IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF AN ASSOCIATION POLICY GRIEVANCE

BETWEEN:

THE WINNIPEG SCHOOL DIVISION

- and -

THE WINNIPEG TEACHERS' ASSOCIATION OF
THE MANITOBA TEACHERS' SOCIETY

****

AWARD

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WILLIAM D. HAMILTON .....CHAIRPERSON
MEL MYERS, Q.C.....ASSOCIATION NOMINEE
ROB SIMPSON ..... DIVISION NOMINEE

APPEARANCES

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THE MANITOBA TEACHERS' SOCIETY
(hereinafter referred to as the "Association")

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AWARD

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(I) GENERAL COMMENTS AND IDENTIFICATION OF ISSUES

This Grievance came before the arbitration board (the "Board") under the provisions of the 2003-2005 collective agreement (the "Agreement") (Ex.1) between the parties.

The hearing was held on May 17 and June, 9 of 2005.

The parties were advised that the Board members had taken their Oaths of Office. Exclusion of witnesses was sought and ordered.

The parties agreed that the Board been properly constituted under the Agreement and had jurisdiction to determine the matters at issue.

On March 23, 2004, the Association filed a policy grievance (Ex.2) in which the Association grieved:

> "…that the Division is misinterpreting, misapplying and/or violating the provisions of the Collective Agreement, and in particular Article 1 and Article 20.03,and Section 80 of *The Labour Relations Act*, by assigning specific duties to teachers at Elmwood High School, during patriotic exercises taking place prior to the school opening time of 9:00 a.m., thereby increasing the instructional day beyond 5½ hours, without the agreement of the Association."

As to remedial relief, the Association requests:

> "
>
> 1. A declaration that the Division has misinterpreted, misapplied and/or violated the provisions of the Collective Agreement and *The Labour Relations Act*.
>
> 2. An Order that the Division compensate any teachers who have performed such duties in excess of 5½ hour instructional day set out in Article 20.03 of the collective agreement.
>
> 3. An Order that the Division cease and desist from the assignment of duties as set out in the grievance.
>
> 4. Any other remedies that are just and reasonable in the circumstances."

On May 3, 2004, the Division responded to the Association stating that there had been no violation of the Agreement (Ex.3).

For some years prior to the 2003/2004 school year, Elmwood High School ("Elmwood") conducted its "opening exercises" at 9:00 a.m. This coincided with the start of the first instructional period for students. The expression "opening exercises" has traditionally encompassed and still encompasses the playing/singing of the first verse and chorus of "O'Canada" and announcements to the student body and teachers over the P.A. system. The singing of "O'Canada" on each school day is required by law. Commencing in September of the 2003/2004 school year, opening exercises at Elmwood were scheduled to begin at 8:55 a.m. The timetables for both teachers and students were changed to reflect "8:55 - 9:00 opening exercises" with the first period of classes commencing at 9:00 a.m. This regime has continued to the present time.

Article 20.03 of the Agreement states:

> "The instructional day, exclusive of midday intermission, shall be five and one-half (5½) hours or such time as may be determined by the Minister of Education and shall be worked consecutively except where alternative arrangements are agreed to by a representative of the Division, a representative of the Association, and the Teacher."

The Association claims that Elmwood improperly extended the instructional day by 5 minutes because opening exercises properly belong within the parameters of the "instructional day", which commences at 9:00 a.m. Under Article 20.03, this extension cannot be made unilaterally. The Association advanced a number of arguments in support of this position and they will be fully discussed in this Award. The Association's position rests on a number of fundamental and inter-related assertions, including (i) teachers are required to physically preside over the students in the classrooms in order to maintain order during opening exercises and these duties differ from the general supervisory duties which teachers undertake from 8:45 a.m. to the start of the first class; (ii) there is an "instructional" element to opening exercises, particularly given that the

singing of "O'Canada" is mandated by law; and (iii) there is no express exclusion of opening exercises as there is for "lunch" in either Article 20.03 or the relevant regulations, leading to the reasonable inference that opening exercises are included in the "instructional day". The Association says that this additional 5 minutes would equate to an additional 3 days of work for the Elmwood teachers over a school year and they ought to be compensated on this basis.

To put its position in perspective, the Association does not challenge the right of the Division to determine the opening and/or closing hours of a school day nor does it dispute the fact that the teachers at Elmwood are required to report for duty and be present in the school at 8:45 a.m. However, this first 15 minutes (for which teachers are paid) is neither part of the "instructional day" nor is it reflective of the predominant "practice" which has been in effect for many years at the vast majority of Division schools. The Association also points to a recent agreement between the Association and the Division regarding the "instructional day" at Kelvin High School ("Kelvin") as a clear example of the manner in which an instructional day can be properly changed by mutual agreement.

For its part, the Division asserts that the Board has no jurisdiction to dictate when opening exercises take place. There is no provision in the Agreement to which the Association can point in support of its position. To award any additional compensation on account of the fact opening exercises are now held from 8:55 to 9:00 a.m. would constitute an amendment to the salary scale because teachers receive an annual salary. They are not paid on an hourly basis. The teachers at Elmwood are already being paid for the 15-minute period when they are required to be on duty. It matters not that opening exercises take place within this initial period. The decision by Elmwood to hold opening exercises at 8:55 a.m. for the 2003/2004 school year was a reasonable one.

The Division cautions that the Board must recognize the clear difference between a "school day" and an "instructional day". The Division says that the "instructional day" relates to the time when the students must be in the classroom receiving instruction. The term "instructional day" is "student" focused and does not define the work day for teachers. Other provisions in the Agreement and the applicable statutory regime must be examined for the latter purpose. Teachers are under a legislative and contractual duty to maintain order in the school(s) between 8:45 and 9:00 a.m. The scheduling of opening exercises during this first 15 minute period is not in violation of the Agreement because teachers have to be in the classroom to receive students at 8:45 a.m. in any event.

The Division also relies on the (past) practice which has existed and still exists in some schools where, to the knowledge of the Association and/or its executive, opening exercises have been held prior to the commencement of the first class. This practice, argues the Division, provides assistance as to the proper interpretation of "instructional day" and it can be helpful in resolving any ambiguity the Board may find. It also rebuts any inference that the Division suddenly and without warning changed the "rules of the game". As to the recent Kelvin agreement, the Division says that its terms, when read as a whole, supports the Division's position.

Notwithstanding that the term "instructional day" is used in both the Agreement and the relevant statutory provisions, the fact is that this term is not expressly defined in either source. This means that we must have regard to the broader legislative context under which the Division and teachers function.

(II) RELEVANT PROVISIONS OF THE AGREEMENT AND THE APPLICABLE STATUTES/REGULATIONS

In order to put the evidence and the submissions of the parties in their proper context, it is useful to quote and/or summarize the relevant Agreement and statutory provisions at the outset.

(a) ***The Agreement***

Article 20, in its entirety, states as follows:

> "20.01 *Within the instructional day* the Division shall provide a minimum of one hundred and eighty (180) minutes of preparation time for each full time elementary teacher and a minimum of two hundred and forty (240) minutes of preparation time for each full time secondary teacher per six (6) day cycle. Preparation time shall be scheduled in blocks of not less than fifteen (15) minutes.
>
> 20.02 Part time teachers shall be provided preparation time on a pro rata basis based on their percentage of contract.
>
> 20.03 *The instructional day, exclusive of the midday intermission, shall be five and one-half (5½) hours or such time as may be determined by the Minister of Education and shall be worked consecutively except where alternative arrangements are agreed to by a representative of the Division, a representative of the Association and the teacher.*
>
> 20.04 The school year shall be two hundred (200) days or such number of days as may be determined by the Minister of Education.
>
> 20.05 The Division shall determine the hours of opening and closing of the *school day*.

> 20.06 The Division agrees not to petition the Minister of Education to extend the instructional day or the school year without the agreement of the Association." (our italics).

Attached as an Appendix to the Agreement is a **CODE OF RULES AND REGULATIONS** (the "*Code*") (Ex.8) which covers a variety of topics. Section 2.4 of the *Code* addresses "**Duties of Teachers**" in the following terms:

> "Teachers shall carry out their duties in accordance with the regulations of Manitoba Education, Citizenship and Youth and of the school system under the direction of the principal.
>
> 1. Teachers shall be responsible for taking all reasonable precautions to safeguard the health and general well-being of pupils in their charge and for any or all pupils of the school as assigned by the principal of the school. They shall enforce the rules governing the conduct of pupils as such rules may be prescribed by Manitoba Education, Citizenship and Youth, the School Board, the Superintendent, or the principal. They shall establish conditions and practices in their classrooms that will contribute to the physical and mental health of the pupils and they shall report promptly to the principal any serious accident or illness affecting pupils in their charge.
>
> 2. *Teachers shall register in person in their respective buildings and be on duty at least fifteen (15) minutes before the opening hour in the morning and five (5) minutes before the opening hour in the afternoon.*
>
> 3. Teachers shall be responsible for the order in their rooms and the adjacent hall, and during the assembling or dismissing of the school shall, under the direction of the principal, supervise the movement of pupils to and from the room." (our italics)

That the legislation and regulatory regime outside of the Agreement must be considered in tandem with the Agreement is made clear by Article 4 of the Agreement, which states:

> "*This agreement is made subject to the provisions of The Public Schools Act, The Education Administration Act and*

> *the regulations made thereunder*. Except as hereinafter provided, the regulations, By-laws and Code of Rules shall remain in force during the term of this agreement and it is understood and agreed that no changes shall be made in forms of such agreements or in the said regulations or By-laws or in the Code of Rules of the Division which affect the terms or conditions of employment of teachers by the Division except by agreement of the parties hereto and subject to the approval of the Minister under *The Public Schools Act*, if such approval is required." (our italics)

The salary schedules for teachers are found in Article 9 of the Agreement. There is no need to summarize this remuneration structure because the parties are familiar with it. The critical point is that teachers are paid a "basic annual salary" depending on their years of teaching experience and assigned Class.

The limitations on the Board's jurisdiction are found in Article 8.02, as follows:

> "The decision of the arbitration board…shall be limited to the dispute or question contained in the statement or statements submitted by the parties, and the decision shall not change, add to, vary or disregard any provision of this agreement."

(b) ***The Legislative Regime***

The Public Schools Act CCSM Ch.250 [the "*PSA*"] governs all aspect of public education in the Province, including the duties and responsibilities of school divisions and teachers. Section 96 of the *PSA* outlines the duties of the teacher. These duties include:

> (a) teach diligently and faithfully according to the terms of his agreement with the school board and according to this *Act* and the Regulations;

(b) …

(c) maintain order and discipline in the school;…"

The School Days Hours and Vacations Regulation [the *"PSA Regulation"*] was promulgated pursuant to the PSA. Section 1 of the *PSA Regulation* defines a **school year** to mean the period beginning on July 1 and ending on June 30th of the next year. Section 2 of the *PSA Regulation* defines the terms and semesters which fall within the parameters of a school year. Section 3 defines the number of school days which comprise a school year. During the 2003/2004 school year this Section prescribed that there must be 198 school days. Section 5 of the *PSA Regulation* addresses "**School hours"** and states, in its entirety, as follows:

> **"5(1)** The instructional day in a school must be not less than five and one-half hours including recesses but not including the midday intermission, unless the minister gives specific written approval of other arrangements.
>
> **5(2)** The school board may by resolution recorded in its minutes, determine the hours of opening and closing of the school day and, subject to this section, the time and duration of the midday intermission and recesses.
>
> **5(3)** Pupils in grades Kindergarten through VI must be given a midday intermission of at least 45 minutes and not more than one and one-half hours.
>
> **5(4)** Pupils in grades Kindergarten through IV must be given a recess of at least 10 and not more than 15 minutes each morning and afternoon.
>
> **5(5)** Pupils in grades other than Kindergarten through IV may, at the discretion of the school board, be given a recess of at least 10 and not more than 15 minutes each morning and afternoon.
>
> **5(6)** If an instructional day is less than five and one-half hours because students have been dismissed for a staff

meeting or a professional development activity, the lost time must be;

(a) deducted from the 10 days set aside for teacher in-service and related matters under subsection 8(1); or

(b) added to one or more instructional days that is extended beyond five and one-half hours." (our emphasis)

The other important statute is *The Education Administration Act* CCSM Ch.10 (the "*EAA*") and the regulations passed thereunder. Section 39 of the **Education Administration Miscellaneous Provisions Regulation** (the *"EAA Regulation"*) states as follows:

"General responsibilities
39 A teacher is responsible for

(a) teaching the curriculum prescribed or approved by the minister;

(b) providing an effective classroom learning environment;

(c) maintaining order and discipline among pupils attending or participating in activities that are sponsored or approved by the school, whether inside or outside the school;

(d) advising pupils as to what is expected of them in school, reviewing their assessments with them, and evaluating their progress and reporting on that progress to parents;

(e) administering and marking any assessment of pupil performance that the minister may direct, in the manner that the minister directs;

(f) ongoing professional development."

Section 40 of the *EAA Regulation* states:

> "A teacher must be on duty in the school at least 10 minutes before the morning session begins and at least five minutes before the afternoon session begins, unless prevented from doing so by exceptional circumstances." (our emphasis)

Under the authority of the *EAA*, the **Schools Patriotic Observances Regulation** has been promulgated (the "*Observances Regulation*"). Section 2 of the *Observances Regulation* states:

> **"Opening and closing of school**
> **2(1)** At the opening of school on each day on which the school is in regular operation for instruction, the pupils shall sing the first verse and the chorus of "O'Canada".
>
> **2(2)** At the close of school on each day on which the school is in regular operation for instruction, or at the close of any opening exercises that the school may conduct, the pupils shall sing the first verse of "God Save the Queen".
>
> **2(3)** The singing prescribed in subsections (1) and (2) shall be done by the pupils in individual classes or in assembly, assisted by any means approved by the principal.
>
> **2(4)** While the singing prescribed in subsections (1) and (2) is taking place, all pupils shall stand erect in an attitude of attentiveness, excepting only those pupils who are excused by the board on medical grounds or other grounds satisfactory to the board." (our emphasis)

(III) THE EVIDENCE

The Association called **Mr. Henry Shyka** ("Shyka") who, since 1989, has been a Staff Officer with the Manitoba Teachers' Society. He has been the business agent for the Association since 1994. Shyka is a teacher by profession.

The Division called **Ms. Janet Schubert** ("Schubert") who, since January of 2002, has been the Chief Superintendent of the Division. From 1990 to 2002 she was a District Superintendent (Central Division). Prior to 1990, she was an Assistant Superintendent for secondary schools.

Based on the testimony of the witnesses and the Exhibits filed, most of the material facts are not in dispute. The material facts can be summarized under a number of topics.

Article 20 and Section 2.4(2) of the Code

1. Article 20, as it is currently worded, (p.6, *supra*) was first agreed to by the parties in the spring of 1999 and has remained unchanged since that time. At the time Article 20 was negotiated, the parties reached certain understandings regarding its operation (see Exs. 4, 5 and 6). as follows:

> "In applying this Article, we have agreed that the time allocated for recess for students shall not be used as preparation time. We have further agreed that the Division shall ensure that all schools shall be operating in accordance with point 3 of this Article by the 2000-2001 school year.
>
> The parties agree that this Article only deals with that time or those duties which have been assigned to teachers during the instructional day as may be determined by the Minister of Education. This Article is not to be taken to address the question of whether there are or are not other assignable duties." (Ex.6)

Article 20.03 recognizes that the Minister of Education retains the discretion to change the parameters of an instructional day and the parties would have to comply with any such Ministerial directive. The proviso at the end of Article

20.03 beginning with the words "…except where alternative arrangements are agreed…" was included to recognize the fact that there may be situations where a variance to the instructional day will be required and where it would be beneficial to all parties to make the variance" (evid. of Shyka).

2. While Section 40 of the *EAA Regulation* states that a teacher must be on duty in a school "…at least ten minutes before the morning session begins", the parties have extended this morning duty period by 5 minutes to 15 minutes [see Section 2.4(2) of the *Code* at p.7, *supra,* and evid. of Shyka].

3. As classroom instruction at Elmwood (and other schools) commences at 9:00 a.m., an Elmwood teacher must arrive at the school at 8:45 a.m. and, during this 15 minutes, it is common ground that teachers are "on duty". Normally, teachers register their presence in the school in some manner (e.g. sign a register) and begin organizing for their day, (e.g. checking their mailboxes for memos, running off copies for classroom instruction, generally supervising students who are entering the school and moving to their individual classrooms.) During this 15 minute period, Shyka confirmed that teachers' duties can include "supervising" the behaviour of students in the hallway(s); enforcing dress codes in some schools; watching for uninvited visitors and taking appropriate action; and dealing with horseplay, harassing activity or bad language. Teachers may also interact on an informal or ad hoc basis with (a) student(s) on course material.

4. An Elmwood teacher binds him/herself to a day which commences at 8:45 a.m. and ends at 3:30 p.m. for a total of 6 hours and 45 minutes, inclusive of the lunch period. The lunch period is typically 1 hour but teachers are responsible for being "…on duty" for the 5 minutes of the lunch period which immediately precedes the opening hour in the afternoon (Section 2.4(2) of the *Code*). The Division can establish a different opening and closing time for a school. Some

schools open earlier in morning on account of transportation requirements. One example is Lansdowne School. This is permissible so long as the teacher is not tied to the school for more than 6.45 hours inclusive of the midday intermission (evid. of Shyka).

5. Prior to the 2000-2001 school year, the instructional day in the schools could exceed 5½ hours because Section 5(1) of the *Regulation* states that a school's instructional day "must be not be less than" 5½ hours. However, commencing with the 2000-2001 school year and continuing up to the present time, the Division and the Association have agreed to a fixed instructional day of 5½ hours (Article 20.03).

Background to the Elmwood Grievance

6. Shyka wrote to Schubert on January 14, 2004 (Ex.11) as follows:

> "It has come to the attention of The Winnipeg Teachers' Association that the school day was altered at Elmwood High School for the 2003/2004 school year. The change involves commencing school at 8:55 A.M. as opposed to the previous year(s), commencement at 9:00 AM. This extension has been confirmed by the Principal of the school.
>
> The Association acknowledges that the School Division can modify the opening and closing of the school, however, this is subject to the individual teacher's instructional day not being more than 5.5 continuous hours (exclusive of noon hour).
>
> By extending the day by five minutes, the instructional day has been lengthened beyond the 5.5 hours. Over the course of a school year this equals to an additional three (3) days of instruction.

> As you are aware, the Association has, through discussion with the Division, varied the length of the day in other circumstances (i.e. Kelvin).
>
> The Association is prepared to discuss altering the school day, if it can be shown it is fair and beneficial for all the parties concerned. No such dialogue occurred in the Elmwood situation. This action was unilateral on the part of the Division and in the Association's view contrary to the current Collective Agreement provisions contained in Article 20.03.
>
> The Association requests that the teachers in Elmwood be compensated for the additional instructional time provided, as a result of the Division's action. Specifically, teachers be provided with either three (3) days of personal leave with pay or equivalent salary.
>
> Further, that should the Division wish to continue the altered day at Elmwood it only do so after discussion with, and concurrence from, the Association.
>
> Should you wish to discuss this matter please contact this writer to arrange a mutually satisfactory time for a meeting."

7. Schubert responded to Shyka by letter dated February 19, 2004 (Ex.13), as follows:

> "Based on instruction from Ms. Suderman, Mr. Chochinov will clearly indicate opening exercises from 8:55 - 9:00 a.m. and instructional time starting at 9:00 a.m. on the teacher timetables.
>
> As you are aware, in accordance with the Public Schools Act teachers are required to be on duty and available to receive students in their classrooms no later than 8:50 a.m. daily. The Code of Rules attached to the Collective Agreement between the Division and the Winnipeg Teachers' Association specifies 8:45 a.m.

> The instructional day at Elmwood High School begins at 9:00 a.m. as required and is 5.5 hours in length, exclusive of the midday intermission. There has been no extension to the instructional day.
>
> In order to ensure that the instructional day begins on time, the opening exercises take place prior to 9:00 a.m.
>
> The Division does not view the action taken at Elmwood to be contrary to Article 20.03 in the Collective Agreement with the Winnipeg Teachers' Association."

8. Shyka said that the Division did not take him up on the offer to discuss altering the school day at Elmwood (see Ex.11, *supra*). He acknowledged the Division's position is that the 5½ hour instructional day begins at 9:00 a.m. and that opening exercises can take place prior to 9:00 a.m. Shyka said that if the instructional day is adjusted in this manner then there must be a corresponding adjustment made somewhere else during the day. Shyka said Elmwood is entitled to move the instructional day forward by 5 minutes in order to hold opening exercises at 8:55 a.m. but, in that event, it must end the day earlier than 3:30 p.m. (at 3:25 p.m.). No such adjustment was made at Elmwood.

An overview of Opening Exercises throughout the Division

9. There are 77 schools in the Division comprised of elementary, middle and high schools. All schools are required to hold opening exercises (i.e. singing of the first verse of O'Canada and announcements). While all schools uniformally observe the singing of O'Canada, the manner of conducting opening exercises can vary. For example, in some elementary schools, opening exercises will be conducted by the teacher in his/her own classroom where the teacher will lead the students in the singing of O'Canada and make whatever announcements are required verbally. In most schools, however, opening exercises are conducted over a PA system. Students are expected to be in the classroom for opening

exercises. Under the *Observances Regulation*, students are expected to stand at attention during the playing of O'Canada. They will then sit down for announcements. These announcements cover a variety of topics. A teacher is expected to ensure that students properly observe the singing of O'Canada at least to the extent of standing in a position of attentiveness. The teacher is also expected to keep order during the announcements.

10. Schubert confirmed that schools normally ring an "opening bell" some 5 to 10 minutes before opening exercises begin. This first bell tells the students that they can and should enter the school. During this period, teachers are responsible for observing and supervising the behaviour of students. In elementary schools, students are expected to go directly to their home classrooms after the ringing of the first bell. In high schools, students do not have to go directly to their classrooms. They may go to their lockers and engage in other activities. The limitation is that all students are expected to be in their respective classrooms for opening exercises.

11. Schubert identified 3 schedules. The first was a schedule typical of the schedule currently in effect at Elmwood (Ex.19). It reveals "… **8:55-9:00 Opening Exercises**" and shows the 5 instructional periods, the first one commencing at 9:00 a.m. Ex.20 is a "2004/05 Teacher Timetable" for an individual teacher at Elmwood. It shows the 5 periods for the day with the first period being 9:00-10:00 for both semesters. This timetable also shows the "prep" periods for this teacher and his other assignments. Filed as Ex.21 is a 2004-2005 timetable for a high school teacher at Grant Park High School ("Grant Park"). The top of this timetable states as follows:

> "**8:45 a.m.** **WARNING BELL**
> **8:50 - 9:00 A.M.** **OPENING BELL (O'CANADA, ATTENDANCE)**

NOTE: ALL STUDENTS EXPECTED TO BE IN CLASS BEFORE 8:50 A.M."

According to Schubert, this timetable shows 5½ hours of instruction following the "Opening Bell".

12. Schubert identified 9 schools which, for varying lengths of time, have conducted opening exercises prior to the start of the first instructional period. Schubert made inquiries as to how long this practice had been in existence. Her evidence was not challenged and we accept it. The schools involved and the approximate length of time opening exercises have been conducted in this manner are as follows:

? Sargent Park	9 years
? General Wolfe	13+ years
? Kent Road	22 years
? Riverview	8 years
? Grant Park	6 years
? River Heights	2 years
? Shaughnessy Park	2 years
? Elmwood	2 years
? Queenston School	Since February 2004 (when a PA system became operational)

Schubert confirmed that 68 schools conduct opening exercises within the 5½ hour "instructional day". Of the 9 schools which do not, Schubert confirmed that 4 have been holding opening exercises in this manner for 2 years or less (i.e. Queenston, River Heights, Elmwood and Shaughnessy Park), meaning that this regime started in the 2003-2004 school year. The other 5 schools have been conducting opening exercises in this manner before Article 20 of the Agreement was changed in 1999 for the start of the 2000-2001 school year.

The Kelvin agreement

13. The Division and the Association entered into an agreement relating to the length of the instructional day at Kelvin for the 2001-2002 school year (Ex.14) (the "Kelvin agreement"). The Kelvin agreement states:

> "The Winnipeg Teachers' Association agrees to waive Section 20.03 in the Collective Agreement related to the length of the instructional day. This waiver is for Kelvin High School and is subject to the following conditions:
>
> 1. The school year will be organized into two semesters of approximately equal length.
>
> 2. Teachers will teach no more than seven (7) sections in a school year. The maximum number of sections taught in any one semester will be four (4).
>
> 3. Each school instructional day shall consist of five (5) approximately equal periods.
>
> 4. Each school instructional day is to commence at 8:45 AM and end at 3:30 PM. This instructional day does not include the 15 minutes teachers are required to be in the building and available to receive students prior to 8:45 AM.
>
> 5. Each instructional day includes the:
>   (a) opening exercises (Oh Canada/Announcements, etc.)
>   (b) 55-minute meal period;
>   (c) preparation periods
>   (d) instructional periods
>   (e) other supervisory periods
>   (f) breaks between classes
>
> 6. Preparation Periods:
>
>   (a) All staff will receive a minimum of 342 minutes of preparation time every 6 - day cycle.

(b) Every effort will be made to provide all staff with one (1) preparation period per school instructional day.
(c) The break periods before and after classes cannot be counted as part of teacher's preparation time.
(d) At Kelvin High School one period/cycle is assigned to each teacher to provide resource assistance to individual students. When coverage is required, teachers are re-assigned from individual resource assignments to provide teacher coverage.

7. Attendance at any meeting scheduled during their preparation time is at the discretion of the teacher."

The parties also agreed to a number of conditions in the Kelvin agreement, as follows:

- The Kelvin agreement can be renewed annually, provided both parties agree. This has been done;

- Any deviation from the conditions outlined in the Kelvin agreement for an individual working at Kelvin can only occur after the affected teacher and the Association agree; and

- If the Division fails to comply with any of the 7 conditions, then "…Section 20.03 of the Collective Agreement will be implemented as written" (Exs.14 and 15).

14. Shyka said that the Kelvin agreement represents an "alternative arrangement under Article 20.03". The principal of Kelvin wanted to make these changes because it allowed for more flexibility for both students and teachers. Without these changes being negotiated, the instructional day would have been 17 minutes longer than 5.5 hours. The fifth paragraph of the Kelvin agreement specifically includes opening exercises as part of the "instructional day". Under the Kelvin arrangement, teachers

are expected to be in the school and available to receive students at 8:30 a.m. (evid. of Shyka).

Cecil Rhodes

15. Shyka said that, to his knowledge, Cecil Rhodes was the only school where the question of opening exercises taking place prior to 9:00 a.m. had been an issue between the parties. As far as he knew, this practice is no longer in place and the issue at Cecil Rhodes has been resolved. In her evidence, Schubert said the fact that opening exercises were starting prior to 9:00 a.m. at Cecil Rhodes was brought to her attention by Shyka. Schubert said that other matters regarding Cecil Rhodes have also been brought to her attention including the fact that the instructional day is less than 5½ hours at that school regardless of the opening exercise issue. She acknowledged this will be an issue which must be addressed by both sides.

16. Questions relating to opening exercises at Cecil Rhodes had been discussed at a number of President's Committee (the "*Committee*") meetings since March of 2001. The *Committee* has representation from both the Association and the Division. The President, Vice-President and Business Agent (Shyka) are normally present on behalf of the Association and the Superintendent and Director of Human Resources will typically be present on behalf of the Division. Minutes of *Committee* meetings are kept by the Association but they are sent to the Division for verification prior to the next meeting. Schubert agreed that if a matter is minuted then it was discussed. Cecil Rhodes was first discussed at a *Committee* meeting on March 15, 2001 in that:

> "…concern was expressed about the start time of Cecil Rhodes School. O' Canada and announcements are taking place at 8:55 A.M. and the day ends at

> 3:30 P.M. The concern is that this is beyond the 5.5 hour day." (Ex.23)

17. Item 1 of the *Committee* minutes for December 12, 2001 (Ex.24) records:

> "The WTA expressed concern that the school day at Cecil Rhodes was starting early. The Association indicated that Oh Canada and announcements were occurring prior to 9:00 A.M. The Chief Superintendent stated that playing Oh Canada and the reading of announcements prior to 9:00 AM did not constitute commencing of the school day and that the practice was acceptable."

18. By memo dated January 7, 2002 (Ex.25), Schubert wrote to the then President of the Association confirming an earlier discussion regarding Cecil Rhodes, as follows:

> "The instructional day at Cecil Rhodes begins at 9:00 a.m. as required under The Public Schools Act. In order to ensure that the instructional day begins at that time it has been determined at Cecil Rhodes that the patriotic exercises take place prior to 9:00 a.m. From my discussions with a number of secondary schools, this is common practice.
>
> Since teachers are required by the *Act* to be in school 10-15 minutes prior to the beginning of the instructional day, it is not an imposition to have the patriotic exercises at this time."

19. At a meeting of the *Committee* on January 17, 2002, Schubert's memo (Ex.25) was discussed. The Association expressed "…some concern related to this practice" (Ex.26). The other concern was the scheduling of prep time in a block prior to the instructional day.

20. At a *Committee* meeting held on February 21, 2002 (Ex.27), the Division, through Schubert, spoke to the opening exercise issue in more general terms, as follows:

> "The WSD indicated that:
> - If the instructional day starts at 9:00 AM. teachers would be required to be present at 8:45 AM.
> - Teachers cannot be required to be present earlier than 8:45 AM for a 9:00 AM instructional start.
> - Between 8:45 AM and 9:00 AM the school can play Oh Canada and begin the day.
>
> The WTA expressed concern about the playing of Oh Canada prior to the start of the instructional day and indicated they would be reviewing the issue further."

21. At a meeting of the *Committee* on March 21, 2002 (Ex.28), a number of general concerns regarding the Cecil Rhodes timetables were raised by the President of the Association. He noted that it could not be determined, from those timetables, when the school day started and when O'Canada was played. Schubert indicated that the school itself should be contacted by the Association to clarify the information.

Other Evidence

22. On cross-examination, Shyka identified a proposal made by the Association during 2003 bargaining. He believed that it was a proposal to amend the Agreement. *Association Proposal* #13 (Ex.17) stated as follows:

> "Replace 20.05 with:
>
> (a) No teacher shall be assigned part of the five and one half (5½) hour instructional day outside the standard work day. The standard workday shall

> commence at 8:45 a.m. and be no longer than 6 hours and 45 minutes. Where the need to vary this start time exists such a start time shall be by agreement with the Association.
>
> (b) Each standard workday shall include:
>
> - WSD policy to be on duty 15 minutes prior to class start to receive students;
> - Requirement to be on duty 5 minutes prior to commencement of afternoon classes;
> - Opening exercise (O Canada, Announcements, etc.);
> - Attendance;
> - 55 minute meal period;
> - Preparation periods;
> - Instructional periods;
> - Other supervisory periods;
> - Breaks between classes;
> - Any mandatory P.D. activities;
> - Staff meetings."

Shyka confirmed this proposal was intended to replace existing Article 20.05 under which the Division has the right to determine hours of opening and closing of the school day (see p.7, *supra*). He confirmed Proposal #13 was intended, among other things, to standardized the start time in all schools at 8:45 a.m. The proposal did not involve any change to the 6 hours and 45 minutes when a teacher must be on duty and it included opening exercises in the definition of the proposed "standard workday".

23. Schubert said that each school in the Division has one or more members on the Association's Council. The Council meets monthly. The executive of the Association is comprised of its table officers and executive members. Schubert said members of the Association's executive were teaching in some of the 9 schools where opening exercises have been conducted prior to 9:00 a.m. for

some years. She referred to Mr. Paul Enns (General Wolfe), Ms. Melanie Hall (General Wolfe), Ms. Judith Lichman (General Wolfe), Mr. Gary McGibney (Grant Park) and Ms. Janet Major. These persons were on the Council's Executive prior to 1999 and/or shortly thereafter. Schubert said she believes some of them still serve in that capacity.

24. On cross-examination, Schubert identified the minutes of a *Committee* meeting taken on November 17, 1994 (Ex.22) when **Mr. Jack Smyth** ("Smyth") was the Superintendent. These minutes record:

> "Thank you for your memo to school administrators re opening time. Final point - does instructional day includes attendance, announcements, etc.? Mr. Smyth's response - "yes"."

Schubert said she was familiar with the memo referred to in this minute and it was ultimately incorporated into the Administrative Handbook (Ex.16). *There is no need to reproduce this excerpt here because it makes no explicit reference to opening exercises.* Schubert agreed the statement attributed to Smyth in Ex.22 indicated that an instructional day included "…attendance, announcements, etc." but she was not sure what Smyth meant by "…instructional day". She pointed out that this meeting took place in 1994, long before Article 20 was part of the Agreement in its current form. In 1994, an instructional day had to be at least 5½ hours. The concept of "instructional day" was not referred to in the collective agreement prior to 2000.

25. Schubert agreed that the Association's consistent position (through the *Committee*) from March 1, 2001 to March of 2002 has been that opening exercises are included in the term "…instructional day". She was not sure what Shyka meant when he said that the Cecil Rhodes matter has been resolved.

Whatever other issues may still be outstanding at Cecil Rhodes, Schubert agreed that Cecil Rhodes is a school where opening exercises are not included in the 5½ hour day.

26. Schubert identified two timetables for Mr. Rob Bell ("Bell"), a teacher at Elmwood. One is Bell's schedule for the first semester of the 2002-2003 school year (Ex.29). It shows the first period beginning at 9:00 a.m. Bell's schedule for the 2003-2004 school year (Ex.30) shows that the school day (first period) commences at 8:55 a.m. in both semesters. Schubert agreed that the students are expected to be in the classroom at 8:55 a.m. From Schubert's perspective, this allows the instructional day to start at 9:00 a.m. Schubert confirmed that teachers of all grades will show movies and videos in the classroom to students and, while doing so, they are required to remain in the classrooms in order to supervise the students. She agreed that junior high and high school students move from one class to another during the course of a school day and the teachers are required to maintain order in both the classrooms and the hallways during those changeovers. She agreed that these "changeovers" are part of the 5½ hours.

27. On her re-examination, Schubert said the terms "school day" and "instructional day" appear to have been used interchangeably in the *Committee's* minutes. Schubert never received a response from Mr. Henry Pauls to her January 7, 2002 memo (Ex.25 – para 18, *supra*) and no grievance was filed by the Association at that time.

(IV) POSITIONS OF THE PARTIES

There is no Manitoba decision which *directly* addresses the question raised in the Grievance. Both counsel relied on decisions from Ontario where

arbitrators have had to decide whether certain duties/activities assigned to teachers fall within the parameters of a "school day", an "instructional day", or an "instructional program", as those terms are used in the (similar) Ontario legislative regime and in the collective agreements which were at issue in those cases. While counsel differed on the relevance of many of these decisions to the precise issue before us, they both agreed that the Ontario decisions must be analyzed carefully before we can extract a principle or line of reasoning which provides meaningful guidance. We have reviewed these authorities carefully and will address them in our summaries of the parties' positions. In some instances, we have added our own ***Comments*** to the summary of an individual case.

(a) The Association

Prior to the 2000-2001 school year, there was no provision in the collective agreement(s) addressing the parameters of an "instructional day". This was left to Section 5(1) of the *Regulation* which simply stated that the "…instructional day in a school must not be less than 5½ hours including recesses but not including the midday intermission…". So, prior to 2000, the Division could establish an instructional day which exceeded 5½ hours. However, during the 1999 negotiations, the parties negotiated Article 20 for the 2000-2001 school year. The parties agreed that the "instructional day… *shall be* 5.5 hours" and this had the effect of negating the discretionary phrase "…not less than" in Section 5(1) of the *Regulation.* It is also a feature of the Agreement (i.e. the *Code*), that a teacher must be on duty at least 15 minutes before "the opening hour" in the morning. This varies Section 40 of the *EAA Regulation* which requires that a teacher must be on duty in the school "… at least 10 minutes before the morning session begins". While the Division still retains the discretion to decide the "opening" and "closing" times for a school, this discretion is limited by Article 20.03 and Section 2.4 of the *Code*.

Mr. Smorang submitted Section 2 of the *Observances Regulation* is the key provision because it requires that the opening exercises must be conducted in the classrooms. Students must be in attendance (unless excused) and they must stand erect and be attentive. The teacher is responsible for ensuring the opening exercises are conducted in accordance with the *Observances Regulation*. By reason of a longstanding practice, opening exercises not only encompass the singing of O'Canada but also include announcements. Opening exercises occur immediately prior to the commencement of a student's first class. In a high school like Elmwood, students are required to be in the classroom where their first subject is to be taught. In elementary schools, the opening exercises will be conducted in the students' home room where the teacher him/herself may lead the singing and read the announcements. Regardless of the format, there is no dispute regarding the expectations of a teacher during opening exercises. The teacher is responsible for ensuring that the students are present; that they are orderly; and that they properly observe the legislated standard(s). These responsibilities are reflected in Section 39(c) of the *EAA* and Section 2.4(3) of the *Code, supra*.

Mr. Smorang submitted that we can usefully refer to 3 benchmarks or blocks of time. The first block is what Mr. Smorang called "the bell" (i.e. the opening or 1st bell) which rings a few minutes prior to opening exercises and during which time the students are allowed and expected to enter the school. This time is rather unstructured although teachers do have supervisory duties commencing at 8:45 a.m. The second block is the beginning and conduct of opening exercises. The third is when the teaching of the first subject actually commences. For our analytical purposes, Mr. Smorang said that the "bell" block can be taken to be the first 15 minutes during which time teachers have general supervisory responsibilities for the conduct of students. The critical question, said Mr. Smorang, is whether opening exercises (the second block) falls within the bell block or the third block. In answering this question, we must bear in mind the nature of opening exercises, regulated, as they are, by law and practice

(announcements). It was submitted that opening exercises properly fall within the third benchmark (or block) and are therefore part of the 5½ hour instructional day.

Mr. Smorang submitted that a number of Ontario decisions support the Association's position that opening exercises are part of the instructional day. In this regard, he referred to the following authorities:

1. **Re York Region District School Board v. Elementary Teachers' Federation of Ontario (Letter Grievance) [2000] OLAA No.562 (Beck)** ["*York*"]. Here, the parties had agreed to a Letter of Intent which stated:

> "The Board will make every reasonable effort to establish a standard school day of 300 instructional minutes in each school, effective September 1, 1999." (our emphasis)

The Federation grieved that the school board had failed to calculate the commencement of the school day "…from the time immediately following the first entry bell" which rang at 8:50 a.m. If the "instructional minutes" were counted from 9:00 a.m. to 3:30 p.m., excluding 30 minutes for morning and afternoon recess and 60 minutes for lunch, then there were 300 minutes of instruction. However, if instruction began when the first bell rang at 8:50 a.m. then there would be 310 minutes of instruction. This reflected the Federation's position. The school board argued that the instructional day commenced "…once the students are in class and ready for instruction and not when the first bell rings for student entry into the school" (p.1). There was a separate provision in the collective agreement (Article E.5.1) which stated that teachers were entitled to:

> "…the equivalent of 120 minutes per week of preparation time per week during the instructional day (the time between the students' entry into school for the day immediately following the first entry bell and the students' dismissal from school for the day, exclusive of lunch and recess breaks) free from supervisory, teaching or other assigned duties…".

The Federation argued that the "…300 instructional minutes" in the Letter were equivalent to the instructional day, as that term was defined for preparation purposes in the collective agreement (i.e. "bell-to-bell", exclusive of recess and lunch breaks). The board argued that the definition of instructional day for "prep" time purposes was a distinct concept and differed from the instructional minutes referred to in the Letter, which focused on student instruction.

The evidence established that teachers moved into the hallway and observed students from the time the students entered the building after the 1st bell. What the teachers did in *York* is not substantively different from what the teachers do at Elmwood during the first 15 minutes (now 10 minutes).

Arbitrator Beck rejected the Federation's position that the definition of instructional day for prep time purposes applied to the "…300 instructional minutes" in the Letter. He arrived at this conclusion by applying standard rules of interpretation, the essence of which is found in para.29 of *York*, as follows:

> "One cannot look at the collective agreement as a whole, and particularly Article E.5.1 and the Letter and conclude that the Board agreed that for the allocation of 300 instructional minutes, the definition of the instructional day

> for prep time was what was agreed to. Nor is the Federation in a position, given the language which it agreed to, to say that that is what it bargained for and what it received in the Letter. Moreover, it is, in my view, equally important to note that in Article E.5.1 that prep time is to be free from supervisory, teaching or other assigned duties. Those are 3 specific areas of teacher responsibility, and during the bell-to-bell period, a teacher's prep time is to be free of those responsibilities. The Letter, on the other hand, refers to "instructional minutes", which in my view, on the basis of all of the evidence, refers to actual teaching time. I am satisfied that what takes place between when the morning bell and the students are seated in the classroom is supervisory rather than teaching activities. It is clear that the instructional day in E.5.1 is made up of supervisory, teaching or other assigned duties. It would be extremely strained to say that "…300 instructional minutes" has the same 3 components and is synonymous with the "instructional day" when those different terms are used in the same agreement, and one of the terms is defined."

Arbitrator Beck concluded that the first 10 minutes following the first bell did not fall within the term "300 instructional minutes". He dismissed the grievance.

Mr. Smorang relied on *York* because it records the school board accepted the fact that the initial 10 minutes was to get students settled, "…thereby maximizing instruction time which started with opening announcements" (Para.13) (our emphasis). Therefore, argued Mr. Smorang, the school board accepted that opening exercises have a learning component and were considered as part of the 300 minutes of "instructional time"

Comments: *There is no doubt York proceeded on the basis that opening exercises (announcements and O'Canada) were regarded as "instructional minutes" by the school board, meaning that the characterization of opening exercises was not an issue before Arbitrator Beck. York really focused on the equivalent of the 8:45 to 9:00 a.m. period at Elmwood (pre-2003-2004 school year) when teachers were/are required to be on duty for supervisory purposes. Arbitrator Beck referred to the decision of Arbitrator Gail Brent in* ***Board of Education for the City of London and The Branch Affiliates of the Federation of Women Teachers' Association of Ontario (1992, unreported)*** *["London"] where, on the facts of that case and the wording in the collective agreement, she found that the "instructional program" began when the 1st bell rang for morning assembly. However, the language in the London agreement referred to "…a standard school day of 300 instructional minutes". Arbitrator Beck noted that the provisions in the London agreement were different and he neither agreed nor disagreed with Ms. Brent's conclusion;*

2. **Re Durham District School Board and Elementary Teachers' Federation of Ontario, Durham Teachers' Local (November 27, 2002, unreported, Beck)** ["*Durham*"]. Mr. Smorang submitted that this case was directly on point, both factually and legally. The relevant clause in the *Durham* collective agreement read as follows:

> "The Board agrees to implement an instructional day of 300 minutes, excluding recess and lunch, effective for the commencement of the 2002-2003 school year." (our emphasis)

The issue in *Durham* was whether the opening exercises mandated under *The Education Act of Ontario* and accompanying regulations (collectively hereinafter called the "*Ontario Act*") were included in the 300 minutes. The union asserted

that opening exercises must be included because the clause only excluded recess and lunch (similar to Article 20.03 here, said Mr. Smorang). The school board said opening exercises were not included and relied, first, on an alleged estoppel (based on negotiating history – ultimately rejected) and, secondly, it argued that it would be illegal ("contrary to law") to interpret an "…instructional day of 300 minutes" to include opening exercises. Under the *Ontario Act* every school board had to ensure that "opening or closing exercises are held in each school". The regulations stated that opening exercises included the singing of God Save The Queen, scriptural writings, including prayers or secular writings that impart social, moral or spiritual values and, by practice, they also included announcements over the PA system. The union stressed that the *Ontario Act* stated "…the length of an instructional program shall not be less than 5 hours a day, excluding recesses or scheduled intervals between classes". As the regulations specifically contemplated the holding of opening exercises but did not exclude them from the definition of "instructional program", the union argued this was not an oversight by the Legislature, meaning that the parties were free to address the characterization of "opening exercises" in collective bargaining. The school board argued that the language of the *Ontario Act* and the regulations meant that a teacher was only providing instruction within the allotted 300 minutes when teaching an assigned course under a regular timetable and there was no specific course being taught during opening exercises.

Arbitrator Beck referred to and commented on a number of cases. He specifically disagreed with the approach taken by Arbitrator Lavery in **Re Conseil Scolaire de District Catholique du Centre Est de l'Ontario and L'Association des Enseignantes aes des Enseignantes Franco-Ontarienes (1998) 83 LAC (4th) 238 (Lavery)**["*Scolaire*"] which was filed by Mr. Parkinson, *infra*.

Arbitrator Beck relied on statements made by Arbitrator Brent in *London.* However, there was no dispute in *London* that opening exercises were included in "instructional time". The only issue in *London* was the characterization of time between first bell and the commencement of opening exercises. Mr. Beck referred to the following comments from *London*:

> "Clearly, there can be a distinction made between an instructional day on the one hand and the time during which there is actual delivery of instruction on the other. The regulations to which I have been referred recognize this by not excluding from the calculation of "instructional program" the incidental time which is taken when students move in to or between classes and only specifically excluding recesses and scheduled intervals. Therefore, it can be concluded that an instructional program can include everything that is scheduled to occur in the school day, save for lunch, recesses and scheduled intervals between classes."

And then, Arbitrator Brent stated:

> "It would certainly appear that there is nothing in the Regulation which specifically prohibits a consideration of either opening exercises or the movement into class after the bell as part of the instructional program or instructional day for the purpose of calculating the 300 minutes. Both of those activities take place after the bell is rung to indicate that school is in session and it is not unreasonable to presume that once school is in session the instructional program has begun."

Arbitrator Beck determined that "…the inclusion of opening exercises in the 300 minutes of the instructional day is <u>not illegal</u> in the sense that it is contrary to the

terms of the *Ontario Act*" (p.8 of *Durham*). Adopting Arbitrator Brent's reasoning, *supra*, Arbitrator Beck ruled that opening exercises are to be counted in the calculation of the 300 minute instructional school day at the elementary schools. At pp.10 and 11 he expressed his *ratio* as follows:

> "It is far too narrow a view, in my opinion, of instruction and the teachers' role, to argue that instruction is not taking place unless there is a scheduled course actually being taught. The teacher is responsible for presiding over the classroom once opening exercises begin, and those exercises consist of a number of factors which might well be thought to have an instructional element looked at in broader terms, particularly in the elementary schools. Moreover, the announcement segment of opening exercises might well have a particular instructional element in terms of how students perceive and understand the particular announcement, whether from the Principal over the loudspeaker or from the teacher, and how they react to them." (emphasis added)

Arbitrator Beck ordered that the teachers be recompensed for the opening exercise time which had been excluded from the 300 minutes and for which they "…have not been paid". He reserved on quantum.

***Comments**: It is important to note that the predecessor collective agreement between the parties in Durham read as follows:*

> *"The length of an instructional school day shall be a maximum of 310 minutes, excluding recesses, lunch break and 5 minutes for opening exercises." (our emphasis)*

Arbitrator Beck referred to the changes which the parties made to this clause and correctly observed that opening exercises were no longer excluded by the parties in the new clause (supra). Subject to the school board's argument that it was "contrary to law" to include opening exercises in the 300 minutes, this change in wording revealed that the parties must have intended to include opening exercises in the new clause.

3. **Re Durham District School Board and Elementary Teachers' Federation of Ontario (2003) 119 LAC (4th) 417 (Beck)** ["*Durham #2*"] where Arbitrator Beck reconvened to address the question of remedy under *Durham*. The union argued that their members were, in fact, teaching for 305 minutes as a result of the earlier decision and not 300 minutes, as agreed. They were entitled to compensation for these extra 5 minutes. The school board argued that no additional time had been added to the school day meaning that there was no additional work time for which compensation ought to be awarded. The school board relied on the fact that teachers receive an annual salary according to their placement on a salary grid and there is no dollar compensation for teaching tasks or teacher assignments, instructional program activity, prep time, activities with students, or any meetings with parents that might take place outside of a normal school day. It was inappropriate to assign a dollar value to an extra 5 minutes of instructional time. For the reasons given at pages 424 to 426, Arbitrator Beck awarded each of the affected teachers an additional day's pay which approximated the value of the extra 5 minutes for the 67 or 68 days in question; and

4. **Re Toronto District School Board and Elementary Teachers' Federation of Ontario (Preparation Time Grievance) [2004] OLA No.423 (Newman)** ["*Toronto*"]. This is a "bell-to-bell" case. The teachers grieved that the 300 minutes which comprised the "…normal daily instructional program" began when

the entry bell rang and the children entered the school. The school board argued that "…the count begins with the start of opening exercises". So, like *York*, the dispute in *Toronto* was a question of characterizing the essence of a teacher's activity "…between the entry bell and the start of opening exercises?" (p.22). After referring to many authorities, the arbitration board concluded that the "…essential character of the period is more supervisory and transitional than instructional" and the period in dispute did not fall within the term "instructional program". The applicable *Ontario Regulation* prescribed that the length of the "instructional program" for each school day for pupils could not be less than 5 hours a day excluding recesses and scheduled intervals between classes.

Mr. Smorang again relied on the fact that the school board in *Toronto* (like *York*) agreed that opening exercises signalled the start of the instructional program and were therefore included in the 300 minutes of instructional program time. At para.29, the rationale for the school board's position on opening exercises was summarized as follows:

> "When the 300-minute cap was introduced into the collective agreement, the TDSB focused attention on the issue. From its perspective, the incorporation of the instructional program cap achieved one of its bargaining goals - the desire to achieve consistency in calculation of the instructional program across this new and diverse board. In some areas, the TDSB recognized, instructional program was calculated as beginning with the entry bell. In others, it began with opening exercises. Both from the perspective of rendering administration of the collective agreement consistent and protecting the students' learning, it was decided that opening exercises would signal the start of the instructional program."

***Comments**: Toronto is a lengthy award involving elementary school teachers. A number of teachers gave evidence as to their activities from the time when opening bell rings up to opening exercises. Many other arbitration decisions were discussed by the Toronto board. At Paras. 109 and 110 the board states:*

> "A review of the authorities begins with the recognition that to date, with the exception of the City of London award (i.e. *London, supra*), there is a trend in the arbitral authority that favours a view of instruction as a narrower concept than the entire time that students are in the school building. In Arbitrator Lavery's view (i.e. *Scolaire, supra*) it is delivery of programmed imparting of knowledge to a group of pupils. In Arbitrator Beck's view, it would be "strained" to consider the 300 instructional minutes is composed of the same 3 elements - supervision, teaching and other assigned duties. The time between entry and the time when students are seated was, in his view, distinct from instructional minutes, and supervisory in nature (*York, supra*). In Arbitrator Herlich's view, the fact that certain periods included elements of instruction was insufficient to colour the entire period as "instructional" (*see Hamilton discussed at page 51, infra*), and in Arbitrator Knopf's view, given the language of the collective agreement before her, instructional time was something that had to be assigned by the employer to the teacher (see *Hamilton –Wentworth discussed at page 54, infra)*
>
> No prior award has concluded that the entry period is part of the instructional program. Only the City of London award allows for an interpretation of that concept broad enough to allow for that result." [*our italicized references to cases*].

The Toronto board also noted that the Ontario regulatory regime incorporated different constructs of time. The broadest concept is the "…school day" which is simply the time when school is scheduled. Within a school day, the applicable regulation contemplates an "instructional program" (undefined). This is similar to the undefined term "instructional day" in Section 5(1) of the Regulation and Article 20.03 of the Agreement. In Toronto, the board found that the term "instructional program" was the smallest unit of measurement and that it fell within the period of time when classes begin and end but it must be measured against the broader concept of the school day. When addressing the Ontario legislation the board stated at Para.121:

> "We appreciate the argument, but do not consider it consistent with the student-centred object of the Regulation. The Regulation, in our view, requires that recess and intervals between classes be excluded from the calculation of the minimum time for instructional program, but goes no further. Neither the Regulation or any governing principle of interpretation requires that instructional program necessarily be interpreted as everything else that remains once classes begin, and the students enter the building. To the extent that the City of London award expresses this view, we must respectfully disagree."

Again, there was no dispute in Toronto regarding the characterization of opening exercises per se.

Mr. Smorang urged us to conclude that opening exercises at Elmwood are part of the third block. They are part of the first instructional period. Mr. Smorang re-

emphasized that students must be present for opening exercises and the teacher is responsible for presiding over the classroom and maintaining order during opening exercises. Further, there is an instructional element to opening exercises both in respect of the national anthem and the communications to the school community. Opening exercises were not expressly excluded by the Legislature in the same manner as lunch or recess periods. If this interpretation is accepted then the "instructional day" at Elmwood clearly exceeds 5½ hours. This is prohibited by Article 20.03 unless there is a counterveiling accommodation made by the parties elsewhere during the instructional day.

On the question of "practice", it was submitted that opening exercises are regarded as part of the instructional day in 67 of the 77 schools in the Division. At Kelvin, a longer instructional day exists but this was achieved through the mutual agreement of the parties (Ex.14). In the *Kelvin agreement*, the Division recognized that opening exercises are part of the instructional day. If the Division wishes to hold opening exercises before the commencement of the 5½ hour instructional day then it is free to negotiate this with the Association. Of the remaining 9 schools, 4 began to hold opening exercises only in the 2003-2004 school year and this was the same year when the Grievance was filed. The remaining 5 schools had this "practice" in effect well prior to 1999 but this must be balanced against Smyth's 1994 statement to the *Committee* that opening exercises are included in the instructional day (Ex.24, *supra*).

It was submitted that the Association's interpretation should be accepted and that compensation be ordered for those teachers at Elmwood who have been supervising opening exercises from 8:55 to 9:00 a.m., calculated from the date of the Grievance.

(b) The Division

Mr. Parkinson submitted that the overriding issue before us is whether students are being instructed within the meaning of the applicable regulations and the Agreement when O'Canada is sung and announcements are read. He stressed that teachers are paid on a salaried basis and not by the hour. The significance of this manner of payment has been addressed by the Supreme Court of Canada and the Manitoba Court of Appeal. Many of the Ontario decisions are not applicable because they addressed different questions from the one before us. Mr. Parkinson said that the onus rests with the Association to establish that there has been a violation of the Agreement. It was also submitted that what tasks constitute "instruction" in a high school may differ from tasks which constitute "instruction" in an elementary school. No evidence was led on these differences. Many of the Ontario cases dealt with elementary schools. No teacher testified that what they do during the initial 15 minutes or during opening exercises constitutes "instruction". We are not entitled to assume that such evidence exists nor can we assume that there would be expert evidence to this effect.

It was submitted that the holding of opening exercises at 8:55 a.m. constituted a reasonable assignment to the Elmwood teachers. The Association does not challenge the Division's right to assign supervisory duties to teachers during this time of the day. As to the 1994 minutes of the *Committee* (Ex.22), it is not clear whether the conversation involved the school day or the instructional day. These terms have different meanings at law. In any event, this 1994 meeting took place some years prior to Article 20 appearing in the Agreement.

The evidence demonstrated that an individual school is entitled to schedule opening exercises as part of the instructional day. At the same time, some schools, to the knowledge of the Association or its Executive, have held opening exercises outside of the 5.5 hour instructional day. The minutes of the *Committee*

confirm that the Association was aware of this practice. Mr. Parkinson submitted this past practice serves two purposes. First, it assists to resolve any ambiguity which may be found in the term "instructional day". Second, it rebuts any inference that the Division is suddenly instituting a new regime for the first time.

As to the claim for damages, Mr. Parkinson submitted that the teachers are already being paid their salaries for the 15 minute period after 8:45 a.m. (inclusive of the opening exercises). There is no basis to claim any compensation. When the parties included Article 20 in the Agreement it was on the express understanding that Article 20 cannot be taken "…to address the question of whether there are or are not other assignable duties" (Ex.6).

The *Kelvin agreement* is not relevant because it goes well beyond the issue of opening exercises. The parties expanded the meaning of instructional day at Kelvin and, in doing so, not only included opening exercises but also included the lunch period and other supervisory periods within the parameters of the instructional day. The parties knew they had to address these items in this specific manner in order to accomplish their overall goal.

It was submitted that the *PSA Regulation* is student, not teacher, orientated. Section 5(1) of the *PSA Regulation* does not state that a teacher must actually teach for 5½ hours in a "school day". The concept of an "instructional day" relates to the instruction to be received by the students. Sections 5(3) to 5(6) of the *PSA Regulation* confirm this perspective. In particular, Section 5(6) supports the interpretation that the purpose of this provision is to ensure that students receive 5½ hours of instruction. It is Section 40 of the *EAA Regulation* which addresses when a teacher must be on duty and that Section deals with the school day, not the instructional day. Similarly, the reference to instructional day in Article 20 of the Agreement is not a reference to the hours that a teacher is required to teach. Rather, it refers to the

amount of time when a student must receive instruction. How much time a teacher will actually teach on a given day is a different matter (see the timetables).

After 8:45 a.m. on any school day, teachers are under a legislative and contractual duty to maintain order in the schools and are required to follow any valid assignment made by the principal. This can include a directive to hold opening exercises at 8:55 a.m. The teacher has supervisory responsibilities after 8:45 a.m. and a teacher is entitled to apply and is expected to apply all school rules and regulations.

Mr. Parkinson referred to the following authorities:

(i) **Re Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society and Winnipeg School Division No.1 (1975) 59 DLR (3rd) 228 (Sup.Ct.Can.)** ("*Wpg. Teachers' Ass'n*") which dealt with a civil claim by the Division against the Association for monetary damages arising out of the withdrawal of noon hour supervision by certain teachers. The Court held that teachers have an implied contractual duty to perform supervisory functions under the direction of their principals. The actual factual circumstances are not germaine to this case. Mr. Parkinson referred to the oft quoted passage of Laskin, CJC (as he then was) at pp.235 and 236 where the Chief Justice spoke to the nature of the relationship between teachers and the Division. The following passage was expressly approved by the full Court:

> "Almost any contract of service or collective agreement which envisages service, especially in a professional enterprise, can be frustrated by insistence on "work to rule" if it be the case that nothing that has not been expressed can be asked of the employee. Before such a position can be taken, I would expect that an

express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.

On this view of the matter, and having regard to the provisions quoted above from the Code of Rules and Regulations, I find it entirely consistent with the duties of principals and of teachers that the latter should carry out reasonable directions of the former to provide on a rotation basis noon-hour supervision of students who stay on school premises during the noon-hour, so long as the school premises are kept open at such time for the convenience of students who bring their lunches, or who purchase food at a school canteen, if there be one. It was not suggested in the course of argument that the rotation system was itself unreasonable, nor did the issue of compensatory time off arise in this context.

Teachers are, no doubt, inconvenienced if they have to supervise students during their common lunch hour, and I should have thought it not unreasonable that consideration be shown to them by way of compensating time off as a quid pro quo. This issue is not before this Court and I say no more about it. I dispose of the first point on the simple ground that the parties collective relations envisage that directions will be given from time to time by the principals of the schools which may, when issued, become part of the duties to be discharged under the collective agreement. I

> do not agree with the Association's contention that any such directions to be valid must be limited to instructional duties during the instructional day. At the same time, nothing said here should be taken as endorsing the right of the respondent to impose duties upon the teachers either in the early morning before they are required to report or in the later afternoon after the close of the school day, at least where those duties do not relate directly to instructional matters."

(iii) **Re Snow Lake School District No. 2309 v. MTS, Local 45-4 (1987) MJ #273 (Man.CA)** (*"Snow Lake"*) where the Court of Appeal upheld the right of the school district to require teachers to supervise students during the noon-hour intermission on a rotating basis. The teachers had given notice that they would withdraw from what was characterized as a "voluntary activity" during noon hour. The parties failed to agree to an alternative arrangement and the teachers filed a grievance. The grievance was initially upheld by a majority of the arbitration board but that ruling was overturned by the Court of Queen's Bench on judicial review. The Court of Appeal ruled that the school division had the right to assign supervisory duties during the noon intermission provided it was done in a reasonable way. In coming to this conclusion, the Court of Appeal expressly adopted and applied the remarks of Laskin, CJC from *Wpg. Teachers' Assn.* Mr. Parkinson relied on the comments of O'Sullivan, J.A. at p.3 of *Snow Lake* where:

> "In some cases the parties may think it reasonable that an extra stipend or other quid pro quo should be given for supervision, although I note that in the collective agreement there is no provision for payment on the basis of time spent or of individual merit, the parties having elected to have pay determined by placement on an annual salary schedule

> dependent on time spent in education and academic qualifications."

(iii) **The Churchill Local Association No. 37-3 of The Manitoba Teacher's Society and the School District of Churchill No.2264 (July 1988, unreported, Baizley)** ["*Churchill*"] where the dispute involved the right of the teachers in the district to discontinue supervision of all extra-curricular activities and to refuse all voluntary administrative activities prior to 8:45 a.m. and after 3:30 or 3:40 p.m. (our emphasis) The activities involved various sporting, social, concert and recreational activities. The arbitration board held that teachers can be required to participate in extra curricular activities as part of their duties, provided that the criteria outlined at p.29 of that decision were followed.

Comment: *While Mr. Parkinson filed this case for its general principles (and it does rely on Wpg. Teachers' Ass'n and Snow Lake), we do not find that Churchill is of any direct assistance in resolving the precise question before us. Churchill related to extra-curricular activities which took place outside of the instructional day or the school day, no matter how one may choose to define those terms.*

(iv) **Re St.Clair Catholic District School Board and OECTA (2001) 98 LAC (4th) 191 (Watters)** ["*St.Clair*"] where the school board directed that teachers must attend an asbestos awareness training session "…after the regular business day of the teachers". The teachers sought additional pay for attending the workshops based on a formula calculated by reference to their annual salary (p.193). The training sessions were conducted either in the morning prior to the

commencement of classes; in the afternoon following the dismissal of students; or during the teachers' lunch break. The teachers were not paid any extra remuneration for attending these sessions. Under the *St.Clair* collective agreement, teachers were paid an annual salary in 26 equal instalments. The relevant regulations under the *Ontario Education Act* stated that the length of the instructional program of each school day for pupils shall be not less than 5 hours and prescribed that "…the instructional program on a school day shall begin not earlier than 8:00 a.m. and end not later than 5:00 p.m. except with the approval of the Minister" (our emphasis). The term "instructional day" was defined in another regulation but it was very general definition - i.e. "…a school day that is designated as an instructional day on a school calendar and upon which day an instructional program that may include examinations is provided for each pupil whose program is governed by such calendar".

Arbitrator Watters found that the school board was entitled to schedule the asbestos training sessions outside of the instructional day and that the teachers were obliged to attend them as part of their professional duties. Further, the teachers were not entitled to receive additional compensation over their annual salary for attending the sessions. The only breach found was the school board's scheduling of certain training sessions over the lunch hour. The arbitrator adopted Laskin, CJC's remarks from *Wpg. Teachers' Ass'n*, cited with approved in *Snow Lake*. At pp.210 and 211, Mr. Watters states:

> "Ultimately, after considering the evidence and argument, I am satisfied that the Asbestos Awareness Training was in "furtherance of [one of] the principal duties" to which the teacher is

committed. It follows, according to Chief Justice Laskin's analysis, that the Employer could require teachers to attend the training as long as the arrangements for same were fair to the employees. I note, in this regard, that the Association did not seriously challenge the fact the training had to occur. Its complaint, rather, was that it was scheduled outside of the instructional day and that teachers were not provided with additional compensation for their attendance. It is, therefore, necessary to determine whether the Employer could properly schedule the training outside of the instructional day and, if so, whether it was obligated to pay the teachers for their attendance.

I can find nothing in the collective agreements, the *Education Act*, or the Regulations that would obligate the Employer to schedule the training within the hours of the instructional day. I accept the Employer's submission that s.3(1) of Regulation 298 speaks to the length of the instructional program for each school day for "pupils". It does not service to limit the time period during which teachers can be called upon to perform the duties of their position. This conclusion is consistent with the reasoning expressed in *School District of Snow Lake* and *Durham Catholic District School Board*. I have not been persuaded that it was unfair, or otherwise improper, for the Employer to schedule the training immediately after the end of the school day. Such scheduling was much like that employed in respect of regular staff meetings. I reach the same conclusion with respect to the preschool training. I note that the Association did not argue that the early morning sessions were somehow more objectionable.

Under the terms of their collective agreements, teachers in both the Elementary and

> Secondary Units receive an annual salary. It is clear that this salary encompasses the performance of certain duties outside of the instructional day, such as staff meetings after school and parent-teacher interviews after school or in the evenings. I consider it significant that health and safety issues are addressed in the after school staff meetings and that teachers do not receive extra compensation for their attendance at same. In the final analysis, I have not been persuaded that good reason exists to treat the training sessions in a different fashion for purposes of compensation. I think that the training sessions were analogous to a single issue staff meeting. The only difference is that, instead of providing a forum for discussion of, or reporting on, issues, the meeting focused on the delivery of formal training …
>
> I cannot accept that the teachers were treated unfairly as a result of certain administrative support and custodial staff being offered time in lieu. The only such staff who may have received time in lieu were those not scheduled for duty at the time the training was given. I think that their situation is distinguishable from that of the teachers, as they are hourly employees and have a defined workday. In contrast, the teachers are paid an annual salary. Given the nature of the latter group's professional obligations, it is difficult to speak in terms of a regular or clearly defined workday." (Mr. Parkinson's emphasis)

(v) **Re Durham Catholic District School Board and Ontario English Catholic Teachers' Association (1999) 80 LAC (4th) 278 (Bendel)** ["*Durham Catholic*"] where the issue was whether teachers were required to participate in parent-teacher interviews at the end of the school day. The arbitration board dismissed the

grievance and found that the school board had the right to require teachers "…to report to parents by attending evening parent-teacher interviews". The board reached this conclusion even though the teachers did not have an express statutory or contractual duty to participate in these evening interviews. After quoting Laskin's remarks from *Wpg. Teachers' Ass'n*, the board determined that providing services at evening parent-teacher meetings had become mandatory "…by course of conduct and of renewal of relationships over a period of time", to track an observation from *Wpg. Teachers' Assn*. In this context, the board found that there was little significance to the fact that these services had to be performed outside of school hours and nothing within the regulatory definition of "instructional program" required that all of a teacher's duties must be confined to that period.

(vi) *York.* Mr. Parkinson noted that this case involved an elementary school. Further, Arbitrator Beck did not have to address the question of whether opening exercises were part of an instructional day because that point had been conceded by the school board.

(vii) **Re: Ass'n de Enseignantes et des Enseignants Franco Ontariennes [1993] OOHSAD No.6 (Wacyk)** ("*Huot*"). This involved an appeal to an adjudicator under the Ontario *Occupational Health and Safety Act*. The initial decision had been that teachers were not entitled for additional payment for the time spent accompanying an inspector during an inspection of the workplace. An appeal was brought by an individual teacher who was a member of the joint health and safety committee. He claimed compensation for the period 3:40 p.m. to 5:00 p.m. on the

basis that this time was beyond his regular working day. The appeal was dismissed on the basis that a teacher's duties are not limited to teaching responsibilities only and that teachers have specific responsibilities in the area of safety. It was determined that the annual salary paid to teachers encompassed his participation in the workplace inspection. The teacher was not economically disadvantaged.

(viii) **Re Hamilton-Wentworth District School Board v. Elementary Teachers' Federation of Ontario (Travel Time Grievance) [2000] OLAA No.620 (Herlich)** [*"Hamilton"*] which addressed the issue of whether the school board was entitled to exclude what was characterized as "travel time" (i.e. the defined interval of 2 to 5 minutes between classes for students in Grades 4, 5 and 6) from "instructional time". The collective agreement stated that a full-time teacher in the elementary schools could only be assigned to provide instruction to pupils "…for no more than one thousand, four hundred and fifty (1,450) minutes for each period of five (5) instructional days during the school year". The concept of travel time between classes was not addressed in the collective agreement. The evidence revealed that the teachers typically remained in their classrooms but the students moved between classes and classrooms as one period ended and the next began. The school board sought to exclude this "travel time" from the computation of teachers' instructional time. The applicable regulation provided that the length of the instructional program for each school day for pupils "…shall not be less than 5 hours a day excluding recesses or <u>scheduled intervals between classes</u>" (our emphasis). The arbitrator found that the periods designated as

travel time were properly characterized as "…scheduled intervals between classes" within the meaning of this regulation, and were therefore excluded from the calculation of time that a teacher is "…assigned to provide instructions to pupils" under the collective agreement. The exception was a back-to-back period when no travelling by students was required and where they remained in the room with the same teacher.

We were referred to Arbitrator Herlich's comments at p.5:

> "On the other hand, neither is it sufficient for the union to simply identify occasional acts of instructions which may take place during a designated scheduled interval between classes to thereby negate the propriety of the designation. In that regard, the employer points out that there is no issue that lunch breaks may provide similar instructional opportunities which teachers may choose (or not) to exploit; but there is no question that lunch breaks are still excluded from the computation of instructional time. But, while the context in instructional opportunities provided by lunch breaks and travel time may differ substantially, they share the characteristic of being periods of time during which the teacher is neither scheduled nor assigned to provide instruction to pupils." (Mr. Parkinson's emphasis)

Mr. Parkinson said that the comments of Arbitrator Herlich equally apply to opening exercises in our case. The "essential character" of opening exercises is supervisory, not instructional.

Comments: *The intervals between classes in the Division's middle and high schools when students move from one class to another (i.e. "travel time") are regarded as part of the 5½ instructional day (see evid. of Schubert - p.26, supra). This is also confirmed by the sample teacher timetables from Elmwood and Grant Park (Exs. 20 and 21).*

(ix) **Re Students' Union, University of Alberta and Governors of the University of Alberta et al (1988) 53 DLR (4th) 541 (Alta. Q.B.)** ["*Alberta*"] where the court upheld the right of the University to impose a library and computing services fee on all students without first obtaining the prior approval of the Minister of Education because the fees could not be characterized as "fees for instruction". Mr. Parkinson relies on the meaning which was given by the Court to "instruction". Based upon dictionary definitions, the Court stated that "instruction" suggested "…an active role on the part of the person who is delivering the instruction, the teacher who is imparting knowledge to students" (p.545). Mr. Parkinson submitted that "instruction" in this sense is not being imparted by the Elmwood teachers during opening exercises.

(x) **Bay of Islands, St. George's Integrated School Board v. NTA (1998) NJ No.21 (Nfld.Sup.Ct.)** [*"Bay of Islands"*] where the legislation provided that the minimum hours of instruction in each school day must be 5 hours. The grievance was filed after a junior high school added 8 minutes to the 5 hour daily timetable to allow for the time students used to move from class to another (i.e. *akin to the "travel time" in Hamilton at p.51, supra*). The arbitration

board upheld the grievance. However, the Court set the award aside on the basis that the provision in the legislation providing for a minimum number of hours of instruction in each school day was for the benefit of the students. Mr. Parkinson submitted that to allow the Association's Grievance here would be tantamount to making an order that "instruction" must cease during part of the "instructional day". This would be contrary to the intention of the *EAA*;

(xi) *Scolaire*. This lengthy award addressed a series of grievances regarding the validity of certain timetables for teaching staff. The key issue was whether these timetables complied with provisions of the relevant collective agreements and the *Education Act* (Ontario). *Scolaire* is a complex case and the evidence was very detailed in nature. Mr. Parkinson filed *Scolaire* for the remarks made by Mr. Lavery regarding the meaning and scope of the word "instruction". In the context of the regulatory regime and the collective agreements at issue, Mr. Lavery determined that "instruction" did not include supervisory and mentoring responsibilities;

(xii) **Re Hamilton-Wentworth District School Board and the Elementary Teachers' Federation of Ontario (August 2, 2002, unreported, P. Knopf)** ["*Hamilton-Wentworth*"] which involved a dispute over whether the time between the entry and the late morning bell was "instructional" or "supervisory" time under the applicable collective agreement. The school board treated it as supervisory time. The Federation argued that it was instructional time.

Reference was made to Arbitrator Knopf's remarks at p.24, as follows:

> "…the critical evidence is that while instruction can and does take place between the two bells, there is no formal expectation, requirement or assignment to provide instruction, or curriculum at that time. A decision that would declare the instructional clock to start running at the first bell would result in school boards including all the time teachers and students spend simply getting ready to get themselves into the classes, gathering up books, hanging up coats and running errands. It would also mean that teachers would be expected to be assigned curriculum and instruction from the moment the first bell rings. The evidence shows that the teachers in this system are not being "assigned to provide instruction" in the period between the two bells.
>
> …the reality remains that the School Board, as the employer, has the right to manage operations within the confines of the collective agreement and the law. That right to manage includes the right to set expectations as to when instructional time begins. Teachers can provide instruction and do provide instruction every moment that they are in the schools. In addition, the evidence shows that teachers provide valuable and significant instruction between bells. But they cannot be required to provide instruction unless they are "assigned to provide instruction" as set out in Article 12.03. The evidence establishes clearly that in this School Board the teachers are not assigned or expected to provide

instruction between bells."
(Mr. Parkinson's emphasis).

***Comments**: This case did not specifically address opening exercises. The issue was how to characterize the time between the "entry and late" bells where the entry bell marked the time that pupils could enter the school and the second bell marks the time when students were to be marked "late". Immediately following the second bell the schools held opening exercises and announcements. There was detailed testimony from teachers regarding what they do "between bells". The applicable regulation under the Education Act (Ontario) required that teachers be in the classroom or teaching area ready to receive pupils at least 15 minutes before the commencement of classes in the morning. This is similar to Section 2.4 of the Code. After referring to the London, York, and Hamilton cases, supra, and for other reasons, Arbitrator Knopf concluded that the time between the entry and late bells in the schools was not "instructional time" within the meaning of the collective agreement. In other words it did not constitute instruction and did not fall within the phrase "…to provide instruction to pupils".*

(xiii) *Durham*. We discussed this case at p.32 to 36, *supra*. Mr. Parkinson noted that school board argued that it was illegal under the *Ontario* regulations to have opening exercises as part of the instructional day. This contention which was not accepted by Arbitrator Beck. Mr. Parkinson also submitted that Mr. Beck's remedial relief in *Durham #2* was, in large measure, based on the parties' bargaining history because the clause in the predecessor agreement had expressly excluded opening exercises from the instructional day but the new wording had deleted this exclusion.

Mr. Parkinson submitted that this case is of minimal assistance at best; and

(xiv) *Toronto*. Mr. Parkinson noted that *Toronto* related to an elementary school and did not involve any issue in respect of opening exercises because the school board agreed that opening exercises were part of the instructional day. However, it was submitted that the distinction made in *Toronto* between "school day" and "instructional program" [Paras.114-121] supports the Division's position here. Mr. Parkinson relied on the finding in *Toronto* that the (parallel) *Ontario Regulation* was "student centred" and neither defined the characteristics of a teacher's assignments nor their scope. At Para.130:

> "Although we take note of the existence of the different terms used…we do not consider their use persuasive of the interpretation urged by the Federation. Nor do we conclude that the interpretation that we favour is the only interpretation of these contract provisions. We do, however, favour this interpretation as that which is more consistent with the Regulation, and with the overall structure of the collective agreement than the interpretation urged by the Federation. We conclude that the interpretation of this collective agreement that is most consistent with the Regulation, and that has the virtue of clarity in making sense, is that which considers the use of the terms "Instructional Time", "Classroom Instruction", "Instructional Day", and "Instructional Program" to refer to the same thing. The terms, in our view,

> mean that activity in that period of the school day that has as its essential character the delivery of planned subject curriculum to classes of students."
> (Mr. Parkinson's emphasis)

At Para. 132, the board expressed the view that the labels which the parties may choose to attach to an activity are not determinative. Rather, the "essential character" of an activity must be the operative test, meaning that occasional acts of instruction delivered during an entry period (*opening exercises here*) do not change the essential character of the activity under review. The "essential character" test was adopted by Arbitrator Herlich in *Hamilton*.

Mr. Parkinson asked us to adopt the conclusion from Para.135 of *Toronto* where the board found the essential character of the time between the entry bell and opening exercises was more supervisory and transitional rather than instructional in nature. The same "essential characterization" must be made of opening exercises in this case.

Mr. Parkinson emphasized that we did not hear evidence from any teacher to the effect that he/she felt obliged to arrive "at work" 5 minutes earlier than normal. This is not surprising because they are required to be on duty in the classroom environment at 8:45 a.m.. There was no evidence of a negative impact on any teacher. The scheduling of Elmwood's opening exercises at 8:55 rather than 9:00 was not in violation of Article 20.03 of the Agreement. The Division acted within its rights in approving this schedule.

(c) Association Reply

As to the principles expressed in *Wpg. Teachers' Ass'n* and *Snow Lake*, the Association does not dispute that teachers are paid on an annual basis nor does it dispute the fact that the Division is entitled to assign opening exercise duties to teachers. The issue is whether the Division is in breach of the specific covenant regarding "instructional day" in Article 20.03 of the Agreement. If a breach is found then, as Arbitrator Beck did in *Durham #2*, a remedy for that contractual breach can be fashioned. The fact that teachers must be in the school by 8:45 is not relevant. The Division would be entitled to start the "instructional day" at 8:45 a.m. (for example) in any of its school and the teachers would have to report for duty in that school 15 minutes prior to the commencement of the earlier instructional day (at 8:30 a.m.). However, this would require a corresponding adjustment somewhere else during the day (likely at the end) in order to comply with the mandatory 5½ hour instructional day.

(V) DECISION

Introduction - Principles of Interpretation

The question before the Board is a narrow one, namely, *does the expression "instructional day" in Article 20.03 include "opening exercises"*? If it does then, by reason of the mandatory wording in Article 20.03, the Division was required to obtain the agreement of the Association to extend the instructional day by 5 minutes. However, if "opening exercises" are not part of the "instructional day" then the Division did not have to obtain the agreement of the Association when opening exercises were scheduled to commence at 8:55 a.m. for the 2003/2004 school year at Elmwood. In the latter case, there would be no violation of Article 20.03 because teachers are required to be present and "on duty" at 8:45 a.m. and it is common ground that part of their duties during this time period includes the supervision and monitoring of students. Based on

the principles evident in cases such as *Wpg. Teachers' Ass'n, Snow Lake and Churchill*, a teacher can be given reasonable assignments by the Division which are "…related to the enterprise of the public school system provided the assignment is seen as fair to the employee and in furtherance of the principle duties to which he is expressly committed" (*Wpg. Teachers' Ass'n* at p.235, per Laskin, CJC).

The primary position of both parties is that the question before us can be answered as a matter of interpretation. This requires that we determine the "essential character" of opening exercises. Are the teachers' responsibilities in respect of opening exercises primarily "supervisory" in nature or are they an integral part of the "education/instructional" duties of teachers in the sense that they are more closely connected to providing instruction to students? We must consider whether there is a material difference between opening exercises (held in the classroom environment) as opposed to the general supervisory duties a teacher undertakes at Elmwood after 8:45 a.m. In many respects, Mr. Smorang was correct when he said our task is to determine whether opening exercises fall within the "bell block" or the "third block" (p.28, *supra*).

In determining the "essential character" of opening exercises, the following interrelated questions must be answered:

- Is the term "instructional day" primarily student as opposed to teacher orientated? Here, we must distinguish between the "instructional day", the "school day", and what assignments properly comprise a teacher's "working day". These terms are not synonymous; and

- Even if the instructional day is primarily student orientated then are opening exercises nevertheless part of the instructional day as contemplated by Article 20.03?

The statutory/regulatory provisions external to the Agreement are relevant because the Agreement is "…made subject to the provisions of" the PSA, the EAA, and the regulations made under those statutes (Article 4). The inter-relationship between statutes and collective agreements generally was addressed by Mr. Martin Freedman (as he then was) in **Kelsey School Division No.48 and the Kelsey Teachers' Association No.45 of the Manitoba Teachers' Society (unreported, September 16, 1944)** where he referred to the oft quoted passage from **Re Ford Motor Company of Canada Ltd. and Canadian Automobile Workers' Local 1520 (1993) 27 LAC (4th) 257 (Palmer)** ("*Ford*"), at p.264:

> "…legislation, such as the election Acts here in issue (*the PSA, the PSA Regulation, the EAP Regulation and the Observances Regulation in this case*) can only be used by arbitrators in relation to the interpretation of the collective agreement in three situations: first, where it specifically is incorporated into a collective agreement; second, where it assists in the interpretation of unclear collective agreement language; and third, where the legislation is in direct conflict with provisions of the collective agreement making these unlawful to enforce. Conversely, it is clear that such legislation cannot be used as the basis for rights enforced by collective agreement arbitration; those must arise from the wording of the collective agreement." (our italics)

In many respects, the legislative regime here is incorporated into the Agreement because the Agreement is "…subject to" the relevant statutory regime. To the extent we find the term "instructional day" to be unclear then the statutory regime can be used as a contextual aid to ascertain its meaning. The third *Ford* situation does not apply because Mr. Smorang and Mr. Parkinson each confirmed that neither party relied on "illegality". This simply means that, unlike *Durham*, the Division is not arguing that it is "…contrary to law" to hold opening exercises during the instructional day, even on its own interpretation. Likewise, the Association is not arguing that it is "…contrary to law" to hold opening exercises prior to 9:00 a.m. Indeed, the Association does not dispute that the Division is entitled to assign opening exercise duties to teachers and the only

issue is whether the Division is in breach of the specific covenant establishing the mandatory length of the instructional day in Article 20.03.

Neither party relied on the doctrine of "estoppel". There is no assertion by one party that the other party made a representation, either by words or conduct, as to the meaning of instructional day during the 1999-2000 negotiations/arbitration proceedings or during the negotiations for the Agreement and that this representation was relied on to the detriment of the party to whom any representation was made.

Both counsel submitted that recourse may be had to "past practice" as an aid to interpretation should we find the term "instructional day" to be ambiguous. The Association referred to the fact that, for many years, the vast majority of the schools in the Division have conducted opening exercises within the parameters of the "instructional day". The Division referred to the fact that, for varying lengths of time, 9 schools have conducted opening exercises prior to the start of the first instructional period (see para.12, p.18, *supra*). While 4 schools started this "practice" in the 2003-2004 school year itself, the remaining 5 schools had been conducting opening exercises in this manner prior to 1999. The Division relied on the fact that no objection was raised by the Association regarding these 9 schools for a considerable length of time. In varying degrees, and from different perspectives, the parties referred to the Kelvin agreement, the Cecil Rhodes circumstances, and *Proposal No.13* (Ex.17) which the Association tabled in 2003 (p.23, *supra*). We will address the relevance of this extrinsic evidence shortly but, before doing so, some preliminary remarks on the basic rules which govern our interpretive task are in order.

The predominant reference point for an arbitrator must be the language in the Agreement because it is primarily from the written word that the common intention of the parties is to be ascertained. Language is to be construed in accordance with its ordinary and plain meaning, unless adopting this approach would lead to an absurdity or

repugnancy, but in these latter situations, arbitrators will interpret the words used in a manner so as to avoid such results. However, it must be remembered that these particular principles of interpretation are to be used in the context of the written Agreement itself. It is also well recognized that a counter-balancing principle is that anomalies or ill-considered results are not sufficient to cause the alteration of the plain meaning of words. Neither is the fact that one interpretation of the Agreement may result in a (perceived) hardship to one party. We refer here (as the Chairperson often does) to the seminal case of **Massey-Harris** (1953) 4 LAC 1579 (Gale) at p.1580:

> "We must ascertain the meaning of what is written into a clause and to give effect to the intention of the signatories to the agreement as so expressed. If, on its face, the clause is logical and is unambiguous, we are required to apply the language in the apparent sense in which it is used notwithstanding that the result may be obnoxious to one side or the other. In those circumstances, it would be wrong for us to guess that some effect other than that indicated by the language therein contained was contemplated or add words to accomplish a different result."

Support for this approach is found in **Re International Nickel Co. of Canada Ltd. and United Steelworkers of America (1974) 5 LAC (2nd) 331 (Weatherill) at pp.333-334**:

> "It may be that the provisions of the collective agreement here in issue pose a problem of construction so that they may be said to be of "doubtful meaning" in that very general sense. In our view, however, the interpretation of the notion of 'latent ambiguity' to include generally 'all cases of doubtful meaning or application'… should not be and was not intended to be taken so far as to open the door to the admission of extrinsic evidence wherever a disagreement as to the construction of a document arises. If that were allowed, the strength of a document such as a collective agreement would be greatly reduced and the well

> established rules respecting the admission of extrinsic evidence would be meaningless."

It is well accepted that "arguability as to different constructions", standing alone, does not create an ambiguity, thereby allowing the introduction of extrinsic evidence [**Re Canadian Railway Company (Telecommunications, Dept.)** and **Canadian Telecommunications Union (1975) 8 LAC (2nd) 256 (Brown) at p.**259]. When ascertaining the common intention of the parties objective tests must be used and "…not what the parties, *post contractu,* may wish to say was their intent albeit with honesty and sincerity…" [**Re Puretex Knitting Co. Ltd. and C.T.C.U. Local 560 (1975) 8 LAC (2 ND) 371 (Dunn) at p.373**].

The foregoing principles are reinforced by the prescription in Article 8.20 of the Agreement under which we cannot "…change, add to, vary or disregard any provision of this Agreement".

It is also a well accepted principle that the provisions of the Agreement are to be construed as a whole and that words and provisions are to be interpreted in context. See **Palmer Collective Agreement Arbitration in Canada (3rd Ed) p.123, para.4.141** and the seminal case of **International Union of Automobile, Aircraft and Agricultural Implement Workers of America, Local 439 and Massey-Harris Company Ltd., (1947) 1 LAC 68 (Roach) at p.69**:

> "…it is also a well recognized rule of construction that where part of a document permits two interpretations, that meaning is to be attached which best harmonizes with the whole of the document. That latter rule has been expressed thus, namely, that the tribunal charged with the responsibility of interpreting the document must attempt to construe it so that it will be a harmonious whole and effect given to every part of it."

Another basic principle is that there is a general presumption against redundancy (see **Palmer**, *supra,* at p.126). Put another way, it is to be (initially) assumed that the parties have not agreed to superfluous or unnecessary wording in crafting the Agreement.

Past Practice and other Extrinsic Evidence

In **DHL Express (Canada) Ltd. and National Automobile, Aerospace, Transportation and General Workers' of Canada (CAW Canada), Local 4215, 144 and 4276 (2004) 124 LAC (4th) 271 (Hamilton)** the principles relating to "past practice" were summarized as follows at pp.299-300:

> "Even if an ambiguity can be said to exist, thereby allowing recourse to past practice as an aid to interpretation, the authorities state that the past practice must disclose that the disputed wording <u>in the collective agreement</u> has been consistently administered and/or applied to the knowledge of both parties, without objection, in accordance with one party's interpretation thereby allowing me to reach the conclusion that *the practice itself reveals the common intention of the parties* (i.e. the actual meaning of the wording itself). It is important to bear in mind the characteristics of a past practice as distilled in the seminal case of **Re International Association of Machinists, Local 1740 and John Bertram & Sons Co. Ltd. (1967) 18 LAC 362 (P. Weiler)** at p.368 (hereinafter referred to as the "*Bertram tests"*). After noting that the doctrine of past practice, while useful, should be carefully employed, Arbitrator Weiler stated:
>
> > "…there should be (i) no clear preponderance in favour of one meaning, stemming from the words and structure of the collective agreement as seen in their labour relations context; (ii) conduct by one party which unambiguously is based on <u>one meaning attributed to the relevant provision</u>; (iii) acquiescence in the conduct which is either quite clearly expressed

> or which can be inferred from the continuance of the practice for a long period without objections; (iv) evidence that members of the union and management hierarchy with some real responsibility for the meaning of the agreement have acquiesced in the practice." (my emphasis)

> The *Bertram tests* have been consistently applied by arbitrators and it is this definition of "past practice" which I have used in this case. Further, when a past practice is relied on as an interpretive aid, it should only be used "…to assist in the definition of existing contractual rights; it does not create new rights" [**Re British Columbia Forest Products Ltd. (Caycuse Logging) and IWA Loc.1-80 B.C.L.R.B. No. 72/80 (MacIntyre)** at p.4]. Evidence of past practice "…must go beyond being compatible with a particular interpretation of the collective agreement; it has to disclose a consensus between the parties with respect to the issue in dispute…[**Re National Grocers' Co. and Teamsters Union, Local 91 (1991) 20 LAC (4th) 310 (Bendel)** at p.314]."

We do not find that the words "instructional day" in Article 20.03 are either patently or latently ambiguous, thereby allowing recourse to past practice as an aid to interpretation. However, even if we had found these words to be ambiguous, it is our view that the evidence of past practice proffered by the parties did not satisfy the *Bertram tests*, meaning there is no past practice which itself reveals the common intention of the parties and reflects the actual meaning of the words used in the Agreement. While the term "instructional day" first appeared in the Agreement in 2000, it was a familiar concept to the parties because it had been part of the statutory/regulatory regime under the *PSA* for many years. However, the term was/is not expressly defined in the *PSA* or the *PSA* regulation either. Therefore, the manner in which the majority of schools in the Division scheduled opening exercises prior to 1999 does not provide us with any definitive assistance because the *PSA Regulation* only states that an instructional day cannot be less than 5½ hours. The expression "…not

less than" is markedly different from the mandatory "…shall be" in Article 20.03. While we are satisfied that the Association or some members of its Executive were aware of the pre-1999 practices in 5 schools and the continuance of that practice after the conclusion of the Agreement, the holding of opening exercises prior to the first "instructional period" in these 5 schools cannot be viewed as past practice within the meaning of the *Bertram tests.* So, any course of conduct prior to 1999 cannot be used as a past practice to reveal the meaning of Article 20.03 of the Agreement. Neither can it be said that there was conduct by one party which was unambiguously based on one meaning because the "practice" has differed among some schools.

As to Cecil Rhodes, there were clearly discussions between the parties from March, 2001 to March, 2002 at the *Committee* (see pp.21 to 23, *supra*). Yet, the evidence revealed that there were issues at Cecil Rhodes beyond opening exercises and that some of these issues remained unresolved at the time of the hearing. The Cecil Rhodes evidence does not support either party's interpretative position on Article 20.03.

Similarly, we do not find that the *Kelvin agreement* is determinative, one way or the other. The *Kelvin agreement* not only extended the "instructional day" but it also addressed preparation periods for the Kelvin teachers. The parties redefined the term "instructional day" to cover a period from 8:45 a.m. to 3:32 p.m., but still excluded the 15 minutes when the Kelvin teachers must be available to receive students (i.e. at 8:30 a.m.). The parties also included certain supervisory periods within the ambit of the term "instructional day". Due to the scope of the *Kelvin Agreement*, it is our view that it neither detracts from nor supports either party's position on the meaning to be attributed to Article 20.03 as a stand alone provision.

Finally, the Association's 2003 bargaining proposal (Ex.17) is interesting because it sought to bring the 5½ hour "instructional day" within the Association's

overall proposal defining a "standard work day" for teachers. The proposal sought to bring a number of duties/responsibilities within the ambit of a "standard work day". This 2003 proposal was intended to replace Article 20.05 under which the Division has the right to determine hours of opening and closing of the "school day" and it sought to redefine, with certainty, matters which are currently covered by the statutory/legislative regime. The proposal was clearly teacher-orientated and, if adopted, would have defined a standard work day for teachers in the more traditional sense. As this proposed clause did not find its way into the Agreement it does not provide any assistance to us in this case.

Characterization/Interpretation of "Instructional Day"

As we have already noted at p.66, *supra*, we do not find the phrase "instructional day", standing alone, to be either patently or latently ambiguous. This phrase is capable of a rational construction on its own without recourse to extrinsic evidence. In saying this, we recognize that the words must be interpreted in the context of the applicable regulatory/statutory regime but this is still a matter of interpretation because that the Agreement is "subject to" this statutory regime (see our comments at p.61, *supra*).

The "instructional day" is narrower than the "school day". The Division is entitled to determine "…the hours of opening and closing of the school day" [see Section 5(2) of *PSA Regulation* and Article 20.05 of the Agreement].

Neither can "instructional day" be equated with a teacher's working day. The mandatory 5½ hour instructional day does not reflect all of the assignments which may be given to a teacher by the Division. The fact that teachers must be on duty 15 minutes prior to the "…opening hour in the morning" supports this perspective. So, too, does the reasoning in *Wpg. Teachers' Ass'n, Snow Lake and Churchill*. While opening

exercises *per se* were not the focus of these decisions, the clear principle which emerges from them is that teachers can be given "reasonable" assignments beyond teaching students in the classroom. The template used by the Courts for upholding the various supervisory and extra-curricular assignments at issue in those cases was "reasonableness". This approach was also evident in *St.Clair* (pp.46 to 49, *supra*) and *Durham Catholic* (pp.49 to 50, *supra*) where the arbitrator upheld the right to have teachers participate in parent/teachers' interviews at the end of the school day. Under *Wpg.Teacher's Ass'n* and the authorities which have followed that reasoning, assignments can be given to teachers if they reasonably relate to the purpose of education (e.g. noon hour supervision, extra-curricular activities, staff meetings). Such assignments are covered by a teacher's written contract and the annual salary paid under Article 9 of the Agreement. It is also significant that the parties themselves agreed that Article 20 only addresses duties which can be assigned to teachers *during* the instructional day and cannot be taken "…to address the question of whether there are or are not other assignable duties" (Ex.6, p.12, *supra*). We reasonably conclude that this caveat was added to ensure that the focus of Article 20 was on the students' "instructional day" and could not be read as an abrogation of the general principles established by *Wpg. Teachers' Ass'n, Snow Lake and Churchill* regarding other (reasonable) assignments to teachers. So, it is clear that a teacher's working day can encompass assignments beyond those performed during the "instructional day" and such assignments can be broader than both the "instructional day" and the "school day".

In some Ontario cases (e.g. *York* and *Toronto*), the school boards acknowledged that opening exercises were part of the "instructional day" or "instructional program" under that Province's legislative regime. These acknowledgements make those decisions distinguishable from the <u>disputed</u> issue before us. Only Arbitrator Beck in *Durham* had to address the "opening exercises" issue directly. While he determined that opening exercises were part of the "instructional program", *Durham* must be read in light of the fact that the parties had

negotiated out a clause which had specifically excluded opening exercises from the term "instructional day". The school board's primary argument in *Durham* was that it was illegal (i.e. "contrary to law") to hold opening exercises during the instructional day. Neither party relies on illegality here (see our comments at p.62, *supra*).

While dictionary definitions are not definitive in and of themselves they can be useful aids to interpretation, *The Shorter Oxford English Dictionary* defines the word "instruction" to mean:

> "1. The action of instructing or teaching; the imparting of knowledge or skill; education; information. 2. The knowledge or teaching imparted… 3. Information; 4. A making known to a person what he is required to do; a direction, an order, a mandate." (our emphasis)

Webster's defines "instruct" as follows:

> "…To teach; to educate; to impart knowledge or information to; to enlighten; to direct or command; to furnish with orders; to order or enjoin. – **Instruction**… the act of instructing; that which is communicated for instructing; that with which one is instructed; information; order; mandate or direction. – **Instructional** … *a* relation to instruction; educational." (our emphasis)

As to its "essential character", we have concluded that the term "instructional day" is primarily student as opposed to teacher orientated. In our view, the term "instructional day" refers to that minimum period of time which the Legislature has mandated must be used for the instruction of students. An instructional day has as "…its essential character the delivery of planned subject curriculum to classes of students", to adopt the reasoning from *Toronto* (pp.57 and 58, *supra*). This conclusion is supported by Section 5 of the *PSA Regulation* (p.9, *supra*). If the term was only intended to define hours of work for teachers or to otherwise limit reasonable assignments that can be made to teachers then there would have been no need to

"include" recesses as part of the instructional day and then define the length of the recesses for various grades [Sections 5(3) to 5(5)].

Although Article 20.03 makes no specific mention of the recesses [unlike Section 5(1) of the *PSA Regulation*] we are satisfied that recesses are still included in the 5½ hours, as are "travel times" between classes. This was confirmed by Schubert (p.26, *supra*). Accordingly, the Ontario decisions which had to address the characterization of "travel time" (i.e. "scheduled intervals between classes") are not directly relevant, particularly in view of the different wording found in the clauses of those collective agreements and the fact most of the Ontario cases referred to instructional programs or "instructional time" by reference to a number of "minutes" in a day (see Part IV).

Of particular importance is Section 5(6) of the *PSA Regulation* which states that time "lost" by <u>students</u> from an instructional day because they have been dismissed on account of a staff meeting or professional development activity must be made up in one of the two ways specifically described in the sub-clauses (a) and (b). Section 5(6)(a) refers to sub-section 8(1) of the *PSA Regulation* which states as follows:

> "The number of days set aside in each school for teacher in-service, parent-teacher conferences, administration and pupil evaluation in Kindergarten through Senior 4 must not exceed 10 days, of which at least 5 must be used for teacher in-service."

That the 5½ hours refers to "instructional time" <u>for students</u> is also confirmed by Article 20.01 of the Agreement which provides that teachers do not have to provide actual instruction for 5½ hours during each school day because the "preparation time" referred to in that provision must be provided "…within the

instructional day". A review of the timetables filed as Exs. 20 and 21 confirms how this clause operates for teachers.

Our determination that the term "instructional day" is primarily student orientated does not end our inquiry because we must now turn our attention to the Association's position that are there instructional/educational features to opening exercises which bring them within the ambit of the "instructional day", as specifically delineated in Article 20.03.

In our view, there are instructional/educational elements to opening exercises which support the conclusion that opening exercises, in their essential character, are properly regarded as part of the instructional day. The term "instructional day" must be read subject to the purpose and intent of the *Observances Regulation* which makes the singing of the first verse and chorus of *O'Canada* mandatory for all students (whether elementary, middle or high school students). And then, the teacher has specific duties during opening exercises. The teacher is required to be in the classroom with the students and is responsible (an "expectation" - evid. of Schubert - pp.16 and 17, *supra*) to monitor behaviour and ensure that pupils are "…standing erect in an attitude of attentiveness" [Section 2(4) of *Observances Regulation*]. A teacher's responsibilities during opening exercises are more focused than the general supervisory/monitoring responsibilities undertaken during the first 15 minutes when the teacher is required to be on duty in the school. During opening exercises, the teacher is responsible for ensuring that the students are present; that they are orderly; and that they properly observe the legislated standard(s). These exercises take place in the classroom environment and, in our view, they reflect the start of the instructional day. We believe we can take judicial notice of the fact that the purpose of "patriotic" exercises is to reinforce the importance of Canadian citizenship. We also accept that, by well established practice, announcements are part of opening exercises and that many of the topics communicated to students during these announcements address

matters of student conduct, rules and regulations, educational activities and extra-curricular events which may be scheduled before or after the "school day".

Some of the alternative definitions of "instruction" or "instructional" (p.70, *supra*) refer to the imparting of knowledge or information to others. This broader view of instruction is reflected in Arbitrator Beck's *ratio* in *Durham* where he found that opening exercises should be counted in the calculation of the 300 minute instructional school day for the elementary schools in that case. It is useful to revisit his rationale, as follows:

> "It is far too narrow a view, in my opinion, of instruction and the teachers' role, to argue that instruction is not taking place unless there is a scheduled course actually being taught. The teacher is responsible for presiding over the classroom once opening exercises begin, and those exercises consist of a number of factors which might well be thought to have an instructional element looked at in broader terms, particularly in the elementary schools. Moreover, the announcement segment of opening exercises might well have a particular instructional element in terms of how students perceive and understand the particular announcement, whether from the Principal over the loudspeaker or from the teacher, and how they react to them." (see p.35, *supra*) (emphasis added)

Arbitrator Beck's comments are persuasive and they support our conclusion that opening exercises are part of the instructional day. We recognize that Arbitrator Beck was faced with the situation where the parties had removed a clause which had specifically excluded opening exercises in the definition of instructional school day and where the primary argument advanced by the school board was illegality. Indeed, it can be said the school board had to advance that argument due to the change it had agreed

to make to the clause in the predecessor collective agreement. Nevertheless, Arbitrator Beck still had to "characterize" the nature of opening exercises in order to reach the conclusion he did.

Article 20.03 also focuses on teachers in that the 5½ hours which comprise the instructional day "…shall be worked consecutively except where…" (our emphasis). Further, the parties have also agreed that Article 20 "…only deals with that time or those duties which have been assigned to teachers during the instructional day…". Given the classroom environment in which opening exercises must be conducted, by statutory edict, and the requirement that teachers must be present in the classroom, it is difficult to characterize opening exercises as falling within the first (bell) block. Again, the term "instructional day" must be read "…subject to" the "…*Observances Regulation"* passed pursuant to the *EAA*. In our view, the wording at the outset of Section 2(1) of the *Observances Regulation* - i.e. - "…at the opening of school on each day on which the school is in regular operation for instruction, the pupils shall…" support the interpretation we have adopted (our emphasis).

In our view, a teacher's responsibilities during opening exercises differ from other assignments which can be made to (a) teacher(s) under the *Wpg. Teachers' Ass'n* rationale, which upheld the validity of assigning supervisory, parent/teacher and extra-curricular activities to teachers. This Award does not affect the operation of that principle beyond our specific ruling that opening exercises fall within the (mandatory) parameters of the instructional day. Neither does our finding affect the operation of parties own caveat that Article 20 cannot "…be taken to address the question of whether there are or not other assignable duties".

In the result, we have found that the Division violated Article 20.03 when it did not seek the agreement of the Association to start opening exercises at Elmwood at 8:55 a.m. for the 2003-2004 school year. A declaration to this effect and an order

directing that opening exercises at Elmwood must be conducted within the parameters of the 5½ hour instructional day will therefore issue. However, this is the extent of the declaratory relief which ought to be given because the Division is entitled to determine when a "school day" starts and finishes and this, in turn, can define the precise hours within which the 5½ hour instructional day must be held. Elmwood is free to continue holding opening exercises at 8:55 a.m. provided there is a corresponding adjustment (likely at the end) to the 5½ hour instructional day (see evid. of Shyka, p.16, *supra*).

Damages

This brings us to the Association's claim for damages and its request that teachers be compensated for the "extra" 5 minutes from the date the Grievance was filed in March of 2004. The claim for damages was specifically advanced in the Grievance and was reaffirmed by Mr. Smorang during his submission. In our view, this is not an appropriate case to award compensation to individual teachers or to award damages to the Association. Our reasons for this conclusion follow.

First, no teacher has suffered any direct or indirect monetary loss. We did not hear evidence from any individual teacher(s) in support of a claim for damages. Teachers are paid an annual salary. This salary covers a variety of tasks and assignments which, as the authorities reveal, cover more than teaching in the classroom during the "instructional day" itself. The annual salary covers the 15 minutes prior to the start of the instructional day and the 5 minutes prior to the commencement of classroom instruction in the afternoon. When opening exercises were advanced to 8:55 a.m., the Elmwood teachers were not required to do anything different from what they had done for many years when the opening exercises started at 9:00 a.m. This case is not about a teacher's "working day" and it is not an "hours of work" case in the more traditional sense.

Second, this is a case of first instance. While we have not found Article 20.03 to be ambiguous, the fact is that there have been some schools (known to the Association) which conducted opening exercises prior to 9:00 a.m. for some years, pre-dating 1999. As Mr. Parkinson correctly noted, this is not a case of the Division suddenly and without warning changing the "rules of the game". The parties were also discussing this issue at the *Committee* (in relation to Cecil Rhodes) throughout 2001-2002 and we are satisfied that each party advanced its own interpretive position in good faith. It was/is an honest disagreement. Again, neither party relied on the doctrine of estoppel in the sense that it alleged the other party had made a specific representation which was relied on to the detriment of the party pleading the estoppel.

Third, Arbitrator Beck's award of damages in *Durham #2* (p.36, *supra*), was based on the finding that:

> "…an increase in instructional time, even if only 5 minutes per day, increases the teaching load placed upon the teacher. And if that increased load is because of a direct breach of contract, which it is here, being contrary to the Letter and the collective agreement, then compensation is an appropriate remedy". (our emphasis)

We do not quarrel the general principle that an arbitrator can award damages to compensate for a breach of a collective agreement (if appropriate) but, in our view, the circumstances faced by Arbitrator Beck in *Durham* were different. The finding in *Durham* that there had been an increase in the teaching load reflected the fact that the parties had not only agreed to reduce the instructional day from 310 to 300 minutes but had also agreed that opening exercises (previously excluded) were now to be included as part of the 300 minute instructional day (see our ***Comments*** at pp.35 and 36, *supra*).

So, we are content to confirm our interpretation and issue appropriate declaratory relief. Different considerations may apply should a similar situation arise in

the future following the issuance of this Award but that situation will have to be addressed on its own merits.

(VI) CONCLUSION

For all of the foregoing reasons, we offer the following summary of our findings:

1. We declare that "opening exercises" (comprised of the legislatively mandated singing of *O'Canada* and longstanding practice of public announcements to the student body at large) are part of the "instructional day" referred to in Article 20.03 of the Agreement;

2. The Division was in breach of Article 20.03 when it unilaterally approved the advancement of opening exercises from 9:00 a.m. to 8:55 a.m. for the 2003-2004 school year at Elmwood without either (i) obtaining the agreement of the Association; or (ii) making an adjustment to the instructional day so that it was maintained at the mandatory 5½ hours;

3. We order that the instructional day at Elmwood be reinstated to 5½ hours (inclusive of opening exercises) for the commencement of the 2005-2006 school year on the understanding that opening exercises can continue to be held at 8:55 a.m. provided that the instructional day, as defined in Article 20.03, is adjusted to reflect the mandatory 5½ hours;

4. For the reasons given at pp.75 to 77, *supra*, the Board declines to award any compensation or damages; and

5. For greater certainty, we re-affirm that this case is limited to the interpretation of Article 20.03 as it applies to the circumstances at Elmwood and nothing in the Award restricts the right of the Division to assign "…other assignable duties" to teachers.

The Grievance is allowed to the extent of the foregoing rulings.

In closing, we express our sincere appreciation to Messrs. Smorang and Parkinson for the manner in which this case was distilled, presented and argued.

Dated at Winnipeg, Manitoba, this 31st day of August, 2005.

William D. Hamilton, Chairperson

Mel Myers, Q.C.
Nominee for the Association

Robert Simpson
Nominee for the Division

IN THE MATTER OF AN ARBITRATION
AND IN THE MATTER OF AN ASSOCIATION POLICY GRIEVANCE

BETWEEN:

THE WINNIPEG SCHOOL DIVISION

- and –

THE WINNIPEG TEACHERS' ASSOCIATION OF
THE MANITOBA TEACHERS' SOCIETY

DISSENT

I have had an opportunity to review and consider the Majority Award and, with respect, I cannot concur. Although I agree with the Chairman's recitation of the issues, evidence and argument, and much of his analysis, I do not agree with the conclusion "that opening exercises, in their essential character, are properly regarded as part of the instructional day".

All teachers in this Division are required to be on duty at 8:45 a.m. Between 8:45 and 8:55, students enter the school and make their way to their assigned classrooms. At Elmwood High School, this will be the room where the students will attend for their first class, assuming they are timetabled for a 9:00 a.m. class. Students entering the school may go directly to class, may stop at their lockers, may socialize or may carry on any number of chores or activities prior to the commencement of their initial instructional session. However, regardless of what the students may be involved in, once they enter the school, the teachers are there to supervise, to monitor, to maintain discipline, to ensure compliance with the rules and regulations of the school and to respond to questions and provide assistance if requested. Prior to 8:55 a.m., the role of the teacher does not change, whether the students are in the hallways or have already arrived at the classroom.

At 8:55 a.m., the students at Elmwood High School are to be in their first class, at which point O Canada is played and announcements are made over the public address system. The expectation is that the students will stand during the playing of the anthem and, presumably, will listen during the making of the announcements. The teacher is present and on duty in the classroom at this time.

We have been asked to conclude that the essential character of this period between 8:55 and 9:00 is "instructional", as opposed to the acknowledged essential character of the period between 8:45 and 8:55 being "supervisory". In my view, there is no basis for that conclusion upon the material presented.

Dictionary definitions of the word "instruction" are found at page 70 of the Majority Award. Other definitions are set forth in *Re Conseil Scolaire de District Catholique du Centre-Est de l'Ontario and A.E.F.O.* 83 L.A.C. (4th) 238 (Lavery) at p. 256:

> "Instruction necessarily refers to the programmed imparting of knowledge to pupils so that they understand and assimilate it."
>
> "The duty of instruction consists in 'the duty to actively impart knowledge to a group of pupils so that they can understand and assimilate this knowledge."

As is reflected in the cases, it is not just a question of there being an instructional element to the opening exercises. The Association must establish that the essential character of the opening exercises is instructional in nature. From the definitions referred to, it is implicit that instruction includes not only the imparting of knowledge by the teacher, but the receipt and understanding of that knowledge by the student. In other words, one would certainly hope that where the essential character of an activity is instruction, there is learning involved.

There was no evidence presented upon which a finding could be made that there was any instruction/learning taking place at Elmwood High School during the period from 8:55 to 9:00 a.m. Granted the teacher was in the room and performed a supervisory role. One might even suggest that there is an instructional element to the opening exercises. However, I simply cannot conclude on any interpretation of the evidence before this Board that the opening exercises conducted at Elmwood High School are instructional in their essential character. The instructional day begins at 9:00 a.m. with the commencement of the first assigned class.

The onus is, of course, upon the Grievor Association to establish a breach of Article 20.03 of the Collective Agreement. In my view, that onus has not been met and the grievance should be dismissed.

Dated at Winnipeg, Manitoba, this 31st day of August, 2005.

Robert A. Simpson, Nominee of
the Division