interest arbitrators generally, they cannot be interpreted as meaning no new approaches and no new initiatives should ever be undertaken by interest arbitrators. In fact, the history of interest arbitration in the public school context in Manitoba provides numerous examples of awards which included provisions representing significant departures from what had previously existed.

Indeed, Arbitrator Scurfield, in the 1998 Brandon School Division interest arbitration award specifically stated that:

In my opinion, arbitrators have the right to impose new articles and collective agreements when the arbitrator has concluded, based on the evidence, that the reluctance of one party to agree to an article is not logical or fair.

With respect to the practice of maintaining long existing practices, he contemplated exceptions, when he wrote:

The exceptions to this approach should be based on evidence that the current practice is impractical, inequitable or out of step with what is occurring in other divisions.

34. Thus, the *Turtle River* test is evidence based and takes into account logic, fairness, practicality, equity and consistency. The test should not be reduced to a rote, formulaic exercise. It is not a checklist, where every box must be ticked. Like every other aspect of interest arbitration, the goal here is to achieve an outcome that is fair and reasonable for both parties.
  
35. The fact that an awarded item represents a breakthrough is not *per se* a valid basis for objection. Over time, collective bargaining does yield changes that may be styled as breakthroughs, and interest arbitration is designed to replicate reasonable collective bargaining. Arbitrators take a prudent approach to operational change, sometimes described as conservatism, but as emphasized by Arbitrator Graham in *Turtle River* (at p. 7), “the history of interest arbitration in the public school context in Manitoba provides numerous examples of awards which included provisions representing significant departures from what had previously existed.” This allows for stability without unnecessary rigidity. In the end, proposals should be considered on their merits.

**Effective period: Article 1.4**

36. In its original bargaining proposals, the Association proposed a two year agreement, but this was amended to three years at arbitration (2018-2021). Past agreements between the parties have varied in duration. The first collective agreement was for 2 years. In the next two rounds, the duration was 3-years. The last two agreements were 4-year terms (2010-2014 and 2014-2018). The Association said it would consider another 4-year agreement if teachers could achieve a measure of protection from the uncertainty and turbulence prevailing in the public school sector. It did not particularize the meaning of “protection”.
37. In April 2020, just as the COVID-19 pandemic was beginning to make itself felt, *Louis Riel* awarded a two-year contract (2018-2020), as follows (at p. 24):

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

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

38. The Division strongly advocated a 4-year agreement on a number of grounds. First, in the previous round of bargaining, almost every school division across the province settled for four years. Pembina Trails itself has a history of

longer agreements (three or four years), which have served the parties well by ensuring substantial periods of labour peace. The last agreement was signed in April 2015 and ran until June 2018, providing three years without the stress of bargaining. If the board now awards a 3-year agreement, notice to bargain will be required in a few months and the parties will have little opportunity to live with the awarded contract before returning to the table.

39. Second, Division management, staff and trustees have been overwhelmed by the pandemic. Many people are exhausted by the constant demands and changes involved in delivering education during a crisis. The Division described this process as “all consuming.”
40. Third, the Division needs a period of stability given the pressures of the government’s policy changes, which include the TIG phase-out, budget and administrative cuts, senior management downsizing, the cap on local taxation revenue and the pending K-12 Review.
41. The board has sympathy for both positions. Regrettably, there is little the board can do to provide stability for the parties, as we noted in *Louis Riel*. Moreover, if Bill 45 is enacted this year, the bargaining landscape will change dramatically and preparation will begin for negotiation on a provincial level. However, existing collective agreements will continue until they expire. A 4-year agreement carries the advantage of fixed terms and conditions until July 2022. Both parties would have a chance to catch their breath and focus on getting through the pandemic. The Division ranked a longer agreement as a priority and the Association was willing to consider it, subject to its interests being protected.

42. Replication supports either a 3-year or a 4-year agreement. The board has considered the practicalities of each option. As will be discussed in detail below, due to COVID, there is significant uncertainty about economic conditions for the 2021-2022 period, whereas there is partial data now available for 2020-2021. The adverse effects of the first wave are known. Governments put a floor under the economy and there was a rapid recovery. The second wave is underway and there are some indications of the early impacts. The board agreed to receive updates from the parties until shortly before the issuance of the decision. Thus, an award covering 2020-2021 is manageable whereas a 4<sup>th</sup> year is uncertain. The range of potential outcomes is substantial.
43. Optimistically, the virus will be relatively contained and vaccination will proceed expeditiously, restoring normal life by the fall of 2021. More darkly, there could be continuing new outbreaks of the current virus or a more serious mutation, and vaccines may not be delivered on time or may not protect the population as hoped. Arbitration boards are accustomed to the vagaries of economic forecasting evidence, but the degree of uncertainty for 2021-2022 is beyond normal expectations. Conceivably a wage re-opener could be utilized in the 4<sup>th</sup> year, but that would impose another bargaining burden and potentially lead to yet another arbitration. A pragmatic solution is required.
44. A cost-of-living clause (COLA) would deal with the uncertainty by fixing a formula for the 4<sup>th</sup> year, with advantages for both parties. The Association would achieve its bottom-line goal of inflation protection. The Division would avoid an increase potentially greater than inflation, something teachers have often achieved in past bargaining. COLA in the 4<sup>th</sup> year is a result

consistent with reasonable collective bargaining in the current difficult circumstances, and thus the board will award it under the replication principle.

45. For clarity, the board is renewing the 2014-2018 collective agreement for four years by virtue of this award, notwithstanding that jurisdiction is retained in case the parties require assistance with implementation of some items.

### **Salaries and Allowances: Article 3**

46. The Association relied on the *Louis Riel* award of 1.6%-1.4% for the 2018-2020 period and sought 0.5% for the third year to match the projected rate of inflation in 2020-2021. It was common ground that inflation has fallen markedly due to the pandemic. By accepting a reduced scale of 0.5% for the third year, the Association said it was incorporating the impact of the COVID pandemic into the award. This is the minimum justifiable increase for the third year because objective labour market data would support a higher award, it asserted.
47. The Association requested an additional 1.0% over the term of the new agreement to correct for the *Louis Riel* reliance on a group of comparator settlements the Association said were tainted by the PSSA. At the time of *Louis Riel*, the court judgement in *MFL* had not yet been issued and the board held it would give “some weight” to these settlements, which followed the PSSA pattern (0%-0%-0.75%-1.0%). Thus, in total, the Association proposed a 4.5% salary increase over three years, with a net impact of \$4.2M year by year. The Division costed this position at between \$9.1M and \$10.5M cumulatively over three years.

48. The Division proposed zero in each year of the new collective agreement, characterized as “a wage pause”, which was less than the PSSA pattern. The Division said this was justified by the severe public school bargaining environment and the fact of a COVID-induced recession, which will have adverse effects for years to come. Noting that other public sector employee groups are lower paid and have suffered layoffs or unpaid days due to the pandemic, the Division argued that teachers are in the best financial position to weather the storm. In its submission, the result in *Louis Riel* should not be followed.

### **The *Louis Riel* salary award**

49. The main conclusions of the *Louis Riel* board were as follows (at p. 43-49):

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

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

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

settlements in the Manitoba public sector averaged 1.46%. The Manitoba private sector average settlement was 1.93%.

The board accepts the Association's contention that currently, many parties in free collective bargaining are settling at or near the rate of inflation but the pattern is far from universal. Admittedly these are not employees in positions directly comparable to teachers. Nevertheless, the data is relevant because it is some evidence of what the current economic climate can bear in terms of labour cost.

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

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

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

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

Manitoba has probably the most diverse economy in Canada. If there is a slowdown, said the bank, Manitoba is expected to weather any storm relatively well. Budget 2019 calls Manitoba's economy the most stable in Canada.

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

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

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

As referenced above, in the recent Alberta teachers' award the government sought a rollback and the arbitrator awarded zero. ...

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

The economic climate in Manitoba for the 2018-2020 contract period, whether one adopts the Division's pessimistic view or the Association's optimistic perspective, is markedly different than the situation that resulted in these zero awards. Specifically, Manitoba has not been marked by recession, high unemployment, significant layoffs and flat wages for the period in question. The board recognizes that the economy will be impacted by the pandemic in

the final months of the 2019- 2020 school year, but budgeting and hiring for this year was completed in early to mid 2019.

In the past 35 years of bargaining, the present parties have settled for less than inflation 15 times and have exceeded inflation 20 times. Cumulatively, salaries did not exceed CPI until 2009 when there was a market adjustment and Louis Riel became the Winnipeg salary leader. Subsequent bargaining resulted in annual increases both above and below inflation. Considering all factors, the board concludes that in this round, a replicated result should be below inflation, but still greater than zero, given that average Manitoba earnings, other collective agreement settlements and the economic climate for the period are favourable on balance.

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

### **Submission of the Association**

50. The Association described *Louis Riel* as a watershed decision which remains fully applicable to the 2018-2020 period, except for the matter of PSSA comparables. *Louis Riel* moderated the salary award by giving “some weight” to zero increases accepted by public sector unions negotiating under the threat of *ex post facto* contract nullification and claw-backs. *Louis Riel* called these “real agreements reached under difficult circumstances” (at p. 45). However, shortly after the award was issued, a judge hearing a mandamus application to require the appointment of an interest arbitration board stated as follows in *MGEU v. Minister of Finance for the Government of Manitoba*, [2020] MJ No. 109, 2020 MBQB 68 (at para. 19):

... The PSSA proposals were the starting point of Manitoba in the negotiation process and it is Manitoba that is in the position to have the PSSA proclaimed into effect at any time and to make its provisions retroactive, despite any advances made in negotiations up to that point. It is the sword of Damocles hanging over the bargaining process.

51. The subsequent *MFL* judgement concluded that meaningful collective bargaining was nearly impossible under the PSSA. Referring to these settlements, the judge said they represented “more capitulation than negotiation” (at para. 430). A number of the agreements were only conditionally ratified and may eventually be renegotiated.
  
52. The present board now has the benefit of the *MFL* ruling and should revisit the question, said the Association. While the precise effect of according “some weight” the PSSA settlements is not quantifiable, the labour market evidence in *Louis Riel* suggested increases approximating 2.0% per year and the board award averaged 1.5% per year. Therefore, argued the Association, it would be reasonable that 1.0% be added to the present salary award over the term of the agreement as a correction. Two different options were offered for adding the 1.0% salary correction – 0.5% added in each of the first two years, or 1.0% added in year 3. The Association clarified that it is not seeking judicial redress at the remedy hearing in the *MFL* litigation.
  
53. Turning to its principal submission that positive salary increases should be awarded instead of a wage pause, the Association relied on *MacDonald Youth Services and MGEU* (Freedman: July 21, 2020), which endorsed the general approach taken in *Louis Riel*, albeit without any reference to *MFL*. The arbitrator in *MacDonald Youth* rejected the PSSA pattern and awarded wage increases approximating *Louis Riel* in a two-year agreement (1.5% per year, 2018-2020), noting as follows (at para.79):

In my opinion successful negotiations in this situation, which I am to replicate to the extent possible, would necessitate movement on both sides, and not just by one party. The proposal of the Union comes closer to meeting the objective

criteria, such as wage increases in some other public sector settlements or awards, and cost-of-living increases, than does the Employer's 2-year proposal.

54. The bargaining history in Pembina Trails, over the course of five voluntary collective agreements, never included a zero salary increase, even during the 2008/2009 recession. Similar to *Louis Riel*, annual salary increases on average were above inflation (2.7% increases vs 1.8% inflation), and settlements over this period included various improvements in contract benefits and language. Thus, the Division's proposed wage pause is inconsistent with the replication principle.
55. As was argued in *Louis Riel*, the Association said the Manitoba economy has grown at an average annual rate of 2.3% over the last two decades, and continues to produce balanced, stable growth. In this period, Manitoba workers have enjoyed average annual wage growth exceeding inflation. In 2018 and 2019, unionized employees averaged 2.0% wage increases and non-union employees averaged 3.0%. Salaried employees averaged 2.9%. In the Manitoba private sector, there were a number of settlements in the spring and summer of 2020 ranging from 2.1% to 2.5%. Parks Canada concluded an agreement in September 2020 with PSAC (2018-2021) at 2.8%-2.2%-1.35%, plus a one-time payment of \$500. Overall, Manitoba wage growth has trended around 2.0% annually. The most recent updates based on data to October-November 2020 confirm these findings, despite the pandemic. The price of labour is not falling.
56. These are well anchored expectations going forward, said the Association. In addition, teachers in Saskatchewan and Ontario signed agreements in the

spring of 2020, as the pandemic was beginning, for positive salary increases over multiple years. In this context, the PSSA pattern and the Division's wage pause are aberrations, detached from labour market realities.

57. The pandemic related shutdown in March-April 2020 precipitated the deepest, most rapid downturn in Manitoba history, estimated as a 4.2% loss of GDP for 2020 at the time of writing. The labour force shrank by 7.3%. However, this was followed by an astonishing recovery in Manitoba, which performed better than other provinces in this respect. By summer 2020, retail sales and wholesale trade had surpassed pre-pandemic levels. Total employment was at 98.5% of pre-pandemic levels by September 2020. Manitoba GDP is now forecasted to grow by 4.1% in 2021 and 3.6% in 2022 (Statistics Canada, Manitoba Growth Consensus Forecast; January 2, 2021). Manitoba has been forecast to recover fully by the end of 2021 (RBC Economics; December 15, 2020). However, actual GDP numbers are not available post-August 2020. Inflation is now forecasted as 0.5% for 2020.
58. The recovery has been widely attributed to unprecedented action by the federal government, as well as the provinces, who put a floor under the economy with fiscal and monetary interventions. As a policy choice, lost aggregate labour income was more than replaced by government. In August, Statistics Canada reported that national household income increased in Q2 while spending declined, increasing the saving rate from 7.6% to 28.2%. In December, BMO reported \$150B in excess savings (7% of GDP), which it described as "an enormous potential war chest to drive spending in 2021." The Association stated that this has created pent-up demand which will be unleashed as the economy re-opens. Moreover, federal government supports

will continue until the summer of 2021. Manitoba implemented a series of initiatives that helped 21,000 people keep working or return to work, balancing out the first wave decline. As a result of all the foregoing, the COVID down-turn is very different than past recessions and should not be used as an excuse to deny salary increases justified by the labour market.

59. The Association acknowledged that in November 2020, second wave restrictions caused employment losses in Manitoba again, mostly in part-time positions, but the drop (2.8%) was much smaller than during the first wave in April. These data are consistent with Manitoba's reputation for a stable, resilient economy.
60. As for the province's fiscal position, the 2020/21 Mid-Year Report (December 2020) projected a \$2.0B deficit, down from \$2.9B in Q1. The original 2020-2021 budget forecast had been a deficit of \$220M. The mid-year improvement included \$648M in federal transfers for COVID spending. Nevertheless, the Manitoba government has continued its policy of tax cuts and declined to tap the Rainy Day Fund. The Association argued that while the pandemic has impacted Manitoba's fiscal position, the recovery will address the losses over time. The net-debt-to-GDP ratio will stabilize and decline. Manitoba's public debt is sustainable over the medium term. Interest rates are at historic lows and are expected to remain low. As a result, debt service costs are not projected to increase. There is no fiscal crisis. The government has choices, and as noted in *MFL*, it continues to forego revenue sources that would help address the deficit, preferring to force public sector employees to shoulder the burden (at para. 365).

61. In summation, the Association argued that even with the second COVID wave underway, it is apparent that the Manitoba economy will recover and thrive again in the near term. The economy has suffered an exogenous shock rather than the effect of any inherent weakness. Depending on the severity of the second wave and the timing of Manitoba's re-opening, the recovery may be delayed, but it will come. Some sectors such as real estate are surging now, which is unexpected. Vaccines are starting to roll out. In due course, restrictions will ease and the economy will certainly rebound.
  
62. The Association argued that the Division's ability to pay salary increases is not a principal issue, as explained in *Louis Riel*. Even so, the Association pointed to a series of favourable indicators in Pembina Trails. There are strong residential growth rates, high assessed property values and above-average household incomes. Moreover, the Division made a policy choice to forego available local taxation revenue over the years. In sum, Pembina Trails is a wealthy division and can afford to pay its teachers the market rate. The Division has the highest assessment per resident student in the Metro area, yet its expenditure per student is among the lowest. The Association also said there is flexibility in the Division's annual budget of \$180M and choices must be made. The undesignated surplus was \$5.5M (2018) and \$5.4M (2019). The consolidated accumulated surplus was \$48.6M (2019). Finally, the Association pointed to at least \$8.5M in additional funds in the current year flowing from COVID savings and redirected government support.

### **Submission of the Division**

63. The Division justified its wage pause proposal based on five main considerations: pressures of the education sector climate, the Division's

financial position, the economy, the impact of COVID, and appropriate comparators.

64. **The education sector climate.** The public school sector has faced significant austerity and restraint since the current government was elected in 2016, as described earlier in these reasons. In this regard, the facts were not in dispute between the parties. However, the Division emphasized that due to government policy initiatives, its autonomy to manage Division operations has been severely restricted. This has necessitated zero wage increases for many employees as well as layoffs for some education support staff. The wage pause is not ideal, but it is reasonable under all the circumstances. The Association's presentation minimized or ignored the harsh realities. For example, the Association treated the current projected provincial deficit of \$2B as an insignificant factor, whereas in reality, this and other impacts of the pandemic are driving government decision-making.
65. **The Division's financial position.** Government funding is unpredictable and unreliable. For the 2018-2020 period, government instructed the Division not to budget for any salary increases. Thus, paying a *Louis Riel*-scale salary award now would be devastating. The Division is not allowed to adopt a deficit budget and local taxation is effectively capped. The Secretary-Treasurer stated as follows:

The LRSD (*Louis Riel*) award would necessarily require an increase in taxation to levels not currently permitted by the provincial government, deplete the accumulated surplus or likely, some combination of both. Either way, the LRSD award puts the school division in a very precarious and fragile fiscal position.

66. The Division denied it has failed to access local taxation as a revenue source. With a 2.0% cap, the Division has increased the special requirement by 1.9%, 1.6% and 1.9% over the past three years, close to the limit. To meet the Association's wage demand through local taxation, the increase in 2021 would approximate 10.9%, which would create an unacceptable burden on ratepayers during an uncertain economic climate. It would also constitute defiance of the provincial cap and trigger financial penalties. In any case, after the close of the hearing, government ordered school divisions to freeze local taxation in 2021.
67. New schools are coming on stream but the cost is not fully covered by the province. Recently divisions were barred from retaining any surplus funds in their capital reserves, which previously could be used for school start-up costs. The Division now faces a \$6M shortfall in this respect. Aside from funding restraints, government has intervened in Division administration and staffing, which limits operational discretion.
68. The overall circumstances are dire. While the Division does not defend government policies, it has no alternative but to live with them.
69. In the spring of 2020, due to the COVID-19 pandemic, the Division moved to remote learning and issued hundreds of layoffs – 472 EA's, 24 bus drivers, 32 library technicians, 370 lunch supervisors and 36 other support staff. No teachers were laid off. By Department of Education directive, all savings were applied to remote learning costs and personal protective equipment. The maximum available further COVID funding is \$2.3M, not the figure cited by the Association.

70. Because of COVID layoffs, the Division saved \$6.96M and the operating surplus was larger than normal - \$12.7M. Government caps the surplus at 4% of the annual budget. It is typically used for non-budgeted expenses such as new busses, furniture and technology. This year the COVID savings were also designated. At June 30, 2020, the undesignated surplus was \$2.8M, which is a fraction of the Association's proposed salary increase cost.
71. The Secretary-Treasurer summarized the Division's dilemma as follows:
- Higher individual teacher salaries will undoubtedly result in a combination of lost student programming, staff layoffs and reductions, fewer teaching supports and educational resources along with the additional pressures associated with increased class sizes – all factors which administration repeatedly hears have *significant negative impacts* on student outcomes and teacher well-being and staff stress loads. (Emphasis in original)
72. The Division reported on how Louis Riel School Division paid for the salaries awarded in its arbitration, given that it had not budgeted for them and had minimal undesignated surplus. Because of the urgency of its situation, Louis Riel received a provincial exemption allowing it to utilize its \$4.6M COVID savings toward the \$5.5M retroactive wage bill. The balance came from surplus and other programs. While this solved the immediate problem, it left Louis Riel without funds to meet new COVID expenses. Going forward Louis Riel has some budget funds based on planning for a 0.75% increase in PSSA year 3, but meeting the rest of its salary cost may trigger a deficit. By June 2021, the accumulated surplus will be depleted. A written statement from the Louis Riel Secretary-Treasurer was tabled with the board setting forth this information. Provincial funding for 2021-2022 was unknown at the time of the hearing.

73. Asked by the board whether much of the Division's submission was really a variation on ability to pay, which was rejected in *Louis Riel*, the Division responded that it is important for the board to understand the current environment. *Louis Riel* acknowledged (at p. 47) that public funds are not unlimited. This reality was underlined on February 5, 2021 when the Division received notice of its 2021-2022 funding from government. However, said the Division, replication is the governing arbitration principle, and the main issue is choosing an appropriate salary comparator.
74. **The economy and COVID.** The Division presented Economics Professor Greg Mason from the University of Manitoba, who prepared a synopsis of current economic trends both nationally and in Manitoba. He stated there was no disagreement between the parties over the present facts but there are live interpretive issues. At the best of times, forecasting is "an impossible exercise." During a pandemic, it is no longer possible to be certain about anything. In particular, Professor Mason took issue with the Association's prediction that there will be a rapid economic bounce-back. It is true that many economists believe there will be a V-shaped recovery. Historically, however, it has proven difficult to regain what has been lost in a recession. At best, the economy resumes its previous growth path. This will be even more difficult now because the Canadian economy is undergoing a structural change caused by the shift away from oil and gas resources.
75. The COVID shock to the economy is exogenous, as noted by the Association, and the second wave is less acute than the first wave, but the end point remains uncertain. It could get worse. Both the Canadian and Manitoba economies are inherently weak. Professor Mason agreed that Manitoba has a diversified

economy but this does not negate the underlying weakness. The Manitoba economy has been slowing for the past 3-4 years – “running out of gas.” The professor expressed the opinion that the recovery will be prolonged and difficult.

76. Over the past decade, national wage bill growth (distinguished from wage *rates*) has averaged about 1.0% but Professor Mason acknowledged that public sector workers have done better because of their “quasi-monopoly power”. Politicians typically strive to avoid service interruptions. Employment levels and retail sales were restored in Manitoba after the first wave due to deferred consumer spending and generous government supports to the economy. The result of the second wave remains to be seen.
77. Professor Mason calculated the Winnipeg CPI increase from January 2019 to November 2020 as 0.33% and said it flatlined between May 2019 and November 2020. He stated that CPI data overstate the actual experience of price changes and do not reflect the improved quality and reliability of goods purchased.
78. In summation, the professor described three potential future scenarios under COVID. First, vaccine uptake reaches 70%, the pandemic is eradicated and economic life is restored by mid-summer/early fall 2021. Second, the virus mutates and becomes more contagious, delaying eradication and normal life until well into 2021. Third, hospitalizations and deaths are held to “sustainable” levels, but the disease becomes endemic and exerts a continuing drag on the economy. Whatever happens, certainty is no longer the norm, he

said. In all this, the capacity of government to fund public services will be constrained. School boards will have to operate in this environment.

79. Finally, two competing narratives on the recovery were presented - rapid recovery versus a struggle to regain lost ground. Professor Mason stated there is support for both views but the consensus seems to favour the pessimistic outlook.
80. The Division filed update data (January 11, 2021) showing a loss of 6,600 jobs in Manitoba in December, according to Statistics Canada's labour force survey. Commentators attributed the losses to Manitoba's Code-Red restrictions imposed in early November. However, one RBC economist predicted that Manitoba would be one of only two provinces to outpace pre-COVID output before the end of the year, due to a less severe first contraction, surges in summer retail sales and provincial government infrastructure investments. Nation-wide, there were 63,000 lost jobs in December.
81. In another update prepared on February 10, 2021, Professor Mason said events of the last month have confirmed his views. A rapid snap back to normal economic activity seems less and less likely.
82. **Comparators.** The Division argued that because of the pandemic, which began in March 2020, the *Louis Riel* award should not be used as a comparator. There is a new economic reality. As a result, the board should consider present circumstances and apply its analysis retroactively to lessen the Division's financial hardship.

83. To the extent that *Louis Riel* is given any weight, there should be no upward adjustment of the salary award by 1.0%, as urged by the Association. The Division acknowledged the *MFL* decision but noted that because it is under appeal, there is no finality at this time. *Louis Riel* considered and rejected the teacher argument that PSSA comparables were tainted and should not be taken into account. This finding should be respected. In any event, an arbitration board considers numerous factors and assigns weight in its discretion. The effect of the PSSA comparables cannot be quantified. Finally, it remains a fact that these settlements were negotiated by the respective parties and they remain in effect at this time.
84. The Division submitted that other teacher settlements across Canada should be considered as comparators. Over the past 10 years, wage pauses have been negotiated or awarded on multiple occasions in BC (four years), Alberta (six years), Saskatchewan, Ontario, Nova Scotia, New Brunswick and Newfoundland (five years). Manitoba teachers rank second for starting salaries and third for maximum salaries across Canada (2019). Because there were never zeros in Manitoba, teachers catapulted ahead during this period, despite comparative economic conditions and favourable living costs in Manitoba.
85. According to the Division, the most relevant comparators are the most recent settlements with its own staff. PTANTE (administrative and non-teaching employees) negotiated the PSSA pattern for 2016-2020 in June 2020. Educational Assistants agreed to the same settlement in October 2019. The PSSA pattern was implemented by the Division for non-unionized employees. In 2016-2017, CUPE negotiated five-year contracts for custodial, office and

trades units mirroring the last Association agreement (2.0%-2.0%-2.0%-3.0%) plus a final year at 2.0%, but this preceded the PSSA and COVID bargaining mandates. In the Metro Winnipeg area, also before COVID (2019-2020), the PSSA pattern was negotiated with seven other support staff unions for periods between 2016 and 2022 (UNIFOR, MANTE, MGEU and EASO (Seven Oaks)). The Division noted that in all these cases, divisions knew their costs and were able to budget for the increases going forward, unlike the situation now facing Pembina Trails after the *Louis Riel* award.

86. Comparing Pembina Trails to other Metro divisions, the Division generally pays above the median. Maximum teacher salaries rank highest along with Louis Riel (June 2018). Comparing across Manitoba, Pembina Trails ranks between 3<sup>rd</sup> and 7<sup>th</sup> place among all school divisions. In other words, Association members are well paid compared to provincial teacher comparables. A wage pause will not affect their relative position.
87. The next most significant comparator is the Manitoba post-secondary sector. Here most collective agreements since 2017 have been settled at the PSSA pattern. University of Manitoba-UMFA had a 5<sup>th</sup> year wage re-opener, which was settled by mediation in November 2020 at zero percent on scale, plus a one-time COVID stipend of \$1,950.
88. Finally, in the Manitoba public sector, most completed collective agreements have followed the PSSA pattern, including major employers such as WRHA, Manitoba Hydro, Manitoba Liquor & Lotteries, WCB and Manitoba Government Direct Service Workers.

89. The Division submitted that private sector parties bargain under unique firm and industry circumstances. The context of each collective agreement defines the outcome. The appropriate comparators for Pembina Trails teachers are employers funded by public taxation revenues. The PSSA pattern predominates in this sector. While a wage pause for the full contract period is slightly lower than PSSA, the difference is not significant. The PSSA settlements were negotiated before the onset of COVID and therefore a pause is not inconsistent with the relevant comparables.

### **Association reply submission**

90. The Association agreed that recessions have long term effects on the economy and result in a permanent loss of income, as stated by Professor Mason, but there is no doubt that incomes will continue to grow despite the current exogenous shock. Market economies are subject to both exogenous shocks (oil, COVID) and endogenous shocks (the business cycle). Without the various historic depressions, recessions and oil price shocks, Canadian Real GDP would be much higher today. Still, Canadians and Manitobans have enjoyed a rising standard of living since the early 20<sup>th</sup> century.
91. The issue for the present board is to replicate a salary scale based on objective labour market data, which continue to indicate positive growth. The Conference Board projects average wage increases of 1.6% for unionized workers in Canada for 2021, even with some employers imposing wage freezes. The Division did not present any analysis of wage trends but the Association filed updates showing the positive trajectory of average weekly earnings in Manitoba to October 2020, the latest available data.

92. As for Manitoba's economy, it has averaged 2.1% growth since the 2008-2009 recession, which is not anemic as suggested by the Division. The Association reiterated that the latest consensus forecast Real GDP for Manitoba is 4.1% in 2021 and 3.6% in 2022. Employment declined in November with the second wave but much less steeply than during the first wave. The latest labour force survey in December 2020 showed only 1.0% negative employment growth. The goods sector was unchanged whereas the service sector declined (hospitality, restaurants).
93. The Association argued that the latest COVID restrictions in Manitoba will delay the recovery but not derail it. Moreover, Manitoba continues to lead most of the provinces in the recovery. Ultimately, the Province of Manitoba backs the Division and provincial inability to pay has not been claimed. Provinces are managing their debt. The federal government and Bank of Canada have continued their supportive policies.
94. The Association responded to Professor Mason's inflation calculations by noting that he did not use accepted Statistics Canada methodology for CPI. As the year closes, the 2020 cost of living index increase has essentially been established at the 0.5% level, reflecting the effect of COVID. This forms the basis of the Association's modest salary proposal in the third year.
95. The Association agreed with Professor Mason that there is uncertainty but noted that there is also considerable data now available on the performance of the economy under two COVID waves. Forecasts can be made on a sufficiently reliable basis at this point in time.

96. As for the Division's finances, there were similar arguments made in *Louis Riel*, but that board awarded 1.6%-1.4%, and the increased salaries were paid. The Division can meet an equivalent award by using its available surplus and exercising management discretion. The Association did not dispute that because of harsh provincial government policies, the Division will face painful choices.
97. The Association rejected non-teacher staff as a comparable. This has never been the basis on which teacher salaries were set. It was rejected long ago in *Fort La Bosse* (Chapman: 1994). There may be a historic correlation, at least until the advent of the PSSA, but teachers have not sought to replicate non-teacher settlements.
98. The only comparators the Division accepted were PSSA agreements that the court found were negotiated under an unconstitutional regime that denied those unions the right to meaningful collective bargaining.
99. Teachers in other provinces have not been a comparable for Manitoba. However, to the extent they are relevant, the record shows positive wage increases for 2020 and 2021 in Saskatchewan, Ontario, BC, Nova Scotia and NWT, mostly negotiated after the onset of the pandemic. The range is 1.0% to 2.5%, not zero.
100. The best comparable remains *Louis Riel*, which has set the Manitoba pattern in the current round at 1.6%-1.4%, plus the 1.0% *MFL* adjustment. The Division asked for a retroactive elimination of this precedent by applying COVID considerations to bargaining that should have taken place in 2018.

The authorities, including *Louis Riel* itself, have rejected such an approach (at p. 25):

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

101. In this regard, *Louis Riel* followed *MacDonald Youth Services and MGEU* (Werier: 2016). Subsequent to *Louis Riel*, this approach to timing was endorsed in *MacDonald Youth Services and MGEU* (Freedman: 2020).
102. The Division cited the University of Manitoba-UMFA wage re-opener agreement (2020-2021), which was post-PSSA and reflected the government's current salary freeze directive. Nevertheless, in the face of a strike threat, the University paid a COVID-related stipend equivalent to 1.6% of the average faculty salary. In addition, substantial unresolved claims were reserved in the ongoing *MFL* litigation. As a settlement made in mid-November 2020, during the second wave of the pandemic, the UMFA agreement is strong replication evidence against the Division's wage pause.
103. In conclusion, the Association dismissed the Division's salary position as ideological and political, rather than based on sound arbitral principles. As such, the board should refuse to entertain it. Teachers should be awarded

reasonable salaries in line with objective labour market evidence, all of which supports the Association's proposal.

### **Decision on Salaries and Allowances**

104. The notion that the Division has advanced an ideological position in seeking a wage pause was repeated several times by the Association during these proceedings, but it was an unfair charge, in the board's view. As in *Louis Riel*, the Division found itself in a vice grip of provincial policy, with little option but to plead for a zero-cost collective agreement. As the Division said, it does not defend government policy in the education sector but must live with it. In fact, the wage pause proposal was more pragmatic than ideological. The Division has been underfunded by government and barred from potentially using its own taxation authority to solve the problem. Its senior administration, needed now more than ever to deal with the crisis, has been hobbled by arbitrary cutbacks dictated by the ministry. Discretion to manage surplus has been constrained. None of these facts are in dispute. The board is entirely sympathetic to the Division's predicament.
105. Government is the party responsible for the Division's problem. Government *does* have an ideological position, as all governments rightfully do. *Louis Riel* noted (at p. 22) that "government has placed a high priority on expenditure restraint and taxpayer relief, both for provincial taxpayers and local ratepayers. The government has made the Division a vehicle for delivery of this policy." The end result is that the Division has essentially pleaded inability to pay the market rate for teachers, albeit the argument was thinly disguised as background on the education environment. Given that the board has adopted the ruling given in *Louis Riel* on ability to pay, the best we can

do is to keep in mind the economic situation while still applying the replication principle as an independent arbitration board.

106. For this reason, the board heard and considered all the evidence presented by the Division on its financial position, including the challenge it will face if a *Louis Riel* scale award is made. In an unusual departure, the board even took evidence from the Louis Riel Secretary-Treasurer explaining the difficulties experienced after that award was issued in April 2020. It appears that that the province gave Louis Riel an exemption allowing it to use COVID savings to pay for most of the retroactive salary cost. The ongoing salary cost is still a problem but this sad affair highlights the reality described in *Louis Riel* (at p. 22). Legally, school divisions are creatures of government and they are subject to close government financial control. Government had the authority and means to fix the salary problem. It allowed Louis Riel a partial fix. Pembina Trails may need to seek a fix as well.
107. While the board sympathizes, it is still obligated to maintain the integrity of the arbitration process: *Saskatchewan Federation of Labour*, [2015] 1 S.C.R. 245 at para. 94. The board must be responsible in fashioning an award but must not allow government to dictate the result.
108. Under replication, there can be little doubt that the best comparable settlement is *Louis Riel*. It is a recent teacher award in an adjacent Metro division, and it was issued unanimously after a lengthy and vigorous hearing. It is a single settlement but it also constitutes the leader when teacher bargaining resumes. The Division expressed discomfort with pattern bargaining by teachers, but the record is clear that this represents longstanding past practice in Manitoba.

The historical settlements embedded in pattern bargaining were made by two parties in each instance – an employer school division and a teacher association. A few were awarded but the vast majority were voluntary agreements. Under replication, these facts strongly support an award for Pembina Trails that matches *Louis Riel*, although no single factor is determinative. The teacher bargaining history in Pembina Trails also supports adoption of *Louis Riel* or a higher award. Settlements have been at or above inflation.

109. As discussed earlier in these reasons, the board is unable to accept the Division's position that settlements with its own support staff unions should be treated as the paramount comparator. *Fort La Bosse* (1994) held precisely the opposite, stating that teachers have different qualifications, responsibilities and duties than non-teaching employees of a division – school bus drivers, clerks, educational assistants, trades persons, office staff. Replication is a market analysis and the search is always for employees performing the same or similar work in a comparable market environment. These are different labour markets and different work.
110. Under *B.C. Rail* (1973), internal comparisons can be a factor in public sector wage determination, as the Division argued. *McMaster University* followed *BC Rail* but did not consider internal, non-faculty comparators. Nevertheless, the board has taken note of the Division's contracts with its staff, some of which were based on the PSSA pattern, as well as staff settlements made with other divisions. These settlements cannot outweigh the effect of *Louis Riel* as a direct teacher comparable.

111. While the board is required under replication to give primary weight to *Louis Riel* for 2018-2020, we do not accept the Association's proposed 1.0% correction flowing from the *MFL* decision. As the Division argued, every interest award is based on a judgemental weighing of many factors, and it is rarely possible to quantify the effect of each consideration. *Louis Riel* found (at p. 44) that collective bargaining results were trending around 2.0% but decided that a replicated result should be below inflation and greater than zero (at p. 48-49). Several factors aside from the PSSA settlements were considered as having a dampening effect on the likely negotiated outcome, had the parties reached an agreement. The present board finds that the *Louis Riel* award continues to be a proper replicated result for Pembina Trails in the 2018-2020 period.
112. Both parties cited teacher settlements in other provinces. The Association denied these were relevant comparators. In any case, the picture was mixed, as one would expect given the varied conditions across the country, and did not necessarily support a wage pause. The Manitoba education sector was also referenced by the Division. Most settled agreements did follow the PSSA pattern, but a recent fully voluntary settlement (University of Manitoba-UMFA in mid-November 2020) was not a true zero. At government's behest, the University refused to allow a scale increase, but did pay a COVID-related stipend of \$1,950 across the board, approximating 1.6% of average salary. Significant past salary claims allegedly owing under *MFL* were reserved to a later date, given the ongoing Charter of Rights litigation. The board interprets UMFA as evidence that in free collective bargaining, despite government's current freeze mandate and the onset of a second wave, a zero-cost settlement is not achievable.

113. In the broader public sector, there have been a number of zeros pursuant to the PSSA pattern, but also positive wage increases. Notably, in *MacDonald Youth Services* (Freedman), *Louis Riel* was followed and the arbitrator awarded 1.5%-1.5% for 2018-2020. In summer-fall 2020, the Treasury Board and PSAC signed a series of agreements at 2.8%-2.2%-1.35% for 2018-2020. In the same period, Canada Post agreed to 2.0%-2.0%-2.5%-2.9% for 2018-2021. In August 2020, Bell MTS settled with UNIFOR clerical workers at 2.0%-2.0%-2.0% for 2020-2022. At the City of Winnipeg, several multiyear agreements negotiated prior to 2018 were settled with CUPE, police, fire fighters and paramedics in the range of 1.5% to 3.0%. In August 2020, WAPSO (City middle management) took 0%-0.5%-2.0%-2.0% for 2020-2023. The majority of Manitoba government collective bargaining tables remain on hold due to the *MFL* litigation.
114. The public sector settlements are diverse and represent a multiplicity of circumstances, but overall they do not support the Division's proposed wage pause.
115. As for the Manitoba economy, the board finds no reason to revise the relatively positive *Louis Riel* assessment for the 2018-2020 period. *MacDonald Youth Services* concurred three months later, with the arbitrator stating as follows (at p. 29-30):

... the provincial economy appeared to be doing sufficiently well at the end of bargaining so that its then present and predicted state would not be a reason to deny increases to this bargaining unit if otherwise merited. ... I agree with the Union that "By all objective measures, the economy was doing well" in 2018-19 and 2019-20. In the early part of 2020 that changed, and great uncertainty replaced whatever level of confidence in the economy then existed (*sic*).

116. The board does not accept the Division’s argument that because of COVID, the foregoing assessments should be retroactively revised or ignored, and a wage pause should be substituted for increases that were justified under replication analysis at the time. We accept the *Louis Riel* finding (at p. 25) that “replication requires an assessment of the landscape more or less as it would have appeared to the parties themselves while at the table.” This approach is well supported in Manitoba. It was first articulated by Arbitrator Werier in *MacDonald Youth Services* (2016), followed by *Louis Riel* and approved by Arbitrator Freedman in *MacDonald Youth Services* (2020). It also accords with first principles of interest arbitration. In the present case, the replication period is 2018-2019, based on the usual and expected period of teacher bargaining.
117. Because the provincial government interfered with public sector bargaining, teacher negotiations never took place. The full course of events was set forth in detail by the court in *MFL*. The Charter violation has been appealed by government and therefore the ultimate ruling is unknown at this time. However, the court heard detailed evidence about a number of tables including teacher bargaining. Mr. Paci testified for MTS at trial. Factual findings were made and these were not appealed by government. As a result, the board is obligated to consider these facts as established for purposes of the present case. The judge concluded that with monetary issues predetermined by the PSSA, meaningful collective bargaining was “unworkable and almost impossible” (at para. 333). Moreover, “by predetermining pay rate increases in favour of management the union is left with almost no ability to exercise bargaining power on non-monetary issues” (at para. 329).

118. The Association said it moved immediately to arbitration because the PSSA precluded meaningful collective bargaining. This reasonableness of this approach has been borne out by the court in *MFL*. The board does not disagree that in theory, an unexpected major economic downturn may justify revisiting wage and benefit levels that prevailed under better times. This is inherent in the caveat expressed by Arbitrator Ready in *City of Regina* (1994) that “A considered application of the replication doctrine cannot ... be completely blind to the economic situation.” However, here it was government that delayed and defeated the conduct of meaningful bargaining, and an independent arbitration board should not allow a party to benefit from such action. Basic fairness is essential to the integrity of any arbitration process. In these unique circumstances, it would be fundamentally unfair to ignore 2018-2019 bargaining data and impose COVID considerations retroactively.
119. The situation is obviously different for 2020-2021. The board accepts the Association’s point that there was a strong recovery after the first wave and that despite a second wave, there is room for optimism that the economy will recover again in relatively short order. There is partial data for 2020 and 2021. Manitoba is well positioned among the provinces. However, employment and GDP numbers are a moving target. The province has already incurred a massive deficit, which will take years to pay down, even with consistent growth going forward. We cannot dispute Professor Mason’s cautionary note that with COVID there is no more certainty. He fairly laid out the possible scenarios. He said that while there is support for the Association’s prediction of rapid recovery, the consensus suggests it will be a struggle to regain lost ground.

120. The Association submitted that despite the negative effects of COVID on the economy, wage growth is still projected to be positive going into 2021. The Division did not dispute the point. However, inflation is down to 0.5% because of the pandemic, or lower using Professor Mason's non-traditional calculation. The Association said it could have made a case for a third-year increase in the same range as *Louis Riel*, but scaled it back in recognition of COVID. Its minimum position is inflation protection. In this regard, the parties are not far apart on salaries in year three.
121. Considering the replication analysis set forth above, and remaining attentive to the economic situation, the board agrees that 0.5% is a fair and reasonable salary increase for 2020-2021. In the next bargaining round, which will likely be a provincial table conducted under statutory principles, subject to the Charter of Rights and Freedoms, the parties will be better prepared to set future terms and conditions.
122. The board awards as follows:
- July 1, 2018: 1.6%
- July 1 2019: 1.4%
- July 1, 2020: 0.5%
- July 1, 2021: COLA, as defined below.
123. COLA will be determined as follows. In January 2022, or as soon as possible thereafter, when the 12 month (January to December 2021) average annual

Statistics Canada consumer price index change is made known, the increase will be applied retroactively to July 1, 2021.

124. As agreed, the general pay increases will apply to all salaries and allowances, parking rates and the professional development fund allocation.
125. Adjustments to substitute teacher rates will be effective the date of the award, except that COLA for the 4<sup>th</sup> year will be effective on the date the parties confirm the amount of the adjustment. Jurisdiction is retained to settle any implementation issue relating to salaries and allowances.

#### **Teachers on Limited Term Contracts: Article 4.6**

126. Under Article 4.6(a) of the current collective agreement, “Teachers on Limited Term Teacher-General Contracts are those teachers engaged to perform a specific task, or for a specific period of time or until the occurrence of a specific event.” After two successive full years of service on a term contract, if the teacher is employed for a third successive school year, the teacher must be offered a Permanent Contract (Teacher-General Contract). However, if employment in the third year is expected to last less than three months, another Term Contract may be used. When a teacher achieves a Permanent Contract after two successive years under Term Contract, seniority and sick leave rights are deemed retroactive to their date of hire.
127. Job security is fundamentally important to teachers, said the Association, and there is a lengthy history of efforts to limit the excessive use of Term Contracts. MTS and individual associations have bargained, litigated and conducted law reform efforts on this issue over many years. This history was

recounted in *Louis Riel* (at p. 77-78, 81-82), where the board concluded that the *Turtle River* test had been met and new language should be awarded defining a more limited scope for Term Contracts. In its amended proposal before the present board, the Association sought language equivalent to the new Louis Riel School Division article, relying on the following findings by the *Louis Riel* arbitration board (at p. 83-87):

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

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

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

The available data suggests that the Division frequently uses term contracts. An Association survey found that 67% of members began employment with the Division on a term contract. By their third year, 21% still had not achieved permanent status. The Division did not deny the Association's claim that insecure employment can create a sense of vulnerability for these teachers. In

the current year, with about 235 postings, there were over 130 term contracts and only 57 permanent hires.

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

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

At the same time, it is reasonable and justifiable to hire under a Term Contract to replace another teacher on leave. To the extent that the Division says this is largely how it utilizes Term Contracts now, a new collective agreement provision confirming this usage should not interfere with the proper administration of the Division. ...

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

The board therefore awards the following revised clause ..., as an exception to hiring under a Permanent Contract ...:

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

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

128. Awarding the Louis Riel article would grant retroactive seniority and sick leave to term teachers who become permanent in their second year. It would also define an "entire" school year as 180 school days or more for purposes of the article. The requested language was as follows:

1. Except as hereinafter provided, every teacher employed by the Division shall be employed under a written form of contract known as Form 2 and/or Teacher General in the Public Schools Act.
2. The exception to 1. above shall be those term teachers employed for a term certain of one (1) school year or less (i) to replace a teacher on an approved leave or secondment, or (ii) to replace a teacher who has terminated employment in the Division during the school year due to unforeseen circumstances, or (iii) to supplement classroom resources for a period of less than three (3) months. Every such term teacher shall be employed by the Division under a form of contract

approved by the Minister known as a Limited Term Teacher-General.

3. A teacher who has been employed full or part time in the Division under a Limited Term Teacher-General Contract for an entire school year and is employed the following school year under a Teacher General Contract shall be entitled retroactively to seniority and sick leave.
4. A teacher who has been employed full or part time in the Division under a Limited Term Teacher General Contract for two (2) successive entire school year shall, upon employment for a third consecutive entire school year, be signed to a Teacher General Contract and shall be entitled retroactively to seniority and sick leave. An “entire school year” means employment for 180 or more school days in the contract year.

### **Submission of the Association**

129. The Association argued that the *Louis Riel* language should be awarded based both on demonstrated need and replication. In general, teachers should be hired on a Permanent Contract unless there is a justifiable reason not to do so. A Pembina Trails membership survey in 2019 showed that most teachers were originally hired on term contract and about 20% stayed on contract up to four years. At the time of the survey, 12% of teachers were on contract. This leaves teachers anxious and distracted about their professional and personal lives. Hiring more permanent teachers is not unfair to the Division. If a staffing surplus occurs, the Division has the ability to lay off under Article 4.9

of the agreement. The layoff article gives first consideration to retaining teachers based on seniority but subject to qualifications, experience and ability, so management retains ample discretion.

130. Achieving permanent status is life-changing for a teacher. It can make the difference in securing a residential mortgage or bank loan and starting a secure family life.
131. Marshall Jones, a High School Physical Education teacher at Vincent Massey Collegiate, made a presentation to the board describing his experience attempting to start his career with the Division. In the tumult of spring hiring in 2010, at the last moment, he secured a full-time term position created when a permanent teacher left the city and returned to living in the country. Mr. Jones was told the position was posted as a term so the Division could “try someone out” for a year to ensure “a good fit.” His year went well but in spring 2011, he was told his job would again be posted as a term, without explanation. He was offered the job and accepted, assuming it would turn into a permanent position the next year. However, in spring 2012 he and eight other term teachers were notified there was a staffing crunch and they should all look for work elsewhere. The others left but his principal scraped together a 0.4286 FTE permanent contract for him, which was supplemented to become full time hours in the fall of 2012 when another phys-ed teacher took maternity leave.
132. In spring 2013, despite inquiries about achieving permanent full-time status after three years, Mr. Jones was told he was still only 0.4286 permanent, and

his FTE in year 4 would be 0.857. A grievance was filed on behalf of several teachers and settled in 2014 with offers of full-time permanent contracts.

133. In the meantime, in order to qualify for a mortgage, he had to ask his parents to co-sign and go on title, which later triggered a \$3,000 expense to remove them from the title once he had a permanent position. While he loves his school and the work, Mr. Jones told the board the term contract process was stressful and made him feel undervalued: “I never really had job security and the unexpected financial implications were difficult to accept.” He expressed the hope that other teachers would not have to experience this kind of ordeal to gain a permanent contract.
134. The Association submitted that every term contract should be a last resort. When a teacher is hired on a Teacher-General Contract, the Division still has a full year to assess their suitability and may decline to continue their employment without arbitral review.

### **Submission of the Division**

135. The Division rejected the Association’s proposals and urged that the status quo be continued. The parties have lived with essentially the same language since the inception of the Division, and it has served them reasonably well by setting parameters for the use of Term Contracts. The collective agreement provides better benefits to teachers than the standard contracts under the provincial regulation. In terms of other divisions, only six define a school year as 180 days. No division except Louis Riel has such a restricted set of conditions for the use of Term Contracts.

136. As of January 31, 2020, teachers on leave accounted for 102.3113 FTE while teachers on Term Contracts accounted for 104.6878 FTE. The difference was only 2.4 FTE. This shows that the Division is primarily using Term Contracts for the purpose of replacing teachers on leave, which paragraph 2 of the Association proposal expressly allows. Thus, the status quo should suffice.
137. The Division also noted that paragraph 3 is a transcription of Louis Riel language and does not currently exist in Pembina Trails (retroactive rights when term teacher rehired in year 2 on a Teacher General). There was no evidence adduced on this point.
138. As well, paragraph 4 of the proposed new language is *less* favourable to teachers than the existing clause 4.6(b), because it would require that the third successive year of employment be an “entire” year before the teacher becomes entitled to a permanent position and retroactive rights. The present wording merely specifies employment for a “third successive year”, without further definition. By matching with *Louis Riel*, teachers would be worse off, so the change can hardly be justified as necessary and fair. *Louis Riel* should not be taken as establishing a new standard.
139. While the Association said that surplus teachers could be addressed by layoff, in reality there would be frequent and recurring layoffs, which would have a demoralizing and destabilizing effect for teachers and the school community. The layoff article requires significant advance notice and is onerous. It is not an answer to the Division’s concerns. In all its history, the Division has not invoked the layoff article.

140. The Division submitted that the *Turtle River* test was not met. A party's preference for new language is not enough. There was little evidence of need, and there would be serious operational problems. Staffing is a complex process and the present balancing of interests is reasonable. According to the evidence, most new teachers achieve permanent status in four years. This is how it works. There is no widespread problem. In any case, a short period of insecurity at the start of a professional career is not unique to teaching.
141. In support of this position, Assistant Superintendent Aitken from Louis Riel School Division made a presentation on experience in that division with the awarded language. She stated that there are more term postings than permanent ones in her division because the number of teachers on leave in any given school year outnumbers open permanent positions. Leaves in this context means Maternity, Parental, Adoptive, Education, Deferred Salary, Medical, LTD and approved leaves of absence. She tries to balance term teacher FTE to that of teachers on leave.
142. In exceptional circumstances, not occurring every year, there have been a few (*ie*, 1-6) more term contracts than the number of teachers on leave in Louis Riel. Ms Aitken listed the following situations. (i) During the year, enrolment increased in a classroom and the class was divided in two, requiring a term teacher. This also bumps up the FTE required for music and phys-ed teachers, which would not necessarily be required the following year. The same effect can occur if September enrolment is higher than projected but does not continue the following year. (ii) Temporary supports or a clinician were added to a school for part of the year, exceeding three months. This may be due to the temporary availability of grant funding or other reasons. (iii) A

unique one-year initiative is implemented, exceeding three months. (iv) A position is posted and reposted but by the end of June there is no qualified candidate. She summarized the experience as follows: “The new language has us re-thinking, re-examining, and being extremely mindful in our planning and decision making.” In addition, COVID has required some new positions to meet distancing and home learning requirements. Because this was not covered in the awarded exceptions, permanent positions were created.

143. Ms Aitken added that she has met with the Association to discuss the new article and the parties have agreed on the operational meaning of some new terms. She made the general point that if additional teachers are needed for these kinds of reasons, and if term contracts are barred, it might become necessary to hire additional permanent teachers, at various EFT’s. These teachers could become surplus at the end of the year, depending on overall enrolment and staffing picture for the next year. She said the layoff article does not speak to laying off part of a teacher’s EFT, which might be necessary. Also, the collective agreement does not cover mid-year layoffs. She did not indicate that these collective agreement issues were discussed with the Louis Riel Teachers’ Association. Over the years, however, Louis Riel has worked hard to avoid ever invoking the layoff article during surplus periods.
144. According to Ms Aitken, the first time she had to lay off employees in her 15-year tenure was last spring, when non-teaching staff were laid off due to COVID. She said the impact was devastating for the employees in question: “The worry, the anxiety, the uncertainty it has on an individual really needs to be understood and considered, and it should not be the fix to over-hiring as a result of the new article language as proposed by MTS.”

145. Finally, Ms Aitken commented that the division may not always be able to hire the best candidate if forced to make a permanent hire for one of the foregoing reasons. The big pool of candidates is available in May-June when teachers from other divisions are able to look around for new opportunities. By definition, they are not available mid-year when a temporary teacher is normally hired.
146. Louis Riel intends to seek to amend the new language at the next bargaining round, as “it has inhibited the Division’s ability to respond to emergent needs.”
147. Speaking for Pembina Trails, Assistant Superintendent Egan responded to the experience of Marshall Jones as a term contract teacher. She observed that he showed excellence as a term teacher, his principal fought for him and he achieved a permanent position, despite some ups and downs. He made a persuasive case for himself. She understood the financial stress but added that the stress would be greater if he had been hired as a permanent teacher and then laid off. Ms Egan said that “we all began as terms and we were rigorously evaluated. We are not abusing our teachers. We hire the best teachers we can.” Finally, she noted that due to COVID, 58 teachers had to increase their FTE’s. If all these additional assignments were made permanent, “we would be hooped.”
148. The Division cautioned that substitute teacher hiring could be precluded under the wording of paragraph 1 in the proposal and requested that this be remedied if the board awards new language.

**Association reply submission**

149. In response to Assistant Superintendent Aitken's presentation, the Association said that the Louis Riel Teachers' Association (LRTA) believes the impact of the award language has been positive. It has provided greater job security by requiring that use of a Term Contract should be a last resort. This has been an objective in teacher bargaining for decades. The LRTA acknowledged that the employer saw some difficulties, especially when COVID hit, which was unpredictable. There are always some adjustments necessary when new language is adopted and the LRTA is working on this with the division. Some of the issues raised by Ms Aitken in the present hearing were unknown to the LRTA despite the fact that those parties have met to discuss the implications of the award. The process will continue, and the Association committed itself to doing the same if its proposals are awarded by the present board.
150. The Association did not dispute that few grievances have been filed over Term Contracts. These members feel vulnerable and are reluctant to complain. Beyond that, some issues are not grievable under the current collective agreement, even though arguably unfair actions have been taken by the Division.
151. The Association pointed out that because the Division has no experience with teacher layoffs, it does not know what the impact would really be in practice. This can be discussed. The Association emphasized that a Permanent Contract can be terminated before the end of the teacher's first year without due process, in a case of surplus or unsuitability. In those situations, there would be no need to trigger a layoff. Mid-year retirements can be handled

with a term contract under the new language. Generally, the Association urged the board to follow *Louis Riel* and award the same article, after which the parties will cooperate to make it work.

### **Decision on term contracts**

152. The Division's principal argument was that the status quo has served the parties adequately for many years and should not be changed. The teachers disagreed. On the basic issue of job security, *Louis Riel* was clear, following the lead of a number of Manitoba arbitrators over the years who incrementally enhanced term teacher employment security (at p. 84-85): "Teachers working on [term] contracts do not have the kind of employment security generally expected in a professional teaching career ... The board is sympathetic to the view that where an opening exists for a permanent teacher appointment, the Division should normally hire under a Permanent Contract, which carries statutory due process, seniority and employment security rights, rather than an insecure Term Contract."
153. The circumstances in *Pembina Trails* were similar to *Louis Riel*, and the general background is the same. *Louis Riel* held that the *Turtle River* test was met and that new language should be awarded. The present board will take the same approach, subject to ensuring that there is a fair opportunity for the parties to address potential implementation issues, as explained below.
154. As in *Louis Riel* (at p. 86), the Division stated that it mostly uses term contracts to fill various leaves granted to teachers for a period of one year or less. These contracts are allowed under the awarded language. To this extent, a new provision confirming such usage should not interfere with staffing.

Before the present board, Assistant Superintendent Aitken from Louis Riel listed a series of problems experienced or apprehended under the new language. None of this information was presented to the *Louis Riel* board. Ms Aitken described these as exceptional and infrequent circumstances, although the board appreciates that they are very real when they arise and must be addressed by management. The employer is reluctant to hire on permanent contract in these situations, where the need is perceived to be temporary, because this may create a teacher surplus for the next year.

155. The Association's answer was that the employer has a right to lay off surplus teachers, if that actually becomes necessary, as per Article 4.9. Because teacher layoffs have never occurred in Pembina Trails, neither party has experience with the process. The operational effect of the layoff language is not well understood. Can there be a mid-year layoff? Can there be a partial-EFT layoff? Ms Aitken said that the "worry, anxiety, the uncertainty" caused by a layoff needs to be considered, but of course these are precisely the ill effects term teachers live with every year. A reasonable balance is needed. The board will leave it to the parties to fine tune the language, as may be necessary based on actual experience and demonstrable problems. The award is final but the board will retain jurisdiction to settle any differences. We urge both parties to be realistic and cooperative in fulfilling the intent of this award. In particular, if layoff is the safety valve to avoid excess staffing, there must be agreement on a measure of flexibility under Article 4.9.

156. Assistant Superintendent Egan observed that "we all began on terms" and new teachers were rigorously evaluated before being offered a permanent contract. This reflects the experience of Marshall Jones in trying to start his career. It

is understandable as a management strategy but questionable as a universal practice. In any case, even if the awarded language reduces the total number of Term Contracts somewhat, there will always be a large pool of contract teachers because of the number of leaves granted every year. The board believes that in practical terms, it will still be possible to “try out” numerous new teachers while still assuring greater overall employment security.

157. To ensure that substitute teacher hiring is not obstructed, the board has revised paragraph 1 of the awarded article as suggested by the Division.
158. In addition, because the pandemic has created unprecedented demands on the Division and necessitated adding temporary teacher resources on an emergency basis, the board will create a COVID exception with a sunset clause. By agreement, the parties may amend the expiry date of the COVID exception, and the board will retain jurisdiction to settle any differences.
159. The board awards the following replacement Article 4.6 effective the date of issuance of the award:
  1. Except as hereinafter provided, every teacher employed by the Division other than as a substitute teacher shall be employed under a written form of contract known as Form 2 and/or Teacher General Contract in the Public Schools Act.
  2. The exception to 1. above shall be those term teachers employed for a term certain of one (1) school year or less (i) to replace a teacher on an approved leave or secondment, or (ii) to replace a teacher who

has terminated employment in the Division during the school year due to unforeseen circumstances, or (iii) to supplement classroom resources for a period of less than three (3) months. Every such term teacher shall be employed by the Division under a form of contract approved by the Minister known as a Limited Term Teacher-General.

3. A teacher who has been employed full or part time in the Division under a Limited Term Teacher-General Contract for an entire school year and is employed the following school year under a Teacher General Contract shall be entitled retroactively to seniority and sick leave.
4. A teacher who has been employed full or part time in the Division under a Limited Term Teacher General Contract for two (2) successive entire school years shall, upon employment for a third consecutive entire school year, be signed to a Teacher General Contract and shall be entitled retroactively to seniority and sick leave. An “entire school year” means employment for 180 or more school days in the contract year.
5. As an additional, temporary exception, a teacher may be employed on a Limited Term Teacher General Contract where necessary to meet the Division’s obligations specifically arising due to the COVID-19 pandemic. This clause expires on June 29, 2022 unless otherwise agreed by the parties.

160. The board retains jurisdiction to settle any differences for the purpose of implementing this article, on request by either party.

**Working Conditions: Article 5**

161. When the current bargaining round began, the Association prepared a detailed proposal for a newly entitled article “Assignable Time”, which was intended to replace Article 5.1 (Contact Time), Article 5.2 (Extracurricular Activities) and Article 5.3 (Lunch Period). “Teacher’s Time” was defined as falling into three categories – assigned time, time spent on professional responsibilities beyond assigned time, and voluntary time spent on extracurricular activities and similar matters beneficial to students and the educational system. The proposal addressed school hours (instructional day), instructional time, supervision time, travel time, preparation time, lunch time, staff time, release time for reporting, obligations outside the instructional day and the school year.
162. As arbitration approached, the Association amended its initial proposal and reduced the scope of the new article to encompass four topics, replacing current Article 5.1, but not Article 5.2 and 5.3. The amended proposal covered length of the instructional day, preparation time, staff meetings after the instructional day and after-school events. The Division was adamantly opposed to the amended proposal and made lengthy submissions in its brief explaining the operational and financial burdens of such new language. The Division asked that the board not award any new language and not interfere with the daily operation of schools. It argued that the collective agreement was not a proper vehicle for determination of key educational issues affecting students or teachers.

163. The Association submitted that teacher time has been a longstanding concern of teachers but said that little progress has been made despite many rounds of bargaining and extended dialogue between the parties through BACE (Board Association Council on Education), a joint liaison committee. A defined instructional day and other workload issues have been tabled at every negotiating table since 2002. The Division refused all proposals. Meanwhile, the demands on a teacher's time have been increasing, as has the complexity and intensity of the role, but teachers have no certainty or control regarding their work time. The Association noted that in *Louis Riel*, there were lengthy presentations by both parties on this subject, but the board declined to make an award because the proposals were complex, might cause departures from current practice and could generate real cost increases (at p. 73, 75). As the present case drew to a close, the Association further simplified its proposal, leaving some of its concerns for another day, and opting for a small step toward greater certainty in teacher work time.
164. Under the final proposal made by the Association, the existing Article 5.1 (Contact Time) would remain the same, as would Articles 5.2 and 5.3 (extracurricular activities, lunch period). New language would be introduced on only two topics, such that Article 5 would read as follows (new language in italics, subject to numbering):

### **5.1 Contact Time**

- (a) The student contact time assigned in any school year to any member, whether such time is in a teaching, consultative, or supervisory role, shall not, without the consent of the Association, be greater than 5% above the average student contact time assigned

to members in each of Elementary, Junior High and Senior High, by the Division (former Fort Garry) during the school year of September 1999 to June 2000.

- (b) Part-time teachers shall be provided preparation time pro-rata based on their percentage of contract.

## **5.2 Extra Curricular Activities**

Participation in extra curricular activities by teachers is voluntary.

## **5.3 Lunch Period**

An uninterrupted lunch period of sixty (60) consecutive minutes shall be provided to each teacher in the Division between the hours of 11:00 AM and 2:00 PM.

## **5.4 Length of the Instructional Day**

*The length of the instructional day in each school shall be as per the chart provided at Appendix A based on the 2019/2020 school year. The instructional day is exclusive of the lunch period outlined in Article 5.3 – Lunch Period and exclusive of the statutory obligation of teachers to be on duty at least 10 minutes before the morning session begins and at least 5 minutes before the afternoon session begins.*

*Note: Within 60 days of the arbitration award, the parties will confirm and agree to the length of the instructional day in each school.*

## **5.5 After School Events**

*Teachers may be assigned to attend no more than three (3) after school events in any school year. After school events include meet the teacher, parent teacher interviews, tri-conferencing, open house, concerts etc.*

165. The Association's Draft Appendix A listed all current High Schools and Other Schools in the Division, along with the current length of the instructional day in minutes for each school. In some cases, where schools have a schedule that varies by days of the week, a five-day average was stated. High School instructional days range from 330 to 350 minutes. Other schools range from 330 to 345 minutes. The Association said this reflected the current practice and therefore the proposal would not cause operational problems or trigger cost consequences. Future changes would be negotiated.
166. The Division did not accept that this latest version of the assignable time proposal was status quo and no-cost, especially going forward. It remained very much opposed, for the reasons set forth in detail below.

### **The *Louis Riel* award**

167. Similar teacher time issues were raised in *Louis Riel*. In fact, much of the evidence is generic to the teaching profession and the Association re-filed the entire LRTA arbitration brief with the present board. *Louis Riel* reviewed the history and the issues as follows (at p. 65-73):

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

passage that has been accepted by arbitrators ever since as authoritative (“the Laskin test”):

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

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

In practice, said the Association, it has been difficult to maintain fair and reasonable assigned time for teachers. In *Transcona-Springfield School Division No. 12* (Freedman: 1989), the association made a series of proposals intended to define a realistic aggregate workload. There was no evidence of excessive demands by the division, but the arbitration board accepted that a unilateral employer right to increase workload without recourse “has elements in it of at least potential unfairness” (at p. 44). As a result, the board awarded a 5% cap on any increased student contact time in the 1988-1989 school year. The board added this observation: “Ultimately the Agreement may have a much more detailed provision on contact time; we do not think we should impose such a detailed provision now. We certainly expect that this issue will be the subject of negotiations between the parties for their 1990 agreement” (at p. 46).

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

However, there still are no quantified teacher hours of work in collective agreements. ...

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

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

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

According to research, teachers in Canada commonly work an average of 45-55 hours per week, which includes instructional time, non-instructional time during the school day and largely autonomous work outside the school day. Surveys and research indicate that classrooms are becoming more complex and the work itself is intensifying. Educating special needs students is especially demanding. Under the *Appropriate Educational Programming Regulation, Regulation 155/2005*, students have a legal right to an appropriate education in a regular class of their peers, without undue delay. There are legal rights to specialized assessment, individual education plans, parental participation and dispute resolution. ...

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

The Association stated that in presenting its current proposals, the intent was not to change any current practices but only to establish certain limits on teacher working time, as a matter of basic fairness. The Division would retain its full right to assign the kind of work that teachers must perform. There would not be cost consequences to the Division, according to the Association.

Admittedly, there is no precedent in Manitoba for the article advanced by the Association.

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

...

The Division stated that the Association's proposed new article would fundamentally change the provision of education and was entirely unacceptable. ...

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

I deplore any tendency to relegate teachers to the sole function of classroom instruction. Education is much more than merely instructing; it is a process of formation. ...

I would say rather that the normal or general rule is that the teacher is not confined to any time period for carrying out his or her professional role.

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

Neither can "instructional day" be equated with a teacher's working day. The mandatory 5 1/2 hour instructional day does not reflect all of the assignments which may be given to a teacher by the Division. ... So, it is clear that a teacher's working day can encompass assignments beyond those performed during the "instructional day" and such assignments can be broader than both the "instructional day" and the "school day".

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

168. *Louis Riel* declined to make any award on teacher time but urged the parties to engage again on the subject, noting as follows (at p. 74):

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

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

As the Division said, disputes over assigned duties have been governed by the Laskin test for many years. Reasonableness has been the touchstone. However, in *Winnipeg Teachers* the Chief Justice was considering whether the employer “may call for the performance of duties which are not expressly spelled out” in the contract. The question of how much time must be devoted to such assigned duties has been left for the parties to address. In Manitoba, arbitration is available when teacher bargaining fails. Generally speaking, interest arbitration is not a vehicle for introducing fundamental changes to an existing bargaining relationship, but each case depends on the circumstances.

### **Submission of the Association**

169. The Association explained the history of Article 5.1 and the 5% limit on increased student contact time. It was awarded in *Fort Garry* (Fox-Decent:

2000), based on *Transcona-Springfield* (Freedman: 1989), and the *Fort-Garry* board stated after reviewing the parties' positions: "It is reasonable and timely to award positively on this proposal." The Association believes that average contact time in 1999-2000 was 270 minutes but the Division does not concur, and the parties have never settled the point. As a result, the article is not necessarily sufficient to define job expectations. A grievance could be problematic because of a lack of consensus regarding the base year average contact time.

170. A membership survey taken in 2019 highlighted many serious concerns over teaching and learning conditions, similar to what was described in *Louis Riel*. Most teachers reported they had insufficient time to deal with pressing tasks and obligations, including self-care. Almost all teachers come to work sick or work at home while sick. Across all grade levels, they say their classrooms are more complex than ever.
  
171. Three teachers presented to the arbitration board and tried to communicate the reality of teaching today. All are active in extracurricular activities and have devoted themselves to various academic and program initiatives. Leah Scantlebury (Acadia Junior High) has taught for 28 years in the Division and described graphically how "her plate fills up" to overflowing every day. She said things have really changed over the course of her career. She feels just as overwhelmed now, as a senior educator, as when she started teaching. "It's just simply too much. ... Teachers need their workload to be manageable." Mary-Ann Mitchler has taught for 34 years at Oakenwald School and remains enthusiastic: "What a beautiful way to spend a life!" Still, over this period of time, class size, diversity and complexity have changed incredibly. The

expectations are now completely unrealistic, she stated. Finally, Chace Porter (Shaftesbury High School, Phys-Ed and Health), worked on multiple term contracts until he became permanent in 2016. “The reality is educators are consistently required to do more and provide more, with less. Less time, less resources and less support. Collectively we are exhausted. ... Even if the pandemic goes away tomorrow, I don't believe the current system is sustainable.”

172. The Association emphasized that it is not asking that teacher duties be reduced. The present proposals are intended to limit when and how long teachers may be assigned to work.
173. Two Metro divisions have collective agreement clauses on the instructional day. In Seven Oaks, exclusive of the lunch period, the instructional day is 5.5 hours for K-8 schools and 5.75 hours for high schools, or as determined by the Minister. Winnipeg School Division has a 5.5 hour standard instructional day, or as determined by the Minister, to be worked consecutively unless otherwise agreed. Both divisions specify minimum periods for preparation time. One rural division, Park West, lists specific school opening, noon and closing times, using an attached schedule similar to the present proposed Appendix A. Many other divisions across the province have workload articles dealing with prep time and extracurricular activities. The Association therefore argued there are comparators that support the proposal.
174. The requirement of inherent fairness is met, said the Association. The Laskin judgement contemplated that parties would negotiate clauses of this nature to better define teacher duties. Now is the time. *Saskatchewan Teachers’*

*Federation* awarded a maximum of 1,044 hours of assigned time per year in 2018, while still recognizing other professional working time and voluntary duties undertaken by teachers. In *Brandon School Division* (Freedman: 2020), a grievance award, it was held that convening school meetings during dedicated prep time violated the Laskin test and the collective agreement (at para. 204). In *Portage la Prairie* (LaBossiere: 2018), the instructional day was lengthened by the division and the arbitrator denied a grievance. In the Association's submission, these cases illustrate the need for language in the collective agreement to prevent "instructional day creep" by employers.

175. The Association cited a series of teacher workload studies, which were also discussed in *Louis Riel*. It has been found that teachers work 50 hours or more per week on average, much of it outside the classroom and the instructional day. The intensification of teacher work has also been well documented. All the teacher presenters spoke to this issue.
176. The Association stated that teacher time language in Manitoba collective agreements has resulted solely from arbitration. Employers have not been willing to bargain in this area and legislation does not stipulate a maximum, only a minimum. The reasonableness of a defined work time has been borne out by the decisions of numerous arbitration boards.
177. In closing, the Association emphasized that its final proposal on the instructional day is by definition a status quo article that the Division should find acceptable. It is cost neutral. It states the current practice, and yet the Division continues to resist. While the Association had hoped to address equity as between different school instructional days, it has foregone that goal

for now. The modest proposed language is a start toward defining teacher working time and can be built upon in future rounds. It also maintains three after-school events as maximum assignable time, recognizing that teachers regularly meet their obligations outside the instructional day as a matter of professional responsibility. The proposal gives teachers greater certainty but without adversely impacting the management of schools by the Division.

### **Submission of the Division**

178. The Division submitted that a change from “contact time” to assignable time in the collective agreement, even under the most recent amended proposal, was unprecedented, unnecessary and unjustified. It would amount to a breakthrough, but the *Turtle River* test has not been met. The Division’s refusal to agree is entirely logical and fair. The evidence did not establish that current practice is impractical, inequitable or out of step with other divisions. The onus of proof under *Turtle River* is on the Association. The member surveys submitted to the board were unhelpful and did not relate directly to the length of the instructional day. The workload studies and literature were generalized and made no reference to actual conditions in Pembina Trails. None of the presenters said a cap on the instructional day would be beneficial to them.
  
179. The Division did not object to retaining Article 5.1 (Contact Time) and stated that this clause already provides protection against instructional day “creep” or incursion into non-contact time. However, reverting to existing language at this stage of the arbitration does underscore the Association’s lack of evidentiary support for its position.

180. Government determines the curriculum and then the Division is responsible for allocating the time required in schools to deliver the necessary educational program. There is variation across schools. Schedules change over time in response to changing needs. Moreover, there could be future curriculum changes by government, with implications for the minimum necessary hours of instruction for purposes of student credits. The proposal would remove the Division's flexibility to manage. The proposal does not account for future costs of potentially hiring more teachers and the outcome on student learning outcomes.
181. In *School District of Snow Lake, supra* (1986), Justice O'Sullivan said that he would "deplore any tendency to relegate teachers to the sole function of classroom instruction. Education is much more than more than merely instructing ..." (at p. 261). In *Winnipeg School Division, supra* (1975), Chief Justice Laskin called for teacher contracts to be "governed by standards of reasonableness" in assessing an employer's assignment of duties not spelled out in the agreement (at p. 274). *Brandon School Division* (Freedman: 2020) was an application of the Laskin test, where it was found to be unreasonable to schedule school meetings during prep time. This decision underlined that school divisions do not have unfettered discretion under the Laskin test, as asserted by the Association in support of its proposal.
182. The Division argued that the Association's proposal, which limits a teacher's time on a minute-by-minute basis, was inconsistent with these established principles. By strictly dictating the parameters of a teacher's day, the parties would actually be infringing on teacher professional autonomy, as well as management rights under legislation. This exact point was made by MTS

itself in the *Portage la Prairie School Division* (2018) litigation, where “the 4 pm directive” required teachers to stay at school after the end of the instructional day. MTS grieved and said that teachers are not clock punchers. The Division agrees.

183. In *Portage la Prairie*, the grievance was denied on the basis that the directive was reasonable under all the circumstances. Judicial review was dismissed: 2020 M.J. No. 150 (Q.B.). The judge concluded her decision as follows (at para. 44):

I will add that I understand why the applicant challenged the Directive. Speaking generally, requiring teachers to remain at school until a specific time each day may be incongruous with both their professional status and the reality that they often work outside of the instructional day in any event. From a practical perspective, teachers can and should manage their own time appropriately. Having said that, the merits of the Directive were not before me on this application.

184. The Division submitted that after school events should not be arbitrarily limited to three per year, as proposed by the Association. The Division has parent teacher night, meet the teacher, Kindergarten information evenings, numeracy nights, concerts, open houses and year-end celebrations. It is crucial that the Division maintain its ability to ensure staffing of these events as needed. Robust parent engagement with their children’s teachers is correlated with student success. These are not “extras” but rather primary teacher duties. Some after-school events are voluntary and teachers always come through for the students.
185. The Division referred in particular to a teacher’s legal responsibility for “administering and marking any assessment of pupil performance that the

minister may direct, in the manner that the minister directs”: *Education Administration Miscellaneous Provisions Regulation*, Regulation 468/88R, section 39(e), made under the *Education Administration Act*. Teacher participation in tri-conferences is considered mandatory and there are currently four such events in the course of each year.

186. None of the presenters said they were ever directed to attend evening events. All were very active in extracurricular activities and the Division provides time off with pay pursuant to policy. A teacher’s level of commitment to such activities is a matter of personal choice and teachers are able to scale back their involvement to alleviate the pressure of their total workload. There are various student support services provided by the Division that help classroom teachers deal with the complexity and intensity of their work. As well, the Division said it is very concerned for teacher work-life balance and general well-being. It will support temporary FTE reductions if teachers make such a request. Codifying teacher time would not be a helpful step.
187. The Division said there has been no significant discussion of Article 5 in BACE meetings, and in any event, BACE is not a labour relations forum. As for collective bargaining, since there was virtually none this round, the parties did not engage on the teacher time issue. These are serious and complicated matters. They should be left to the parties for future discussion, as suggested by the board in *Louis Riel*.

### **Association reply submission**

188. The Association reiterated that its proposal does not displace current practice but does seek to enshrine it in the collective agreement. There should be a

clear limit on how much time the Division can assign to its teachers. The status quo would become the limit. This is cost neutral. It is a practical solution to a longstanding problem that would never be resolved in collective bargaining, as the Division confirmed in its submission.

189. The proposal does not reduce a teacher's total working time spent carrying out their professional duties. However, said the Association, providing teachers with certainty on assignable time will help them manage their obligations beyond the hours when they are expected to be at school.

### **Decision on assignable time**

190. The Association's decision to amend its proposal twice caused some disruption to the arbitration process, which was unfortunate and inefficient. At the same time, it was responsive to real concerns raised by the Division and focussed the board's attention on a potential zone of reasonableness between the two contending positions. Interest arbitration has been described as a component or extension of collective bargaining, so parties should not be discouraged from adjusting their positions if by doing so they may enhance the possibility of reaching agreement.
191. The Division rejected in principle collective agreement language on teacher time. It sought to preserve its management rights and maintain operational flexibility. Given the current bargaining environment, as described earlier in these reasons, this approach may be understandable. For its part, the Association aspired to insert highly prescriptive provisions on assignable time. It readily conceded that the job extends far beyond the hours spent in school. However, the Association sought to achieve certainty over teacher

working time during the school day. The board has considered whether there is there a mutually acceptable middle ground.

192. The teacher time issue is not a new one. Both parties recounted the history, starting with *Winnipeg School Division* and the Laskin test, which was formulated 45 years ago. The reasonableness test is incontrovertible. Work must be related to the educational enterprise, fair to the teacher and in furtherance of the teacher's principal duties. Unfortunately, a reasonableness test does not in itself provide the answer when disputes arise. Conflict and litigation are common. The court in *Winnipeg School Division* stated that the parties can negotiate terms, such as compensation for noon hour supervision, which was the issue in that case. This reflects a fundamental tenet of employment contracts. The employee provides work and the employer provides compensation. For the relationship to succeed, the parties each need to know the terms of their bargain.
193. In Manitoba, teacher salaries are bargained and settled in the collective agreement. Teacher duties are generally not listed in the collective agreement but rather in legislation. Teacher work time is not defined anywhere with precision. However, there have been exhortations by arbitrators faced with the Laskin test that the parties should or will negotiate working time in order to avoid further conflict.
194. In *Transcona-Springfield* (Freedman:1989), a 5% cap on contact time was ordered and the arbitrator stated: "Ultimately the agreement may have a much more detailed provision on contact time; we do not think we should impose such a detailed provision now. We certainly expect that this issue will be the

subject of negotiations between the parties for the 1990 agreement.” That was 30 years ago. There is still no detailed article establishing actual contact time or assigned time.

195. In *River East School Division* (Marr: 1996), dealing with extracurricular duties, the arbitrator ruled on the reasonableness of time spent by teachers, but in lieu of any further remedy, urged that the parties negotiate terms.
196. In *Fort Garry* (Fox-Decent: 1999), the association sought an article on contact during the instructional day, which the arbitrator defined as including teaching students, consultation with students and supervision of students. The division had “some sympathy” with the proposal but objected on jurisdictional grounds. A 5% cap was awarded on increases but there was no substantive article. Pembina Trails is the successor division and of course this remains in issue 20 years later. As noted, the parties have been unable to agree on the baseline for the 5% cap.
197. Winnipeg School Division and Seven Oaks School Division each have an instructional day defined by a specified number of hours, subject to some qualifications. The Association said these were awarded articles, not negotiated. Regardless, they exist in major Metro school division collective agreements.
198. In 2020 in *Louis Riel*, it was stated that “[t]he question of teacher time has now been flagged as a major concern of the Association and it deserves to be considered in depth by the parties to see whether some common ground may

be found” (at p. 74). The board said it expected the parties to engage the issue in collective bargaining.

199. The foregoing review establishes that the appropriateness of collective bargaining as a means of setting teacher working time was affirmed long ago in Manitoba. To that extent, the Division’s position rejecting such provisions in principle would appear to be illogical and unfair, to use the terminology from *Turtle River*. Current practice is clearly impractical because after 20 years, the parties have been unable to give any precise quantification to Article 5.1 on contact time. Arguably the absence of workable language is also inequitable, since it prevents teachers from assessing their current load of contact time and gauging whether it may violate the collective agreement.
200. As discussed earlier in these reasons, the *Turtle River* test is evidence based and takes into account logic, fairness, practicality, equity and consistency. The test should not be reduced to a rote, formulaic exercise. The test does not preclude breakthrough awards, but in the present case, whether an award constitutes a breakthrough or merely an improvement depends on precisely what may be awarded. In the end, the board has tried to consider the Association’s proposal and the Division’s objections on their merits.
201. Saskatchewan may not provide a direct comparable due to different local conditions and history, but the outcome in *Saskatchewan Teachers’ Federation* should not be ignored. The board quoted from the Task Force on Teacher Time, which framed the issue as follows: “What can be expected of a teacher, quantitatively, by their employing board in exchange for their salary?” The arbitration board in *Saskatchewan Teachers* concluded that a

negotiated limit can be put on assignable hours of teacher work, as defined, while still recognizing that professionalism requires teachers to perform the rest of their duties autonomously.

202. Thus, the real question is not whether assignable time is a legitimate potential collective agreement provision. That question has been answered on numerous occasions in the affirmative. The issue we must consider is what kind of language would meet the test of balancing the parties' interests and concerns. In objectively reasonable collective bargaining, which we must replicate, the parties would agree on a provision that reflected a degree of compromise and respected their competing interests. In this context, the Association's decision to scale back its proposal and request a partial step towards greater certainty deserves serious consideration.
203. The board does not believe that it is practical or desirable to define the instructional day by listing the current hours in every Division school. While this is undeniably a status quo clause, the Division has made the compelling point that it needs flexibility to revise schedules and hours from year to year, or even during a school year, depending on circumstances. We therefore do not accept the approach based on Appendix A. However, the board does conclude that there should be some defined limit on the instructional day worked by teachers. We will set that limit at the maximum current school instructional day in the Division, leaving management a fair amount of flexibility, but not giving carte blanche for future increases.

204. The form of the awarded language tracks the existing clauses in Winnipeg School Division and Seven Oaks School Division, which are significant comparables.
205. The Division also pointed out that it may need to respond if the department introduces new curriculum requirements that trigger increased instructional hours for student credit. We will include an exception for this purpose.
206. It bears repeating, albeit it was not disputed, that teachers always retain the obligation as professional employees to discharge their responsibilities outside and beyond the defined instructional day. For clarity, we will make this obligation explicit in the awarded language.
207. For the reasons advanced by the Division, we decline to award language limiting after-school events to no more than three events per school year.
208. Both parties cited *It's About Time!! A Report on the Impact of Workload on Teachers and Students* (Dibbon, Memorial University of Newfoundland, 2004). The board adopts the spirit of the following comments from the report (at p. 35) as justification for taking a modest step on teacher time in this award:

Many possible solutions to the workload problem have been proposed. However, given the diverse nature of teachers' work, no single solution will provide a panacea for all teachers. Reductions in class size will work better for some; increased preparation time will be more beneficial to others. Still others will benefit most from increased professional development and training while for others it will be the elimination of mandatory supervision. The issues associated with teacher workload are real and serious, much too serious to be dealt with exclusively as a collective bargaining issue. Because a one-size-fits-all solution is unlikely to be found, all of the partners/stakeholders ... must work together to find appropriate ways to implement solutions that are sensible,

meaningful to teachers, and timely. It is common knowledge that we are living in times of fiscal restraint, but the fact that we cannot change everything does not mean that we can or should do nothing.

209. The following is awarded as new Article 5.4, effective June 30, 2021:

**Length of Instructional Day**

- (a) The maximum length of the instructional day in each high school (averaged over the week, Monday to Friday) shall be 5 hours and 50 minutes. The maximum length of the instructional day in other schools shall be 5 hours and 45 minutes, averaged over the week if necessary. The instructional day is exclusive of the lunch period outlined in Article 5.3 and exclusive of the statutory obligation of teachers to be on duty at least 10 minutes before the morning session begins and at least 5 minutes before the afternoon session begins.
- (b) The instructional day may be revised by the Division to meet new Department of Education course credit requirements or to comply with statutory requirements.
- (c) Nothing in this article limits a teacher's obligation to discharge their professional responsibilities outside the instructional day.

**Leave of Absence for Executive Duties: Article 6.3**

210. The Division proposed that the Association pay reimbursement for the full amount of salary and allowances where a teacher is on leave of absence for MTS executive and other committee duties under Article 6.3. The present

language requires the Association to pay the cost of a substitute teacher for the period of absence. The Division argued this represents only partial indemnity for the actual cost. The average daily rate for a teacher is \$448 whereas the substitute rate is \$170 (2018-2019 school year). The Association pays only 38% of salary cost.

211. There are numerous committees and groups for which leave of absence is claimed under Article 6.3, and the overall cost to the Division is substantial - \$97,390 over the past five years. There is also the intangible cost of disruption to the teaching process, as noted in *Transcona-Springfield* (Freedman: 1989). The Division said it should not have to devote scarce resources to financing teacher participation in the Union.
212. There are five other Pembina Trails collective agreements and each of them requires the union to reimburse the full salary cost during union leaves. While other teacher agreements in Manitoba are consistent with Pembina Trails, this should not outweigh operational and fairness considerations, said the Division. In addition, under Article 6.4 of the present agreement, which covers full time and long term leaves for Association business, reimbursement is based on the full cost of salaries and benefits.
213. According to the Division, the status quo is impractical, illogical and unfair. Under the *Turtle River* test, the payment obligation should be changed.
214. In response, the Association pointed out that when a non-teacher is absent on a brief union leave (custodian, secretary), there would usually be no replacement hired, so there is a loss of service to the Division. Substitute EA's

are hired but they are paid the full wage rate. By contrast, a teacher on union leave still plans and prepares classes, and is replaced at a fraction of the salary rate. There is no loss of service to the employer. The proposal would actually enrich the Division.

215. Article 6.4 leaves are different in that they are extended periods of absence and the replacement teacher receives the full salary rate, reflecting fulsome duties. This is the reason the present agreement provides for full reimbursement to the Division for those leaves.
216. The Association referred to *Fort La Bosse, supra*, which held that non-teacher employees of a division are not proper comparables. The present language is consistent with all other Manitoba teacher agreements, so replication dictates that the Division's proposal be rejected.
217. The board accepts the Association's submission. The proposal is denied.

#### **Bereavement Leave: Article 6.7**

218. Article 6.7 provides that a teacher shall be granted up to five regularly scheduled consecutive workdays leave without loss of salary in the case of death or life-threatening illness in their immediate family, defined as spouse, child, mother, father, brother, sister, grandmother, grandfather, or grandchild, whether the family member is natural, in-law, step or foster, court appointed ward or court appointed guardian. Paid leave shall be granted for one day in the case of death or serious illness of an aunt, uncle, niece or nephew. Lastly, a teacher is entitled to one day of paid leave to act as a pallbearer at a funeral. The Association said the purpose of bereavement leave is to provide paid time

off to attend the funeral, tend to business related to the estate of the deceased and also have time to grieve a loved one.

219. First, the Association proposed that the word “consecutive” be removed and that the words “or for any matters pertaining to the death or life-threatening illness of a family member” be added. This would provide needed flexibility, given that the nature of funerals and memorials has evolved in our society. Also, since the article provides for leave to deal with the illness of a family member, the consecutive days requirement may prevent a teacher from effectively assisting the ill person. Many teacher collective agreements in Manitoba have bereavement or compassionate leave articles. The government of Canada allows five days of bereavement leave, which may be taken as desired over a period of six weeks from the date of death.
220. Second, miscarriage should be added to the clause. While currently a teacher and her partner may access sick leave when a miscarriage occurs, this proposal would treat miscarriage as a loss of life in the same manner as for other family members.
221. Third, leave in cases of death or illness of an aunt, uncle, niece or nephew should be increased to five days from one day, with flexible timing as needed, and cousin should be added. Fourth, one day of paid leave should be added for a mourner at a funeral, beyond the current provision for pallbearers. Finally, the article should be revised to provide up to four days paid leave for travel to a funeral. Teachers often have family living outside Manitoba.
222. The Association identified the removal of “consecutive” as the priority item.

223. The Division opposed all the proposals as exceeding the benefits available to other employees within the Division as well as other teachers in the province. There is no precedent for deleting the requirement for consecutive days off. The current language is generally consistent with other teacher agreements, although there is some inevitable variation. As for travel days, only 10 of 38 divisions make any such provision, and even then it is generally qualified in various ways. Only Mystery Lake School District in Thompson, a remote northern city, allows four days for travel, again on conditions. The Division submitted that the traditional purpose of bereavement leave should be maintained. It provides time to gather, mourn, give comfort and make arrangements, but not typically to conduct estate or other business.
224. Miscarriage is already covered by sick leave and in some cases EI benefits are available.
225. The current article is generous and reasonable, said the Division. The Association's proposals would convert it to an additional personal leave. In the discretion of management, compassionate requests for extra leave with or without pay are now received and granted where necessary. The collective agreement (Article 6.11) also allows two days of personal leave. There was no evidence of need related to the various proposals.
226. The board agrees with the Association that the word "consecutive" in Article 6.7(a) should be deleted. Diverse and changing social norms and practices related to bereavement should be recognized. The Division acknowledged that delayed ceremonies and non-consecutive leaves are now accommodated, but on a discretionary basis. There was no indication that providing a

contractual right would be a serious burden to the Division, whereas in individual cases, the flexibility may be necessary and important. On grounds of fairness, practicality and equity, we award this aspect of the proposal. Otherwise, the board agrees with the Division that the existing provisions are reasonably generous and broadly comparable to other divisions in Manitoba. Further changes should be negotiated or, if presented to an arbitration board, justified based on the *Turtle River* test.

**Maternity/Parental/Adoptive Leave: Article 6.8**

227. Currently, Article 6.8 top-up benefits do not apply to a term teacher during their first year of employment. All other teachers are eligible for top-up once they have been employed for seven months. The Division proposed to eliminate term teacher eligibility for top-up, as follows:

*New Article 6.8(f):*

In order to receive any Top-up benefits from the Division, as outlined above, the teacher must be employed by the Division on a Teacher-General Contract for a period of seven (7) consecutive months by the Division.

228. In addition, the Division proposed that a return to work obligation be established in exchange for the receipt of top-up benefits, which will be provided for up to 135 teaching days in the renewal collective agreement at 90% of gross salary. The proposed new language is as follows:

*New Article 6.8(g):*

Any teacher receiving top-up benefits from the Division, as outlined above, must enter into a written agreement with the Division providing that:

- (i) they will return to work and remain in the employ of the Division for at least the equivalent of one full school year (10 consecutive teaching months) following their return to work; and
- (ii) should they fail to return to work as provided above, they are indebted to the Division for the full amount received from the Division as a top-up during the entire period of leave; or
- (iii) should they return to work as provided above, but fail to complete their work commitment, they are indebted to the Division for a pro-rated amount based on the number of teaching days they have remaining on their return to work commitment.

229. The Association strenuously opposed both proposals.

### **Submission of the Division**

230. There is a lengthy evolutionary history of maternity, parental and adoptive leave benefits, commencing in 1990 with UI top-up during the two-week waiting period. In 2000-2001, three arbitrators awarded 17 weeks of maternity top-up and also some adoptive leave top-up. In 2006, a grievance award held that natural fathers were entitled to top-up equivalent to adoptive

leave benefits. These awards triggered negotiations across Manitoba and ultimately all teacher collective agreements included essentially the same maternity, parental and adoptive leaves, along with related top-ups. Pembina Trails negotiated parental leave top-up to 90% of gross salary in 2009. In addition, arrangements were negotiated in some divisions to bridge top-up benefits over break periods to avoid inequitable effects. In 2017, after a further round of grievances, divisions including Pembina Trails agreed to provide up to 50 teaching days of parental top-up, rather than 10 weeks, to avoid alleged discrimination.

231. Also in 2017, federal EI amendments provided for an extended eligibility period up to 69 weeks, at a lower payable weekly rate. Because the Division and other employers were committed to top-ups at a 90% level, this change caused an increase in cost as the difference was made up by the employer. Finally, in 2019 the federal government introduced an additional five-week parental sharing benefit.
232. Qualifying periods for top-up were historically set at one teaching year or 10 months, but this was later reduced to seven months, matching the statutory qualifying period for maternity leave in Manitoba. In 2017, when Pembina Trails agreed to provide up to 135 teaching days of top-up (85 days of maternity + 50 days of parental), the parties also agreed that top-up would not be available to term teachers during their first year of employment.
233. The Division said its two present proposals were intended to address key operational issues. It needs to ensure cost containment for top-up benefits, in

an equitable manner. Also, it needs to protect its investment in teaching staff who take advantage of leaves with topped up salary.

234. The significant progression of top-up benefits as described above has caused costs to escalate over the past 30 years. A teacher taking maternity leave and the standard EI parental benefit will cost the Division \$39,150 (2019-2020 school year). On average, 33 teachers per year access top-up benefits. It is estimated that 73% of Manitoba public school teachers are women and that a majority of new female hires are in their childbearing years. Maternity and parental leave costs add 1.74% to total payroll cost (2019-2020).
235. While the cost is high, the Division said it views these benefits as an investment in its teaching staff. Teachers are able to optimize their leave time with their families and avoid financial pressures. These benefits also help make the Division an attractive, competitive employer. The Division submitted that it should only be required to make the investment once teachers have been signed to a permanent contract, as a matter of prioritizing scarce financial resources.
236. Over the past six years, only three term teachers have received top-up benefits, at a cost of \$78,118. The negative impact on teachers is small, but the cost to the Division is significant, and could grow over time based on demographics. There are other collective agreement leave provisions or policies with minimum periods of service as a qualification (leave of absence without pay, teacher exchange policy). In other divisions, sabbatical leave provisions specify minimum service eligibility as well as a return to work obligation.

237. As for a return to work obligation, the Division argued it would help to ensure a fair return on the investment made in the employee. It is a reasonable requirement in exchange for a generous benefit. The Division referred to data and analysis showing that such arrangements enhance employee attachment and long-term success for women in the workforce. Most top-up plans now feature a defined qualifying period for eligibility, proof of EI enrolment and some form of return to work agreement.
238. The Division's experience shows that not all recipients of top-up benefit return to work and remain with the Division for another year. Over the past six years, five out of 201 teachers who received top-up did not return for the minimum expected 10 consecutive months. One teacher returned for six months and then resigned. While the non-return percentage is low (2.49%), again the Division's cost is high - \$195,750 for the five teachers in question. These funds could have been put to good use elsewhere in the Division's operation.
239. In *Louis Riel*, the board expressed openness to awarding a return to work obligation, but suggested that the language should be better tailored to accommodate individual circumstances (at p. 59):

The board believes that a return to work obligation may be fair and reasonable, given that teachers in the Division receive favourable maternity/parental benefits under the collective agreement and many other public sector employees are obligated to return for a minimum period of time after their leaves. If top-up is an investment, then it is appropriate for the employee to contribute to the payback. It would be inequitable for the Division to provide \$40,000 or more to support a teacher's leave, only to have the teacher end the employment relationship, at least in the absence of reasonable grounds for declining to return. On the other hand, return to work has not proven to be an issue outside of a handful of cases over a period of years, and the board received

no information on the circumstances in each case. If a teacher fails to return after receiving top-up, it may be justifiable due to their family and personal situation at the time. The Division's proposed language is inflexible and would need to be tailored for individual circumstances, but that is a task the parties should undertake themselves.

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

240. The Division said it added a prorating provision to its proposal in response to these comments in *Louis Riel*. Prorating of repayment is a feature rarely found in public sector collective agreements, so the concession is significant. Moreover, it undertook to exercise management discretion to forego repayment where there are extenuating circumstances, such as the unexpected death of a spouse. The proposal now provides reasonable flexibility and should be awarded.
241. The Division acknowledged that there are no Manitoba teacher agreements containing the current proposals. However, the proposals are consistent with non-teaching staff contract provisions and many other public sector agreements, including professional employee bargaining units. MTS has been unyielding on these issues over many rounds of past bargaining and refused all consideration of the merits, calling them deal breakers. The Division's only recourse is an interest arbitration award, based on fair and reasonable terms.

### **Submission of the Association**

242. The Association agreed that there has been an evolution in teacher maternity and parental leave rights, flowing from collective bargaining and grievance litigation, often based on human rights principles. In light of the progress

made, it is unacceptable to impose restrictions of the kind requested by the Division. The burden of these proposals will fall disproportionately on women.

243. Only three term teachers have accessed top-up benefits since 2014-2015. The potential saving of about \$13,000 per year amounts to petty cash for the Division. Yet the impact on an individual teacher and their family would be substantial and harmful. There are already length-of-employment qualifiers to access these benefits, based on employment standards legislation and the EI program. Sabbatical leave is an irrelevant consideration as there is no such leave in the Pembina Trails agreement. The proposed exclusion of term teachers impacts younger, vulnerable members who are just beginning their careers. It should be rejected.
244. A return to work obligation should also be denied. Maternity and parental top-up benefits are a benefit of employment, not a benefit of future employment. No such provision has ever been negotiated or arbitrated in a Manitoba teacher collective agreement. Non-teaching contracts and other public sector agreements are not useful comparables, and in any event, in those cases there would have been an exchange for other improvements. Here the Division offered nothing.
245. The Association argued that the Division's return to work proposal remains inflexible despite the concerns raised in *Louis Riel*. The amended proposal does nothing to address the fact that a teacher's life situation can change dramatically in 12 to 18 months, including a spouse being transferred, a child being ill or any other significant life circumstance that would prevent someone

from returning to work. The Division's amended proposal is still too inflexible and does not address the fundamental issue that was identified in *Louis Riel* regarding changes in individual circumstances.

### **Decision on maternity and parental top-up benefits**

246. The *Louis Riel* board heard and denied a proposal to exclude term teachers from top-up benefits, somewhat similar to the present Division proposal. In *Louis Riel*, the impact on teachers was more serious because top-up would not be available until a teacher had been employed for two consecutive school years on a Teacher-General Contract. However, in this board's view, the argument against exclusion is applicable to both versions of the proposal. The Division's savings are not substantial but the teachers likely to be most in need of the benefit would be denied. This cuts against the progress made over many years, through legislation and collective bargaining, to enhance gender equity in the teaching profession and to support family life for teachers. The proposal is denied.
247. Different considerations apply to the Division's proposed return to work obligation. The present board echoes the comments made in *Louis Riel* (at p. 59) that the proposal may be fair and reasonable if it includes sufficient flexibility to accommodate individual circumstances. The Division responded to *Louis Riel* by adding a proration clause. Should the teacher return to work but fail to complete their work commitment, they are indebted to the Division for a pro-rated amount, based on the number of teaching days they have remaining on their return to work commitment.

248. This is a positive step, but it does not address the situation of a teacher who is unable to return at all following maternity or parental leave, due to extenuating personal circumstances. Such a teacher would be indebted for the entire amount of the top-up received during their leave. The Division might exercise its discretion to mitigate the debt but that would be an act of kindness, not a recognition that there should be no debt, as a matter of right. Kindness is a quality the Division said permeates its personnel practices. The board has no reason to doubt this assertion. However, in a collective bargaining environment, employee debts in the order of \$25,000 or more should be governed by more formal safeguards.
249. The board does not regard a back to work obligation as regressive. This is evidenced by the fact that the arrangement, in different forms, predominates in public sector collective agreements where unions have fought hard for family friendly working conditions. It protects the employer's investment while providing a generous employee benefit, which is fair to both sides.
250. Would this clause be a breakthrough if awarded to the Division in arbitration? The Association stressed that it has never agreed to entertain such a proposal in bargaining. Earlier in these reasons, the board reviewed the *Turtle River* test and held, as have other boards, that significant operational changes may be awarded in some circumstances. In this case, moreover, the Association has achieved what might be considered a breakthrough on term teacher contracts and assignable time. The overall balance of a new collective agreement is important in interest arbitration, as it is collective bargaining.

251. Applying considerations of logic, fairness, practicality and equity, the board awards the Division's proposal, amended to provide for extenuating personal circumstances.

252. The board awards as follows, effective April 1, 2021:

*New Article 6.8(g)*

Any teacher receiving top-up benefits from the Division, as outlined above, must enter into a written agreement with the Division providing that:

- (i) subject to extenuating personal circumstances, they will return to work and remain in the employ of the Division for at least the equivalent of one full school year (10 consecutive teaching months) following their return to work; and
- (ii) should they fail to return to work as provided above, they are, subject to extenuating personal circumstances, indebted to the Division for the full amount received from the Division as a top-up during the entire period of leave; or
- (iii) should they return to work as provided above, but fail to complete their work commitment, they are, subject to extenuating personal circumstances, indebted to the Division for a pro-rated amount based on the number of teaching days they have remaining on their return to work commitment.

**Personal Leave: Article 6.11**

253. Currently the agreement provides for two days of paid leave to attend to personal business, at the discretion of the Superintendent. One unused day may be carried over to another school year. The Association proposed that teachers be allowed to take either full or half days under this article. The Division has applied this article as authorizing only full days.
254. The Association said that members have found they often require only a half day off to deal with a personal or family matter. The proposal would allow for flexibility and efficiency.
255. Second, the Association proposed to delete reference to the discretion of the Superintendent. The Superintendent does not in fact use discretion in granting personal leave. Based on Letter of Understanding (LOU), teachers are not required to give reasons when making a personal leave request. However, at times the Division has enforced policies limiting personal leaves taken around other break periods. The Association stipulated that the Superintendent has the inherent right to restrict a leave if it would inhibit the Division's ability to operate.
256. Third, the Association asked to move the language of the LOU into the body of the collective agreement, for clarity and durability.
257. The Division opposed all proposals. It said the interpretation allowing only full days has been a shared one for many years. Only one teacher agreement in Manitoba allows half days. It is difficult to arrange for half day substitutes

if a teacher takes less than a full day and it requires greater administrative resources to record the data in personnel files.

258. The Division denied that the Superintendent does not currently exercise discretion in dealing with personal leaves. Admittedly, reasons are not required from a teacher but there is still a necessity to consider operational and scheduling constraints. For example, in November 2020 the Division asked teachers not to apply for personal leaves because there was a shortage of substitutes and there was a public health directive in effect for COVID. The LOU affirms that reasons are not required and it forms an appendix to the collective agreement. There is no reason to move the language.
259. The Division added that management exercises discretion to accommodate teachers informally if they have used up their personal leave days and still need to be away from work. In that instance, it is helpful to know the reason.
260. The board declines the proposals.

### **Professional Development Fund: Article 7.5**

261. Article 7.5 establishes a professional development fund which is jointly administered by the parties. The Division allocates specified amounts annually to the fund. In 2017-2018, the allocation was \$495,927, and it was agreed that the general pay increase would apply to the amount of the allocation. A large surplus has developed in the fund (\$559,294 as of June 30, 2020) which must be counted as part of the Division's general surplus. The Division said this amounts to 11% of accumulated surplus. This limits the Division's fiscal flexibility because government has imposed a cap on school

division surplus (4% of operating budget). Surplus funds are normally used to manage unbudgeted expenses and contingencies.

262. The Division proposed that if the year-end fund surplus exceeds 50% of the annual allocation for that year, the excess be remitted to the Division for its own use, and not be retained in the fund.
263. There are 20 teacher agreements with professional development fund articles, and two agreements require that *all* unused funds be returned to the division each year. The Division argued it was fair and reasonable to return half the surplus given current fiscal pressures, while leaving the other half in the fund for teacher development. Due to COVID, fund take-up has been reduced but eventually professional development activities will resume. The proposal will not unduly affect the future operation of the fund.
264. The Association rejected the proposal. The fund surplus amount that would be reclaimed is a tiny fraction of the total operating surplus and would have a negligible benefit to the Division's operations. While usage is down because of COVID, there is significant pent-up demand for professional development, and once the pandemic passes, the surplus funds will be needed.
265. There was considerable debate about the calculation of the affected surplus funds, but regardless of that, the board denies the proposal. The Division's proposal is certainly understandable. On the other hand, the board's review of the activities supported by the fund satisfies us that the supports provided by the fund are important in addressing teacher concerns around the intensification of workload and other issues. We do not believe it is advisable

to limit the fund's capacity unless the surplus continues to grow unduly. The release of pent-up demand after COVID may scale back the surplus. The Division's proposal is therefore premature. However, the issue may be revisited in future if circumstances change.

### **Health Spending Account: New Article**

266. There are no teacher health spending accounts in Manitoba. Teachers pay the full cost of extended health and dental premiums, except for one cost shared plan (Seven Oaks) and one employer paid plan (Mystery Lake). In the Manitoba public sector, many collective agreements include a HSA in addition to employer paid or shared cost health and dental plans.
267. The Association proposed that the Division establish and fund a health spending account (HSA) effective January 1, 2020, with an initial credit per member of \$1,000 to supplement existing plans. Balances could be carried forward one year.
268. The Association said the annual HSA cost would be \$1.03M, but in practice the cost would be less, because a sizeable portion of group insurance benefits typically goes unused.
269. The Division opposed the HSA proposal. No other teacher or non-teaching bargaining unit in Manitoba has this benefit. A nearly identical HSA proposal was made in *Louis Riel* and the board rejected it, as follows:

The Association proposed a Division-paid Health Spending Account (HSA) providing \$1,000 per annum per FTE teacher, with a total potential cost of \$1.1 million per year. In practice, only about 40% of available health spending

account funds are utilized by plan members, so the real cost would be significantly less. There would be one year of carry forward for unused benefits. Currently, teachers in Manitoba pay for their own health and extended benefits, unlike many major collective bargaining units in the province, where some coverage is employer paid under various terms and conditions.

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

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

The arbitration board declines to award a Health Spending Account.

270. In Manitoba, teachers' health and welfare benefits are provided through a trust co-sponsored by MTS and the MSBA. The trust has been structured so that teacher benefit premiums are deducted on a pre-tax basis. As a result, teachers save approximately 40% on the actual cost of their benefits. For these reasons, said the Division, it is incorrect to suggest the teachers suffer relative to other public sector employees who have employer paid or cost shared plans. Teachers elected to create their own self-insured LTD and short term disability plans through MTS. As for pension, teachers enjoy a defined benefit plan partially funded by government. In sum, the Division argued that teachers are well compensated and their benefit packages are very satisfactory.

271. Lastly, the Division said that administration of the proposed HSA would be costly and burdensome. This is not the time for a new, expensive health benefit.

272. The board denies the proposal.

### **Exceptional Students: New Article**

273. The Association withdrew its proposal for a new article on Exceptional Students. The Division raised a question of arbitrability with respect to the proposal. The Association stated its withdrawal was without prejudice to its position that the proposal was fully arbitrable.

### **Agreed Items**

274. Items agreed between the parties are attached as Appendix A and will be incorporated into the renewal collective agreement.

### **Conclusion**

275. The board wishes to thank the parties and all participants for their excellent input and unfailing courtesy throughout these protracted proceedings, conducted in the midst of the COVID pandemic.

276. The award is unanimous. During the course of deliberations, the nominees expressed their candid views while also cooperating in a search for consensus. Each respective nominee of the parties has in certain instances agreed with the other two members, despite some reservations regarding the outcome of particular issues. We have done this because we think it is important to

achieve a workable, unanimous award that addresses the important matters raised by the parties in this arbitration.

277. These are difficult and uncertain times. More than ever, the parties will need to continue working together in a relationship each side described as respectful and productive.

**Jurisdiction retained**

278. The board retains jurisdiction to clarify or implement the award as may be necessary.

Issued electronically and dated this 15<sup>th</sup> day of February 2021.

**ARNE PELTZ, Chair**

**DENNY KELLS, Nominee of the Division**

**DAVID SHROM, Nominee of the Association**

**APPENDIX A****ITEMS AGREED BETWEEN THE PARTIES**

Throughout the collective agreement changed “Assistant Superintendent, Human Resources and Policy” to “**applicable Assistant Superintendent**”.

**ARTICLE 2.1 – EDUCATION QUALIFICATIONS**

Amend to read as follows:

Except as otherwise qualified in this Agreement, the classification accorded the teacher by Manitoba Education pursuant to Manitoba Regulation **115/2015** and subsequent amendments shall be used to determine the class in the “Basic Salary Schedule.”

**ARTICLE 3.2: METHOD OF PAYMENT**

Amend to read as follows:

- (a) For the period September 1, 2014 to August 31, 2014:
  - (i) Teachers shall be paid one-twelfth (1/12) of their annualized salary rate on or before the second last teaching day of each month during the period September to May inclusive in which services were provided from the first teaching day of a month. In the case of a teacher commencing employment on a teaching day other than the first teaching day, the teacher shall be paid on or before the second last teaching day of that month the proportion of the number of days taught bears to the total number of teaching days in the month multiplied by one-twelfth (1/12) of the teacher’s annualized salary rate.

(ii) On or before the second last teaching day of the month of June, teachers shall be paid the difference between the annualized salary earned during the school year and all amounts paid prior to that date. The amount of the annualized salary earned by any teacher shall be determined by taking the total days taught by a teacher as a proportion or percentage of teaching days in the Fall and Spring Terms as prescribed by the Minister of Education multiplied by the annualized salary rates in effect during the school year.

(a) For the period commencing on and from September 1, 2015:

Subject to the Letter of Administration: Method of Payment, dated April 30, 2015, attached to this Agreement, Teachers shall normally be paid one-twenty-fourth ( $1/24$ ) of their annualized salary rate on or before the fifteenth (15th) day of each month and on or before the last business day of each month, September to August inclusive in which services were provided from the first teaching day of a semi-monthly pay period. In the case of a teacher commencing employment on a teaching day other than the first teaching day of the pay period, the teacher shall be paid, for that pay period, the proportion of the number of days taught bears to the total number of teaching days in the pay period multiplied by one- twenty-fourth ( $1/24$ ) of the Teacher's annualized salary rate.

(b) Where, in any year, teachers who leave the employ of the Division between the expiration of the previous agreement and the date of signing of this agreement shall bear the onus of notifying the Board as to any change in address.

(c) Any perceived discrepancies with respect to the full time equivalency are to be brought to the attention of the **applicable Assistant Superintendent**. Any

perceived discrepancies with respect to classification, step on the salary schedule and deductions are to be brought to the attention of the Secretary-Treasurer.

#### **ARTICLE 3.4: Principals and Vice-Principals**

Amend to read as follows:

**f) Return from Leave:**

Principals and vice-principals returning from Deferred Salary Leave or Maternity Leave shall be placed in the same or comparable position as had been occupied at the time leave was taken

#### **ARTICLE 3.10 DEDUCTION OF PROFESSIONAL FEES**

Amend to read as follows:

- a) Professional fees for a school year will be deducted from every participating teacher. These deductions will be made in **twenty (20)** equal semi-monthly installments, from the first day of the school year in September to the last day of that school year in the following June, according to the scale of fees established by the Manitoba Teachers' Society, starting with the September cheque.

Monthly installments will be forwarded to the Central Office of Manitoba Teachers' Society, normally not later than the twentieth (20th) day of the following calendar month.

- b) Pembina Trails Teachers' Association fees will be deducted from every teacher. These deductions will be made in **twenty (20)** equal semi-monthly installments, from the first day of the school year in September to the last day of that school

year in the following June, in accordance with the current rate of fees set by the Pembina Trails Teachers' Association. The fees will be remitted to the Pembina Trails Teachers' Association not later than the twentieth (20th) day of the calendar month following the month of collection.

- c) remains as Current Agreement
- d) remains as Current Agreement
- e) remains as Current Agreement
- f) remains as Current Agreement

**ARTICLE 6.8: Maternity/Parental/Adoptive Leave**

Notwithstanding that the Division maintains other amendments to this article, the parties agree as follows:

Every teacher shall be entitled to maternity and/or parental and/or adoptive leave and any teacher, who has satisfied a seven (7) consecutive months of employment as a teacher with Pembina Trails School Division qualifying requirement, shall be entitled to the Supplementary Employment Benefits as described in items 4, 5 and 6 of this clause.

- a) remains as Current Agreement
- b) remains as Current Agreement

**(d) a teacher taking Maternity Leave and/or Parental/Adoptive Leave pursuant to this article shall be entitled to receive pay equivalent to ninety percent (90%) of the teacher's gross salary (gross salary means the teacher's gross salary at the time the leave commenced plus any subsequently negotiated salary adjustments) for up to one hundred and thirty-five (135) teaching**

**days, which pay will include any employment insurance benefits received in accordance with this article.**

**(e) effective July 1, 2017 The Division shall pay a teacher on Maternity Leave and/or Parental/Adoptive Leave:**

**(1) if the teacher's one (1) week or five (5) day waiting period falls entirely on teaching days, ninety percent (90%) of the teacher's gross salary plus up to eighty (80) teaching days of Maternity Leave Top-Up calculated at the difference between the teacher's employment insurance benefit and ninety percent (90%) of the teacher's gross salary provided the teacher remains on either maternity or parental leave and continues to receive employment insurance benefits;**

**(2) if the teacher's one (1) week or five (5) day waiting period falls partially or entirely within a non-teaching period, ninety percent (90%) of the teacher's gross salary for any teaching days and up to eighty-five (85) teaching days of maternity leave top-up calculated at the difference between the teacher's employment insurance benefit and ninety percent (90%) of the teacher's gross salary provided the teacher remains on either maternity or parental leave and continues to receive employment insurance benefits;**

**(3) up to fifty (50) teaching days of parental/adoptive leave top-up calculated at the difference between the teacher's employment insurance benefit and ninety percent (90%) of the teacher's gross salary provided the teacher remains on parental/adoptive leave and continues to receive employment insurance benefits.**

**For greater certainty, a teacher who is receiving employment insurance benefits shall be entitled to:**

- (1) one hundred and thirty-five (135) teaching days of pay and/or top-up benefits if the teacher takes both maternity leave and parental/adoptive leave;**
- (2) eighty-five (85) teaching days of pay and/or top-up benefits if the teacher only takes maternity leave;**
- (3) fifty (50) teaching days of pay and/or top-up benefits if the teacher only takes parental/adoptive leave;**

**unless the teacher takes a shorter period of maternity leave or parental/adoptive leave in which case, the pay and/or top-up will be pro-rated to reflect the actual number of teaching days taken. The parties acknowledge that the top-up payments made by the Division for maternity leave may extend into the period of time that the teacher is on parental leave but the payment is intended to be a top-up of maternity leave benefits.**

**(f) Non-Application**

**This article shall not apply to any teacher who is employed on a term contract during the teacher's first year of employment. All other teachers shall be eligible to receive the top-up benefits once they have been employed for a period of seven (7) months by the Division.**

**ARTICLE 6.15: Educational Leaves**

Amend to read as follows:

A teacher will have the right to one-half day of paid leave for the purpose of writing a university examination or effective April 30, 2015, defending a thesis or dissertation during the school day to a maximum of two examinations or defenses during any school year or for the purpose of attending the teacher's own convocation during the school day.

### **ARTICLE 7.1: GROUP LIFE INSURANCE**

Amend to read as follows:

- a) remains as Current Agreement
- b) remains as Current Agreement
- c) delete "unless granted exclusion"
- d) remains as Current Agreement
- e) remains as Current Agreement
- f) remains as Current Agreement

### **ARTICLE 7.3: SHORT TERM DISABILITY PLAN**

Amend to read as follows:

Commencing on and from September 1, 2015, The Division shall administer the Manitoba Teachers' Society Short Term Disability Plan as follows:

- a) remains as Current Agreement
- b) remains as Current Agreement
- c) remains as Current Agreement
- d) remains as Current Agreement
- e) remains as Current Agreement
- f) remains as Current Agreement

- g) The Division shall refund to the Association 100% of the additional premium rebate under the *Employment Insurance Commission Act* as a result of the implementation and continuation of the Short Term Disability Plan.

**The parties agree to renew the following SCHEDULE, MEMORANDUMS and LETTERS:**

Letter of Administration Re: Method of Payment

ADDENDUM TO THE AGREEMENT RE: PROFESSIONAL DEVELOPMENT FUND

AUXILIARY AGREEMENT

COLLATERAL DENTAL PLAN AGREEMENT

LETTER OF AGREEMENT RE: REVISED SALARY GRID NET OF DENTAL AND EXTENDED HEALTH

Letter of understanding RE: DIVISIONAL PRINCIPAL

**The parties agree to delete the following:**

LETTER OF ADMINISTRATION RE: JOINT COMMITTEE WITH RESPECT TO RELEASE TIME FOR REPORTING

Note: Appendix A was provided to the board by the parties.