

Manitoba Labour Board

Suite 500, 5th Floor - 175 Hargrave Street, Winnipeg, Manitoba, Canada R3C 3R8

T 204 945-2089 F 204 945-1296

www.manitoba.ca/labour/labbrd

MLBRegistrar@gov.mb.ca

Case No. 268/17/ESC

File No. 126287

IN THE MATTER OF: THE EMPLOYMENT STANDARDS CODE

BETWEEN:

Randall Znamkowski,

Employee,

- and -

PRAIRIE ROSE SCHOOL DIVISION,

Employer.

WHEREAS:

1. On October 23, 2017, pursuant to section 95 of *The Employment Standards Code*, (the “Code”), the Director of the Employment Standards Division by order, dismissed the complaint by the Employee against the above named Employer.
2. The Employee having disputed the above-mentioned Dismissal Order (the “Order”), the Director of the Division, pursuant to section 110 of the *Code*, referred the matter to the Manitoba Labour Board (the “Board”).
3. On June 7, 2018, the Board conducted a hearing at which time both parties appeared before the Board, the Employer being represented by Counsel.
4. The Board, after hearing opening comments from the parties, determined that the hearing should be bifurcated such that it determine firstly the following issues:
 - a. Whether the Employee is exempt from receiving overtime wages pursuant to section 5 of *The Employment Standards Regulation* (the “Regulation”), or pursuant to section 2(4) of the *Code*; and
 - b. Whether the Employee is entitled to receive wages in lieu of notice.

Further, the Board determined that the issue respecting the quantum of overtime wages would be determined later, if necessary.

5. The hearing proceeded on June 7, 2018 and continued on June 8, 2018 at which time the Employee testified and Counsel for the Employer cross examined the witness. It was determined that additional hearing dates were required. As such, the Board scheduled two additional hearing dates, which were dates agreed to by the parties, those being July 23 and July 24, 2018.
6. The hearing reconvened on July 23 and July 24, 2018, at which time both parties appeared before the Board, and presented evidence and argument, the Employer being represented by Counsel.
7. At the conclusion of the hearing, the Employee presented submissions to the Board and requested that the Board, pursuant to section 125(5) of the *Code*, award costs to him in the amount of \$281.00 to cover the losses and expenses incurred by him. Also, Counsel for the Employer advised the Board that a formal request would be made by the Employer seeking costs. Subsequently, Counsel for the Employer, by way of letter dated July 25, 2018, requested that the Board award costs to the Employer in the amount of \$484.75 to cover the losses and expenses incurred by the Employer.
8. The Board, following consideration of material filed, evidence and argument presented, has made the following determinations:
 - a. The Employee met each of the conditions as set out under section 5 of the *Regulations* and accordingly is deemed a Professional under the *Code*. As such, the Employee is exempt from the overtime provisions;
 - b. The Employee performed management functions primarily and as such he is not entitled to overtime wages;
 - c. The Employer had just cause to terminate the employment of the Employee within the meaning of section 62(1)(h) of the *Code* and as such the Employee is not entitled to receive any wages in lieu of notice from the Employer;
 - d. The Board does not have jurisdiction to award any remuneration for car expenses, as it did not form part of the compensation package or constitute "wages" as defined in the *Code*;
 - e. Accordingly, the Employee's appeal is dismissed; and
 - f. The requests by the Employee and Employer to be awarded costs pursuant to section 125(5) of the *Code* are dismissed, as the Board is not satisfied that the necessary conditions which would permit it to award costs, are present in this case.

T H E R E F O R E

WAGES:

The Manitoba Labour Board **HEREBY DISMISSES** the claim of Randall Znamkowski.

- AND -

COSTS:

The Manitoba Labour Board **HEREBY DISMISSES** the request of the Employee for costs pursuant to section 125(5) of the *Code*.

- AND -

The Manitoba Labour Board **HEREBY DISMISSES** the request of the Employer for costs pursuant to section 125(5) of the *Code*.

DATED at **WINNIPEG**, Manitoba, this 10th day of October, 2018.



Ruth Liwiski, REGISTRAR

Note: Reasons for Decision attached.

KP/cj/nm

NOTES

1. Appeal of board order re unpaid wages

130(1) A person who is a party to a final order of the board made under this Code in respect of a matter referred to the board under section 110 may appeal the order to The Court of Appeal.

2. Appeal of the Board Decision or Order to Court of Appeal

a. Leave to appeal required

130(2) An appeal may be taken only on a question of law or jurisdiction and by leave of a judge of The Court of Appeal.

b. Time for application for leave to appeal

130(3) An application for leave to appeal shall be made within 30 days after the day the order is made or within such further time as a judge may allow.

3. Board and director entitled to be heard

131 The board and the director are each entitled to be heard, by counsel or otherwise, on the argument of an application for leave to appeal and on an appeal.

4. Applicant to file proof of payment to the director

130(4) If a person that files an application for leave is not an employee and is required, under the order that is the subject of the application, to pay money to the director, the person shall file with the application evidence that he or she has complied with subsection 125(4).

5. Evidence of compliance with an Order of an Acknowledgment of Receipt from the Employment Standards Division indicating that the amount stated in the Order has been deposited in the "Province of Manitoba Wages Trust Account." *The Employment Standards Division will only accept certified cheques, money orders or cash. Personal cheques will not be accepted unless certified. Please make cheques, etc. payable to "The Province of Manitoba Wages Trust Account."*

Xpresspost to:

- Mr. T. Osiowy, Superintendent, Prairie Rose School Division
- Mr. D. Simpson, Fillmore Riley LLP
- Mr. R. Znamirowski

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BETWEEN:

Randall Znamirowski,

Employee,

- and -

PRAIRIE ROSE SCHOOL DIVISION,

Employer.

BEFORE: K. Pelletier, Vice-Chairperson

Y. Milner, Board Member

T. Henderson, Board Member

APPEARANCES: T. Osiowy, Employer

D. Simpson, Counsel for the Employer

R. Znamirowski, Employee

REASONS FOR DECISION

INTRODUCTION

1. The Employee filed a claim for overtime wages and wages in lieu of notice with the Employment Standards Division (the "Division") on December 23, 2016. The Division issued reasons for decision on October 23, 2017, dismissing the claim on the basis that the Employee was terminated for just cause and therefore not entitled to wages in lieu of notice. The Division further concluded that the Employee was not entitled to overtime wages as he had, in the course of his employment, performed management functions primarily.

2. The Employee appealed the Division's decision to the Manitoba Labour Board (the "Board") on November 2, 2017.
3. The Appeal was heard over the course of four days, on June 7, 8, July 23 and 24, 2018, respectively. The Employee appeared before the Board and presented evidence and argument. He did not call any witnesses. The Employer was represented by counsel, and called one witness to provide evidence.
4. The Board determined that the hearing should be bifurcated as the preliminary issue of whether or not *The Employment Standards Code*, C.C.S.M. c. E110 (the "Code") applied to the Employee would necessarily be determinative as to whether or not he should be entitled to any overtime wages. The Board requested that the parties address:
 - a. Whether the *Code* applies to the Employee; and
 - b. Whether the Employer had just cause to terminate the Employee.
5. If the Board were to conclude that the *Code* applies to the Employee, it was agreed that the parties would reconvene to hear evidence and argument as it relates to the issue of quantum of overtime wages.
6. For the reasons that follow, the Board has concluded that the Appeal be dismissed.

BACKGROUND FACTS

7. The Employee commenced employment with the Prairie Rose School Division ("PRSD") on October 21, 2014. His employment was terminated on June 22, 2016. From October 21, 2014 to November 28, 2014, the Employee held the position of Associate Secretary-Treasurer of the PRSD. Between December 1, 2014 and the date of his termination, he held the position of Secretary-Treasurer of the PRSD. The divisional office is located in Carman, Manitoba. Throughout, the Employee resided in Winnipeg, which involved a commute to and from work.
8. In his role of Secretary-Treasurer, the Employee held the second highest ranked position within the PRSD, reporting directly to the Superintendent of the PRSD, with a dotted line reporting relationship to the Board of Trustees. For the duration of his employment, the Superintendent of the PRSD was Terry Osiowy ("Osiowy").
9. The role of Secretary-Treasurer is regulated by *The Public Schools Act*, C.C.S.M. c. P250, which mandates at section 53(1) that: "Every school board shall appoint a secretary-treasurer, fix and pay his remuneration and define his duties."
10. The Employee testified that he was a Chartered Accountant (a "C.A."). His annual registration with the Chartered Professional Accountants of Manitoba was paid for by the PRSD and he testified that he was a "regular member" under *The Chartered Professional Accountants Act of Manitoba* (the "CPAAM"), C.C.S.M. c. C71. Both the Employee's *curriculum vitae* and signature line on his email identify him as a C.A.
11. The evidence before the Board was presented in three separate categories, namely: (a) the Employee's claim for overtime; (b) the duties and responsibilities of the Secretary-Treasurer of the PRSD; and (c) Employee performance concerns.

The evidence as it relates to each of these three matters will be outlined under separate subheadings below, for ease of reference.

The Employee's claim for overtime

12. The Employee claimed that he was owed a significant amount of overtime wages as a result of the long hours he worked throughout his employment tenure. The Employee testified that he had negotiated with the Employer the ability to be paid for all overtime hours worked.
13. The Employee testified that, prior to commencing employment with the PRSD, he had specific discussions with Osiowy relating to overtime pay. He recounted a discussion which occurred on August 26, 2014, before commencing employment, in which he had a lengthy face-to-face discussion with Osiowy, relating to the position of Secretary-Treasurer which he was being offered. In this meeting, the Employee testified that there were specific discussions relating to overtime pay, and that an agreement had been reached, from his perspective, for the accumulation and banking of his overtime hours, which he would then be allowed to access as banked time hours in lieu at a mutually amenable time. The Employee also recalled that, in this meeting, he provided Osiowy written documentation relating to the applicable overtime provisions enshrined in the *Code*. He sent this same information by email to Osiowy the next day.
14. Osiowy's recollection of the August 26, 2014 face-to-face interaction with the Employee did not align with the Employee's version, at least not as it relates to the claim for overtime. While he recalled discussing overtime with the Employee, he testified that he would never have been in a position to agree to overtime pay, as it was not available to senior administrators of the PRSD. In Osiowy's testimony,

he remained steadfast that no such agreement on overtime, or banked time off in lieu, had ever been reached.

15. Following the August 26, 2014 meeting, Osiowy sent an email to the Employee in the afternoon of August 27, 2014, in which he enclosed a PRSD formal compensation package, requesting a response by 4 p.m. on Thursday, August 28, 2014. Osiowy explained in his evidence that the package had been vetted and approved by the Board of Trustees, and contained standard provisions included in other employment contracts, including his own. He noted that neither overtime, nor the ability for the accumulation of banked time was offered by the PRSD in this document, or at any other time. The document contained an offer for seven Fridays off in the summer in lieu of additional hours worked over the course of the year, which Osiowy explained was a standard term included in the employment agreement of all PRSD staff.
16. The Employee responded to Osiowy's email on August 28, 2014. Attached to this email are two documents. The first, titled: "Offer of Employment High Lights", was characterized in his email as "a summary of the points". The second document appended is a draft "Proposed Offer of Employment" in the form of a contract of employment, which he prepared for Osiowy's signature. The document also included what appears to be the logo from the PRSD, though Osiowy testified that it was not. It is made clear to the Board, through testimony, that this offer of employment was prepared by the Employee, and not by Osiowy or any other representative of the PRSD.
17. In the "Offer of Employment High Lights" document, the Employee requests a thirty-five hour week, with any additional time to be accumulated and taken as banked time. The "Proposed Offer of Employment" references that he is requesting pay at

the rate of 150% for additional hours in excess of thirty-five hours weekly, and 250% for hours worked on statutory holidays. No documentary evidence was tendered indicating a written reply to either document. Osiowy testified that he could not specifically recall receiving these documents, but confirmed that he did not respond as his email containing the compensation package was reflective of that which was being offered.

18. The Board also received as evidence two documents titled: "Compensation Package". The first of these documents is dated September 3, 2014 and the second, September 4, 2014. The evidence was that these documents were also prepared by the Employee. In both documents, the Employee has included many of the terms outlined in Osiowy's offer of August 27, 2014, but also outlines various other terms which ultimately are not formally included in the contract of employment which ensues. The document also contains handwritten notations, which were confirmed to be the Employee's, most of which were illegible. Osiowy referred to these requests as the Employee's "wish list", and it was acknowledged by the Employee that many of the terms were not ultimately agreed to, including the compensation sought; vacation entitlement requested; hours of work; and notice provisions. In both documents, there is no indication that any banked time will be available to the Employee. The only reference to additional time in lieu is where it is noted that: "in recognition of extra time worked throughout the year", the Employee will receive an additional "56 hours (7 Fridays) in July and August", as referenced above as being a standard term of contract for PRSD staff. The Employee confirmed that he had successfully negotiated reimbursement of his professional dues and professional development.
19. Following this brief exchange of email messages, there does not appear to be any further written correspondence between the Employee and Osiowy relating to terms

and conditions of employment. According to Osiowy, further communication occurred over the telephone.

20. Osiowy testified that in one such telephone conversation, the Employee informed Osiowy that he would review the employment contract once he had started working. The Employee denied that he had done so, stating that he was troubled that it took so long for an employment contract to be drafted and a copy provided to him.
21. Osiowy explained that he would not have been able to accept any term outside of the standard terms agreed to by the Board of Trustees, which terms were reflected in both the initial job offer of August 28, 2014 and the formal contract of employment, which was presented to the employee on October 27, 2014, six days after he had commenced employment. This contract was neither signed by the Employee, nor any representative of PRSD.
22. The Employee maintained that he had not agreed to the terms of the contract of employment presented to him, as overtime provisions were not included. There was no evidence that there were any further discussions on the employment contract, or any of its terms, once it was sent on October 27, 2014. In fact, the Employee confirmed that he did not raise the issue of what he alleged to be the missing overtime provisions with Osiowy, the Board of Trustees, or any other representative of the PRSD. The Employee acknowledged that he was paid in accordance with the terms of the contract and that the terms were reflective of what had been agreed to, with the exception of the overtime provisions.
23. Osiowy acknowledged that the contract sent to the Employee on October 27, 2014 had not been signed by either party, but that the terms had been agreed to previously. Osiowy advised that there were no concerns expressed by

the Employee once he had commenced employment and no concern with the contract as drafted once it had been presented to him. The PRSD paid the Employee in accordance with the employment contract, and adhered to the terms contained therein.

24. The Employee confirmed in cross-examination that he began keeping track of his overtime hours from the time he started employment with the PRSD, explaining that he had not advised anyone that he was maintaining a record. He acknowledged that he did not fill out an overtime form for review and approval at any time throughout his employment tenure and that he did not submit his overtime hours until after the termination of his employment. From his perspective, he did not believe that he should be submitting his hours, as they would be reviewed once he "took the time off". He explained that Osiowy had knowledge that he was "working a lot" and that, when the time came, he would be entitled to the accumulated banked time off.
25. The Employee further testified that it was an expectation that he be in the office during the core divisional office hours of 8 a.m. and 5 p.m., but confirmed in cross-examination that there was no expectation that he report his hours, or any consequences as a result of his occasionally arriving late for work.
26. The Employee testified that his workload was heavy, requiring a tremendous amount of overtime hours. This, the Employee said, had not been made clear to him at the time of hire. Specifically, he testified that, shortly after he started working with the PRSD, the Superintendent required him to attend a number of committee meetings, which were often held in the evening, outside of working hours. As a result, he was often required to be at work between thirteen and fifteen hours a day on the days that the committees met.

27. Osiowy confirmed that he did not have any knowledge of the Employee keeping track of his overtime hours, and acknowledged that no claim for overtime had been discussed with him at any time throughout the Employee's employment tenure. He further testified that he did not receive any overtime form for review or approval.
28. Osiowy testified that the Employee was assigned no more work than his predecessor, who was able to complete the required work in the prescribed time. In fact, the duties and responsibilities of the Employee were less than had been required of his predecessor, as some of the duties traditionally assigned to the Secretary-Treasurer had been assigned to other staff, in light of the Employee's concerns expressed regarding the workload.
29. Osiowy confirmed that in or about January 2015, there were prescheduled Monday meetings with the Board of Trustees. Prior to that time, meetings were *ad hoc*, as matters arose. Osiowy testified that the decision to preschedule meetings for alternate Mondays was determined in cooperation with the Employee, to ensure that there would be predictability in scheduling.
30. Osiowy confirmed that the Employee was also required to attend Board of Trustee meetings, including in camera meetings of the Board, which were held bi-monthly, between the months of September and June every year. These meetings required the Employee to work into the evening. However, Osiowy explained that there was never any expectation that the Employee be at work at 8 a.m. the following morning, if he was required to work the preceding evening. From Osiowy's perspective, the fact that the Employee attended work at 8 a.m. was his choice, and not mandated by the PRSD.

31. The Employee testified that, throughout his employment, he had requested assistance in the form of an accountant, or an assistant secretary-treasurer, to assist him with the mounting work that he was expected to complete. He took issue with the fact that, following his departure, the Division ultimately posted and filled the position of Assistant Secretary-Treasurer. Osiowy explained that the reason for the posting of the Assistant Secretary-Treasurer was the current Secretary-Treasurer was working reduced hours. The assistant role is intended to both act as a support to the current Secretary-Treasurer, and for succession planning. Osiowy explained that he expected that the current incumbent would eventually move into the role of Secretary-Treasurer, thus rendering the assistant role obsolete.

The duties and responsibilities of the Secretary-Treasurer of the PRSD

32. While the Board does not intend to recount in detail the numerous duties and responsibilities associated with the role of Secretary-Treasurer, it was clear from the evidence and the job description produced that the Employee was directly responsible to the Board of Trustees and the Superintendent for all financial, budgetary and related administrative aspects of the PRSD's operations. Osiowy referred to him as the "gatekeeper of our financial information". Specifically, it was uncontested in the evidence that the Employee was responsible for the preparation, communication and delivery of all aspects relative to the PRSD budget; the purchasing of supplies and equipment, within the confines of the approved budget; and the supervision of certain staff within the divisional office, amongst other responsibilities. As Secretary-Treasurer, the Employee was also responsible for reporting and advising the Board of Trustees on all financial and budgetary matters of the PRSD, and was responsible for preparing for and attending all regular and special meetings of the Board.

33. Part of the concerns, from the Employee's perspective, was that he replaced a retiring Secretary Treasurer who previously held the position for thirty-eight years (the "Retired Employee"), with considerable experience and significant institutional knowledge. The Retired Employee remained in her role for an additional six weeks as a transitional measure, to assist the Employee in understanding the role that he was undertaking. The Board of Trustees and the Superintendent took additional measures in ensuring a smooth transition by entering into a contract with the Retired Employee on an as-needed basis. She continued to provide transitional support on an as-needed, contractual basis, for an additional year, to December 2016. A per diem was agreed to, which was subsequently modified by the Employee without Board of Trustee approval. Osiowy advised that, when he approached the Employee about the change, it was explained to him, and Osiowy agreed that the increase in the Retired Employee's per diem rate "made sense". The evidence was that the Retired Employee had greatly assisted the Employee in preparing the budget submission and financial statements in 2015.
34. While admitting that he held the second highest position within the PRSD, the Employee denied that he performed managerial functions primarily. In his evidence, he explained that, while he was involved in some employee selection and interviews, he did not have the power to hire or to fire employees. He did not have the ability to modify job duties or the wage rates of the employees that he supervised, as this would require approval from the Board of Trustees. He acknowledged that he signed overtime forms submitted to him by employees under his supervision, but noted that this was essentially "rubber stamping" as the approval often came "after the fact". He further testified that, while he made decisions on how business dollars were spent, he did not have significant discretion to approve spending outside of that which had been pre-approved in the budget.

35. Osiowy testified that, as second in command, the Employee was part of the senior administrative team of the PRSD, responsible for the oversight and proper functioning of the divisional office, addressing staff issues and other matters as they arose. The Employee participated in collective bargaining on behalf of the Employer and that his signature appears in the collective bargaining agreement, which he signed on behalf of the PRSD.
36. The Employee managed a large budget, and had financial responsibility, oversight and accountability in relation to the approved budget. While he may not have been the final decision maker in respect of hiring or firing, he made recommendations that were mostly followed. The Employee was also involved in confidential discussions regarding financial and budgetary issues; human resource issues; and personnel issues. He was also present at many in-camera discussions of the Board of Trustees. All of this demonstrated that the Employee held a significant role within the PRSD.
37. In cross-examination, the Employee acknowledged that he was hired, at least in part, because he was a C.A. and had a certain skill set that would be beneficial in his role as Secretary-Treasurer. He confirmed that, in his employment, he performed accounting functions, including the preparation of budgets and financial statements. He acknowledged that he was involved in audits; that he met with auditors; and that he had access to any relevant information that they might require. He also confirmed that while he did not prepare legal documents, he would be tasked with the review of legal documentation and that his signature would be binding on behalf of the PRSD. He also acknowledged that he was a member of the bargaining committee on behalf of the PRSD and that he signed the collective agreement.

38. The Employee acknowledged that part of his role was to identify operational concerns. However, he testified that many of the concerns that he raised were either not considered by the Superintendent, or not brought forward for consideration by the Board of Trustees. As an example, the Employee testified at length regarding an issue with teachers' salaries, which he spent a considerable amount of time researching and preparing supporting documentation. While the documentation was reviewed by the Superintendent, it was never brought forward to the Board of Trustees for review and consideration. Accordingly, he denied that he had any influence as a senior administrator to effect change or make any high level decision.
39. In his direct evidence, Osiowy took the position that the example of the teachers' salary issue was an example of the Employee performing work which he was not asked to prepare, which consumed a tremendous amount of his time, rather than focussing on the work that he was mandated to perform.

Employee Performance Concerns

40. A significant amount of time was spent in cross-examination on concerns with the Employee's performance. From the evidence, it appears that the issues were formally brought to the attention of the Employee beginning in December 2015. Prior to that time, while Osiowy testified that he had informally raised concerns with the Employee regarding his performance, the Employee maintained that there were no issues raised prior to December 2015. At the hearing, the Employee provided the Board with email correspondence in support of his contention that he was praised for his performance and recognized by various individuals within the PRSD for the long hours he was working on behalf of the PRSD. The Board did not receive any documentation in support of the Employer's suggestion that there were any performance-related concerns prior to late 2015.

41. The Board heard that concerns regarding the Employee's behaviour in the workplace were raised by certain employees in December 2015. Specifically, the Board heard evidence relating to an incident involving the Employee where he was overheard yelling and swearing over the phone, which workers within the office found to be offensive and disrespectful. At the time of the first incident, Osiowy was on an unexpected leave of absence, which had started on November 9, 2015. A second incident occurred in January 2016, involving an allegation that the Employee had purportedly directed a colleague to investigate what staff were doing during working hours. This was commonly referred throughout the proceedings as the "spying incident".
42. On his return from his extended leave, Osiowy addressed the concerns raised with him in two ways: first, he met with the Employee to discuss the issues raised and to outline a course of action and expected conduct. He then conducted a meeting with some of the staff, along with the Employee, to provide the staff the opportunity to outline their concerns. It was clear from the Employee's evidence that he was not satisfied with the manner in which the meeting with staff occurred, in that he testified that he was "told to listen" and "ordered not to talk about it." Following the meeting, he testified that he spoke to the affected individuals to let them know that he did not have any intention of deliberately hurting them.
43. Osiowy wrote to the Employee on January 31, 2016, requesting he attend a meeting the next day, on February 1, 2016. In this email, Osiowy generally outlined some of the issues that would be discussed in the next day's meeting, encouraging him to review his job description and to come to the meeting prepared to discuss how he views his role within the PRSD. In this email, he wrote: "The list of items [to discuss] that you will receive will clearly summarize my concerns and it will provide you with the required actions and timelines for addressing those concerns."

When these items are shared with you, you will not be surprised with the list of concerns. We have had many conversations in the past and many of the listed concerns have been shared with you.” The letter further outlines: “It is my hope that you will receive these concerns and the required actions and timelines as a defined starting line for your future work as PRSD’s Secretary Treasurer.”

44. This meeting occurred in Winnipeg on February 1, 2016. At the meeting were Osiowy, Joanne Johnston, human resources manager, and the Employee. In preparation for the meeting, Osiowy had received feedback from office staff and from the Retired Employee, whom he testified had expressed concerns with the Employee’s performance. He had compiled a list of the concerns and drafted a letter which he intended to present to the Employee. He testified that he used this letter as a guide for their discussion.
45. In the meeting, Osiowy testified that they went through a number of the concerns he had with the Employee’s performance. He testified that they discussed the work that was expected of him. They also discussed various resources that were available to the Employee for support, including other secretary-treasurers working within other school divisions. From Osiowy’s perspective, the purpose of the meeting was to provide the Employee direction and to clearly articulate the concerns of the PRSD. He testified that they discussed clear target dates for completion of the work outstanding. Given the acrimony and low morale in the workplace, Osiowy stated that he was “his last supporter” and that he was committed to ensuring that the Employee would be successful in his position.
46. On February 2, 2016, the Employee was issued the letter referenced in the February 1 meeting, which outlined a number of concerns with his performance. This letter also outlined for the Employee timelines for completion of the specified

duties and tasks. In cross-examination, the Employee acknowledged that many of the timelines set by the Employer were not met or were not met on time. The Employee explained that there was no priority set in this letter, which made it difficult for him to appreciate which matters needed to be first completed. The Employee also testified that he understood from this letter that he was "being set up to fail" by Osiowy. He also testified that he did not respond to the letter, because he "wasn't asked for [his] opinion. It wasn't encouraged."

47. Osiowy testified that, despite the concerns discussed in the February 1, 2016 meeting, along with the clear items for completion outlined in the February 2, 2016 letter, the Employee was unable to conclude many of the tasks previously completed by the Retired Employee in her role as Secretary-Treasurer, who had done so within the specified timelines and without concern. His focus was to be on the payroll and financial activities of the office. In fact, Osiowy testified that the Employee had fewer tasks than the previous incumbent, as he had voiced concerns regarding his workload. For instance, Osiowy testified that the Employee was not required to complete the minutes at the Board of Trustee meetings, which was instead assigned to an administrative assistant in support of the Employee. Notwithstanding, Osiowy testified that it was up to the Employee to manage his time and workload to ensure the timely completion of the work.
48. The Employee testified that many of the tasks required of him were new to him. He needed time to complete the documentation, and explained that a significant amount of his time was spent doing data entry, as he did not have the necessary supports in place to assist him. He acknowledged in cross-examination that he had under his direct supervision a team of employees dedicated to performing the work required of the Secretary-Treasurer, but he clarified that these employees were otherwise busy doing other work, and were not available to perform the tasks for

which he required support. Osiowy testified that the Secretary-Treasurer is responsible for ensuring that the work is completed, which may require, from time to time, data entry. If the Employee wished for the employees in the office to perform certain tasks within their skills and abilities, including data entry work, it was up to him to direct them accordingly.

49. The Employee relayed an example of his attempt to delegate work to his administrative assistant, which Osiowy had subsequently advised her not to perform. The Employee testified that this demonstrated that he was unable to delegate work to his staff and that Osiowy was “deliberately attempt[ing] to have him fail”. Conversely, Osiowy testified that the work that he was requesting that the administrative assistant perform was well beyond her skills and abilities, and was a task that fell squarely within the role and responsibilities of the Secretary-Treasurer. In fact, the work delegated related to a budgetary shortfall, which the Employee had requested the administrative assistant to locate and correct, and which she had expressed to Osiowy was beyond her capabilities. While the Employee acknowledged that this work constituted work of the Secretary-Treasurer, he nevertheless maintained that it had been inappropriate for Osiowy to intervene.
50. Osiowy testified that he had provided the Employee interim support, to assist with the transition. The Retired Employee had overlapped with the Employee for six weeks to assist him in familiarizing himself with the day-to-day activities of the role of Secretary-Treasurer. Beyond that, the Employer had enabled the Employee to contract the services of the Retired Employee, as required, for an additional twelve-month period. During this time, the Retired Employee was called in to assist with budget preparation and to assist with other tasks, as required, at a fairly significant cost to the Employer. Commencing January 1, 2016, the Employee was expected to perform all tasks related to his role as Secretary-Treasurer on his own, without

engaging the Retired Employee. In doing so, Osiowy testified that the Employee was provided with considerable support over an extended period. From Osiowy's perspective, the concerns with the Employee's performance were more apparent once the Retired Employee was no longer engaged to assist the Employee with his duties and responsibilities.

51. The Employee disputed that he was provided significant support from the Retired Employee, stating that, in the result, he was only provided with twelve weeks of support (6 weeks of overlapping support initially, and another 6 weeks of equivalent time throughout 2015). From the Employee's perspective, this was insufficient for the magnitude of tasks that needed to be performed. From the Employee's perspective, it was clear from the overtime record that the work required additional support than had been provided to him by the PRSD.
52. Osiowy testified that, as part of the employment contract, the Employee was to be evaluated. Accordingly, in March 2016, he solicited and received feedback from various stakeholders, including individual Trustees, Principals, and other staff members. He testified that he sought a wide range of views on the Employee's performance, so that he could then provide him with clear and honest feedback. This feedback was ultimately communicated to the Employee in writing.
53. As it relates to specific concerns with the Employee's performance, the Board heard evidence relating to an array of tasks and responsibilities which fell within the scope of his duties, and which the Employee was not able to fully or substantially complete. The Board has determined that there were two matters which were of significant importance, and which were discussed at length, including the budget submission and the preparation of financial statements. This is not intended to minimize the severity of the other issues raised, but it was fairly clear from the evidence, and

through the Employee's own admissions, that he was unable to complete some tasks. He explained that, in some instances, the completion of some of the tasks depended on work from his team, who were unable to perform the tasks required, and in other cases, involved other employees of the PRSD.

54. The budget, which is due in its entirety on March 31 each year, follows a series of meetings and consultations, including public consultations, and is largely based on the financial information from the proceeding year. Prior to its submission to the Province, the budget must be reviewed and approved by the Board of Trustees. The Employer noted that, in his first year of employment, with the assistance of the Retired Employee, the budget was submitted on time and in the proper form. In the second year, the Employee submitted part of the budget on time, but did not provide the entirety of the supporting documentation, despite reminders and prompting. The Employee testified that the information that he was late in submitting constituted a "very small piece". Osiowy disputed this, without commenting on the importance of the nature of the missing documentation. He testified that the delay in submitting the information by the Employee led to a delay in submitting the budget submission to the Province, which he indicated was not a "small piece". On the contrary, Osiowy testified that this was entirely inappropriate and unacceptable.
55. Osiowy testified that there were other concerns relating to the budget. For instance, Osiowy was concerned on his return from extended leave in January 2016 that the Employee had "nothing prepared" regarding the budget. The Employee had not held any of the pre-scheduled budget meetings, which is a necessary step in gathering the information for the budget submission. Osiowy was also concerned that, following the budget presentation in February, the budget included a significant shortfall, which was dismissed by the Employee as being minor. Osiowy testified that he was starting "to get really concerned".

56. When the budget was not submitted in its entirety by the deadline, Osiowy testified that this was the first time that PRSD had been late in their budget submission. He testified that this was a significant concern for him as: "not having your budget submitted to the Province means that your budget isn't ready". He testified that no explanation was provided by the Employee for the late submission.
57. Beyond the budget concerns raised, there was also an issue raised regarding the 2017 financial statements, which were due on June 1, 2016. The Employee acknowledged that the creation of and submission of financial statements constituted a "key responsibility" of his role within the PRSD. The Employee confirmed that, prior to the termination of his employment, he was unable to provide the financial statements and, despite having received extensions, he had failed to meet any of the deadlines. He testified that these financial statements were not "mandatorily required", as the Province could simply rely on the previous year's financial information. This was disputed by Osiowy, who testified that these financial statements were "key" for the Province to establish funding for the succeeding school year. The Employee acknowledged in cross-examination that he negotiated an extension from June 1 to June 14, 2016 from the Province for the submission of the financial statements without first informing or discussing it with Osiowy.
58. Osiowy testified that there is a process that must be followed prior to the submission of financial statements. Specifically, Osiowy testified that the draft version needs to be approved by the Board of Trustees and reviewed by the auditors. When he was contacted by the Province about the extension, Osiowy was concerned that the Employee would not have the necessary time to complete all of the required steps prior to the late submission of the financial statements on the extended deadline of June 14, 2016.

59. Osiowy expressed his frustration with being advised by the Province that the Employee had requested an extension. He testified that he had many discussions with the Employee over the course of the months of April and May to ensure the timely delivery of the financial statements. Further, he noted that there were Board of Trustee meetings in April and May, in which the Employee could have raised the issue with the group, to advise them that there would be an issue with providing the information on time. Osiowy testified that he relieved the Employee from some of his other responsibilities once the extension from the Province was granted, to ensure that his focus would be on completing the financial statements. Despite these discussions and accommodations, the Employee was nevertheless unable to deliver, and did not approach Osiowy to provide any explanation.
60. Osiowy testified that he specifically instructed the Employee not to communicate directly with the Province. He clarified that this was to ensure that any concerns were raised directly with him, rather than implicating the Province. When it became clear that the June 14 deadline would not be met, the Board heard that the Employee requested a further extension from the Province. Again, he did not discuss this issue with Osiowy prior to writing to the Province, requesting a further extension. Once it came to Osiowy's attention that the Employee had failed to follow his instructions, and had failed to deliver the financial statements, he called the Employee into a meeting to "discuss why he had communicated with [the Province]" despite his instructions.
61. On June 16, 2016, the Employee was placed on administrative leave due to his failure to meet several of the concerns outlined in the February 2, 2016 letter; for failing to file the financial statements; and for his insubordination and "lack of respect" to Osiowy's directives.

62. Osiowy testified that the termination of the Employee's employment was approved by the Board of Trustees. The Board Chair signed the termination letter to the Employee, dated June 22, 2016, in which are outlined a number of concerns, including his failure to "complete key operational requirements of [his] position"; failing to disclose to the Superintendent "important information and missed deadlines"; and engaging in "insubordinate actions and inappropriate workplace comments". The late submission of the budget and his failure to meet the deadline for the submission of the financial statements are also listed as grounds for the termination of his employment. The letter also notes that the Board of Trustees has determined that the Employee has "failed to meet [his] legislated required duties and responsibilities as the Secretary-Treasurer for the Division and [his] actions constitute a serious breach of faith and trust".
63. For the Employee, the termination came as a shock, and he was distraught by the manner in which it was carried out. The Employee testified that he did not have the opportunity to discuss any concerns with Osiowy once he was placed on administrative leave, and he was not provided the opportunity to explain himself before the Board of Trustees.

ISSUES

64. There are four issues for consideration in the present case. The first issue for consideration is whether the Employee is a professional pursuant to section 5 of the Employment Standards Regulation (the "Regulation"), and therefore excluded from the overtime provisions of the *Code*.
65. The second issue for consideration is whether the conditions set out in subsection 2(4) of the *Code* apply to the Employee, in that:

- a. The Employee performed management functions primarily; or
 - b. The Employee had substantial control over his hours of work and whose annual regular wage is at least two times the Manitoba industrial average wage.
66. The third issue is whether the Employer and Employee had an agreement for the payment of overtime wages independent from the overtime provisions of the *Code* and *Regulation*.
67. The final issue is whether the Employer had just cause for the termination of the Employee. Each of these issues will be addressed in turn below.

LEGISLATION

68. The relevant provisions of the *Code* are the following:

Definitions

1(1) In this Code,

"employee" means an individual who is employed by an employer to do work, and includes a former employee but does not include a director of a corporation in relation to that corporation; (« employé »)

"employer" means a person that employs an employee in any employment or business, and includes

- (a) a person that has control or direction of, or is directly or indirectly responsible for, the employment of an employee or the payment of wages to an employee,
- (b) a former employer,
- (c) a receiver of the business of an employer, and

- (d) two or more employers declared to be a single employer under section 134; (« employeur »)

"employment" means the engagement of an employee by an employer for the performance of work by the employee under an agreement in which the employee agrees to perform work for the employer for consideration that consists of or includes wages paid to the employee by the employer; (« emploi »)

Application of this Code

2(1) Except as otherwise provided in this Code, this Code applies to all employers and employees, including the Crown, and an agency of the Crown, and its employees.

Exemption — standard hours of work and overtime

2(4) Division 2 (standard hours of work) and Division 3 (overtime) of Part 2 do not apply to any of the following:

- (a) an employee who performs management functions primarily;
- (b) an employee who has substantial control over his or her hours of work and whose annual regular wage is at least two times the Manitoba industrial average wage, as defined by regulation.

Termination by employer — notice or wage in lieu of notice

61(1) Subject to section 62, an employer who terminates an employee's employment must

- (a) give the employee notice of the termination
 - (i) in accordance with subsection 67(1) (notice period for group termination), if that subsection applies, or
 - (ii) in any other case, in accordance with the applicable notice period in subsection (2); or
- (b) pay the employee a wage in lieu of notice, in accordance with sections 77 (amount of wage in lieu of notice) and 86 (wages to be paid within certain time).

Notice period — termination by employer

61(2) For the purpose of subclause (1)(a)(ii), the notice period for terminating the employment of an employee is the applicable notice period set out in the following table for the employee's period of employment with the employer.

Exceptions to notice requirements

62(1) Section 61 does not apply in any of the following circumstances:

- (h) when the employment of the employee is terminated for just cause;

Regulations

144(1) The Lieutenant Governor in Council may make regulations

- (a) exempting an employer, employee, employment or business, or a group or class of employers, employees, employments or businesses from the application of this Code or a provision of this Code;

69. The Employment Standards Regulations, 6/2007 provide the following regarding professional employees:

Professions

5(1) Except for Divisions 5 (annual vacations and vacation allowances), 9 (unpaid leaves) and 13 (equal wages) and subdivisions 1 and 3 of Division 10 (termination of employment), Part 2 does not apply to an employee who

- (a) is qualified to practise and is practising or employed in a profession that is governed under an Act of the Legislature that applies solely to the profession; or
- (b) is registered or enrolled and employed as a student-in-training in respect of such a profession.

POSITION OF THE PARTIES

(i) The Employee

(a) *Is the Employee a “professional”?*

70. On the issue of his exclusion from the Code as a result of his professional designation, the Employee denied that he was deemed a “professional” under the Code, on the basis that the CPAAM did not “solely” apply to him. He argued that, while some “part of the Act applied to him”, others sections did not apply to him as a Chartered Accountant.

(b) *Does the Code apply to the Employee*

i. *Did the Employee perform management functions primarily?*

71. The Employee spent considerable time going through caselaw relating to managerial exclusions under the Code. From his perspective and based on the evidence presented, he was not performing “management functions primarily” as that term is employed in section 2(4)(a) of the Code.
72. The Employee relied on the following cases in support of the proposition that s. 2(4)(a) of the Code did not apply to him: *Nygard International Partnership Associates and Michalowski*, Case No. 735/03/ESC; *Legacy Hotels Corporation and C.L.*, Case No. 41/08/ESC; *1405383 Alberta Ltd.*, and *S.M.*, Case No. 140/12/ESC; *Winnipeg Dodge Chrysler Ltd.*, and *K.O.*, Case No. 218/16/ESC; *Quick Auto Lease and G.Z.*, Case No. 102/12/ESC; *6300154 Manitoba Ltd.*, and *D.P.*, Case No. 70/15/ESC; *North Star Construction and W.M.*, Case No. 30/10/ESC; and *Manitoba Government Employee’s Association and Provincial Auditor, Province of Manitoba*, Case No. 1207/87/LRA.

73. The Employee argued that the evidence revealed that he did not perform management functions primarily, as all of his tasks would require approval from either the Superintendent or the Board of Trustees. He characterized his role as primarily entering data, which did not involve any management functions. While acknowledging that he was involved in some competitive processes and in supervising staff, he did not have the ability to offer employment. His involvement was only to provide recommendations for hiring. He noted that he did not set his own hours of work, and was required to be at work at 8 a.m. on each working day. He argued that he was unable to meaningfully contribute to the work of the Board of Trustees, as he was advised to speak only when necessary and when addressing an issue that was within his scope as Secretary-Treasurer. He also raised the concern that any issue he brought forward for review were quashed without proper consideration. On the whole, in looking at the indicia of management functions as developed by the Board, the Employee argued that these established that the Employee did not perform management functions primarily.

ii. Substantial control over hours and earnings of twice the industrial average

74. The Employee acknowledged that he had annual earnings representing more than twice the industrial average. However, he argued that he did not have substantial control over his hours of work. Specifically, he testified that he was to be in the office daily between 8 a.m. and 5 p.m. He was also mandated to attend Board of Trustee meetings and other committee meetings, which were often held past his regular hours of work. Even when he attended work late, he argued that he would make up the time at the end of the day. He presented examples of when he was absent from the workplace during the week for personal reasons and noted that he made up his hours over the weekend. In so doing, the Employee argued that he did not have any substantial control over his hours.

(c) Agreement for overtime

75. Notwithstanding the issue of his exclusion from the *Code*, the Employee argued that there was an agreement between the PRSD and the Employee for the payment of overtime. The Employee noted that he had raised the issue of overtime in his first discussion with Osiowy, and provided him with information in support of his request. He pointed to the "Offer of Employment High Lights" and the "Proposed Offer of Employment" documents he prepared and presented to Osiowy in support of his contention that he be entitled to overtime for all hours worked in excess of regular hours.
76. He maintained a record of his overtime hours, conceding in cross-examination that he had never filled out the form or submitted his overtime hours for approval. He nevertheless maintained that the facts bore out that an agreement had been reached with Osiowy regarding the accumulation of, and banking of his overtime hours.
77. The Employee relied on many of the above-referenced cases in support of the proposition he was owed for his overtime hours including, *inter alia*, the *Nygaard*, *supra*, and *Legacy Hotels*, *supra*, decisions.

(d) Just Cause

78. The Employee argues that he was not terminated for just cause. He notes that he was neither progressively disciplined, nor provided an opportunity to discuss any alleged Employer concern while placed on administrative leave, with either Osiowy or with the Board. Throughout, the Employee argued that he noted a significant "change" in his relationship with Osiowy following his return from an extended leave. From the Employee's perspective, once Osiowy was determined to "get rid of [him]",

there was nothing he could do to change his mind. He repeated in his final submission that the subsequent hiring of an Assistant Secretary-Treasurer following the termination of his employment demonstrated that he was performing a lot of work that should have been performed by an employee in an assistant or accountant capacity.

79. The praise he had previously received from other employees and representatives of the PRSD demonstrated that he worked long hours and that his work was commended.
80. On the whole, the Employee maintained that he was not terminated for just cause and that he should accordingly be entitled to wages in lieu of notice pursuant to the *Code*.

(ii) **The Employer**

(a) ***Is the Employee a professional?***

81. Counsel for the Employer noted that the Employee was not entitled to overtime on the basis of his professional designation. As a Chartered Accountant, under the *CPAAM*, the Employee fell squarely within the exception of s. 5 of the *Regulation*, in which it is noted that Part 2 of the *Code* (overtime) does not apply to a professional employee.
82. The Employee acknowledged that he was a regular member of The Chartered Professional Accountants of Manitoba, which is a regulatory body governed by the legislature. He also acknowledged that the Employer had paid the prescribed fee and that he was performing work under “professional services”, as they are defined in *CPAAM*. Accordingly, Counsel argued that the Employee met each of the conditions as set out under s. 5 of the *Regulation*.

83. Counsel relied on the following cases in support of the Employer's contention that the Employee was a "professional" under the *Code*: *R.P. and Catrysse Veterinary Services*, Case No. 232/14/LRA; *Re Cheng*, 2017 CarwellBC 1918, [2017] B.C.W.L.D. 5202; and *Reyes v. Jonas Lang Lasalle Real Estate Services Inc.*, 2017 CarswellOnt 344, [2017] O.L.R.B. Rep. 81. Counsel also relied on certain sections from the Employment Standards Regulations in British Columbia and Ontario to outline for the Board some of the distinctions with those pieces of legislation and our own, which we have been called to interpret.

(b) Does the *Code* apply to the Employee

i. Did the Employee perform management functions primarily?

84. Counsel referred to a section from M. Lynk's book titled *Employment Law in Canada*, in which it is noted at p. 8-205:

The notion of "manager" clearly encompasses an individual who has independent authority to make effective decisions concerning the administration of the organization to which he or she belongs, for example, in relation to budget planning, making contracts with clients and suppliers, allocating expenditures for the purchase and maintenance of plant and equipment, allocating wage increases and regulating the work process in general. Individuals having autonomous discretion to make decisions on these matter will normally be found at the upper echelons of the organizational hierarchy.

85. Counsel for the Employer contended that the evidence sufficiently established that the Employee was in a managerial position. He was the 2nd in command of the PRSD, performing work reserved for those occupying senior administrative positions within the organization. Counsel referenced paragraph 53(1) of *The Public Schools Act* which mandates the appointment of a secretary-treasurer, and paragraph 53(4) which specifically outlines:

Payment of accounts without approval

53(4) The secretary-treasurer may without prior approval of the school board pay all accounts that are payable by the school division or school district and that have been included in the estimates of the school division or school district for the year in which the account is payable if he considers payment without prior approval of the school board to be in the best interests of the school division or school district and pay all other accounts that are payable by the school division or school district and that have been approved by the school board.

86. The Employer argued that the evidence revealed that the Employee held a position of high importance, mandated by law, which required him to perform work, manage and make decisions within a large operating budget.
87. Counsel relied on a number of decisions, which stand for the proposition that the task of the Board is to review the actual role, rather than the role as perceived by the Employee. In that regard, Counsel urged the Board to consider that the Employee had a very large budget to manage, from which he had to make financial decisions and be accountable for expenditures. He was expected to manage his team of employees within the office and to conduct performance appraisals. He was on the collective bargaining committee, and was signatory on behalf of the PRSD in the Collective Agreement. Despite his suggestion to the contrary, the Employee set his hours of work, and no one was monitoring his comings and goings. He approved overtime for the employees within the office, and he was responsible for keeping track of their hours.
88. In light of the evidence presented, Counsel urged the Board to conclude that the Employee was performing management functions primarily. In support, Counsel relied on the following decisions: *Legacy Hotels Corporation and C.L.*, 41/08/ESC; *Creamer v. Berry Creek School Division No. 1*, 1991 CarswellAlta 570, 123 A.R. 330, 28 A.C.W.S. (3d) 792; and *Tsakiris v. Deloitte & Touche LLP*, 2013 ONSC 4207.

ii. Substantial control over hours and earnings of twice the industrial average

89. The Employer held that the Employee had substantial control over his hours of work. His employment contract is silent on the issue of hours of work. The only document which references the hours of work is the Compensation Package, communicated to the Employee on August 28, 2014 by Osiowy, which indicates that "standard hours is an 8 hour day or 40 hour week. Salary includes overtime as approved by Superintendent up to a 50 hour week average over the year."
90. The Employer argued that the Employee could arrange his schedule, especially when he was required to attend Board of Trustee or committee meetings which required him to stay later in the day. While the Employer acknowledged that the core hours of work of the divisional office was 8 a.m. to 5 p.m., there was no requirement for the Employee to attend to the same hours as the office staff.
91. The Employer maintained that the evidence did not support the Employee's contention that he did not have substantial control over his hours of work.

(c) Agreement on overtime

92. Counsel for the Employer argued that there was no agreement for the payment of overtime as alleged or at all, and that the Employee had failed to bring forward any evidence in support. All of the documents on which the Employee relied in the course of these proceedings were created by him, for his benefit, and there was no objective evidence in support of his contention that there was an agreement between the Employee and the PRSD on the issue of overtime. In fact, all documents created by Osiowy suggested otherwise. Further, Osiowy testified that he would not have been in a position to accept to pay overtime, as all terms would

need to be vetted by and agreed to by the Board of Trustees. The terms which he communicated to the Employee on August 28, 2014 formed the basis for the contract of employment, presented to the Employee on October 27, 2014. Neither document contain any reference to overtime pay.

93. From the Employer's perspective, the Employee's claim for overtime was not credible.

(d) Just Cause

94. Counsel for the Employer argued that the preponderance of evidence demonstrated that the Employee had been terminated for just cause. Despite the Employer's efforts to ensure that the Employee was successful in his position, the evidence demonstrated that there was a deterioration in his performance over the course of his short employment tenure. The Employee was provided with support by way of transitional assistance from the Retired Employee. He was offered the opportunity to discuss concerns he was experiencing and to consult with and get an understanding of his role from other Secretary-Treasurers in the similarly-sized school divisions in the Province. He was advised of the concerns with his performance, duties that were required of him in his role, with clear objectives outlined in a letter dated February 2, 2016. Despite this assistance, the Employee was unable to meet clearly articulated objectives and timelines. He failed to perform work that was required by the required deadlines, as determined by the Province. Through his evidence, he attempted to minimize these shortcomings, suggesting that the missing information from the budget was minimal, and that the financial statements were not necessary, but the evidence demonstrated that they were a provincial requirement, to ensure that the school division was compliant. It was not up to the Employee to unilaterally determine what work was to be, or not be,

completed. On the whole, the Employer suggested that the Employee's evidence demonstrated that he had not taken the February 2, 2016 letter "with the level of severity that he ought to have taken it".

95. Counsel for the Employer also addressed the Employee's contention that he was merely performing "data-entry" functions. The responsibilities of the Secretary-Treasurer, as outlined in the job description and as outlined in Osiowy's letter of February 2, 2016 demonstrate that the Employee held a much more important role than that of a "data-entry" clerk.
96. Further, Counsel for the Employer pointed to the evidence relating to the Employee's unacceptable conduct: his disrespectful exchanges in the office environment, which the Employer noted had led to a breach of trust in the office. He raised the concerns with the performance review, and how his performance was perceived by individuals who had dealings with him in his role of Secretary-Treasurer. He also raised the issue of the Employee's conduct and insubordination vis-à-vis Osiowy. Counsel noted that the Employee's behaviour in seeking an extension from the Province prior to discussing it with Osiowy demonstrated he was unable to follow direction. His failure to meet expectations coupled with his blatant disregard for Osiowy's specific instructions not to communicate any further with the Province, were sufficient to demonstrate that the employment relationship had come to an end and that it was irreparable.
97. Counsel also contended that the Employee's suggestion that he was not progressively disciplined and that there was a "conspiracy to force him out" did not have any evidentiary foundation. To the contrary, the evidence demonstrated that Osiowy had attempted to provide him the necessary supports to see him succeed. Overall, Counsel argued that the Employee was provided clear expectations, with

clear consequences outlined. The fact that the Employee, through his testimony, failed to take any responsibility, deflecting blame onto others and suggesting that the deadlines were not important, demonstrate that the Employer had just cause to terminate his employment.

98. Counsel relied on the following cases involving the issue of just cause: *North Perimeter Service Centre Inc. and J.H.*, Case No. 136/12/ESC; *Matheson v. Matheson International Trucks Inc.*, 1984 CarswellOnt 753, [1984] O.J. No. 306; and *Penney v. Labrador Inuit Development Corp.*, [1987] N.J. No. 214. 199 A.P.R. 153, 5 A.C.W.S. (3d) 345;

ANALYSIS

(a) Is the Employee a “professional”?

99. There is no dispute from the facts of this case that the Employee is a Chartered Accountant, who is registered as a “regular member” of the Chartered Professional Accountants of Manitoba. Chartered Professional Accountants in Manitoba are regulated by the *CPAAM*, enacted by the legislature in 2005, in replacement of *The Chartered Accountants Act*, *The Certified Management Accountants Act*, *The Certified General Accountants Act* and *The Certified Public Accountants Act*, which previously governed the designated accounting profession in Manitoba.

100. Subsection 40(1) of the *CPAAM* stipulates that:

“No person, other than a person who is authorized by by-law to do so, shall use

- (a) the title “Chartered Accountant”, “Certified General Accountant”, “Certified Management Accountant”, “Certified Public Accountant”,

"Certified Practising Accountant", "Public Accountant", "Accredited Public Accountant" or "Registered Industrial Accountant";

- (b) the abbreviated title "CA", "CGA", "CMA", "APA" or "RIA"; or
- (c) a variation, or equivalent expression in another language, of any title or abbreviation set out in clause (a) or (b);

in a manner that implies that the person was a member of The Institute of Chartered Accountants of Manitoba, The Society of Management Accountants of Manitoba, The Certified General Accountants Association of Manitoba or The Certified Public Accountants Association of Manitoba, as those bodies existed on the day before this section came into force.

101. Section 5 of the *Regulation* outlines two conditions which must be met for an employee to fall under the professional exclusion. These are, that the Employee is:

- a. qualified to practice and is practising or employed in a profession that is governed under an Act of the Legislature that applies solely to the profession; and
- b. registered or enrolled and employed as a student-in-training in respect of such a profession.

102. In terms of the first condition, the Board does not read the section as suggesting that an employee must be exclusively working and performing the activities of the profession, but that the employee is employed as a professional and is executing tasks utilizing their specialized knowledge and professional judgement. It may be incidental to the work of a professional employee that they are required to perform other duties which are not directly related to their professional, but that does not mean that they will then cease to be members of a profession. For instance, a professional employee performing ancillary duties will not be excepted from their professional designation by virtue of their performing tasks not deemed to be "professional" work designation (such as clerical work or data entry). The real

question is whether or not the employee is qualified to practice and is practising or employed in a profession.

103. In the present case, there is no question that the Chartered Professional Accountants are governed by an Act of the Legislature (the *CPAAM*). It was also undisputed from the evidence that the Employee was hired as a C.A., and is qualified to work as a C.A.. He acknowledged that he was hired as a result of his professional designation, which was one of the posted qualifications for the position in question. He also acknowledged in his evidence that he was expected to employ his specialized knowledge and professional judgment in the position of Secretary-Treasurer. He recognized in his evidence that he would be disciplined if he did not abide by the rules as established by the Chartered Professional Accountants of Manitoba, and that he applied accounting principles in his work.

104. The Board has considered the Employee's contention that, because some parts of the *CPAAM* do not apply to him, it could not be said that the *CPAAM* applies solely to his profession. An act governing a profession may contain general provisions which will not directly affect or impact the professionals it seeks to govern. For instance, there are administrative sections contained in *The Law Society Act* which do not directly affect lawyers *practising* in the profession, but which generally relate to the legal profession. In the same way that the *CPAAM* includes provisions which will not apply to the Employee specifically, but which generally relate to the profession of accounting.

105. The Employee's suggestion that, because he was not engaged in the practice of public accounting, it could not be said that the *CPAAM* solely applied to his profession is addressed in the preamble to the CPA Code of Conduct, which defines "professional services" as follows:

The term “professional services” applies to all registrants and is not restricted only to those who are engaged in the practice of public accounting. It includes those of a registrant’s activities, whether undertaken for remuneration or not, where clients, employers, the public or professional colleagues are entitled to rely on registration with CPA Manitoba as giving the registrant particular competence and requiring due care, integrity and an objective state of mind.

106. Counsel for the Employer also referenced the decision in *Reyes, supra*, in which there is reference to the term “public accounting”. At para. 52, quoting from the decision in *Stan Seidenfeld Professional Corp. v. Peng* [2016 CarswellOnt 7578 (Ont. LR.B.) case:

Thus, “public accounting” is simply a reference to an accountant holding out his/her services to perform the normal accounting functions for member of the public. It is intended to be a reference to the accounting profession, not just to those accountants who are licensed to sign an audit or assurance agreement.

...

Therefore, the Board finds that the term “public accounting” as used in O. Re. 285/01 s. 2(1)(a) is meant to be a reference to those who are qualified and registered practitioners of accounting i.e. accountants, offering their services to the public.

107. The Board is satisfied that the provisions of the *Code* relating to overtime as set out in Part 2, Division 3 of the *Code* do not apply to the Employee, who was qualified to practise and was practising or employed as a professional accountant under the *CPAAM*.

(b) Does the Code apply to the Employee

i. Was the Employee performing management functions primarily?

108. In addition to concluding that the Employee is exempt from the overtime provisions as he is deemed to be a professional under the *Code*, the Board is also satisfied that the Employee was performing management functions primarily for the reasons that follow.

109. This Board succinctly summarized the law as it relates to the managerial exception in section 2(4)(a) of the *Code* in the *Legacy, supra*, decision. At p.28, the Board outlined the following principles to consider:

1. The onus of proof lies with the party seeking to rely upon the *Code's* managerial exemption;
2. Job titles and job descriptions may not accurately reflect an employee's true duties and responsibilities. The focus of the Board must be on what the employee actually does;
3. Mere supervision of other employees is not determinative of managerial status and the Board has consistently refused to conclude that individuals often referred to as "front line supervisors", who merely coordinate, direct, and supervise the work of other employees with lesser experience, skill, expertise or education, thereby perform management functions primarily;
4. The importance of any alleged managerial functions performed as well as the frequency with which the functions are performed ought to be considered;
5. Some managerial functions, for example, the power to hire and fire employees, are considered to be of great importance, while other functions like the imposition of minor admonitory discipline, authorization of leaves and the conduct of performance appraisals are viewed as being relatively less significant;
6. The managerial exemption only applies where an employee performs management functions primarily, and consequently the occasional performance of some management functions does not itself justify the exemption;

7. Rather than focusing on the performance of one or two functions traditionally associated with management authority in isolation, the broad spectrum of duties and the degree to which they are performed should be considered;
 8. Functions that are performed within strict predetermined parameters with little or no discretion are not ordinarily indicative of managerial status, as opposed to functions performed with a high degree of independent decision making authority;
 9. The degree to which an employee spends a substantial amount of time performing the same duties as their non-managerial subordinates is a factor to be considered in determining whether the employee performs management functions primarily; and
 10. The ability to exercise independent decision-making authority so as to exert substantial control over the economic lives of his or her subordinates is an important indication that an employee performs management functions.
110. The Employee relied on the management exclusion indicia, as outlined in the *Legacy* decision, in support of his contention that he was not performing management functions primarily. These indicia include (at p. 29 of *Legacy*):

The indicia of management function have been extensively reviewed by this Board and include, but are not limited to, the following:

1. Hiring employees, including interviewing, evaluating and selecting prospective candidates;
2. Dismissing employees;
3. Promotion or demotion of employees;
4. Authority to increase or decrease the wage rate paid to employees;
5. Authority to impose discipline (minor admonitory discipline being of less significance);

6. Engaging in policy making;
 7. Establishing budgets;
 8. Completion of performance appraisals, particularly when paired with the responsibility for follow up with employees;
 9. Evaluation of probationary employees;
 10. Authority to authorize overtime;
 11. Authority to authorize leaves of absence or other absence from the workplace including vacations;
 12. Participation in collective bargaining on behalf of the employer;
 13. Acting on behalf of the employer during the grievance procedure;
 14. Meeting with the union as a representative of the employer;
 15. Attendance at meetings with managerial personnel, particularly where labour relations is discussed or policies are formulated, and;
 16. Independent ability to purchase material or tools.
111. A review of evidence should not merely involve an assessment of one or two management functions, no matter how important. Rather, the focus of the assessment should be on a broad spectrum of management duties and the degree to which the range of management duties are being performed. In other words, the assessment of the managerial exception needs to involve an evaluation of whether the position in question is truly a management position, involving significant decision-making responsibilities, supervision of employees beyond merely coordinating, directing, supervising and reviewing their work and a power to recommend that impacts on decisions to hire, promote, discipline or terminate.

112. In considering the evidence presented, the Board has not fixated on a single function performed by the Employee, but has reviewed the totality of the evidence as it relates to the duties and responsibilities which were assigned to him. In doing so, the Board has reviewed legislated duties outlined in *The Public Schools Act*, along with the responsibilities outlined in the job posting, the job description and those discussed in these proceedings. On the totality of the evidence, the Board is satisfied that the Employee performed management functions primarily for the following reasons:

- a. It was uncontested in the evidence that the job description was an accurate reflection of the duties, responsibilities and expectations of the role of secretary-treasurer. At the top of this document, it is noted that this position "shall be responsible for the division's business matters involving: finance, purchasing, contracts, accounting, auditing, collective agreements and insurance." The document also outlines that the secretary-treasurer has responsibilities as Secretary to the Board of Trustees, and as Treasurer of the Prairie Rose School Division. The job description demonstrates that the Employee held a senior position within the PRSD.
- b. The position of secretary-treasurer is a statutorily mandated position within the PRSD. The Employee held the second ranked position of the PRSD and reported to the Superintendent, with a dotted line reporting to the Board of Trustees. In this capacity, the Employee was a senior administrator, responsible for the administration and financial oversight of the PRSD.
- c. The Employee was involved in high-level discussions within the Board of Trustees, including in-camera discussions, and was entrusted with highly confidential information relating to budgetary and financial matters.

- d. The Employee was involved in collective bargaining on behalf of the PRSD, and signed the ensuing Collective Agreement, thus binding the PRSD.
- e. The Employee was responsible for reviewing and signing off on any financial and legal documents.
- f. The Employee participated in selection processes as part of a team, and made recommendations on hiring. Specifically, he confirmed that he was involved in the hiring of a transportation supervisor and maintenance supervisor. While Osiowy confirmed that the recommendation for hiring came to him for approval, he would generally follow the recommendation brought forward by the committee.
- g. While inapplicable in the fact situation presented, the Employee conceded that any performance concerns involving the staff he supervised would need to be addressed by him directly, but that he would not have had the ability to fire one of his office staff. That evidence was contradicted by Osiowy, who noted that the Employee would have full authority for making a recommendation on the firing of an employee and bringing the matter to the Board of Trustees for approval. The Board accepts, based on the job description and evidence presented, that the Employee had responsibility for managing staff in the office and that he would have been responsible for bringing forward any recommendation for the termination of one of the employees whom he managed to the Board of Trustees.
- h. The Employee signed off on the office staff's overtime forms. While he claimed that his signature was merely a formality, he acknowledged that he was responsible for ensuring that the claim for overtime was accurate. He also

confirmed that there were no further signatures beyond his own on the form. From the form presented and the evidence considered, the Board accepts that the Employee authorized overtime for the office staff and that it was his responsibility to ensure the accuracy of the overtime claim.

- i. The fact that he did not submit any overtime hours for himself during his employment (even though he did for other employees), or seek approval or payment from the Employer for any such hours, further supports the conclusion that he himself viewed himself as being in a managerial position and not entitled to overtime wages.
 - j. As Office Manager, the Employee was responsible for supervising and evaluating staff. While he did not perform any performance appraisals of the staff whom he supervised, he acknowledged that there was an expectation that one be performed every three years.
 - k. The Employee had financial responsibility and oversight of the entire PRSD budget, and had the ability to authorize spending within the approved budget of the school division.
 - l. While he did not attend each of the meetings, the Employee confirmed that he attended personnel meeting, where confidential personnel matters were discussed.
113. On the whole, the Board has determined that the Secretary-Treasurer of the PRSD position has many of the managerial/supervisory indicia which the Board traditionally looks to support a managerial/supervisory determination. The fact that the Employee was obligated to perform some non-managerial/non-supervisory

tasks does not negatively impact the position so as to change its “character”. The Secretary-Treasurer position he held, coupled with the authority and control that he was provided as Secretary-Treasurer of the PRSD, and his supervisory functions relating to office staff is sufficient for this Board to determine that the fundamental character of his work was managerial.

114. The Board is satisfied that the Employer has discharged its onus of demonstrating that the Employee, in his position of Secretary-Treasurer of the PRSD, exercised managerial functions primarily.

ii. Industrial Average

115. The second component of s. 2(4)(b) of the *Code* provides that, if an Employee’s earnings meet a minimum threshold of twice the industrial average wage, approximately \$95,000 in 2018, and exercises substantial control over their own work schedule, they also be excluded from the overtime provisions under the *Code*.
116. Section 2(4) indicates that “Part 2 do not apply to any of the following”, and then goes on to affirm under subsection 2(4)(a) that individuals performing “management functions primarily” are exempted. Pursuant to subsection 2(4)(b), “an employee who has substantial control over his or her hours of work and whose annual regular wage is at least two times the Manitoba industrial average wage, as defined by regulation” is also exempted. Section 2(4)(b) is expressed as an alternative to section 2(4)(a) relating to the managerial exemption.
117. In light of the Board’s determination that the Employee is excluded from the overtime provisions by virtue of his exercising managerial functions primarily, there is no need for this Board to consider this secondary argument. In any event, the Employee is

also exempted by virtue of his professional designation, pursuant to section 5 of the *Regulation*.

(c) Overtime agreement

118. While the Employee contended that there was an agreement between himself and the PRSD, the Employer maintained that no such agreement had been reached, other than that he would be paid straight time, or in accordance with the salary grid as set out in his employment contract.

119. This issue must be determined solely on the basis of credibility, with the onus on the Employee. As credibility findings are required, the Board has relied on the test outlined in the seminal case of *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.), and in particular, on the following passage from page 357 of that case:

“In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.”

120. The Board is not satisfied on the evidence presented that the Employee has sufficiently established on a balance of probabilities that there was an agreement between the Employee and the PRSD with respect to the payment of overtime wages. The Board was concerned with the evidence of the Employee for a number of reasons, chief among them the fact that there was no supporting documentation demonstrating that there was any agreement for overtime to be payable. All documents presented in support of his contention that there had been agreement to pay overtime were prepared by the Employee, and there were no documents or emails which specified the terms of the alleged agreement.

121. Specifically, it was unclear to the Board as to the details relating to the overtime arrangement. On the one hand, the Employee's document indicated that he was to be paid overtime at the rate of 150% for any hours worked in excess of 35 weekly hours, and 250% for all hours worked on statutory holidays. Yet, the Employee agreed that the expectation was that he work 40 weekly hours. There was no evidence that the Employee had submitted his overtime hours at any time throughout his employment tenure. In fact, the evidence was that the overtime hours were not submitted until after his termination. The Compensation Package documents prepared by the Employee on September 3 and 4, 2014, utilizing Osiowy's compensation package provided on August 28, 2014 as a template, does not include any information relating to any overtime agreement. The only consideration relating to additional hours of work is the stipulation that he is provided an additional 7 Fridays in July and August in recognition of additional hours worked throughout the year. Further, these same documents outline: "salary includes overtime as approved by Superintendent up to a 50 hour week average over the year". While the evidence clearly established that the Employee worked additional hours, there was no evidence to support that his hours had been approved to be worked by the Superintendent.
122. Further, the Board was concerned that the Employee, once he received the employment contract a few days after commencing employment, acknowledged that he willfully failed to sign the contract as it did not contain any provision relating to overtime. Yet, he did not raise the issue with Osiowy, or the Board of Trustees or any other PRSD representative. In fact, he did not raise the issue at all until it was clear that his termination was imminent. Instead, he covertly maintained a record of his hours, without seeking authorization from Osiowy or filling out an overtime form. If he was clear that an agreement on overtime had been reached,

he did not make it evident to either Osiowy or any other individual within the PRSD, and did not take the necessary steps to ensure that his rights were protected.

123. On the whole, the Board finds the objective evidence of the Employer, as supported by the August 28, 2014 email and document, along with the unsigned contract of employment, to satisfactorily establish that there was no agreement or an arrangement on the payment of overtime hours, beyond the additional 7 days off in the summer to compensate for extra time worked throughout the year.

(d) *Just Cause*

124. Since its inclusion in the *Code* in 2012, there has been a wealth of Board decisions on the concept of just cause, from which can be gleaned the following principles:
- a. The onus to demonstrate just cause rests with the Employer, having regard to the conduct or capacity of the employee in the context of the operational requirements of the employer's undertaking and, inter alia, the employee's position and length of tenure in the organization. [*North Perimeter, supra*]
 - b. In interpreting the just cause provisions under the *Code*, the Board has consistently interpreted the provisions as being remedial and given a fair, large and liberal interpretation.
 - c. A contextual approach to just cause is adopted in examining the circumstances surrounding the misconduct.
 - d. Underlying the contextual approach is the principle of proportionality, which requires that an effective balance be struck between the severity of the

employee's misconduct and the sanctions imposed. [*McKinley v. BC Tel*, [2001] S.C.J. No. 40, quoted in *North Perimeter*]

- e. Given the integral nature of the work to the lives and identities of individuals in our society, care must be exercised in “fashioning rules and principles of law which would enable the employment relationship to be termination without notice.” The importance of this principle is underscored by the generally recognized principle that there is a power imbalance inherent in most facets of the employment relationship. [*McKinley, supra*]

125. As noted in *North Perimeter*, it is generally recognized that an assessment of the concept of just cause will follow a three step contextual analysis, as developed by the Ontario Court of Appeal in *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 at paragraphs 50-53:

- a. Determining the nature and extent of the employee's misconduct, if any;
- b. Considering the surrounding circumstances, including the circumstances of the employee and those of the employer; and
- c. Deciding whether dismissal is warranted based on consideration of whether the dismissal is a proportional response to the misconduct.

126. The instant case involves termination on basis of performance. The Employer relied on the decision in *Matheson, supra*, in which the test for just cause on the ground of incompetency was outlined, as expressed by Galt J. in *Ross v. Willards Chocolates Ltd.*, [1927] 2 D.L.R. 461 at 469-70 (Man. K.B.):

It is not always easy for an employer who finds an employee thoroughly unsatisfactory and deficient in obedience or competence to point to a single instance which would justify his summary dismissal. But I do not think it is necessary to rely upon such a single instance where the employee's conduct shows a general laxity and disregard of instructions in a business requiring energy, accuracy of accounts and strict adherence to instructions, such as this business required.

The employer then must adduce evidence or an accumulation of events which prove Mr. Matheson was incompetent in his position as president of the defendant corporation. The plaintiff's performance must fall below an objective standard. It is not enough for the employer to dismiss for what he honestly believes to be just cause; the true test is whether just cause existed.

127. In *Matheson*, the issue related to the just cause of the employee, who held the position of president of the corporation. The employer plead in that case that the employee's performance fell below an objective standard, in that the employee had failed to carry out his responsibilities, including the submission of reports and financial statements on time. At paragraph 16, it is noted that: "When information was requested, he could not supply it. He ignored correspondence sent to him by the directors and failed to carry out their requests." The Court in *Matheson* concluded that the employee was incompetent and that discharge was justified.
128. The Employer submitted that a similar conclusion should be adopted in this case, as the facts as outlined in *Matheson* are not unlike the ones which were established through the evidence. The evidence demonstrated that the Employee failed to adhere to objective performance standards, and failed to reasonably deliver on key aspects of the duties of his position in a timely manner.
129. The Employer also referenced the *Penney* decision, *supra*, also dealing with matters of incompetence. In that decision, the Court noted at p. 8-9:

I find that he was incompetent in this position. In making my finding I am cognizant of the fact that it is not only one or a number of his failing that amount to incompetence but rather an accumulation of events. To say, for example, that his failure to file a tax return or corporate return amounts to incompetence would be clearly wrong in law. But these failures, coupled with an accumulation of other short comings, demonstrate a total lack of attention by the Plaintiff to his duties. His failings when taken together are indicative of a general laxity amounting to incompetency. I find that the accumulation of events adduced in evidence proved beyond the balance of probabilities that the Plaintiff was incompetent...

130. On the case law presented, in order to establish summary dismissal on the basis of an employee's performance, an employer must demonstrate that there is more than mere dissatisfaction with the employee's performance. The employer must demonstrate, through the evidence, that the employee was advised of the level or standard of performance expected, and provided clear instructions on how to attain the desired standard. The employee must also have been provided with sufficient opportunity to improve his performance and been advised that his failure to meet the standard of performance expected would result in dismissal. Once these elements are established, the employer must then demonstrate that the employee was unable to or incapable of meeting the standard.
131. In assessing the facts presented in the instant case, the Board has considered the position held by the Employee, being the 2nd in command of the PRSD, and that he was working for the Employer for less than two years. The Board has also considered that the Employee was employed as a professional and skilled employee, required to utilize his specialized skills in the performance of his duties. While it is clear from the evidence that the Employee spent considerable time at work, the Board was not provided any reasonable explanation for his failure to deliver on the mandated timelines and to complete his work assignments. No evidence suggested that there were additional duties required of the Employee

that had not, for instance, been required of the previous incumbent, or that there was additional work to complete. To the contrary, the Board heard that the Employee was not required to take and complete the notes of the Board. From all accounts, the Employee had a team which supported the work that he was to complete, and it was within his realm of responsibility to assign work as required. The Employee acknowledged that he had a team who supported the work of the Secretary-Treasurer, but continuously referenced an instance where Osiowy advised one of his staff not to perform certain work involving a fairly significant discrepancy in the draft budget. From Osiowy's perspective, the issue was to be resolved by a skilled individual, namely the Secretary-Treasurer, and could not be assigned to an administrative assistant, who was overwhelmed by the request.

132. Beyond his failure to complete assigned tasks, which the Employee understood he was required to complete, the Board was concerned that the Employee did not advise or provide explanation to either Osiowy or to the Board of Trustees to deliver on the required tasks, despite having the opportunity to do so. It was acknowledged that his office was next to Osiowy's, and the evidence demonstrated that there was a bi-weekly Board of Trustees' meeting, which he was required to attend. In light of the evidence presented in that regard, the Board is satisfied that the Employee's failure to provide information to the Employer and to the Board of Trustees, coupled with his failure to explain why he was unable to deliver and/or complete tasks in a timely manner is sufficient for this Board to determine that there was cause for a disciplinary response.

133. One of the pre-requirements for a dismissal on the basis of performance is that the Employee must be warned in advance that the failure to meet clear and objective standards within a reasonable period of time may result in termination of employment. The Board is satisfied that the Employee was advised of his

unsatisfactory performance on February 2, 2016, and again in late March 2016, when he was provided feedback from various stakeholders, and that that dismissal might result from his continued failure to perform. Osiowy's uncontested evidence was also that he had multiple discussions with the Employee regarding the work that he had set out in his February 2, 2016 letter, including discussions regarding the timely completion of the financial statements.

134. The Board was also concerned that, throughout the hearing, the Employee failed to take any accountability for his failure, and deflected much of the blame onto others: his office staff; Osiowy; the Board of Trustees. The Employee acknowledged missing deadlines and failing to complete work, but has consistently failed to accept responsibility for his failure to deliver the results expected of him, and has responded to constructive criticism in a fashion that is self-serving and may be perceived as insubordinate.
135. For the reasons that follow, the Board is satisfied on the evidence presented that the Employer has sufficiently demonstrated that termination of employment was a proportional response and was warranted in the circumstances. The Board has concluded that the Employee is not entitled to wages in lieu of notice pursuant to the *Code*.
136. Further, it is noted that the Employee requested compensation for a car allowance as part of his Appeal. The Employee acknowledged as part of his evidence that he was not successful in negotiating a car allowance and that, at no time throughout his employment tenure did he receive payment for a car allowance. Instead, and as noted in the unsigned contract of employment, the Employee was paid a flat fee when required to travel on behalf of the Employer. Accordingly, the Board made a determination in the proceedings that it did not have the ability to award any

remuneration for car expenses, as it did not form part of the compensation package or constitute “wages” as defined in the *Code*.

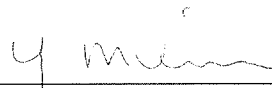
137. The parties further requested that the Board award costs pursuant to s. 125(5) of the *Code*. In the circumstances, the Board is not satisfied that the necessary conditions which would permit it to award costs are present in this case.

138. Based on all of the foregoing, the Employee’s Appeal is dismissed.

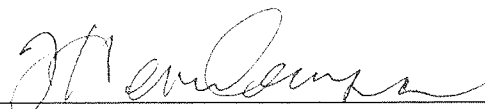
DATED at **WINNIPEG**, Manitoba, this 10th day of October, 2018, and signed on behalf of the Manitoba Labour Board by



K. Pelletier, Vice-Chairperson



Y. Milner, Board Member



T. Henderson, Board Member

KP/cj/nm

Xpresspost:

- Mr. T. Osiowy, Superintendent, Prairie Rose School Division
- Mr. D. Simpson, Fillmore Riley LLP
- Mr. R. Znamkowski

INFORMATION TO EMPLOYER AND EMPLOYEES(S)

Your attention is directed to the following:

THE EMPLOYMENT STANDARDS CODE

Content of board order

125(3) Where the board by order requires an employer or employee to pay wages, the board shall require the person to pay the wages to the director together with

- (a) administrative costs calculated in accordance with subsection 96(1); and
- (b) interest on the wages in accordance with section 97;

Payment of money to director under order

125(4) A person that is required by order of the board to pay money to the director under subsection (3) shall do so immediately or within such time as the order allows, whether or not the order is appealed under section 130.

Appeal of board order re unpaid wages

130(1) A person who is a party to a final order of the board made under this Code in respect of a matter referred to the board under section 110 may appeal the order to The Court of Appeal.

Leave to appeal required

130(2) An appeal may be taken only on a question of law or jurisdiction and by leave of a judge of The Court of Appeal.

Time for application for leave to appeal

130(3) An application for leave to appeal shall be made within 30 days after the day the order is made or within such further time as a judge may allow.

Applicant to file proof of payment to the director

130(4) If a person that files an application for leave is not an employee and is required, under the order that is the subject of the application, to pay money to the director, the person shall file with the application evidence that he or she has complied with subsection 125(4).

Board and director entitled to be heard

131 The board and the director are each entitled to be heard, by counsel or otherwise, on the argument of an application for leave to appeal and on an appeal.