

IN THE MATTER OF: An arbitration pursuant to *The Labour Relations Act*,
R.S.M., 1987, c. L10

BETWEEN:

THE BRANDON TEACHERS' ASSOCIATION

(the "BTA" or the "Association")

- and -

THE BRANDON SCHOOL DIVISION

(the "BSD" or the "Division")

Grievance regarding Preparation Time and related matters

AWARD

Members of the Board

Hon. Martin H. Freedman, Q.C., C. Arb, Chair
David M. Shrom, Nominee of the Brandon Teachers' Association
Denny Kells, Nominee of the Brandon School Division

Appearances

Garth Smorang, Q.C., Counsel; Cale Dunbar, President of the BTA; Diane Beresford, Staff Officer of the Manitoba Teachers' Society, for the Association.

David Swayze, Counsel; Stacy Senkbeil, Counsel; Dr. Marc Casavant, Superintendent/CEO of the BSD; Mathew Gustafson, Assistant Superintendent of the BSD, for the Division.

Hearing Dates: July 8, 9, 10, 11, 12, September 4, October 26, 2019

Award dated January 20, 2020

AWARD

INTRODUCTION

1. This arbitration arises out of a grievance filed by the BTA in December 2018 (ex. 2). It alleges that since the start of the 2017-18 school year the BSD has encroached on teachers' preparation time ("prep time") contrary to the provisions of the collective agreement (the "Agreement") between the parties (ex. 1), a related Letter of Understanding ("LOU"), and applicable law, in that teachers have been required to attend certain meetings during prep time, which is to be uninterrupted and unassigned time. The grievance asserts that the BSD has improperly increased the number and length of staff meetings held outside the school day, has required teachers to attend certain other meetings held outside the school day, and has improperly encroached upon the teachers' duty-free lunch period. The details of the allegations will appear as we deal with the issues before us.
2. The conflict between the parties stems from the introduction by the BSD of a program embodying a new approach to fostering collaboration among teachers, and the requirement that teachers participate in meetings related to this new approach held mainly, but not always, during the instructional day. The principal complaint of the BTA is that the BSD requires teachers to participate in these sessions during a period in the school day known as the "prep time" period. The BTA asserts that what teachers do during that period has historically, and legally, been in their own discretion provided the time is spent on work-related matters. Instead, the BTA says, the BSD has mandated attendance at regular sessions, held during a common prep time period usually once a week, for the purpose of advancing the new approach to collaboration among teachers.

3. The BTA makes it clear that it supports the idea that teachers should collaborate with each other, as an important way to enhance outcomes that are positive for students. It acknowledges that the BSD has the right to implement the program to improve collaboration. Its objection is not to the particular program introduced by the BSD. Rather, its objection is to the method of implementation and the encroachment on what the BTA regards as sacrosanct time, the use of which has been and should remain in the teacher's discretion. It maintains that the implementation has infringed the collective bargaining rights of the BTA as well as the common law rights of teachers. Prep time, it says, has always been recognized as a necessary component of the teacher's day, to be used in whatever way the teachers saw as best enabling them to prepare for their student-contact time. The BSD was not only encroaching on prep time, said the BTA, but was also increasing the frequency of staff meetings outside school hours. Teachers in some schools were holding "Collaborative Teacher Team" ("CTT") meetings during the lunch period, which was by the Agreement mandated to be duty-free time. None of this was permissible, or even necessary, said the BTA, and at least one school has been able to schedule CTT meetings without any teacher losing prep time as it has been historically understood.

4. The BSD responds by denying that prep time is autonomous time, whose use is in the teacher's discretion. It argues that while the Agreement provides a certain amount of prep time for teachers it does not deal with or dictate how that time should be used or who decides how it will be used. Therefore, it says, the BSD may properly require teachers to participate in meetings to further the collaboration program, even if those meetings are held during prep time periods. It said that this case is about what the Agreement does not deal with, and what the BTA and the BSD can and cannot do. It argued at the outset of its case that it was not requiring teachers to use prep time for CTT meetings, although it said that there had to be a CTT meeting

every six days. How each school handles the needs of the program may vary, said the BSD, but the CTT meetings must be scheduled, and fall within the school day.

5. Both parties said without hesitation that teachers work very hard, are often under considerable pressure, and have to balance competing demands on their time. At the opening of its case the Division said that the teachers have “incredible demands” on their time.

6. While more details of the program will appear in our review of the evidence, it will be helpful to provide a very brief overview at this point. Solution Tree is an organization based in California which developed and sold the program to the BSD. In brief, the program (which we will call the “ST program”) requires teachers to attend group meetings called CTT meetings, and there to participate in developing a Response To Intervention (“RTI”) program initiative. The teacher responsible for certain logistical and other arrangements is the Continuous Improvement Coach (“CIC”). The approach is explained in a Solution Tree Handbook called “Taking Action: A Handbook for RTI at Work” (ex. 15). RTI, says the Handbook, is about creating a collective response for students needing additional support, rather than leaving the response to an individual teacher. For this to work the staff must have the time to work together. Teacher teams should meet, the Handbook states, at least once each week, for about an hour, and participation must be mandatory. “Collaboration by invitation does not work” (ex. 15, p. 68). The Handbook states that it is possible to do the essential work of the RTI process within the contractual hours of the workday. It states that it should be possible to find 60 minutes to meet, in a 35-hour work week, and that collaboration should occur without increasing costs.

7. It will also be helpful at this early point to set out the applicable contractual provisions. The Agreement contains Article 32 titled “Preparation Time”. It states:

WHEREAS some teachers throughout grades K-8 currently have more preparation time than the minimums stipulated in this article, such preparation time shall not be reduced.

1. Within a six (6) day cycle the Division shall provide at least two hundred forty (240) minutes of preparation time for each full time teacher of students in the range of grades from Kindergarten to Grade Eight (8). This time shall be scheduled in blocks of not less than thirty (30) minutes. This time shall be exclusive of scheduled recess times.
2. Within a six (6) day cycle the Division shall provide at least three hundred ninety (390) minutes of preparation time for each full time teacher of students in the range of Grade Nine (9) to Grade Twelve (12). This time shall be scheduled in blocks of not less than sixty-five (65) minutes.
3. Part time teachers shall be allotted scheduled preparation time on a pro-rata basis based on their percentage of assignment.

8. Article 27 is titled "Lunch Period". This was not the result of negotiations, but rather was awarded by an interest arbitration board in 2006. It states:

Every teacher shall be entitled to an uninterrupted duty free lunch period (mid-day intermission) of sixty (60) minutes, exclusive of scheduled non-contact time, between 11.00 a.m. and 2.00 p.m. of each school day, unless the Brandon Teachers' Association on behalf of a majority of teachers in a particular school and the administration responsible for that school agree to a different arrangement.

9. The current version of the LOU is dated November 23, 2015 and is titled "PREPARATION TIME". It is appended to and is part of the Agreement. It refers to Article 32 and then states:

AND WHEREAS the Division and the Association acknowledge that on occasion such preparation time may be interrupted;

AND WHEREAS the Division and the Association have agreed that teachers are entitled to receive such interrupted preparation time, and that such interrupted preparation time may be banked and accumulate to a half day or full day(s);

NOW THEREFORE the parties hereby agree the teachers are entitled to such banked interrupted preparation time, to be taken at a time mutually agreed upon between the teacher and the principal.

10. We heard evidence from a number of witnesses for each party, and received many documents in evidence, over hearings lasting several days. We received comprehensive written submissions from counsel and heard full oral arguments as well.

EVIDENCE

11. The BTA adduced evidence from 9 witnesses. Seven were actively engaged as teachers (an eighth teacher had recently retired), and they testified as to their experience with the RTI initiative, CTT activities, prep time and other matters. Two witnesses, one of whom was the recently retired teacher, testified on broader aspects of the issues before us.
12. Peter Buehler, until his very recent retirement, had been a teacher for about 45 years, the last 30 or so with the BSD. He was a librarian and his most recent teaching position was at Crocus Plains Regional Secondary School in Brandon. He left that position when he became the full-time president of the BTA in 2016. He explained that every one of the 23 schools in the BSD has a principal, and the larger schools also have a vice-principal. Those persons are members of the BTA, which has about 850 members in total.
13. Mr. Buehler was actively involved for the BTA in collective bargaining for a number of years. When he arrived in Brandon in 1988 prep time was already a fixture on the timetable, he said. He explained that in prep time teacher does work in order to prepare for class. The teacher would consider what to do, how to do it, what resources they would need, what other personnel they would need to talk with, and it was an opportunity to get ready for class. The amount of prep time would vary from school to school but would usually be around 40 minutes. Through him there were introduced some documents relating to collective bargaining history. These were not objected to by the BSD. We do not think it necessary or helpful for us to refer to these documents as they deal with proposals that were never agreed to or implemented. At most they show one party's understanding and intentions, but do not reflect any mutuality of intention. We will discuss this later in more detail.

14. The first clause on prep time was agreed to by the parties and introduced in the 2010-2014 agreement (ex. 5). The end result of the provision is the same as the present Article 32. There was then, and there is now, no definition of prep time in the clause. Mr. Beuhler said it was not discussed because “we all knew what it was”; he said “it was time not working with students”.

15. At the time of the introduction of this clause the Superintendent of Schools in the BSD was Dr. Donna Michaels. Dr. Michael sent a memorandum on October 11, 2011 to all principals and vice principals (ex. 9) marked “Very Important”. The memorandum was on the implementation of article 32. The relevant parts read:

The purpose of this memorandum is to provide direction/clarification on the implementation of Article 32...in unique school events and circumstances. A unique school event and/or circumstance, for this purpose, is defined as one that requires the active and direct supervision of the teacher for the students in his/her care during during a school-based activity occurring on a periodic basis (e.g....school-based trips...cultural events. Every effort should be made to avoid the loss of teacher preparation time as per Article 32 by pre-planning and booking required substitute teachers...

[original emphasis]

16. The memorandum goes on to provide that if a teacher has a scheduled preparation time during a unique event in which his/her participation is required the teacher is to receive the equivalent missed preparation time in accordance with certain procedures set out in the memorandum, including that it is to be provided within the same 6-day cycle if possible. Among other matters it is stated that missed schedule time cannot be banked.

17. Mr. Buehler had seen this memorandum which deals, he said, with the recovery of interrupted prep time. He said that high school was a 5-period day, with each period about 65 minutes long. This memorandum was acceptable, he said, although there were some problems. It was not workable to provide the equivalent missed prep time within the 6-day cycle, and if it could not be banked it could be lost. The ultimate result was the creation and execution of a Letter of Understanding

dated February 11, 2013 (the previous version of the LOU), which provides for banking and accumulation up to a half day or full day. Ex. 10.

18. Two months after ex. 10 was signed the parties issued to all teachers a joint memorandum on prep time (ex. 11) which explained the implementation of the February Letter of Understanding regarding repayment of interrupted prep time. Teachers had the option of having interrupted prep time repaid in half day and full day amounts on a time for time basis, at a time acceptable to both the teacher and the administration. It was to be repaid within the school year if possible; otherwise at the earliest opportunity the next year.
19. Shortly after the start of the 2017-18 school year Mr. Buehler created a memorandum from the executive of the BTA to all teachers (ex. 16). Essentially it stated that meetings scheduled during prep time in which the member does not voluntarily agree to participate violate Article 32. It stated further that prep time is non-contact time, is for use in planning for teaching or following up teaching, and is managed by each member autonomously. In an emergency or during a unique school event, teachers may have to be directed to meet or otherwise use their prep time. The memorandum was issued, he said, because members expressed concern that meetings were being scheduled in prep time.
20. The Manitoba Teachers' Society ("MTS") had already written (ex. 17) to the Superintendent, Dr. Marc Casavant, expressing this concern. That letter also expressed concern that after-school monthly staff meetings, which were a part of a teacher's expected duties, were also being taken over by required work on the new collaboration program. The letter stated that how and when a teacher would accomplish all the work needed to do the job beyond the teaching day had always been for the teacher to decide. This was, the letter said, another incursion into a teacher's autonomy.

21. At the end of September 2017 Mr. Buehler wrote to his council members (ex. 20) that the BTA had learned that at some, perhaps all, schools and worksites members were expected to attend meetings and Professional Learning Community (“PLC”) groups and do other required activities during their scheduled prep time. Members were reporting that their prep time was “no longer fully theirs”. He wrote that “Occasional requirements of this sort are understandable and reasonable. Frequent requirements of this sort are not.”
22. By the start of the 2018-19 school year the complaints from teachers were increasing. For example, Kathy Penner-Warnica (who testified) wrote him (ex. 21) that her principal told her he understood that she had lost virtually all her preps for a week or 10 days but that the CTT/PLC meetings were not optional. She had been told that the team could decide when to meet if they didn’t want to give up their preps, such as before or after school or during lunch, but everyone would have to agree on the time. She expressed to Mr. Buehler great concern and a feeling of being overwhelmed, and she said she worried that this would lead to giving up Article 32. Mr. Buehler testified that this was the sort of complaint that led the BTA to file the grievance.
23. Mr. Buehler testified about an exchange the BTA had with Bryce Ridgen, a principal at Vincent Massey School. See ex. 22 and 23. Principals and vice-principals, although administrators, are members of the BTA. Mr. Ridgen expressed dissatisfaction with the BTA’s approach to the implementation of RTI and the Division’s Continuous Improvement Plan (“CIP”). The Union explained its position, saying that the concerns if only from a few of its members was nevertheless significant. The BTA said that it fully supported the intentions of the plan but had concerns about the implementation process. In one exchange (ex. 25) Mr. Buehler said to Mr. Ridgen, summarizing the BTA’s position in the grievance before us:

Preparation time is time to be used at each member's discretion to perform some aspect of their work – to do something that supports their job as teachers. In that sense, it is time each member manages autonomously.

24. In cross-examination he agreed that the position on prep time that he had articulated in ex. 16 was not necessarily the position of the BSD on prep time. He agreed that the duty-free lunch provisions in the Agreement mean that in that time there were to be no duties required of the teacher and no contact with students. He said that while on prep time typical tasks teachers would do included marking tests, answering calls from parents, planning lessons, and similar work. When on prep time they were fulfilling the responsibility of teachers. Some of this work was often done by teachers on weekends, he said. He agreed that teachers would meet and discuss common problems, and would talk about collaboration and team teaching.
25. Mr. Buehler said that the 30 minutes referred to in Article 32 was the minimum amount needed to do effective work. He agreed that the Article contained no language about non-student contact time or duty-free time. He said that teachers spoke of prep time as part of the teaching day. The issue, he said, was who had control of the prep time, the teacher or the Division.
26. He was questioned about proposals that had been made during negotiations by each party to make changes to Article 32 but as indicated we do not find it necessary to consider these. At most they show a party's subjective interpretation of the provisions in question or the party's proposals for new or modified provisions. Further, provisions advanced were often withdrawn (as with ex. 13). On the LOU, in the 2015 negotiations there were proposals, but the LOU remained, and remains, virtually unchanged, he said, so the BTA was satisfied on the issue of banking time. He agreed that the BTA wanted more substitute teachers brought in, but he also agreed that there was a chronic shortage of substitute teachers and that it can happen that teachers do lose prep time because of the lack of substitutes.

27. He was a librarian, and agreed that as such he would sometimes be spoken with by teachers during their prep time. Collaboration among teachers was not a new concept, he agreed. He agreed that the BTA would discuss BTA matters sometimes at staff meetings, and they were often an agenda item. It was his view that staff meetings should be regularly scheduled and should end around 5.00 p.m.
28. Mr. Buehler was asked about The Manitoba Teachers' Society Code of Professional Practice (ex. 37), and agreed that a teacher's first responsibility is to the student, and that teachers should make ongoing efforts to improve professionally.
29. Evidence was adduced by the BTA from Dr. Donna Michaels. She was Chief Superintendent and CEO of the BSD from June 2001 to June 2016. She has a Doctorate in Strategic Planning and Education Administration. After a career as a teacher she became vice-principal and then worked as a principal for over 20 years. She became Superintendent of senior high schools in Calgary, then Superintendent of Schools in Victoria, and then she returned to Calgary as Chief Superintendent of schools. She became Brandon's Superintendent in 2001. She is a certified teacher.
30. Ex. 5 is the collective agreement between the parties for the 2010–2014 period. She was part of that bargaining process and said that article 32 in that agreement was the first agreement in Brandon that contained language on preparation time. That language is similar, with some inconsequential changes in detail, to the present article 32. Before the article came into existence, she said, the Division had built prep time into the timetable. She said that teachers do a wide variety of tasks and it was established practice across Canada to give prep time for teachers to deal with work related matters. She gave examples, such as have been referred to above, of what teachers would do in their prep time. She said teachers work with honesty and integrity and that a teacher might help a student during prep

time. She said that prep time is integral to the teaching process. Looking at the structure of teaching, she said, it is necessary that teachers have prep time.

31. There was considerable discussion about the Article, she said, and about the language needed to capture the complexity of the situation. A phase-in was needed because of that complexity and because of the operations of the schools. It was important not to violate the collective agreement, she said. They needed the right implementation process. One issue was as to the meaning of “preparation time”. The parties had discussed what it had meant historically, and what it would mean in the future with technological advances. She said the BSD understood that prep time was part of the teacher’s responsibility. Teachers are professionals, she said, and need time to do their work. She and the Division Board were very pleased with the Article, she said. After this agreement came into effect, she said, there was no change in what prep time was used for.

32. She was asked about ex. 9, the “Very Important” memo she wrote on October 11, 2011, to principals and vice-principals about Article 32 in the case of “unique school events or circumstances”. Several principals had wanted explanations of implementation of Article 32. They had instructed the principals but some had difficulty with it. So she and others met with the BTA and developed ex. 9. It met the intent of the collective agreement, she said, and once in writing it was not negotiable. This could not be “messed around with at the school level”. Exhibit 9 implement a process of repayment of lost prep time. They had to implement the agreement. She could not police it all and had to work with the BTA and make sure the agreement was honored. In 2015 she authored a memo similar to ex. 9. She sent such memos annually.

33. Ex. 11, the joint memo of April 1, 2013, was sent out to teachers to advise them that the BSD and the BTA were working collaboratively, and were of one mind on the issue of repayment of interrupted prep time.

34. Dr. Michaels was asked whether, from 2011 to 2018, the BSD had ever scheduled duties in prep time periods, and she replied that it had not been done to her knowledge. She said “It would not have been accepted”.
35. In cross-examination she was asked about teaching as a “profession”. She said that while there is in Manitoba no legislation designating teachers as “professionals”, teachers, such as herself, see themselves as professionals. She agreed that she was involved with some initiatives that had collaboration among teachers as an integral part of the plan or program (see, e.g., ex. 42).
36. Dr Michaels was re-examined, on the subject matter of ex. 42, The Professional Growth Process, and the “Learning Group” aspect of it. That suggests that colleagues form a group that will be characterized by respect, trust and sharing. She was asked whether the Division had ever mandated that such work be done during prep time. She said it had not, because “I knew not to do that, because it would incite and irritate, and undo all our good”.
37. The Association called seven other witnesses, most of whom testified pursuant to a subpoena. All are currently employed as teachers in the Division. Each gave her or his experiences with the introduction by the BSD of the new approach to CTT and RTI. We will briefly summarize their evidence.
38. Jodie Stapleton is a kindergarten teacher at Riverview School. She described what she does to prepare for class before school starts and after school ends, and also what she has typically done during scheduled prep time periods. Among other things she has to organize the classroom, get the agenda ready, gather materials, laminate and photocopy materials, talk with parents when they pick up their children, and tidy up and clean the room. She gets her supplies ready, wipes desks and answers emails (which she receives from parents almost daily). She has to deal

with injuries and bathroom accidents. Her prep time periods are scheduled in 30-minute blocks, but her young students still come into the room needing help of one kind or another. She fills out report cards, which are in-depth reports, which she said takes considerable time. She said she routinely takes work home. There are often interruptions during prep time so at night she reviews material. Some of her students have limited English language skills, so she needs to use extra resources for them. She works about 1-2 hours each night. As well, she goes to the school every second weekend to do additional work in preparation for class. She estimated she works (including the time in preparation) between 50-60 hours each week.

39. She receives 240 minutes of prep time per 6-day cycle. She said that in her 15 years as a teacher with the Division there had never been any directed activity during prep time, before the events leading to the grievance. When she received the schedule for the 2018-19 year she saw that there was scheduled CTT time for one hour in her prep time periods. She was given no option about this, and no choice as to which prep time periods she would choose for the CTT meeting. She said that CTT meetings meant that she lost 60 minutes of time for preparation that she still had to do, and she had to take more work home. This added to her already significant burden. She said she had not sought compensation for lost prep time under the LOU. Her principal had said that he was proud of never handing in a request for lost prep time, and she understood she should not be handing in such a form.

40. In cross-examination she said she had gone to Winnipeg to attend an RTI program and she also attended one in Brandon. She was aware that a first step in the collaborative process was to develop collective responsibility for student outcomes. She and the other kindergarten teacher had collaborated and decided on their foundational outcomes, in literacy, numeracy and social behaviour. She has lost two 30-minute prep time periods to the CTT process, i.e., one hour per cycle.

41. Kathy Penner-Warnica teaches French in grades 4-5 at New Era School. She has been a teacher for about 6 years. She said that staff meetings are usually held about once a month. She receives 240 minutes prep time each cycle. Prior to the current year there were no designated duties during that prep time. In the 2017–18 year they were encouraged, she said, to meet regarding PLCs and at certain times they got relief. In the next school year she and other staff members were given a timetable (ex. 48) showing CTT slots. On day 4 they would meet with their CTT. There was no discussion about substitute teachers relieving them. They were told what was scheduled during their prep time. An example is found in ex. 49, which includes an email from the coaches, attached to which is the schedule showing three days of CTT meetings.
42. She said that she submitted a loss of prep time form to her principal. He discussed the matter with her and said that he could see that she had lost the majority of her prep time by virtue of these meetings. As a result, she was told, he would honour her loss of prep time request. She was told that going forward it would not be honoured again. She was concerned about this but he told her the CTT meetings were not optional, and they would just have to go forward with it. See ex. 21. In that letter to Mr. Buehler she reported that the principal told her that CTT/PLC meetings were not optional and the team could decide to meet before, during lunch, or after school, if they didn't want to give up their prep time, but all would have to agree. She did not want to rock the boat but did not like the way this was headed. To her, preparation time is very important. Her prep work is fluid and includes planning, photocopying, getting in touch with resource teachers, speaking to other teachers, emailing parents and so on, and when she lost prep time she felt stranded. She was asked who decided the priority of what is to be done in her prep time, and her answer was "I do". She always takes work home.

43. She agreed in cross-examination that she was required to do 30 minutes of CTT in a 6-day cycle. Her view was that she was not supposed to be directed what to do in her prep time. She agreed that for the meetings set out in ex. 50 coverage was provided by substitutes. It was put to her that it was convenient to have the CTT meetings take place during school hours. She said that it was not convenient to have them during prep time, which is intended for student enhancement. She said the CTT has turned into simply re-stating something that already exists. She was positive about the idea of RTI.

44. Cale Dunbar testified for the Association. He teaches Mathematics to Grades 9-12 and is the current President of the BTA. He has been with the Division for about 6 years. He has been teaching in the outreach program to students who don't attend school (so classes are flexible to fit their schedules), and also mainstream maths. The outreach program is 100% individualized. The teachers usually do not know who will be attending classes. 90% of those students are on their own Individual Education Program, and the Resource Teacher is involved with them.

45. He is guaranteed 390 minutes prep time, which has been from 8.50 a.m. to 9.55 a.m. For 65 minutes every morning he would have prep time, when he would mark tests, send and answer emails, make phone calls, do copying, make assessments, and deal with documents, all in relation to the children he was teaching. Each child had special requirements, so he would regularly consult the resource teachers. In the 2017-18 year there were PLC meetings where the entire math department would attend. These meetings, which were about 6 each year, were in half-day blocks. They had substitute coverage, but he would lose half his prep time.

46. At the end of June 2018 he and others received an email from the principal advising them that the Division's expectations were that all teachers would meet in specific subject groups weekly for one hour to engage in RTI work. This was the

origin of the collaborative teacher teams (CTT). The email says “For the above to happen for all teachers in all subject areas, a plan is being developed that will make use of both prep time and sub time.” Ex. 51. As events transpired, the CTT time for him was in his prep time, and he lost 20% of his scheduled prep time.

47. His view was that CTT was not well suited to what he was doing at the school for the outreach students.

48. Evidence was adduced from Tammy Tutkaluk, a grade 7 teacher at River Heights School, who has been a teacher for about 15 years. She is currently vice-president of the BTA. She, like others, is involved with students in extra-curricular activities. She has coached the soccer team, and is active in the running club. She described what happened at staff meetings, which occurred about once a month. The teachers would discuss discipline issues, recess duty concerns, updating the staff on issues, receive updates of various kinds, and so on. The meetings take about an hour and are held from 8.00 a.m. to 9.00 a.m.

49. In the evenings she would typically attend parent council events, or some other event that teachers were expected to attend. There would be occasional concerts, and often she would meet with parents in the evening. Her evening work would vary. She could have 60 science tests to mark, and on average she would work from Monday through Thursday 2-3 hours each night. In the morning, before school would start she would do photocopying, check emails, and get things ready for the day. In her prep time periods she would deal with emergent issues first, and then get ready for the next day. She would do photocopying, talk with parents, mark papers, and so on. She has students who have Individual Adaptation Plans because of lower than average I.Q.s. Dealing with issues relating to these students frequently takes up some prep time.

50. The CTT meetings began two years ago, and last year they continued (at 45 minutes per cycle). Her 2018-19 schedule (ex. 52) had CTT on day 4. When her students were in Home Ec., that would be a prep for her but it was taken over by CTT. It was “a done deal” by the time she received her timetable. By the time she got it there were no options available. Some of the 2018-19 timetables for her school were filed as ex. 53. This shows, she said, that teachers lose prep time to the CTT meetings. She said that the teachers were told that a teacher who loses prep time to these meetings cannot bank for lost time. An issue is whether a teacher can carry over and bank prep time to the next school year because in past years they were allowed to do that. But they have been told that this will not happen in the future. See ex. 54. Ex. 56 is a letter from the vice-principal in November 2018 to the teachers saying that they are going to continue to recover the prep time that had been carried over from previous years, and they will not be carrying over prep time from year to year although there could be such special circumstances where that might happen.

51. In cross-examination it was suggested to Ms. Tutkaluk that last year her prep time totaled 300 minutes per cycle of which 45 minutes was taken by CTT meetings, leaving 255 minutes of prep time. She agreed with that. She agreed as well that Article 32 stipulates that a teacher such as she, is to receive at least 240 minutes of prep time per cycle. She agreed that the availability of substitute teachers was an issue, and that prep time can be lost due to lack of a substitute.

52. Glen Simard testified for the BTA. He has been a teacher for 23 years, almost all with the Division. He is a Phys Ed teacher, a Numeracy coach and a C. I. Coach, at Ecole Harrison, a K-8 school. Part of his role as a CIC is to implement the CTT meetings in conjunction with the RTI program. He is very familiar with the program, and agrees with the ST program. He said the leadership team had to offer a “doable” plan (see ex.15). He said that teachers will be supportive if the program will be

effective and assist in meeting goals. Solution Tree had stated (ex. 15) that the essential work of the RTI process could be done “within the contractual hours of the workday”, and he agreed with that. He also agreed with the Solution Tree statement that the leadership team must be creative in finding time for teachers to collaborate without increasing costs or losing significant instructional time. Part of his task was to help create the “doable” plan.

53. In the 2018-19 year, he said, a schedule for CTT/RTI was created for his school such that no teachers lost any prep time. They constructed teams, each led by a coach. Meetings were not built into the timetable. They were given relief time, substitutes came in, and in-service days were used. For the 2018-19 year he constructed a timetable and found times when teachers could meet in appropriate groups without interfering with prep time periods. They would meet during teaching time with other teachers covering for them. Those covering were not babysitting, he said; they were engaged in constructive work with the students. This was very well received by the teachers. He has done the same thing for the current school year.

54. His school is a single-track French language immersion school, he said when cross-examined. It is not a catchment area school, and draws students from across the entire Division. His school does not have a breakfast program. His school’s students, he agreed, all have English as their first language. He was unaware of the numbers of indigenous students at the school. He agreed that in following the ST program he had to determine what would work best in his school. In speaking with other CICs he learned that they are not implementing the program the way he did. He agreed that his school did not have more than two classes per grade, and that other schools have more. He agreed that other schools face different challenges and have different demographics, but he said that the CIC challenges are the same, and that is to find time within the timetable for the program, and construct a timetable

that works best for the school. In other schools, he said, the administration creates the timetable and the CIC “chimes in afterward”.

55. Mr. Simard said that he did not want to interfere with prep time because teachers talk collaboratively then. There was collaboration among teachers, he said, before this program was introduced. He said that their common time was invaluable, and they like the CTTs. He agreed that CTTs had enhanced the culture of collaboration, and said they had created an environment where that could happen. Students are looked at as “our” students rather than “my” students, he said.

56. The BTA called Shane Benson as a witness. He has been a teacher for 18 years, 17 of them with the BSD. For the last 12 years he has been a drafting and design teacher at Vincent Massey High School, where he teaches grades 9-12. His experience with the new program started in the 2018-19 year. He received from the administration a document (ex. 60, page 1) setting out five groupings of teachers for PLC (CTT) work. He was one of a group of 13 teachers. Within the group were four sub-groups. In his sub-group were 6 teachers, in French, Drafting (himself), Cooking Principles, Basic Video, Psychology and Band. They met for 65 minutes each week, on Wednesdays during a prep time period. The scheduling of these sessions was announced at a staff meeting by the Principal, Bryce Ridgen. No options were given to the group. He said he lost 65 minutes of prep time each week. The same arrangement was established for the current year (ex. 60, page 2), with 9 teachers in his group. His sub-group is himself, with a Graphics teacher and a Band teacher.

57. He explained what he did in his prep time periods. He would check the machines used in his class for both safety and maintenance issues, shop for supplies, meet with student services personnel on issues involving his students, and other work-related tasks. Because of the lost prep time he had to come in earlier, or work

more after school or during lunch. In addition to his work he coaches rugby, helps with the drama program and engages in some other extra-curricular activities.

58. Mr. Benson was unhappy with the imposition of this scheduling during his prep time, so he wrote to the principal (ex. 61) in November 2018. He said he liked the RTI program, but did not want to have to attend during his prep time. He said that if forced to attend he would grieve, on the basis that the scheduling violated Article 32. Mr. Ridgen responded (ex. 63) within a couple of days. This letter (which, as the subsequent evidence disclosed, was partly drafted for Mr. Ridgen by the BSD Assistant Superintendent) stated clearly that “Participation in the CIP and CTT is mandatory.” It continued:

However, the precise timing CTT meetings [sic] is determined by the participants, not the Division. My role as a Principal is to ensure that the CTT meetings occur and occur in a timely manner. I recognize that teachers are very busy, with increasing demands on their time...Preparation time is time for the teacher to use to focus on classroom preparation, marking, completing report cards, and planning for and fulfilling their other roles and responsibilities arising from their duties as a teacher. Preparation time may be used for CTT, but that is up to the teachers involved. Teachers also have time before the instructional day and after the instructional day that may be used for the purpose of doing this work, as well as participating in CTT...

The exact timing of the CTT meetings is up to the participants involved so long as they take place at the frequency, and by the deadline determined by me, depending on the circumstances.

I would encourage you to work with your colleagues to find mutually agreeable times where everyone can participate. For example, if you are not available during your preparation time, feel free to meet prior to the instructional day, or on the completion of the instructional day. Evenings and weekends are also available to you should your colleagues be available at the same time. If all are in agreement, you may also use your preparation time, but that is entirely up to the teachers involved. My expectation is that every teacher will make a concerted effort to find a mutually agreeable time...

59. Mr. Benson testified that he was “pretty scared” to have received this “official” letter, and he responded to the Principal that he would attend the scheduled sessions. He agreed, when cross-examined, that the letter did not contain

any threat and that it offered certain options. He also said that he did meet with several of his colleagues to discuss finding other times for the CTT meetings, but it was very difficult to find alternate times for these meetings.

60. The final witness for the BTA was Sandra Thompson, who has been a teacher with the Division since 2001, and for the last 9 years has taught at George Fitton School (K-8). She uses her prep time to transfer her students between classrooms, copy documents, talk with parents, and perform other tasks similar to those described by other teachers. She stays late or will arrive at school early, to do certain tasks such as cleaning and sharpening pencils. In the evenings she will write report cards, go over notes, talk with colleagues, cut and laminate documents, and so on. She does her lesson preparation outside of school, because there are too many other tasks to do during prep time.

61. She said that before the introduction of the new program staff meetings would be held once a month, usually after school from 3.45 p.m. to 5.00 p.m. The meetings would be run by the principal, and would deal with departmental reports, communications, announcements, school events and similar types of matters. This changed in the 2017-18 year. Certain “tasks” now had to be accomplished at the meetings. The staff was now to look at outcomes; there were divisional initiatives to be discussed, and these tasks took almost the entire meeting time. There was no time for the type of business that had always been discussed at meetings. This change continued the next year. The number of staff meetings doubled, with the schedule showing a staff meeting every second Monday. Teachers were in their CTT groups and these CTT discussions took almost 100% of the meeting time. After the present grievance was filed they started to get 5 minutes at the end of the meetings for matters such as news from the BTA.

62. In the 2017-18 year the CTT meetings were during the noon hour. She was not happy with that but it was almost impossible to find a time outside school hours,

so she had to agree. The next year the meetings continued and her group was given some options. Several of the groups could not find a mutually acceptable time to meet. Teachers had childcare responsibilities, and according to the options presented to them some people would lose more prep time than others. The teachers could not agree and they never met formally as a CTT group although some of the subgroups met from time to time.

63. Ms. Thompson was asked about prep time recovery, and she referred to an email from the principal of her school (ex. 66) advising that certain prep time recovery would take place the next day. Two substitute teachers (or the equivalent) were coming to accommodate lost prep time. This was very short notice, and made it difficult to do the necessary preparation for a substitute teacher.

64. In the current year one hour of prep time, on day 4, has been set aside for what she assumed to be CTT (she testified before the start of the current school year).

65. Ms. Thompson was cross-examined, and said that her school was large, with several teachers teaching students in the same age groups. It is a catchment school with a large indigenous population. Some students are non-verbal, some are wards of Child and Family Services organizations, and it is an inner-City school. She agreed that collaboration among teachers permits input from other teachers, and that helping students is the goal. In the 2017-18 year they were directed to find a time for meetings and she reluctantly agreed to the lunch period. She said that in staff meetings before the change to PLC the principal had set the agenda. It was suggested to her that after the shift to PLC she could have asked to have an item placed on the agenda. She said she did that but was not given any time to speak to it. In the 2018–19 year it was difficult to find a mutually acceptable time for a meeting. Ms. Thompson said she was never forced to give up any prep time and did not lose any prep time that year.

66. That was the evidence for the Association. The Division adduced evidence from 10 witnesses, including several teachers. The first witness was the current Superintendent and CEO of the Division, Dr. Marc Casavant. He has been in this position for over three years. Previously he was Superintendent of three different school divisions in Saskatchewan. He has been a teacher, a principal, and has a Master's and Doctoral degrees, and was recruited for his present job.
67. He was asked why the BSD started the CIP. He said that in the spring of 2016 the provincial government introduced the Continuous Improvement framework, to be implemented in the fall of 2017. The purpose of this framework was, among other matters, to close the achievement gap and ensure high levels of achievement in numeracy and literacy for all students, and to promote reflection and collaborative inquiry. The goal included trying to ensure success for all students. This was almost a policy of the government. School divisions must report annually on their CIP. Each school division is required to participate.
68. The Division engaged in a process to decide how to proceed. Among other matters it was determined that there was inconsistent implementation of best practices in the areas of literacy and numeracy. What was needed was schoolwide implementation, clarity of focus of priorities, and, among other matters, collaboration time. See ex. 70. To some extent collaboration among teachers already existed in some schools. Some principals had it structured into their schedules. Dr. Casavant said that RTI assists in answering the question, "if students do not learn, what should we do about it"? The process that was adopted is a Division-wide initiative and part of the goal is to ensure that every student has the same opportunities. Everybody should talk the same language. When a student moves schools the transition should be easier. These are just examples of the goals, he said.

69. In deciding how to proceed the administration examined many resources, including Solution Tree. Representatives of the BSD attended conferences, and many BSD persons were involved. In all his previous school divisions RTI was used based on the ST program. The basic principle of RTI, he said, is to have teachers assume collective responsibility for students, much as Mr. Simard had testified. In implementing this program the division asked principals to be innovative and creative. They needed to build in, on a weekly basis, collaborative teacher time. He was asked about Exhibit 15, the Solution Tree outline, and said that the administration had not directed principals that prep time must be used for CTT meetings.
70. Dr. Casavant said there were 23 schools in the Division, most of which were K-8 and the balance were High Schools. Most schools are catchment-based. Two schools are not as diverse as the others and have a selection process for admissions.
71. He said that the purpose of prep time was so that teachers could carry out their responsibilities such as marking, doing report cards, talking with students' families, collaborating with other teachers, and generally to do the work they were assigned to do. It was put to him that Mr. Buehler had said that prep time was autonomous time, and he responded that he did not see that in the Agreement, nor had he heard the Assistant Superintendent say that it was. Prep time, he said, was to support teachers, and CTT is an appropriate activity for prep time. He said that it was his understanding that most teachers liked the scheduling.
72. His understanding of Article 32 was that the Division is to provide teachers time when they did not have direct supervision of students. Using substitutes to cover for teachers so that CTT meetings could be held during a regular class time was not a viable option because there is a shortage of substitutes across the country, some don't want to work in every school, some are away, and it is costly.

73. He said that his office did not direct that work be assigned during the duty-free lunch period. If teachers choose to use that period for meetings that would be up to them. The Division does not police this, he said. He observed that many principals are not happy about the present grievance. They feel the program creates a very collaborative process and the grievance is not consistent with that process.
74. Dr. Casavant was cross-examined on a number of matters. He said he was familiar with the Agreement and was responsible for its administration. He said that the new program/plan was developed with members of the BTA, but he agreed that the BTA as an association had no involvement in that. He agreed that part of the role of the BTA is to ensure the Agreement was being followed and that teachers were not assigned unfair duties.
75. He agreed that a different model for "Continuous Improvement" could have been chosen, but he had worked with Solution Tree before and they are a "fundamental driving force". The Division had already become engaged with RTI for several years before Solution Tree was hired. He agreed that teachers work hard and have incredible demands placed on them. They work sometimes 50 or 60 hours in a week, he agreed. Their involvement in extra-curricular activities facilitates a large part of the climate of a school, he said, and the schools benefit greatly from it.
76. Dr. Casavant did not ask the School Board for extra money or staff to allow for collaboration time, he said. He agreed that the Division has the right to hire teachers and substitutes. He also agreed that there was not much room in the timetable to find time for the collaborative work, other than during lunch or teaching time. He said he never directed that prep time be used, and never said not to encroach on it. He acknowledged that teachers were told in one instance that they would be meeting during their prep time. He was asked whether he had discussed this issue with the Association. He had not done so. It was put to him that, since there is an

Article in the Agreement on prep time, this should have been discussed with the BTA. He said that did not happen.

77. He agreed that participation in CTT meetings was mandatory. He was asked about ex. 63, the letter written by Mr. Ridgen to Mr. Benson. He agreed with the statement that evenings and weekends could be used for CTT meetings if all participants agreed, and acknowledged that the Division could not assign duties to teachers on evenings or weekends. He also agreed with the statement in the letter that prep time might be used if all were in agreement, but that was entirely up to the teachers. He was asked what would happen if a teacher did not agree, and he responded that it was a collective responsibility. It was suggested to him that the system was based on coercion but he disagreed.

78. Based on the number of teaching days in a year it was suggested to Dr. Casavant that for high school teachers the incursion into prep time by the CTT meetings meant they would “lose” about 37 prep time periods or about 40 hours, and he accepted that analysis. He also accepted as true that, as the MTS had asserted in their letter to him of September 22, 2017 (ex. 17), teachers in Brandon schools were being assigned as much as an hour of their allotted prep time in a cycle to participate in PLC meetings and other mandated activity. He acknowledged that he could not contradict the evidence of Dr. Michaels on the meaning of “prep time”.

79. Dr. Casavant was referred to the BSD’s response to the grievance (ex. 3). This was a letter he signed on January 26, 2019. The letter denied the allegations made by the association in his grievance. He acknowledged there had been no formal investigation to that point, but he had been in the schools, and he said “I’ve seen what I’ve seen”. The response states “Although participation in CTT and PLC is a requirement of every teacher, the scheduling of PLC and CTT meetings has been left entirely up to the teachers.” He agreed that statement was not accurate. The response then states “No teacher has been required to give up preparation time

for the purposes of PLC or CTT.” He agreed that statement was not accurate, but added “through the choices that were made”. The response further states “Rather, teachers may elect to use their preparation time for that purpose”. He agreed that statement was not accurate.

80. He was asked about staff meetings and agreed that traditionally the meetings, normally held once a month outside the instructional day, with teachers required to attend, would typically discuss the business of the school. He said that now, with advanced technology, much of that can be accomplished outside meetings by electronic communications.

81. Dr. Casavant said, when re-examined, that the Division was conscious of the importance, while implementing the program, of not increasing costs (as Solution Tree had recommended). There was direction from the Minister about cost constraints which the Division took seriously.

82. The BSD called Mathew Gustafson as a witness. He has been with the division since 2002 and has been the assistant superintendent for the last four years. He was previously a teacher, a vice principal and a principal. Mr. Gustafson has two Bachelor’s degrees and a Master’s degree. He is familiar with the concept of prep time. He said, as had other witnesses, that in their prep time teachers engage in a variety of tasks such as planning, contacting parents, marking assignments and doing report cards, administrative tasks and collaborating with colleagues. Colleagues could discuss a variety of matters relating, for example, to students and problems they might be having, and how to assist in solving them. All those are part of the job and are mandated activities.

83. He had become involved in RTI in 2007, when he was Principal of Vincent Massey High School. There are different tiers of intensity. Tier 1 covers the majority (about 80%) of students, who do well with universal instruction. Some students

(about 15%) need a little more time and they are in Tier 2. Tier 3 is for the remainder of about 5% who need even more intense support. RTI addresses all Tiers. He explained the details of RTI which we need not review here. He said that collaboration among teachers is needed for RTI to work. Collaboration was not a new concept, he said, and when he joined the Division it was the practice for teachers to collaborate. There would be departmental meetings and other types of collaboration. For certain aims to be accomplished collaboration was seen as important. He gave an example of one school where the schedule had been adjusted so teachers had an hour to work together. The work the teachers were doing was a requirement, but how they did it was not.

84. He explained that PLC (Professional Learning Community) is about creating an environment so teachers can work collectively. It is not a new concept. PLC focusses on schools. As a Division it is their view that a student at a particular school should have the same access and opportunities as a student at another school. CTT looks at outcomes. Through all of this collaboration is an essential component. Solution Tree states that collaboration should occur during the school day and not at the expense of core instruction. They spent time establishing school leadership teams (SLT) and it is the SLT that decides how to implement the program and how CTT would be scheduled. He said that he had not directed how CTT was to be scheduled. He said that some schools are using prep time for CTT, while some are using substitutes, and providing specialist relief. He was familiar with how Mr. Simard handled the situation. He said they use specialists to cover off other teachers. It would be important not to take teachers out of core instructional duties for this program. He agreed the teachers have huge demands on them, but prioritizing is important or collaboration via the CTT would not happen.

85. He said that prep time is being used in some schools for CTT and he thought that was an appropriate use of prep time. He agreed that a number of tasks are

required to be done that are commonly done in prep time. He said that everything has deadlines. He said that, in his view, prep time cannot be fully autonomous.

86. Mr. Gustafson reviewed 2018-19 prep time repayment reports (ex. 75) which were few in number. 14 schools reported no requests for repayment, while 8 schools reported 388 requests. Two schools accounted for over half the requests. Lack of substitutes accounted for over 80% of the reasons given for the requests. He was also asked about ex. 11, the joint letter of April 2013 about repayment of interrupted prep time. He said this has guided all principals since it was issued.
87. He was referred to the grievance and the Agreement. He said there is no definition of prep time in the Agreement. Duties are not assigned to teachers during the lunch period, because it is a duty-free period. That time is autonomous for the teachers. He was aware that teachers may get some work done during that time, but, he said, lunch hours are “hands off”.
88. In cross-examination he agreed that it was Dr. Casavant who was primarily responsible for the administration of the Agreement. Mr. Gustafson said that he worked primarily with the schools. He had not been involved with the Agreement or its predecessors until he took his present position. He agreed that teachers are professionals who do not need constant direction or supervision. They regularly take home work or come in early or stay late because, he agreed, the work has to get done.
89. He agreed that teachers could decide what tasks they will perform in a given prep period, subject, he added, to due dates that might apply. He also agreed that such things as going to the washroom, getting coffee or taking a short break would not be a problem. He agreed that teachers do not account for what they do during prep time. He reiterated that prep time was not fully autonomous. He said that the work done by teachers in CTT meetings would have to be done by them even if

there was no program such as the ST program; the only difference is that the work is now done collectively. He said that the CTT meetings have not increased the work the teachers have to do, and no additional tasks have been added.

90. Barb Miller was the Principal of King George School, and had been Principal of another school, for a total of 12 years, and is now the Principal of a new school opening in 2021. King George is a K-8 catchment area school with about 350 students and a diverse population. They have a breakfast and snack program. Several languages are spoken among the students, who come from about 18 countries. About 28% of the population is indigenous. She explained some of the issues facing the school and some of the steps taken to deal with them.
91. Among those steps was having teachers work collaboratively for some of the time, usually one day out of five or six. They did this during gym or music classes and also during prep time. This started the second year she was there and continued for grades 1-4 for her last four years there. This was the ST program and she said it had a positive effect. Their process evolved and all grades were included. They focussed on literacy and numeracy. Each teacher spent 60 minutes in CTT per cycle and it worked well. She explained the makeup of the groups, meeting for CTT during prep time.
92. She said they discussed when to meet and agreed on prep time. When asked whether she sought direction on how to find the time to do this she said there had been conversations for a long time, but they were not told to do it that way. They had started focussing on outcomes a long time ago, but “Foundational Outcomes” as part of the new program became a factor more recently. They dedicated parts of some Professional Development (“PD”) days to working on it.

93. Ms. Miller discussed staff meetings, which used to be management-focussed with operational reports and so on. Now the staff contribute to the agenda and want time to discuss PD matters so that is about half the meeting time.
94. She said that the results of the collaborative efforts were positive, and that collaboration as was now happening was absolutely beneficial. They were developing a sense of collective responsibility for students. There was no pushback from teachers, and none have asked for repayment for lost prep time because of CTT meetings.
95. When cross-examined she said that starting in 2018-19 the teachers lost two prep time periods per cycle for CTT. This was built into the timetable which the teachers were given. She agreed that as a result of this scheduling teachers would have to do at some other time at least some of the work (more likely the routine part) they would have done during the lost periods. She said the planning they might do during prep time would be encompassed to a degree in the work done in the CTT meetings.
96. Bryanne McLaughlin testified for the BSD. She has been with the Division for 9 years, and is a CIC at Earl Oxford School, another catchment area K-8 school with a diverse population. In addition to a breakfast and lunch program they also have a clothing program in the winter months. She has attended Solution Tree sessions and RTI programs, and she said that the Solution Tree document “Taking Action” (ex. 15) is their “bible”. She described some of the background and details of how the SLT (School Leadership Team) proceeded with the program. The SLT was the Principal, the Vice-Principal, the resource teacher and her.
97. In the spring of 2018 they asked the staff which of them wanted to be involved in setting things up, and several did. With the SLT they made up a schedule. They had been told that each CTT team would have one hour per cycle.

The result of the process was that the majority of the time used was from the prep time periods. The results of the CTTs have been good, so far, she said. Among other matters she said they received a grant from The Manitoba Teachers' Society to fund certain relief (substitutes) for their work. She said the teachers have been positive about the program and have found it beneficial.

98. The CICs from different schools meet and discuss matters. At her school they have not had problems using prep time periods for CTT meetings. Things run like clockwork, she said. Before CTT there was collaboration, but only in pockets, and not to the present extent. She has never seen CTT meetings held other than during the school day.

99. In cross-examination she said that when she was a teacher she used all her prep time as she saw fit, and she described what she did, including seeking out colleagues and speaking with people related to work. She said, regarding CTT scheduling, that the teachers did not have input about CTT being scheduled in prep time. The teachers, she agreed, were not on the committee setting the schedule, and teachers were given their schedules. Two of eight prep time periods were used for CTT, she agreed. She agreed that the preparation and work that teachers would have accomplished in those two periods would have to be done at some other time, apart from collaborating with colleagues which would have been done in the CTT meetings.

100. Brad Twordik testified for the BSD. He was Principal at Earl Oxford School for over 3 years and had been a teacher with the Division for several years before that. He said that teachers at his school collaborate. When he taught he used prep time to discuss matters with other teachers and to go over material with them. The change that the ST program brought about was that collaboration became scheduled within the school day, bringing a structure to collaboration. They changed from

personal learning to collaborative teaching teams. When he came to the school in January 2016 there were already common prep time periods on the schedule.

101. In 2017-18 he asked teachers to participate in setting the timetable, and some did. A master timetable was created and common prep times were aligned. This process worked very well, he said. The timetable was circulated, and some teachers wanted more common prep time. This process was to encourage collaboration, and was also in furtherance of the RTI process. This process was repeated the next year. The process saw some CTT teams work together. Some classes were covered by substitutes. When the common prep time periods occurred the students might be in gym class, or music. He said that three teachers had requested repayment of lost prep time. He had not received such requests before as a result of the CTT meetings. There were discrepancies in the requests such as a claim for a lost period because of CTT when there had been no CTT meeting. The teachers who had claimed told him, after he reviewed their claims and the discrepancies, that they would not resubmit their claims.

102. Mr. Twordik said he believed there were benefits from the CTT and RTI processes, and that they provided value to students. He said that teachers were finding value in it.

103. He was cross-examined about staff meetings, and said they are held once every couple of months. They would discuss best practices, among other matters. Common prep times were not created until the 2018-19 year, he said. He said that participation in CTT meetings was mandatory, and agreed that a teacher who refused to participate could be disciplined.

104. Gail McDonald also testified. She had just retired, and had been the Principal at George Fitton school for 16 years. She had previously been a Principal at another school and also a teacher for 15 years. George Fitton is a catchment area school with

about 460 students in the last year, covering grades K-8. It is an inner-city school with a very diverse population and a number of languages spoken. Some students have no understanding of English and there is a large transient population. The school has a lunch and breakfast program as well as a winter clothing program. In the 2018-19 year the average size of a class was about 20 students.

105. She said that collaboration has always been an aspect of teaching. The PLC (Professional Learning Community) process took place at her school. It started at the grade level with teachers getting together for common purposes. The school would try to schedule at least one block of common prep time, and this occurred for the 15 years that she was a principal. Teachers made use of this time to collaborate. In 2016 the Division started the CIP, an aspect of which was RTI. The next year they were to have CTT teams. Ideally the teams would meet for 30 minutes per cycle. They told the teachers to get together in grade groups and to meet. That worked for some groups but not for all, and there were challenges in making this happen. The groups chose when to meet. Some chose the lunch hour. Article 27 was considered but the choice of time was up to the group/teachers involved, she said. They were not directed to meet during lunch. How teachers use their lunch hour is their business, she said. No teacher complained to her about these meetings. Ms. Thompson never expressed any concern to her.

106. In 2017-18 some teacher groups found time to meet but others had trouble doing so. The school looked at alternate ways, such as several groups meeting at the same time in the arena/gym, and they did do that. There had always been a professional learning component in what they did and bi-monthly meetings have been used for professional learning since at least 2010. They would be scheduled in advance, from 3:45 p.m. to 5.00 p.m. Departmental housekeeping was handled by email. In 2018-19 they scheduled CTT meetings in the arena and this was placed on the calendar. If the time conflicted with PD it would be canceled. For the 2019-20

year (see ex. 68) there is one hour of CTT time built into the schedule with minimum impact on support teachers. They have gone back to single-grade classrooms partly to facilitate CTT. No teachers had expressed concerns about having to participate in the CTT process and none had asked to recover lost prep time spent at CTT meetings. She said the lack of substitutes is the biggest reason for loss of prep time.

107. She referred to ex. 66, and said this was simply an offer of prep time recovery, not an imposition of it. She also said that the BSD administration had not told her how to find time for CTT meetings. Ms. McDonald said the impact of CTT has been extremely positive, and she gave several examples of that.

108. In cross-examination she was asked about the CTT meetings that had been held in 2017-18 over the lunch hour. She agreed that they were performing duties then, but said this was their choice. She agreed that attendance at CTT meetings was mandatory. She agreed that under Article 27 a breach of the Agreement would have occurred unless the BTA and administration had agreed with what happened. She agreed that teachers are expected to be at staff meetings, and could not refuse to attend because a meeting was held outside the school day. In 2018-19 they did not have separate staff meetings; they only had CTT meetings.

109. A further witness for the BSD was Chris Czarnecki, the Principal at St. Augustine School, a K-8 school. He was a teacher for over 20 years and has been a principal for 7 years. At his school teachers have collaborated for some time. A 30-minute spot was set aside on the timetable for this, starting about 5 years ago. He created the slots, and they were part of prep time. His teachers received 270 minutes of prep time of which 30 was for collaboration. Then the Solution Tree model was implemented and CTTs were established. This was in 2017-18 and the same 30-minute meeting times continued. Coverage for teachers in their classes would be handled by having a phys-ed or music teacher cover. The previous practice simply continued on. There was very positive feedback and no teachers expressed concern

about prep time being used for this purpose. He said there was considerable improvements in results, and better teaching, as a result of 5 years of collaboration.

110. The school has some instruction in Catholicism. Some teachers do prep work instead of going to Mass and those who do go to Mass are reimbursed the lost prep time. He was referred to ex. 29, the email from Dr. Michaels about Article 32 in the case of a unique school event, and he was asked when prep time is recoverable. He said it was recoverable when prep time is lost because of scheduled events or circumstances occurring on a regular basis, such as regular mass services. There had been no requests for reimbursement of lost prep time, for CTT, he said.

111. In cross-examination he was asked about staff meetings. They occur once a month in the morning before school starts. If the agenda was light they could discuss PD matters. The CIC and the resource specialist are given time to speak. Those two and he are responsible to produce the timetable for the school, which is a very challenging exercise, he said. The prep time and CTT will be shown on the timetable. He agreed that teachers get 240 minutes of prep time which they can use as they see fit, but he might direct them to meet during a prep time period.

112. Brooke Williams testified. In 2018-19 she was the CIC at Vincent Massey High School and is now Vice-Principal at another school. She had been CIC for two years, and has been with the Division for 14 years. Vincent Massey has about 1,000 students.

113. Collaboration has been a fact in her schools, over the years. In 2017 she set up CTTs; she was part of the decision process about how to do that, and teachers gave feedback. There were departmental CTTs in 2017-18, but the next year they switched to smaller CTTs based on specific academic topics. They consulted on how to find the time to implement the CTT concept, with their SLT. All options were discussed. They settled on the groupings shown in ex. 60. These small groups

would meet in a “collaboration” room, at the same time every week, for 60 minutes. These sessions took place on what she called “work-together-Wednesday”. There were benefits to having a scheduled time for these discussions.

114. She became aware of the grievance just before it was filed, when Mr. Buehler wrote BTA members advising them of it. She wrote to Mr. Buehler for clarification. See ex. 34. She felt strongly that the benefits for students in the ST program were immense. Mr. Buehler’s reply explained the position of the BTA and said that it applauded the successes of the CIP, but had a dispute over how it was being implemented. She said that the purpose of the CTTs was to help teachers help students.

115. When cross-examined she said that at Vincent Massey there were separate CTT meetings for the groups shown on ex. 60, but since they all met in one large room there could be discussion across groups. She agreed that the time Mr. Benson spent in a CTT meeting was not time when he could do the safety work that he does in prep time.

116. Bryce Ridgen testified for the BSD. He is the Principal of Vincent Massey High School, and has held that post for 3 years. He held previous administrative and teaching positions. They have a large SLT representing different disciplines. He explained the application of Continuous Improvement and RTI at his school, and the importance of collaboration. The issue was when to engage in the specific collaborative aspect, and it was the SLT’s responsibility to resolve that question. They considered several suggestions, and he proposed aligning common prep time periods with small groups. This took place in the 2017-18 year. In the 2018-19 year they had established the common prep time periods, and Wednesday was designated the day for the teams to meet, so every Wednesday they have a scheduled meeting.

117. He said that in the small groups that meet on Wednesdays they discuss several matters, such as outcomes, grading, and similar topics that, he said, they would in any event be discussing on their prep times. One of the groups was made up of those teachers who were the only persons in the school teaching certain subjects, such as Mr. Benson. No coverage was needed for any of this, he said, because this was “a repurposing of prep time”. The teachers were still doing prep work, but in a collaborative way. He talked with colleagues in other schools and found that what might work for his school would not necessarily work in others.
118. The pushback he received on using prep time for the CTTs came from Mr. Benson (ex. 61/62). He responded shortly afterwards. Attendance at the meetings was “absolutely” mandatory, he said. This was a Divisional initiative. He was asked if there were any options about the timing. He said there were, although this had not arisen before. They were following the RTI framework, and were supposed to have these meetings during the school day. The alternative could only be to have them outside the school day, if everyone agreed. That was not his preference, he said. No other teachers complained, he said.
119. At the end of the year they did a survey and received overwhelmingly positive feedback. Only one teacher was not supportive. He found that the grievance was pitting member (of the BTA) against member and that was not conducive to students’ best interests. He said the BTA was not working to help the CIP to be successful. He had solicited both positive and negative feedback, yet the BTA (of which he is a member) asked only for negative feedback. He said the BTA had been cutting him out of the process by asking its members who had concerns to talk directly with them rather than talking to him. It made his job more adversarial.
120. Mr. Ridgen said that no teachers at his school were asked to do any of the CTT work outside the instructional day. He saw what was being done as collaborative preparation, with support. He was mistrustful of Mr. Buehler, and

thought that Mr. Buehler would try to prove that whatever they did was a violation of the Agreement.

121. When cross-examined it was put to Mr. Ridgen that he did not support the grievance. He said that he was unclear about the reasons for it. When asked whether teachers must attend and follow the agenda at the meetings, he said that the CIC has been flexible in her approach. He said teachers could be excused from a meeting. He agreed that while in a CTT meeting a teacher could not, for example, do photocopying. He was asked whether attendance was mandatory, and although he had earlier said that it was “absolutely”, he was less definitive in cross-examination.

122. He said that he supported a collaborative process, and agreed that prior to the introduction of CTTs teachers would collaborate, but he said they did that on their own, and it lacked structure. He agreed that the BTA should see that the Agreement was followed, but he said that the Agreement does not state or imply that prep time is autonomous. He asked to become a BTA Council Representative, and did become one, after the exchanges he had with Mr. Buehler in the fall of 2018. He said he went to only one Council meeting.

123. It was his idea, he said, to use common prep times for CTT meetings. The teachers were told about this after it was done, he agreed. No options were given to them, he said, because he believed this was the best approach. He would not suggest doing this outside of school hours. He agreed that 20% of the teachers’ prep time was taken up by these meetings. He said they were still doing prep work in the meetings.

124. He was referred to his letter to Mr. Benson (ex. 63) and agreed that, as stated in the letter, participation in the CTT meetings was mandatory. He attended CTT meetings. He was asked if he had ever raised with any of the groups that they could meet some other time, and he said he had not.

125. When preparing his response to Mr. Benson (ex. 63) he reached out to Mr. Gustafson for advice. The response was a collaborative effort between the two of them. Senior administration played a major role in creating the response, he said. He sent Mr. Gustafson his thoughts, and received back from him a draft response to Mr. Benson. He did not change the draft. He signed it and sent it to Mr. Benson.
126. The last witness was Kevin Grindey, who has been a teacher with the Division for 24 years, all at Vincent Massey. He now teaches history. He reviewed the establishment of the SLT at the school, which included Brooke Williams as the CIC. Before the CTTs were set up there had been collaboration, but it was informal, in hallways, during in-service days, and so on, and it was limited, although still beneficial. There was one other history teacher (previously two others). Now they meet weekly, with a clear plan, focus and vision. They are trying to do the best for the students, he said, and to ensure every student reaches the desired level. This made him a better teacher, he said.
127. He said that he viewed the CTT meetings as a prep period, where they plan on what is best for the students. He plans and prepares, but now part of that is done collaboratively. This is not an additional burden on him. This makes him more efficient, and he does not have to cram work into his other prep times. He is still actively involved, as he has been in the past, in extra-curricular activities. The Wednesday meetings do not interfere with that. Nor do they interfere with his family obligations.
128. He was aware that there had been some complaints about the incursion into regular prep time periods. He learned a lot from the others in his group. Teaching can be insular, he said, so this has been very beneficial. He has learned other perspectives, and the students will benefit from that. The group setting is very productive, more so than if they were left to their own devices. If a substitute

replaced him there would be some loss of productivity and students might not progress to the same extent. He would have to prepare for the substitute, which puts him behind and the students don't gain as much, he said.

129. Mr. Grindey agreed in cross-examination that in his other prep time periods he alone decides what to do. He said that if the CTTs did not happen he would use those periods for prep work but it would be less efficient. As well, he does not want to lose class time. He was referred to the Division's reply to the grievance (ex. 3), and to paragraph 2. which stated that the scheduling of PLC and CTT meetings has been left entirely up to teachers and that teachers could elect to use prep time for PLC or CTT. He agreed that that statement was not true.

SUBMISSIONS

130. As noted above, each party provided us with comprehensive written submissions, and supplemented those with oral submissions. We will set out only a relatively brief summary of the highlights.

The Association

131. The BTA reiterated that this grievance is not about the merits of the RTI program developed by Solution Tree, or the value of collaboration among teachers, or whether the BSD has the right to implement the program, which was acknowledged. It said that if attendance at CTT meetings is mandatory, the BSD has the authority, which it should have exercised, and the obligation pursuant to the Agreement, the LOU and the law, to hire teachers, whether full-time, term or substitutes, to make time during the school day outside of prep time and lunch, so that teachers could attend those meetings. The BTA acknowledged that the Division, as the employer, has "inherent management rights".

132. It reviewed the facts, which we will not do here. It noted that both parties agreed that teachers work very hard and have great demands placed on them. It pointed out that the evidence showed that at least since 1988 classroom teachers were assigned regular prep time slots, and that Article 32 first appeared in the negotiated 2011-14 collective agreement and is unchanged since. Prep time was time which “shall” be given to teachers. The evidence was that there was no definition of “prep time” because both parties knew what it meant. The LOU provided for teachers to be compensated if prep time was interrupted, which meant that teachers are to receive uninterrupted prep time. The BTA stressed the significance of the evidence of Dr. Michaels, that duties were never scheduled during prep time, because that would not have been accepted. In other words, it would have violated the Agreement and the LOU. She was not cross-examined on this evidence, said the BTA. When the BTA and the Manitoba Teachers’ Society raised the issue, the BSD did not assert a management right to do what it did because it knew it lacked that power, said the BTA. Management rights as a basis for its actions was never raised until the arbitration hearing, the BTA said. This is relevant to the issue of the mutual intent of the parties.

133. The BTA said the evidence was clear and undisputed that the interruption of prep time, whether by mandatory CTT meetings or otherwise, results in teachers having to do more work outside school hours.

134. In its submission the BTA dealt with staff meetings, CTT meetings and the violation of the LOU. As to staff meetings, it argued that the evidence showed a past practice of such meetings being held either before the start of or after the end of the instructional day, and that the content of such meetings was for regular business matters, communicating information and announcements and some other matters. This changed at George Fitton School with the introduction of the new program, with almost all the time spent on matters essentially related to the program. Further,

the number of scheduled staff meetings increased considerably. Attendance at these meetings, while mandatory, is a further imposition on teachers.

135. Referring to CTT meetings during prep time, the BTA said that at no time until cross-examination of Dr. Casavant did the BSD acknowledge the inaccuracy of statements in its reply to the grievance. That reply had said that scheduling of PLC and CTT meetings was left entirely up to the teachers, which the BSD knew at the time was not correct. The evidence was that the timing of meetings was set by the Division/schools during prep time periods and this was imposed on teachers. Further, the Division had told certain teachers that CTT meetings could be held outside the school day or during the duty-free lunch period if they wished, which the BTA said would be a violation of the Agreement.

136. There was evidence that the RTI program could be accommodated within the instructional day, by the utilization of substitutes. Further, at two schools (St. Augustine and Ecole Harrison) the timetables have been managed to permit CTT meetings to be held within the school day without encroaching on the minimum required prep time of teachers.

137. The BTA set out its understanding of the applicable law, and said that this Board, as rights arbitrators, has no authority to make an agreement for the parties; rather, we are only to interpret the several contractual provisions including the LOU, and determine if there has been a violation. It referred to the law on ambiguity in agreements, which we will discuss below, and said there was no ambiguity in Article 27. As to Article 32, the BTA argued that there was a latent ambiguity in that the wording did not make clear who could determine what was to be done during prep time. It argued that the history and practice, and the evidence, especially that of Dr. Michaels, showed a common intention that teachers could determine their own use of prep time. It referred to certain authorities, including the decision of the Supreme Court of Canada in *Winnipeg Teachers' Assn, Local 1 v. Winnipeg School Division*

No. 1, 1975 CanLII 181 (SCC), [1976] 2 S.C.R. 695 (“*Wpg. Teachers*”), which was a noon-hour supervision case. The Court (per Laskin C.J.C., for the Court on this issue) said that standards of reasonableness govern in a contract between employees and their employer when determining the degree to which the employer may require duties to be performed which are not stipulated in the contract. As applied to teachers, the duties must be related to the work of the teacher, in furtherance of the teacher’s main duties and be seen as fair to the teacher.

138. The BTA also cited the decision of the Manitoba Court of Appeal in *Snow Lake School District 2309 v. M.T.S. Snow Lake Local Assn. 45-4*, [1987] M.J. No. 273, 46 Man. R. (2nd) 207 (“*Snow Lake*”) (leave to appeal refused), where the Court said that the question for the arbitrators was whether the rota system set up for the supervision of students over the noon hour was reasonable. The BTA also cited three arbitral awards. We will later comment on some decisions cited.

139. All these authorities, said the BTA, meant that a standard of reasonableness had to be applied, and when applied to the facts here it was clear that the method of implementation of the new program placed unreasonable demands on teachers. The BTA said that: “All teachers testified that if their preparation time is interrupted with other duties such as obligatory CTT meetings to work specifically on the RTI program, then the work they would otherwise have done must be done at other times outside of school hours such as arriving early, staying late, taking work home and doing it at night, weekends, etc.” It argued that, if we found the BSD had the right to assign CTT meetings in prep time, it would not be fair to remove 20% of those periods since the result was that work still had to be done by teachers, but outside school hours.

140. The BTA discussed the law and facts in relation to four discrete issues. First was the duty-free lunch provided for in Article 27. It said there was no ambiguity in the provision, which had been established in 2005 by an interest arbitration award.

If the BSD wanted to assign duties (such as participation in a mandatory CTT meeting) during the lunch hour, it required the agreement of the Association to do so. The evidence showing that principals, who were agents of the Division, had suggested this to teachers, and that Ms. Thompson was required to attend such meetings, evidenced a violation of the Agreement.

141. Next it addressed the prep time issue. The mutual intention of the parties in creating Article 32 was clear, it argued, based on the evidence of Mr. Buehler, who gave the Association's perspective, and Dr. Michaels, who gave the Division's perspective. Both parties understood, said the BTA, that prep time required a teacher to perform duties, but what those duties were, and which would be performed in a particular prep time period, were in the teacher's discretion, based on "their individual needs and priorities". The imposition of CTT meetings during prep time periods violated this understanding which was the foundation of Article 32, it argued. The words used in Article 32 and in the LOU, reflective of the mutual intention of the parties, confirm that the teachers are contractually entitled to perform duties, as they determine need to be performed, during prep time. It said that in identifying the parties' mutual intention we should look at the wording of the Agreement and the LOU, as well as the context in which they were created and the surrounding circumstances.

142. The BTA said that the BSD had stated in its response to the grievance four different grounds for denial, three of which were now either withdrawn or shown to be unsupported. The only surviving ground, it said, was that PLC and CTT meetings were an appropriate use of prep time. Considering what the evidence shows was intended to be done in prep time, and what has in fact been done by teachers then, there is no justification for this defence. Further, said the BTA, accepting this position would open the door for the Division to require teachers to perform any range of duties in prep time, which would be contrary to the intention

of the parties and any reasonable interpretation of Article 32. The evidence is clear, said the BTA, that the parties always intended that the use of prep time would be in the teacher's judgment, and the past practice confirms that.

143. Third, the BTA referred to the LOU. It argued that there was no limitation in the LOU that would restrict its application to prep time interruptions involving the supervision of students, as the BSD argued. The "interruptions" contemplated are any that prevent the teacher from carrying out whatever work-related task would otherwise have been done were it not for the interruption. In assigning CTT meetings into prep time slots the Division has reduced the minimum number of minutes guaranteed for prep time by Article 32. The LOU is the agreed mechanism for recovery of that lost time.

144. Finally the BTA discussed the assignment of duties outside the school day. These could be either staff meetings or CTT meetings. It acknowledged that the Division could exercise the right to assign duties outside the instructional day, subject to meeting the tests in *Wpg. Teachers'*. The BTA had not grieved about staff meetings being scheduled outside school hours, because they had been not more than once a month, were of brief duration and provided opportunities for useful communication about school activities. The evidence here, however, shows that at least in George Fitton School the staff meetings have become CTT meetings and the number of meetings has more than doubled. This is unfair to the teachers and unreasonable, and fails the test in *Wpg. Teachers'*, said the BTA, and a violation of the Agreement has occurred.

145. CTT meetings scheduled as such outside the school day has not yet actually happened, although in two instances teachers were invited to use those times for CTT meetings. Because no such meetings have been scheduled, the BTA acknowledged this issue was currently only a hypothetical concern. The BTA said that if we find the BSD has the right to schedule CTT meetings in prep time it would

be unfair and contrary to the principles in *Wpg. Teachers'* to take 20% of prep time for that purpose. It asked that we reiterate the principles of law referred to above and declare violations of the Agreement and the LOU based on what is established by the evidence.

146. As to remedy, the BTA sought a finding that the BSD had breached the Agreement, and that compensation be paid to teachers who have been adversely affected by the actions of the BSD. It asked that we retain jurisdiction on matters pertaining to remedy.

The Division

147. The BSD said the grievance was really about whether prep time is “autonomous” time (a phrase used by MTS and Mr. Buehler), which it said was not the case. The Agreement speaks only to the minimum amount of prep time for teachers, not how it should be used or who decides how it is used. It referred to proposals that had been made by the BTA during bargaining in the past, and it referred to the October 11, 2011 memo sent by Dr. Michaels (ex. 9), and the Letter of Understanding entered into subsequently (ex. 10). The joint letter of April 2013 (ex. 11) was also noted by the BSD. The present LOU was entered into at the time the Agreement was made. The BSD said that these documents show the parties’ agreement that prep time that is interrupted by the teacher being required to supervise students can be banked and recovered.

148. Subsequent emails from Dr. Michaels, said the BSD, confirm that banked and recovered time is for a “unique school event” where student supervision is required. The BSD referred to the evidence of Mr. Czarnecki as illustrating a valid claim for recovery of prep time, if a teacher attended mass with students even if that was during prep time. In that case prep time could be recovered because, the BSD said, the teacher was directly supervising students.

149. The BSD argued that teachers have a duty to remain current with the state of pedagogy, put students first, and engage in professional collaboration and development. These duties were not disputed by the Association. The BSD said that engaging in CTT is a professional obligation of a teacher.
150. It said that the core issue was to determine the definition of preparation time. As professionals, teachers do not have regular hours, although the instructional day is defined in the applicable regulation as not less than 5 ½ hours (not including lunch). The BSD said that students spend time in classes such as gym, music, choir and others, when their teacher is not directly supervising them. At those times the teacher will generally have periods that are classified as preparation time.
151. The Division agreed that teachers are hard-working, and in addition to instructing students, they are required under applicable legislation or by the Division to fulfill other responsibilities, such as communicating with parents, collaborating with specialists and resource teachers, attending to technology matters, preparing the classroom and materials, meeting with other teachers and administrators, planning lessons, doing assessments and preparing report cards. It said that while there is no definition in the Agreement of “preparation time”, the MTS (and the BTA) view prep time as work time, and MTS has instructed teachers that prep time is to be used for work-related duties. Further, prep time is non-contact time, thus when a teacher is required to supervise students during prep time the teacher may request recovery of that time. See the LOU.
152. The BSD addressed the main issue here, which is who determines what work-related tasks the teacher is to perform during prep time. It said that there is no requirement that the use of such time is solely determined by the teacher, and there is no basis to say it is “autonomous” time. It said that the agreement between the

BTA and the BSD (ex. 11) of April 1, 2013 provides that repayment of lost prep time only occurs when the teacher has to give up that time to supervise students.

153. The BSD argued that structured collaboration time is a valid use of prep time. Originally the small groups were called PLCs (Professional Learning Communities) but they are now the CTTs. The BSD explained in its submission the establishment and development of CTTs. It said that it gave no direction to principals how to schedule the group meetings, but only that they meet for at least 30 minutes per cycle. Schools found different ways of scheduling the CTTs. Each school had an SLT and “used a consultative process which involved teachers” to set the schedule. It reviewed the scheduling in certain of the schools. It said that some of the ways schools found to schedule meetings involved using common prep times. Some schools used duty-free lunch but that was a decision of the teachers, not a requirement of the school or the Division. When some teachers expressed unhappiness with that, the decision was made to use staff meeting time after school.
154. The BSD said that setting aside and using common prep time was not mandated by it. Even so, it argued that the use of common prep time complied with the Agreement. Prep time is work time, it said, and the Division can direct what is to be done in work time.
155. It referred to regulations (Man. Reg. 468/88 R) setting out the responsibilities of teachers, which include being responsible for ongoing professional development. It noted that the BTA has agreed that teachers have a multitude of obligations including the promotion and development of a collegial spirit among teachers. Collaboration is an imperative, it said, and MTS had established a grant to support this concept becoming a reality. The Division noted the Provincial initiative (ex. 69) intended among other matters to close the achievement gap among students, and its response to this initiative.

156. The BSD turned to the issue of the definition of prep time, and said the Agreement must be read on its face. It said there is no ambiguity in Article 32, which simply provides for a minimum amount of prep time. With no ambiguity, it said, extrinsic evidence around bargaining is inadmissible. In the absence of a definition there can be no breach, because, it argued, “there are no rules around how preparation time is to be utilized”. Thus there is no basis to admit evidence about the “understandings” of the definition of prep time when the Article was bargained, and in the absence of an agreed definition there is no breach.

157. The Division referred to authorities on this issue including the decision of Arbitrator Stout in *Toronto District School Board and CUPE, Local 4400*, 2015 CanLII 44016 (ON LA) (“*Toronto 2015*”), cited in the same arbitrator’s subsequent decision in a case between the same parties issued in August 2018 (unreported, “*Toronto 2018*”). In *Toronto 2018* the Arbitrator referred to the dicta of the Supreme Court of Canada on the role of surrounding circumstances and contextual evidence in contract interpretation set out in *Sattva Capital Corp. v. Creston Moly*, [2014] 2 S.C.R. 633 (“*Sattva*”). We will refer to these later in our decision.

158. The BSD said that because the language refers only to minimum amounts of prep time required in a cycle all the “surrounding extrinsic evidence” must be considered to determine the true meaning of prep time. It referred to the evidence given by Mr. Buehler and Dr. Michaels. It argued that their evidence and Dr. Michaels’ letter (ex. 9) on prep time in a “unique school event” showed that the concern of the parties was that prep time was time free from student supervision.

159. The BSD said there was, at best, evidence only of the subjective intent of the BTA that prep time was “autonomous time”, and there was no evidence of any mutual intent to that effect. The only common understandings were that (1) prep time was free of student supervision, (2) if interrupted by student supervisory duties prep time was bankable and was repayable (subject to the provisions in the LOU,

Dr. Michaels' memo (ex. 9) and the joint letter (ex.11)), and (3) certain minimum amounts of prep time were stipulated. There were no representations made during negotiations that prep time was autonomous time. The purpose of prep time was never discussed, the BTA witnesses had said; it was understood.

160. The Division next turned to the argument that structured collaboration time is a valid use of prep time consistent with the Agreement. It said that collaboration is an essential element in being a teacher. It reviewed the Solution Tree approach, which it had adopted, and it explained the ST program in detail. It said that “Rather than the teacher having to try to find the time to connect with their teaching partners, and the specialists within their school...these resources are provided to the teachers during a set aside time each week...[since] the curriculum is provincially mandated, preparation time cannot be fully autonomous and there must be a coordination of efforts amongst teachers”.

161. It referred to *Wpg. Teachers'*, as had the BTA, as the leading authority on the imposition of implied contractual terms. It referred as well to a recent arbitral decision, *The Portage La Prairie Teachers' Association v. The Portage La Prairie School Division* (unreported, November, 2018, Board chaired by Arbitrator Labossiere) (“*Portage La Prairie*”). It said that the case, involving whether the employer could require teachers to stay at school until 4.00 p.m., was about whether the employer could impose an implied contractual term. The parties had accepted that the tests set out in *Wpg. Teachers'* were applicable, and the Board said that the issue became whether the imposition of the “4PM Directive” was a reasonably imposed implied contractual term. The majority of the Board, one member dissenting, held that it was. We were told that the decision is the subject of an application for judicial review.

162. The BSD reviewed the analysis in *Wpg. Teachers'* and argued that the tests were met. Clearly, it said, it had the authority to prescribe a teacher's duties, and the

many duties performed by teachers other than classroom instruction and supervision could reasonably be imposed on teachers. Those duties include collaborating with others, as described in the evidence. Certainly that duty was related to the enterprise of teaching, one of the tests in *Wpg. Teachers*'. The Division said that by establishing foundational outcomes as was done in the 2018-19 school year, and by establishing common goals or outcomes, the objective of the 2019-20 school year, the program goes to the very core of the educational enterprise.

163. The program also is in furtherance of the principal duties of the teachers, said the Division. They are responsible to ensure the curriculum is delivered as the Division directs, and the evidence showed an increasing diversity among students in many schools with a variety of needs. The program, with its emphasis on the students becoming "our" students, a direct consequence of the CTTs, helps ensure that the goals of the educative process are realized.

164. The last test is whether the imposition of the implied contractual term is seen as fair to the teachers. The Division said that since the BTA had essentially agreed that the other tests were met, this was the real issue. Prep time is work time, unlike the duty-free lunch period. The Division said it had the right to mandate work-related activities during prep time, whether that was attending meetings with parents, preparing report cards, or meeting with other teachers to collaborate. All teachers who testified said that these were functions they performed during their prep time. They are all requirements of the job, the BSD said. The CTT meetings met all the tests and were fair to the teachers since they took place "during time they have available to prepare for their teaching." The BSD said that it does not require them to use time outside the school day, and the scheduling of CTT meetings in prep time periods does not increase teachers' workloads. Only about 20% of prep time is dedicated to this program, and that is a reasonable requirement in the context of the total time available to teachers.

165. In a 2005 arbitral decision (*Winnipeg School Division v. Winnipeg Teachers' Association*, 2005 CarswellMan 948, 83 C.L.A.S. 51) ("*Wpg. School*") the majority of the Board chaired by Arbitrator Hamilton found that the employer had violated the collective agreement by requiring teachers at a school to supervise the singing of O Canada, before the start of the school day. It held (at para. 68) that "instructional day" was different from and narrower than "school day" since the ½ hour instructional day does not reflect all the assignments that may be given to a teacher, and (at para. 69) that assignments can be given to teachers if they reasonably relate to the purpose of education.

166. The Division said that CTT is a core principal duty and mostly it is performed within the instructional day, but it also argued that the *Portage La Prairie* decision, (and a 1988 arbitral decision involving the Churchill School District) stands for the principle that CTT can be scheduled outside the instructional day. It said that collaboration is not a new reality in its schools, and that no new work tasks had been assigned. Staff meeting times were not prescribed, there was no requirement to follow a particular agenda, and attending more than one meeting a month was not an unreasonable requirement. No violation of the Agreement had been established and it asked that the grievance be dismissed. It added that this was a case of first impression, that there was no evidence that any teacher lost money by the CTT program, and that if the grievance was allowed it would not be appropriate to award any damages.

ANALYSIS AND DECISION

The Issue

167. There is one main issue to determine. There are also two subsidiary issues which we will deal with near the end of this Award. The main issue can be simply

stated: whether the Division is entitled to require teachers to attend CTT meetings held during one common prep time period per 6-day cycle, or whether that is a violation of the Agreement. If the Division is so entitled, we must then consider whether what has been done meets the applicable legal tests. The subsidiary issues relate to staff meetings outside the instructional day and the sanctity of the duty-free lunch period.

Matters Not in Issue

168. The parties agree on a number of matters. Teachers work extremely hard. The Division said in its opening statement that teachers have “incredible demands” on them, which the evidence shows they do. They work beyond the hours in the instructional day, and very often beyond the greater number of hours in the school day. Teachers’ main work focus is on the students in their care and under their supervision. At the same time, teachers are entitled to their own lives.
169. The parties also agree that collaboration among teachers is to be encouraged and is of considerable value. There is no dispute that encouraging and facilitating collaboration is a valid objective which the Division may pursue, as long as that is done in a manner that does not violate the Agreement.
170. Much of the evidence related to the details of the ST program. This does not raise issues for us to determine. The BTA agrees that the Division may adopt and implement the ST program. It challenges only the manner of implementation, and the requirement that teachers attend CTT meetings during prep time periods. (It also challenges incursions or possible incursions into lunch periods and staff meeting time.)

Applicable Contractual Provisions

171. Our jurisdiction flows from the Agreement and the grievance which the BTA has launched. In effect, the grievance asserts that by its manner of implementation of the ST program the BSD has violated Article 32, Article 27 and the LOU, the texts of which are set out in paras. 7, 8 and 9 above. Also raised regarding the disposition of this matter are Dr. Michaels' memorandum of October 2011 about "unique school events" (ex. 9), which in different forms was reissued a number of times, with the only change relating to the banking of scheduled time, and the joint letter from the parties to teachers (ex.11) sent on April 1, 2013, which Dr. Michaels subsequently said (see ex. 41) takes precedence over the ex. 9 memo.

Principles of Contractual Interpretation

172. In considering this matter we are guided by the jurisprudence on interpretation of contracts, which include collective agreements. Both parties submitted authorities on this aspect of the case. A recent explanation of the general principles can be found in the decision of the Manitoba Court of Appeal in *Elias et al v. Western Financial Group Inc.*, 2017 MBCA 110 (CanLII) ("*Elias*") in which the Court extensively cited the *Sattva* decision of the Supreme Court. At paras. 68-73 and 75 in *Elias* Pfeutzner J.A. said for the Court:

It is well settled in Canada that the goal of contractual interpretation is to give effect "to the intention of the parties, to be gathered from the words they have used" (*Consolidated-Bathurst v Mutual Boiler*, 1979 CanLII 10 (SCC), [1980] 1 SCR 888 at 899). In *Sattva*, Rothstein J described the process of determining the intention of the parties when he wrote (at paras 47-48):

To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning.

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement.

Courts are required to consider the surrounding circumstances in interpreting a contract regardless of whether the contract may be ambiguous (see...*Sattva* at para 46...)

The type of evidence that can be considered as part of the surrounding circumstances was described in *Sattva* (at para 58):

The nature of the evidence that can be relied upon under the rubric of “surrounding circumstances” will necessarily vary from case to case. It does, however, have its limits. It should consist only of objective evidence of the background facts at the time of the execution of the contract (*King*, at paras. 66 and 70), that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.

[emphasis added]

However, the surrounding circumstances cannot be used to overwhelm the words of the contract. In *Sattva*, Rothstein J wrote (at para 57):

The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract ([Geoff R] Hall, [*Canadian Contractual Interpretation Law*, 3rd ed (Toronto: LexisNexis, 2016)] at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v B.C. Tel Mobility Cellular Inc.* (1997), 1997 CanLII 4085 (BC CA), 101 B.C.A.C. 62).

It is also clear that the requirement that surrounding circumstances be considered in the interpretation of contracts does not conflict with the parol evidence rule.

The parol evidence rule has been stated as follows in *Ahone v Holloway*, 1988 CarswellBC 336 (CA), quoting from Professor Corbin’s text, *Corbin on Contracts* (1952) at 534, (at para 16):

When the terms of a contract have been embodied in a writing to which both parties have assented as the definite and complete statements thereof, parol evidence of antecedent agreements, negotiations and understandings is not admissible for the purpose of varying or contradicting the contract so embodied.

[emphasis added]

The parol evidence rule does not exclude evidence that would be included as part of the surrounding circumstances, as explained in *Sattva* (at para 60):

The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

173. At para. 47 of *Sattva* Rothstein J. also adopted the following well-known dicta:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. (*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

174. The above principles apply to the interpretation of collective agreements. *Brown & Beatty*, Canadian Labour Arbitration, 5th ed., at 4:2100, submitted by the BTA, states that:

A more recent articulation of the proper approach has been as follows:

The modern Canadian approach to interpreting agreements (including collective agreements) and legislation is encompassed by the modern principle of interpretation which, for collective agreements, is:

In the interpretation of collective agreements, their words must be read in their entire context, in their grammatical and ordinary sense, harmoniously with the scheme of the agreement, its object and the intention of the parties.

175. Collective agreements should be construed in the context of the labour relations milieu in which they were created and operate. The Ontario Labour Relations Board recently approved, in *Brick and Allied Craft Union v. Moscone Tile*, 2015 CanLII 44678, the following explanation (at para. 26) from *Canadian General-Tower Limited*, 2011 CanLII 73194:

23. The goal of contract interpretation is to determine the true objective mutual intent of the parties at the time of entry into the contract (*Eli Lilly & Co. v. Novopharm Ltd.*, *supra*). Although there are important differences between a collective agreement and a commercial contract, the general fundamental rule of collective agreement interpretation is the same as it is for legislation or any other contract....

176. The general principles of contractual interpretation are applicable, and should be applied in a manner reasonably consistent with the purposes of the governing legislation, the principles of labour relations, the nature of the collective bargaining process (to the extent relevant) and the facts in evidence.

177. One further legal concept must be noted, which was raised by the BTA. Sometimes provisions in collective agreements (or any contract) may be unclear, imprecise or for any reason may be difficult to understand or interpret. Often parties will argue that the agreement is on that matter ambiguous and will seek to rely on extrinsic evidence to explain the vague provision. In *Elias* the Court said (at paras. 78-9):

Another issue that is raised by this appeal is the law respecting ambiguity of contractual provisions. It must be emphasized that a contractual provision can be difficult to construe without being ambiguous (see *Moore Realty Inc v Manitoba Motor League*, 2003 MBCA 71 (CanLII) at para 25).

True legal ambiguity occurs where a phrase is “reasonably susceptible of more than one meaning” (*Hi-Tech Group Inc v Sears Canada Inc*, 2001 CanLII 24049 (ON CA), 2001 CarswellOnt 9 at para 18 (CA)). Ambiguous wording has also been described as one with a “double or devious meaning, that is to say, one word or one expression or a series of expressions capable on its face or in its application of two or more meanings” (*Moore Realty* at para 25).

178. The BTA argued that Article 32 was latently ambiguous, in that while there was no patent ambiguity on the face of the provision it was unclear from the wording what the parties intended regarding the control of prep time, and whether it was the teacher or the Division which could determine what would be done in that time. This permitted the Board, said the BTA, to consider extrinsic evidence and past practice, both to determine that there was a latent ambiguity and also to resolve it.

Article 32 – Preparation Time

179. Since at least 1988, according to Mr. Buehler’s uncontradicted evidence, prep time was part of the timetable. The introduction of the concept into the collective agreements between the parties occurred with the 2010-14 agreement, and the provision in Article 32 was continued unchanged (having dropped outdated provisions) into the Agreement.
180. There is no definition of “preparation time” in the Agreement. Notwithstanding, both parties understand and agree that it is work time, and not time when the teacher may engage in personal activities (apart from such incidental matters as getting coffee and going to the washroom). The time is to be used for a myriad of work-related tasks and activities which we have already outlined and which most witnesses described.
181. Article 32 stipulates some matters and is silent on at least one matter. It expressly states that: 1. Preparation time shall not be reduced for those K-8 teachers who have more than the minimums stipulated in the Article; 2. Within a 6-day cycle the Division shall provide at least certain stipulated minutes of preparation time for full time teachers in identified grade ranges, which shall be scheduled in blocks of not less than either 30 minutes or 65 minutes depending on the grade range; 3. Part time teachers shall be given scheduled preparation time on a pro-rata basis. At least to the extent stipulated, the management rights of the Division regarding prep time are constrained.
182. There is nothing unclear about what is stated in Article 32, nor did either party argue that there was. Nor is there any real lack of certainty about what is meant by “preparation time” although that is undefined in the Agreement. It is, as all the witnesses who spoke about the subject said, time for the teachers to prepare for their

work of teaching students, which they do in a myriad of ways. Considering the evidence, the purposes of the Agreement and the context in which the Article must be considered, it is clear that prep time is meant to be time free of student contact. That is, in our view, why the documents on “interrupted” prep time came into existence.

183. It was recognized that on occasion prep time could be interrupted by a teacher having to assume student contact or supervisory responsibilities. Soon after the first incarnation of Article 32, in the 2010-14 agreement (ex. 5), Dr. Michaels issued her memo to Principals and Vice-Principals (ex. 9) dealing with prep time that was interrupted by requiring the teacher to supervise students during certain events. If that happened the teacher was to receive the lost prep time. The first version of the LOU (ex. 10) acknowledged that prep time could be interrupted and that teachers would receive and could bank that time. Soon after that document was signed the joint letter of the parties was sent (ex. 11) dealing with when repayment of interrupted prep time would occur.

184. None of those documents deal, directly or indirectly, with the issue before us. They are confined, in our opinion, to circumstances when prep time is interrupted by student contact or supervision. That is not the case before us. In our view the introduction of CTT meetings on a limited basis into the scheduled prep time periods is not an “interruption” of prep time, as contemplated by the LOU, whose meaning is informed by ex. 9 and ex. 11. Rather, CTT meetings are consistent with the purposes of prep time, which is to provide time, free of student contact, for teachers to prepare for their main duties. CTT meetings are one method of focussing and presumably enhancing teacher efforts on one of the important matters that the evidence shows teachers often engage in on their own during prep time, that is, discussion and collaboration with colleagues for the purpose of improving the efficacy of their efforts to educate and serve students’ interests. The question

remains, is the Division entitled to schedule and to require participation in these meetings during one common prep time period per cycle?

185. The Association argues that because the Article is silent on the question of who decides what specific tasks are to be done by a teacher in a particular prep time period the Article is latently ambiguous. If that is so, it says, we should consider evidence of negotiations and past practice, which it says would show that the parties understood and agreed that it was the teachers and not the Division which would decide what prep work would be done, and when, during prep time.

186. The legal principles stated earlier show that we are to determine the intention of the parties on this subject when they entered into the Agreement, and in doing so we are to consider the words used and the surrounding circumstances. There are no words in the Agreement or Article 32 touching on the issue we are to determine. If we consider the past practice, as the BTA argued, it shows that the teachers have done what prep work they wanted to do, and when they wanted to do it, during prep time. There was, however, no evidence or suggestion that at any time until the introduction of the mandatory CTT meetings did the Division have or express any interest in what prep work was done in any particular prep time period. Those are circumstances surrounding the Agreement and Article 32.

187. Another important aspect of the context and surrounding circumstances, which in our view informs the proper interpretation of the Article, is that at all times it has been understood and not disputed that prep time is work time. Unlike the duty free lunch, it is the employer's time and not the employee's time. Subject to any applicable legislation and jurisprudence, any valid agreement to the contrary, or to any waiver or estoppel that would limit its rights, it is up to the Division to decide what work will be done, and when, during work time. There is nothing in the legislation that could apply that restricts the Division's right to do what it has done. Neither waiver nor estoppel was argued or relied on by the Association, and we do

not think those legal concepts would apply. As to the jurisprudence, we will discuss its application below. The remaining argument by the Association is that, because there is a latent ambiguity in Article 32 we should imply in it a contractual term based on past practice that the prep time is, in effect, autonomous time, as the MTS and Mr. Buehler maintained.

188. Is there a latent ambiguity in or relating to Article 32 on the issue of which party decides what prep work is to be done during a particular period? The nature of a latent ambiguity has been discussed in many cases; see, for example, the decision of Arbitrator Robinson in *Brandon (City) v. Brandon Professional Firefighters*, 2012 CanLII 97765:

I have also considered the alternative argument submitted by the City that there exists latent ambiguity in the collective agreement as the agreement is either ambiguous or silent with respect to what is to occur in the event of an initial job competition in which no successful candidate is produced. The general rule regarding the use of extrinsic evidence as an aid to the interpretation of collective agreements is discussed in Snyder & Palmer, *Collective Agreement Arbitration in Canada* (4th) (Markham, ON: LexisNexis Canada Inc. 2009). At page 42, the authors describe the two categories of ambiguity:

...In cases of latent ambiguity, while the words appear on their face to be capable of just one meaning, it is apparent when one attempts to apply them to a particular situation that they are ambiguous. In the case of latent ambiguity, evidence is admissible not only to resolve the meaning of the agreement, but also to reveal that there exist two meanings. Although there is a difference in principle between the two categories of ambiguity, there is rarely any practical need to differentiate between them, and arbitrators rarely do so.

At page 41, the subject of what constitutes ambiguity is discussed and the authors conclude that the “silence of an agreement on a particular point is not tantamount to ambiguity”.

The concept of latent ambiguity is not intended to allow the admission of extrinsic evidence wherever a disagreement as to the interpretation of a collective agreement arises...Moreover, the absence of collective agreement language spelling out what ought to occur in the event of a failed search does not constitute latent ambiguity.

189. While extrinsic evidence is admissible to see if there is a latent ambiguity, as was stated in *Toronto 2015* (at para. 88), evidence of one party's subjective intention is not admissible and in any event is not helpful in determining the mutual objective intent of the parties. In the decision of Arbitrator Peltz (relied on by the BSD) in *WRHA v. MAHCP* (unreported, 2016) the arbitrator cites Palmer & Snyder, *Collective Agreement Arbitration in Canada* (5th Ed), at 2.55: "Extrinsic evidence is only of assistance if it reveals a consensus as to the meaning of the disputed provision. If it is merely compatible with one of the interpretations being proposed, it is of no value in resolving the dispute." Here the BTA asks us, on the basis of an alleged latent ambiguity, to imply a term into Article 32.

190. In the *Portage La Prairie* decision the Board said (at p. 53): "In Manitoba, a practice's history has not been treated as a sufficient basis to impose the practice as an implied contractual term." Only if that practice reflects a mutuality of intention could it support such a finding. The lack of objection or direction from the Division or from school principals, until the Division decided to introduce the ST program, does not support a conclusion that the Division had thereby given up its right to direct what work would be done in the work/prep time periods. Dr. Michaels said that if the Division had scheduled duties in prep time that would not have been accepted. By that we understand her to have been referring to duties of some kind other than the work usually done in prep time. If she meant that in her opinion prep time was autonomous in the sense that Mr. Buehler had said, we do not accept that view, nor does the evidence of past practice show the necessary common intention to support that view.

191. The silence of the Agreement on the issue we are considering does not, as is stated in Palmer & Snyder, *op. cit.* (see para. 187 above) amount to an ambiguity. As was stated in *Burlington (City) and CUPE, Local 44*, 2017 CarswellOnt 3743 (at para. 16):

...when collective agreement parties disagree about what they intended they are presumed to have written what they meant and to have meant what they wrote. Collective agreement language cannot be manipulated and allegedly missing words or terms cannot be implied under the guise of interpretation in order to achieve an interpretation favoured by a party unless that is essential to the apparent intended operation of the collective agreement read as a whole...

192. The extrinsic evidence relied on by the Association, such as the history of negotiations and the past practice, does not mean that the Article or the Agreement is ambiguous. The past practice means no more than that the Division was willing, at the time, to permit teachers to decide what prep work they would do, at that time. Neither the past practice nor the lack of any reference to this matter in the Article means that the Division relinquished and turned over to teachers its right to decide what will be done in the work time that is prep time. We find no latent ambiguity and we do not imply the contractual term in Article 32 as sought by the BTA.

193. Thus we conclude that, subject to important provisos, the Division can assign work during prep time periods. The first proviso is that the work must be prep work. That is clear from Article 32, which entitles teachers to prep time, and the Division did not suggest otherwise. What is done in the CTT meetings is, in a structured and organized manner, some of what teachers do from time to time on their own initiative in prep time. The evidence satisfies us that it does not by any means entirely replace collaborative time spent by teachers, who will still discuss matters with colleagues in other prep time periods. The evidence does not show that there is even an approximate correlation between the time teachers previously spent on their own in collaboration with colleagues and the time they spend in CTT meetings. Nevertheless, what they do in CTT meetings may be properly characterized as prep work.

194. On this first proviso, we add that there is no legislative or regulatory limitation or restriction, and none was argued, on the right of the Division to

determine what prep work will be done during prep time periods. As noted earlier, the Association did not argue that the conduct of the Division, in permitting teachers in the past to decide what prep work they would do during prep time periods, constituted a waiver by the Division of its right to make that determination. Nor did it argue that by its conduct the Division was now estopped from asserting the right to make that determination. The facts would not support either a waiver or an estoppel argument.

195. Second, an agreement between the parties could limit the Division's rights, and could stipulate that certain work would be done during the prep time periods. No such agreement exists, and none is found in or pursuant to the Agreement or any of the other documents provided to us. The past practice does not establish any such agreement, in our opinion. At best, as stated, that practice only shows a past willingness of the Division to permit teachers to decide on their own prep work, at a prior particular time or period. As also stated, there is nothing to suggest the Division was giving up its right to direct work. Even the response it made to the grievance (see ex. 3), where it incorrectly said that the scheduling of CTT meetings had been left entirely up to teachers, was coupled with the assertion that, regardless of that statement, CTT was an appropriate use of prep time, and there was no suggestion that the Division was relinquishing any of its rights. We will add that even if we were to find that the past practice or extrinsic evidence provided some support for an implied contractual term, for something as fundamental as a finding that it is the employees (albeit professionals) and not the employer who decides what work will be done at a particular time, we would expect there to be quite clear evidence supporting that as the mutual intention of the parties.

196. Third and finally, how the Division has implemented the ST program and the effect of the introduction by some schools of CTT meetings into the timetable must meet the tests in the applicable jurisprudence. We agree with the Association that it

is only if we find (as we have) that the Division can do what it has done that we need to consider whether it is limited or prevented from doing so by the law established in the *Wpg. Teachers'* decision. The Division did not dispute this, and argued that what it had done was not unfair or unreasonable. The Association in its submission said that: "Regarding the assignment of duties not specified in the collective agreement and falling either during or outside of the instructional hours, the law has recognized that School Divisions can impose such duties upon teachers so long as they conform to a reasonableness test set out by the Supreme Court...[in *Wpg. Teachers'*]...". That case resolved the question of whether a school division could impose noon-hour supervision duties on teachers. At p. 705 Laskin C.J. said:

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.

197. The Agreement does not stipulate what specific prep work is to be done, or may be done, during prep time periods. It is not disputed that fostering and facilitating collaboration among teachers is related to the work of the teacher and is in furtherance of the teacher's main duties, and we so find. It is only the "fairness" factor set out in the dicta in *Wpg. Teachers'* that could prevent scheduling mandatory CTT meetings during prep time, on the basis that, even though the Division has the legal right to do so, the effect of doing so is unfair to teachers. The unfairness would be in the consequential shifting into out-of-school hours of necessary prep work that could not be done in the prep time periods taken up by the CTT meetings or in other prep time periods.

198. We heard considerable evidence from teachers and from former teachers about their work done during prep time and also outside the school day. As indicated earlier, there is no dispute that teachers work hard and over many hours. Some

teachers who were called to testify by the BTA said that if they have to attend CTT meetings during a prep period the non-collaborative work they would otherwise have done still must be done, and they have to devote additional time outside school hours to do it. The BTA had argued that “all” teachers who testified did so to this effect. Certainly several did. This was the evidence of Ms. Stapleton (summarized in para. 39 above), Ms. Penner-Warnica (para. 42, and see also ex. 21, where she wrote that losing a prep time period seriously affected her ability to be an effective teacher), and Mr. Benson (para. 57). The effect of losing a prep time period was also confirmed by Ms. Miller (para. 95) and Ms. McLaughlin (para. 99). We regard all this evidence as sufficiently representative for present purposes. Mr. Gustafson said (para. 127) that the work done at CTT meetings would still have to be done by teachers were it not for those meetings, albeit in a different format, which is also confirmatory. He also gave his opinion that the meetings do not add to their burden in any material way. Mr. Grindey essentially agreed (para. 89), and also said that he did not find attending the meetings added to his burden. While the Division argued that their method of implementation of the ST program “does not require [teachers] to use up time outside the school day”, the weight of the evidence is clearly to the contrary.

199. Moreover, there was no evidence or suggestion that the amount of time a teacher would spend on collaborative matters before the introduction of the CTT meetings would aggregate as much as approximately one period per cycle. The evidence strongly suggests otherwise, as collaboration was just one of many preparatory tasks done by teachers. This supports the conclusion that the dedication of a period to this particular task results in other prep work being “left over”, and having to be done outside the school day.

200. In *Snow Lake* the Manitoba Court of Appeal expressly adopted the *Wpg. Teachers’* tests. At para. 6, for the Court O’Sullivan J.A. said that the proper

approach to the issue of the duty of teachers to provide service which was not expressly stipulated in the collective agreement was as described by Laskin C.J.C. in the earlier case and at para. 11 he accepted that approach as applicable in the case before the Court. He said at para. 16 that it was for the arbitrators, not the Court, to decide whether the practice in Snow Lake was reasonable.

201. In the recent decision in *Portage La Prairie*, the Board noted a very long-standing practice of teachers staying at school until 4 p.m. even if they did not have assigned duties until then. After the practice continued for about 40 years the school division mandated that teachers do so, and the teachers' association grieved. The case turned on the application of the test in *Wpg. Teachers'*. The Board said (at p.49) that a school division could assign duties to teachers beyond the instructional day but in doing so the division must act reasonably. The Board said that the 4PM Directive was fair, and reasonable, and its having been in place for 40 years without objection was evidence of fairness. At page 71 the Board added the following:

...the Board wishes to stress that its finding in this case is restricted to the unique factual matrix...and, in particular, the long history of the 4PM Directive. The 40 years of practice described above was ultimately the determining factor in concluding that the 4PM Directive is reasonable. In the absence of that lengthy practice, the Board would likely not have concluded that the 4PM Directive was "seen to be fair to the employee" and would have upheld the grievance...

[original emphasis]

202. In the present case there is no evidence of something like the long history of the 4PM Directive, as within a reasonable time after the introduction of CTT meetings into the common prep time periods on teachers' schedules the grievance was filed.

203. Considering the evidence in its entirety, and with an appreciation of the work that the teachers must do, the properly acknowledged "incredible demands" on

them, and the already significant out-of-school hours they spend doing it, it is difficult to see how adding to this burden by action that has the effect of requiring prep time work to be done in out-of-school hours, could be “seen as fair” to teachers, as the Supreme Court said in *Wpg. Teachers* was a requirement. While the CTT meetings to an extent replace collaborative work the teachers would otherwise do, the evidence shows that they also prevent teachers from doing at that time some other prep work, which still must be done. Holding CTT meetings in common prep time periods, even if only once per cycle, necessarily shifts to some degree to out-of-school hours, work that teachers would do were it not for those meetings.

204. We conclude that the dedication of a common prep time period per 6-day cycle which results in the creation of more out-of-school work for teachers is not a fair or reasonable way for the Division and schools to “call for the performance of duties which are not expressly spelled out” (*Wpg. Teachers*). The result of requiring teachers’ participation in CTT meetings during one such period per 6-day cycle is to add unfairly and unreasonably to their workload. While this scheduling leaves the majority of prep time periods available for the teachers to continue to carry out their other preparatory work, it is not realistic to think that 100% of prep time work (less some collaboration with colleagues done at CTT meetings) can be compressed into 80% of the time. There will in many, and we think in most, cases be a spillover into out-of-school hours. Thus for the reasons given herein we find there has been a breach of Article 32. There has also been a breach of Article 1 of the Agreement, which requires the Division to act reasonably and fairly in administering the Agreement.

Article 27 – Duty Free Lunch

205. The uninterrupted duty free lunch period mandated by Article 27 is an important benefit for teachers. It can only be interfered with if the administration of a school and the Association on behalf of a majority of teachers in that school agree

to a different arrangement. See Article 27. There is no evidence that any such arrangement has been reached regarding any school.

206. The BTA argued that two witnesses' evidence supports its argument that article 27 has been violated. It said that the evidence of Kathy Penner-Warnica establishes that her conversation with her principal, when he suggested one option for her team was to meet during lunch, was a violation of the article. As noted earlier (see para. 41) her evidence was that her principal told her that CTT/PLC meetings were not optional and the team could decide to meet before, during lunch, or after school, if they did not want to give up their prep time, but all would have to agree.

207. We accept this evidence, but it falls short of establishing the alleged violation. There was no more than a suggestion by the principal which was not acted upon. Further, had all the teachers affected agreed to use their lunch period, one can only speculate whether the BTA would have been asked pursuant to Article 27 to agree to the arrangement "on behalf of a majority of the teachers in the school", many of whom would likely have been unaffected by the arrangement. At best this is speculative. No breach is established by this evidence.

208. The other witness was Sandra Thompson, whose evidence (see paras. 62 and 65) establishes that CTT meetings were held during her duty free lunch period, that she was required to attend such meetings to which she objected, and that she attended reluctantly. The BTA was not asked to agree, nor did it agree, to this arrangement in accordance with Article 27. The evidence of Gail McDonald confirms the CTT meetings during lunch hour. The evidence thus establishes that in this respect and at George Fitton School the Division violated Article 27.

Assignment of Duties Outside School Day – Staff Meetings

209. The BTA said that at George Fitton School staff meetings had become CTT meetings, and the number of such meetings more than doubled. See the evidence of Ms. Thompson. Without explanation by the BSD, there was no basis to conclude that this was fair to teachers, the BTA said. These were meetings outside the school day, and while staff meetings were valuable, doubling the number to accommodate CTT matters was not.
210. No satisfactory reason was offered by the BSD for this practice at the school. It is not reasonable that some staff meetings, which have had a well-understood and commonly applied purpose and focus, be unilaterally converted to another purpose, however valuable in itself, since the evidence shows that this has the effect of more than doubling the number of staff meetings which teachers must attend outside the instructional day. In our view this does not pass the test in *Wpg. Teachers*; it is not fair to them and thus there has been at George Fitton School a violation of the principle set out in Article 1 of the Agreement requiring the Division to administer the Agreement fairly.

Remedy

211. We have found a breach of Articles 32 and 1, and the grievance insofar as it relates to those Articles is allowed. We have found two other breaches of the Agreement by the Division as set out in paras. 208 and 210 above, relating to duty free lunch periods and staff meetings. We declare that violations of Articles 32, 27 and 1 occurred and in those respects the grievance is allowed.
212. The BTA sought compensation for teachers affected by the breaches. The BSD said that since this was a case of first impression no damages should be awarded. We leave to the parties the task of addressing and resolving the issue of

compensation for breaches of the Agreement, and we reserve jurisdiction on any issue of remedies which the parties are unable to resolve.

213. We express our thanks to counsel for their thorough and very helpful presentation of the evidence and of their submissions.

Dated this 20th day of January, 2020

“Martin Freedman”

Martin H. Freedman

“Denny Kells” Concurs subject to partial dissent attached

Denny Kells

“David Shrom” Concurs

David M. Shrom

Denny Kells: Brandon School Division Partial Dissent

For the most part, I agree with the award of the Chair in this matter. However, I disagree with his conclusions as they relate to the application of the three part test set forth by the Supreme Court in the *Winnipeg Teachers'* decision.

The essential issue in our case was whether a teacher's preparation time as that term is used in Article 32 of the collective agreement is autonomous time, in the sense that it is the teacher who decides how it is to be used. The Chair has rejected the contention that such time is autonomous, stating that if one of the witnesses "meant that in her opinion prep time was autonomous ... we do not accept that view, nor does the evidence of past practice show the necessary common intention to support that view."

All parties agreed that "prep time" is work time. The Chair found that the mandated CTT meetings that were held during scheduled prep times were "consistent with the purpose of prep time, which is to provide time, free of student contact, for teachers to prepare for their main duties." The Chair stated that "unlike the duty free lunch, it [prep time] is the employer's time and not the employee's time [and absent any restrictions to the contrary], "it is up to the Division to decide what work will be done, and when, during work time." What teachers and their colleagues "do in CTT meetings may be properly characterized as prep work."

Based on the foregoing, there is no need to consider the three elements set forth in the *Winnipeg Teachers'* decision.

The *Winnipeg Teachers'* decision [*Winnipeg Teachers' Association v. Winnipeg School Division No. 1*, [1976] 2 SCR 695 (SCC)] dealt with the assignment of duties **beyond the school day**. That is not our case. Rather, the *Winnipeg* decision stands for the principle that a school division may assign duties to teachers beyond the school day, and that unless such duties are stipulated in the teachers' contract, they must be reasonable, in that, (in the words of Laskin, C.J.C.):

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

The *Portage la Prairie*, *Snow Lake*, *Churchill* and *Winnipeg Teachers'* decisions all dealt with the performance of duties outside of the school day. They are therefore of limited or no application in this case.

The Chair has focused on the third element of the *Winnipeg Teachers'* test, i.e. "whether the imposition of the implied contractual term is seen as fair to the teacher." However, the concept of an implied contractual term need not be considered when the duties in question constitute recognized teaching duties that fall within the school day.

The Chair framed the issue as follows:

Whether the Division is entitled to require teachers to attend CTT meetings held during one common prep time period per 6-day cycle, or whether that is a violation of the Agreement. If the Division is so entitled, we must then consider whether what has been

done meets the applicable legal tests. The subsidiary issues relate to staff meetings outside the instructional day and the sanctity of the duty-free lunch period.

The Chair has concluded that it did not constitute a violation of the collective agreement to require teachers to attend CTT meetings held within a scheduled prep time. At the risk of being overly repetitive, there is no legal authority for the proposition that duties that the Division can assign within the school day must meet the applicable legal test set forth in the *Winnipeg Teachers'* case, for the three part test in that case is limited to an implied (as opposed to an express) term obligating the teacher to perform work beyond the school day. Again, that case has no application to work that is assigned within the school day.

Despite having determined that the collective agreement provisions were not ambiguous, and that there was no basis to conclude that preparation time was autonomous teacher time, the Chair's approach has effectively implied or read such a term into the collective agreement. He has essentially decided that if preparation time that is utilized for a CTT meeting is not offset by an equivalent amount of additional preparatory time, an unfairness will (in the words of Laskin, C.J.C.,) be found, with such unfairness being in "the consequential shifting into out-of-school hours of necessary prep work that could not be done in the prep time periods taken up by the CTT meetings or in other prep time periods."

Teachers generally plan their own use of prep time. In doing so, one would expect that teachers, as with most other professionals, will prioritize those activities. At pages 15 and 16 of its submission, the Association has enumerated the type of activities for which preparation time is frequently used. It is apparent from that list that not all prep work is essential, and that some of the work that is not done during a prep period may be done during other free moments within the school day, as for instance when students are otherwise engaged in a classroom task. Some prep activities may be deferred to free time the following school day. The collaboration that may have taken place within a scheduled prep time may nevertheless continue to occur during a scheduled CTT meeting.

Moreover, the view of the Chair in terms of a "consequential shifting" is not supported by the evidence. We heard from nine teachers who were called by the Association out of a total of 850 members. While some teachers may have "experienced a shifting" of some preparation from "in school" to "out of school", there is no evidence to suggest that that the shifting was widespread, or that it was consequential, or that it could not have been managed by prioritizing such tasks.

The Chair has stated that "the effect of the introduction by some schools of CTT meetings into the timetable must meet the tests in the applicable jurisprudence", referencing of course to the test formulated by Laskin, C.J.C. in the *Winnipeg Teachers'* decision. But as I have noted, that test does not apply to work or direction given which clearly falls within the parameters of the Teachers' contract. In coming to that conclusion, the Chair has effectively implied a term that any direction as it relates to the recognized duties of the teacher, whether occurring within or outside of the school day, must be "fair to the teacher". In my view, there is no basis for implying such a term.

From my perspective, there is no need to go further. Nevertheless, if I am wrong in terms of the application of the three part *Winnipeg Teachers'* test, it is my view that the Division's assignment

of CTT meetings to prep time periods did not violate that test. I speak specifically to the fairness aspect of the test.

Fairness is not an abstract concept. Rather, whether a matter is fair may well depend on the larger context. Here, the constricts of the school day are such that CTT meetings could not, for the most part, be held during regular class time, for that would clearly result in a loss of student instructional time. The use of substitutes to provide release time for teachers who are attending CTT meetings was not a viable option, for the clear evidence was that the Division was suffering from a shortage of substitutes. That is particularly true during certain times of the year when teachers who might otherwise be available to substitute elect not to do so because they are holidaying or perhaps residing in warmer climates.

The Association recognized that the Division has retained its inherent management rights, and in its submission, it suggested that the Division should have, in addition to hiring substitutes, hired term and regular teachers to provide coverage (for regular classes) while teachers attended CTT meetings outside of scheduled preparation time. Quite apart from the cost and impracticality of doing so, proceeding in that fashion could be seen as “unfair”, for as the Division noted in its submission [see para. 91], and as one of its teachers, Kevin Grindey testified, “requiring that he give up an hour of class time and prepare for a substitute teacher [or a term or regular teacher] would be more onerous as it would require him to use preparation time to prepare for a substitute teacher and it would mean that he could not accomplish as much with this class as he would like to.” Putting aside the scheduling issues that would be involved, such an approach would require the teacher to prepare the lesson for his replacement. He would also be required to evaluate the replacement’s success at the start of the next class, and if necessary, re-teach aspects of the lesson that had not been successfully communicated to the students. Having a replacement teacher deliver a lesson on a topic in which they had not been immersed is likely to have some impact on overall progress.

Merriam-Webster On Line Dictionary defines “fair” as meaning “free from favour toward either or any side.” It states that fair also implies “a proper balance of conflicting interests.”

The Division has undertaken a very significant initiative to better equip its teachers to perform in a manner that benefits both them and their students. It has done so in a way that fairly addresses both its responsibilities and its operational and scheduling constraints. The teachers are clearly benefitting from the Division’s approach, and practically speaking, there is nothing that the Division could reasonably have done to be any fairer to its teachers than it has been. If the “fairness” test were to apply, which again it does not, then the Association has not met the onus of establishing that the Division was unfair to its teachers.

The Chair has commented that there was evidence that at two schools (St. Augustine and Ecole Harrison) the timetables had been managed to permit CTT meetings to be held within the school day without encroaching on preparation time,

Both schools are however “outliers.”

Glen Simard, the CIC (coach) at Ecole Harrison, testified that Ecole Harrison is a single track French Immersion School. It was not a catchment school, and as such, it was able to establish a cap on its student population. It was also able to be somewhat selective in terms of who could enrol. It had a student population of 370. It was a low-needs school, in that it had relatively few students who were indigenous or whose first language was not English, or whose families were on welfare. It had a stable student population as evidenced by the relatively low number of student transfers in and out of the school. Although it only had 15 classrooms, it had a staff of 23 to 25 teachers. Those unique circumstances permitted the school to utilize the additional teachers to cover for regular classroom teachers, thereby obviating the necessity of holding CTT meetings during scheduled preparation times. Mr. Simard acknowledged that this somewhat unique approach would not likely be workable at most schools.

Chris Czarnecki was the principal at St Augustine Catholic School. The school had an enrolment of approximately 208 students. It had only one class at each of Grades K-8. It was able to free up teachers for CTT meetings by doubling up on classrooms during non-preparation time, as for example Grade 1 and 2, and at times Kindergarten, Grade 3 and 4, Grade 5 and 6, and Grade 7 and 8. Even with these circumstances, the principal testified that it was very challenging to prepare a timetable to enable staff to attend CTT meetings during regular classroom times. There was no suggestion that the approach taken at this school would have been transferable to other schools.

Certainly, if the three step test was applicable, which it is not, the obligation to establish unfairness would fall on the Association. It has not led any convincing evidence in that regard.

The Division's practice as it relates to CTT meetings does not violate the collective agreement. The Division was entitled to require teachers to attend CTT meetings during scheduled "prep times." There was no need to employ an implied term to reach that conclusion, and it then follows that the three part test formulated in the *Winnipeg Teachers'* case is irrelevant to our determination.