IN THE MATTER OF AN ARBITRATION

BETWEEN:

BC Public School Employers' Association

(the "Employer")

AND:

BC Teachers' Federation

(the "Union")

Re: Provincial Policy Grievance
Teachers Teaching On Call – Access to the
Provincial Extended Health Benefit Plan
(BCTF File No. 99-2016-0001; EPLP File No. 172728)

ARBITRATOR:	Judi Korbin
COUNSEL:	Michael Hancock For the Employer Patrick Dickie For the Union
DATE AND PLACE OF HEARING:	December 6, 7 and 15 2017 and October 23, 2018 Vancouver, BC
DATE OF SUBMISSIONS:	July 30, 2018; September 7 and September 28, 2018, October 9 and October 15, 2018
DATE OF AWARD:	March 6, 2019

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The parties are agreed that I possess the jurisdiction to hear and determine the matter in dispute.

The parties are further agreed that I am to determine the matter on the basis of the documents tabled in December 2017 and on the written submissions provided in July, September and October, 2018.

This dispute concerns an April 22, 2016 Union Provincial Grievance claiming, "… failure of BCPSEA and school boards to comply with the right of Teachers Teaching on Call [TTOC] to access Extended Health Benefits in districts that have adopted the Provincial EHB Plan."

Background:

- Between 1987 and 1994, locally certified teacher associations negotiated local collective agreements with the province's school boards. The local collective agreements provided for various extended health, dental, group life, and other benefit plans.

- In June 1994, the Public Education Labour Relations Act ("PELRA") came into force. It established a province-wide public school teacher bargaining unit. The Union became the exclusive bargaining agent for the province-wide unit and the BCPSEA became the exclusive bargaining agent for the school boards.

  PELRA also introduced province-wide bargaining by designating cost provisions as provincial matters to be negotiated at the provincial level. Benefits were designated as a cost provision.

- In the 1997-1998 round of collective bargaining, the Union and BCPSEA both tabled proposals to create various provincial benefit plans.

- On July 30, 1998, the AIC was imposed as part of a renewal collective agreement pursuant to the Public Education Collective Agreement Act, S.B.C. 1998 c. 41. Paragraph C.4 of the AIC became Article B.2.4 of the 1998-2001 PCA, which remains in the PCA to date and provides:

> ARTICLE B.2: TEACHER ON CALL PAY AND BENEFITS
>
> 4. Effective July 1, 1998, Teachers on Call shall be eligible, subject to plan limitations, to participate in the benefit plans in the Collective Agreement, provided that they pay the full cost of benefit premiums.

- In the 2011 round of collective bargaining, the Union's objectives presented to BCPSEA included negotiating improvements to the benefit plans, and employer paid benefits for TTOC and part-time teachers.

  On June 2, 2011, the Union tabled language that would require all employees to participate in all benefit plans as a condition of employment.

- The issue of benefit plans was subsequently hived off from main table bargaining, and the parties struck a Committee to explore greater standardization of benefit plans independent of the main bargaining table.

  That Committee began exploring standardization of benefits on June 11, 2012.

- The parties to this proceeding met and discussed the issue of TTOC access to the standardized EHB plan on June 14 and 19, 2012 in their bargaining for a new collective agreement. The parties' respective bargaining notes from those two days are reproduced below:

June 14 – Employer	June 14 – Union
JI: Jim Iker RDN: Renzo Del Negro JT: John Trieu	JI: Jim Iker RDN: Renzo Del Negro JT: John Trieu

JI: Another element, is Teachers on Call. I know the opening position was that this applies to TOCs. TOCs have not had improvements in terms of access. We know that in the health sector, when casuals hit an hours threshold, that there is benefit coverage for them. This is an equity issue. This is a segment of our membership that everyone depends on. If there was some form of coverage in either a subsidized way or by attaining a certain number of hours, it would be important that they get coverage. We know that some of our TOCs experience financial hardship and need the benefits. Other members prefer to work on call for the lifestyle because they enjoy working part time, but others do not. RDN: The short answer is we would need to find a way to pay for it. Right now we are basing this on eligible employees and to include TOCs would require finding a way to pay for it. This may not be a simple issue to deal with in terms of mechanics and cost but I hear what you are saying and this is noted. JI: We understand that this is a cost issue but it is also a philosophical issue. It becomes an equity issue and a concern that hasn't been address[ed] since 1998. Caucus 11:25am – 11:36 am JI: I didn't mean to derail us by mentioning TOCs, its just that its an important issue that just needs to be discussed. One minimum that we can do is, currently the language puts restrictions on TOCs, where some of our TOCs can join the plan but pay for it themselves. In any common plan, there shouldn't be a plan restriction; any TOC should be able to get on the plan.	JI: Another element that's TTOCs. We had a position that it applies to our TTOCs. We know that our TTOCs haven't had improvements in terms of access. It was in 1998 when negotiated $3 per day. We know a plan cost more. We know that in health sector that in terms of casuals there is a way that members in other units i.e. healthcare where casuals or replacements get a threshold that there is benefit for them. It's part of an equity issue. That you have a segment of members that both sides depend on when ill or doing union work there is some for[m] of coverage in a subsidized way or attaining a certain percentage of work that there become some coverage. Part of that is a lot of TTOCs live [in] poverty conditions and have to work a number of jobs. We know a small segment that choose to do as a lifestyle or are part time and have access. Want to raise that again. RDN: We would have to find a way to pay for it. If you are adding more eligible employees we would have to find a way. We would have to find a way to balance thresholds so have to balance that out. That may not be a simple one to deal with even in mechanics and costs. JI: We are aware that cost item but also know philosophical one as well. We sometimes have differences as classing as employees and not employees. We introduced that idea re sick leave as well. It becomes an equity issue. If there is a way to deal with it, it is a concern and hasn't been addressed since 1998. JI: Didn't raise TTOC issue to derail. It's an important piece to think if there is any way at all. Other piece depending on what we can do. One minimum of what

RDN: Can you join a plan if you don't have enough hours? JT: Employees can chose to not join a plan if they can't afford it. When we establish these plans for the districts, we have made the plan available to TOCs but they have had to pay for the plan themselves. JI: This is an area we'd like to look at. This is it for today.	we can do is that there are restrictions in current language. It says pending plan restrictions. We notice that there is one TTOC in Bulkley Valley and…who is, we assume, paying for the plan. A minimum should be that there is no plan restriction. RDN: Is there a threshold. JT: With examples there is a plan for TTOCs but we have created a separate record. In those example only 1. Could be because employee paid. JI: Some TTOCs have coverage elsewhere. JT: When we established plans for those districts who could offer, there was no restriction. JI: That is an easy area to look at.
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June 19 – Employer JI: The other thing we talked about was access, the assumption is that with the standard plan, there would be no restrictions on access, ie the TOCs would be able to buy the package. Currently some TOCs don't buy plans because they can't afford it, but sometimes they are prepared to buy the plan but restrictions exist prohibiting them from doing so. JT: The same eligibility rules would apply as in the past. JI: Well we don't know what the eligibility is but for this plan, we will be setting it from here, so we want to ensure everyone has eligibility.	June 19 – Union JI: Other thing was the TTOC access. So the assumption is that with standard plan there would be no restriction to access. Access is that the benefit is available for them to buy. Right now TTOCs don't buy because can't afford or restriction in plans that don't enable them to pay. RDN: Is that set by district? JT: Typically by district. JI: So if going to common plan would be set here. JT: Same eligibility rules would apply.

JT: I would assume that districts would have to make it accessible to TOCs. JI: Well they do not. JT: We though this was dealt with at the local level, we have to be very careful about changing headcounts because the funding of the common plan would change. JI: Right, the first issue we are raising is just accessibility, with TOCs being able to purchase the plan themselves. RDN: (To John) Would that change the overall plan cost? JT: No, from a rate setting and funding perspective it will not change. However, we know that the plan itself will be more expensive to a TOC to purchase than the equivalent cost for a full time member. JI: So it comes down to whether they can afford it. The issue is if we've agreed previously that TOCs can buy the plan. RDN: The only reason we would have that there is because district doesn't want to be on the hook for covering a provision themselves. JI: We need to know if the employer is going to put a restriction into the plan. RDN: I don't know why we would do that; I'd need to check. JI: The only restriction is the plan limitation. RDN: What processes are in place for the districts to collect the money? Do they collect it off paychecks? This is what	JI: In some not eligible and some not. Want to make sure that TTOCs are eligible. JI: Don't know status of districts in making. JT: My understanding is that there was supposed to be access. Not sure who all did. Some say access with 100% employer paid. Not sure how incorporates with existing plan. Assume district have to make available. JI: They aren't and you stats show that. JT: We have accommodated when dist comes to us. What should be clear between parties is insuring that…what is going to affect this illustration is number and cost sharing remaining the same. Understand that access so long as cost sharing is same we can coordinate that with individual districts. It could be 0 people taking up and that may be situation. But no interest so perhaps not proceeded. Need to be clear that these headcounts change so cost of providing will change. JI: First issue is accessibility at employee cost. In language it says can join within plan limitations. So what we are saying is if developing common plan then common plan should allow joining at their cost. RDN: If at their cost would that change? JT: No providing there is a separate provision in each contract for TTOCs. From rate setting and funding perspective we know that cost and same plan design that cost will be higher than providing to group. Reason is we spread risk over large group. If we have 100% employee

we'd need to find out. I'm speculating, but a district, in the absence of language, on a month to month basis would collect the benefit fees.

JI: We're raising the issue because we are moving to a common plan and therefore there should be access.

RDN: I'd have to look into it.

JI: What I'm finding interesting is that benefits is a provincial item and yet some areas are still up to the districts. So even though benefits is provincial issue there is still a local component.

RDN: Not everyone is with Pacific Blue Cross, some districts have different insurance carriers and that's where the restrictions might be coming in. We can figure out if there are any restrictions on those. We'd have to be careful that we aren't making commitments that Great West Life and Manulife cannot do.

…

RDN Here are the current outstanding issues:

- The TOC's accessing the benefits and looking at restrictions in the language
- Need to resolve where we sit with age 65+
- Need to resolve any changes to the yellow plans; ie the drug card
- For this exercise, what constitutes savings are the administrative savings to be negotiated with Pacific Blue Cross and what is outstanding is any savings resulting from districts joining the buying group

then we have only those that want plan will pay so will use.

JI: So if TTOC would need 900 per year to buy plan. If we decide that TTOCs can join plan subject to plan limitations.

RDN: Only reason to have that there is if for some reason Pacific Blue Cross says there is a threshold to meet. A district would not want to be on hook for cost. Would Pacific Blue Cross say not eligible?

JI: We need to know that because we have TTOCs saying that districts won't allow that. If we are talking about standard plan is employer going to put a restriction.

RDN: Don't see reason. Would have to talk to secretary treasurers. May be more to it.

…

RDN: listed as outstanding, TTOCs accessing benefits, shouldn't be an issue just need to verify with carriers, still need to resolve re age 65, resolve the potential to yellow plans ie Drug card, for this exercise what constitutes savings, what is outstanding is any savings as result of joining buying group. Not sure if any future savings is savings. Biggest outstanding is infusion of 2.6 million.

• I'm not sure if any future savings as a result of districts joining constitutes savings or not, our position on that is the same as the other • The biggest outstanding matter is we still need an infusion of 2.6 million to implement this plan as is That's what I had, I'm not sure if you had any additional items. JI: My comment is, savings from districts joining the buying group can be used to offset the infusion of money from the government.	

- On June 26, 2012, the Union, BCPSEA, and the provincial government as represented by the Ministry of Education, signed an agreement that provided funding for a standardized provincial EHB plan (the "Tripartite Funding Agreement").

  The Tripartite Funding Agreement attached a document titled "Provincial Health Benefit Plan" that set out a contemplated provincial extended health plan. This document contained four notes at the end, including the following (the "Tripartite TTOC Note"):

  > Teachers Teaching on Call (TTOC) will not be precluded from accessing the Provincial Extended Health Benefit Plan. The TTOC will pay 100% of the premium costs.

- On October 30, 2012, the Union made a proposal that deleted the provision identical to the Tripartite TTOC Note from LOU No. 10, and included a new Article B.11.3 that read:

> Teachers Teaching on Call shall have access to the Provincial Extended Health Benefit Plan. The TTOC will pay 100 per cent of the premium costs.

- On October 31, 2012, BCPSEA countered with the following Article B.11.3:

> Teachers Teaching on Call shall have access to the Provincial Extended Health Benefit Plan. TTOCs accessing the Plan shall pay 100 per cent (100%) of the premium costs.

- On October 31, 2012, the Union agreed to the language proposed by BCPSEA.

- On April 22, 2016 (grievance filing) and as of the hearing on this matter held on December 7, 2017 the parties advised that three different arrangements existed regarding the exclusion of TTOCs in EHB plans.

    1. Some Districts provided full access;
    2. There were some Districts where TTOCs could access the plan as long as they met minimum hours;
    3. There were some Districts that prevented TTOC participation.

Union Position:

Union Counsel contends that Employers are breaching the PCA, in particular Article B.11.3, by prohibiting TTOC in many school districts from accessing the Provincial EHB Plan unless they work various minimum hours.

Counsel argues that the Union's position in this case is consistent with the plain and ordinary meaning of the language, the collective agreement context, and the extrinsic evidence:

Plain and Ordinary Meaning:

Counsel contends that B.11.3 clearly and unequivocally provides TTOC with access to the Provincial EHB Plan, and that allowing only TTOC who work a minimum number of hours to obtain any access is completely contrary to the mandatory plain wording of Article B.11.3.

Counsel argues that it is inherent in the notion of “access” that a person with access is able to use that which he or she has access to, and submits that the Employer position would require reading words into B.11.3.

Collective Agreement Context:

Counsel states that when the parties make a collective agreement benefit subject to some sort of limitation or condition, they regularly do so expressly rather than by implication and argues that in the face of the express conditions on benefits found throughout the collective agreement, including in the EHB Plan itself, there is simply no basis to read into Article B.11.3 the conditions Employers are imposing on TTOC access to the EHB Plan.

Counsel notes that Article B.2.4 was negotiated in 1998 and made the participation of TTOC in all benefit plans subject to plan limitations, but argues that those are limitations on TTOC participation in the various plans, not on access to the plans.

Counsel also cites the general rule of collective agreement interpretation that a specific provision prevails over a general provision, noting that Article B.2.4 is a general provision dealing with TTOC participation in all benefit plans and Article B.11.3 is a specific provision dealing with TTOC access to one specific plan. Reading the provisions harmoniously, it is argued, requires that the unconditional specific promise in B.11.3 in regard to access to the Provincial EHB Plan prevail over any suggestion to the contrary in Article B.2.4.

Extrinsic Evidence:

Union Counsel contends that there is no bona fide doubt as to the meaning of the Article B.11.3, but argues in the alternative that the bargaining history supports the Union's interpretation that Article B.11.3 grants all TTOC access to the Provincial EHB Plan. Counsel submits that the Union made it clear to BCPSEA that all TTOC should be able to access the standardized Plan: "In any common plan, there shouldn't be a plan restriction; **any** TOC should be able to get on the plan." [**Emphasis added**].

Counsel also argues that it was in the context of seeking Employer paid benefits for TTOC, and after not making any progress on that for over a year, that on June 14, 2012 the Union suggested a minimum hour threshold similar to the one in the healthcare sector. Counsel argues the Employer should have understood (a) that the Union then turned to employee paid benefits in exchange for elimination of existing hours thresholds and (b) that there is no basis for the Employer assertion that the parties were discussing only TTOC as a class, and not minimum hours thresholds that many TTOC could not meet as well.

Counsel contends further that Employer arguments regarding cost considerations are invalid because TTOC pay 100% of the premium.

Union Counsel cites the following authorities in support of his arguments in this case: *Public Education Labour Relations Act*, S.B.C. 1994, c.21; Donald J.M. Brown, Q.C., & David M. Beatty & Christine Deacon, *Canadian Labour Arbitration*, 4th ed. (Canada Law Book, 2006) at 4:2100; Ronald M. Snyder *et al*, *Palmer & Snyder: Collective Agreement Arbitration in Canada*, 6th ed. (LexisNexis, 2017) at 2.10-2.12; *Construction and General Workers' Local 1111 v. PCL Construction Ltd.*, [1982] A.G.A.A. No. 1 (Sychuk); *Oxford English Dictionary*, OED Third Edition, December 2011 (Oxford University Press); *Saskatchewan Union of Nurses v. Prince Albert Parkland Regional Health Authority (Wellness Policy Grievance)*, [2016] S.L.A.A. No. 15 (Hood); *Catalyst Paper (Elk Falls*

Mill) v. Communications, Energy and Paperworkers Union of Canada, Local 1123 (Grievance 2010-3 Retiree Benefits), [2012] B.C.C.A.A.A. No. 73 (Hall); *Vancouver (City) v. Canadian Union of Public Employees, Local 15 (Rogers Grievance)*, [2014] B.C.C.A.A.A. No. 65 (Hall); *Morbern Inc. v. United Steelworkers of America (MacIntosh Grievance)*, [2004] O.L.A.A. No. 44, 124 L.A.C. (4th) 257; *Simon Fraser University v. Assn. of University and College Employees, Local 2 (Split-Shift Grievance)*, [1985] B.C.C.A.A.A. No. 198 (Hope); *Re International Woodworkers of America, Local 2-1000 and G.W. Martin Lumber Ltd.* (1972), 24 L.A.C. 352 (Reville); *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995] B.C.C.A.A.A. No. 637 (Bird); *Open Learning Agency v. Faculty Assn. of Open Learning Agency*, [2000] B.C.C.A.A.A. No. 337 (Kelleher); *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation*, [1999] B.C.C.A.A.A. No. 370 (Taylor); *Nanaimo Times Ltd. (Re)*, [1996] B.C.L.R.B.D. No. 40 (Hall); *Surrey School District No. 36 (British Columbia Public School Employers' Assn.) and British Columbia Teachers' Federation/Surrey Teachers' Assn. (Severance Pay Grievance)*, [2009] B.C.C.A.A.A. No. 27 (Korbin); *Louisiana-Pacific Canada Ltd. (Golden) and United Steelworkers, Local 1-405 (Dahlin Grievance)*, [2013] B.C.C.A.A.A. No. 53 (Gordon); *United Food and Commercial Workers Union, Local 1518 and Sofina Foods Ltd. (Abbotsford Turkey Plant) (Rest Period Grievance)*, [2017] B.C.C.A.A.A. No. 50 (Dorsey); *Prince George School District No. 57 (Re)*, [1976] B.C.L.R.B.D. No. 41; Quicklaw search results for statutory use of terms "unrestricted access" and "shall have access"; *Archives and Records Act*, R.S.P.E.I. 1988, c.A-19.1; *Geneva Convention Act*, R.S.C. 1985, c.G-3; *Early Childhood Services Act: Licensing Regulation*, N.B. Reg. 2018-11; Donald J.M. Brown, Q.C., & David M. Beatty & Christine Deacon, *Canadian Labour Arbitration*, 4th ed. (Canada Law Book) at 4:1100; and *Canada Bread Co. and Bakery & Confectionery Workers' Int'l Union, Local 322 (Shift Grievance)*, [1970] O.L.A.A. No. 1 (Christie).

Union Counsel concludes by stating that Employers are breaching the PCA and in particular Article B.11.3 by prohibiting TTOC from accessing the Provincial EHB Plan in many school districts unless they work various minimum hours. Union Counsel seeks a

declaration to that effect, with further remedies being remitted to the parties and this arbitrator remaining seized of any issues in that regard.

Employer Position:

Employer Counsel submits that the parties did not agree, and the collective agreement does not provide, that the access to the Plan provided to TTOC would be without restriction with respect to minimum hours of work thresholds.

Counsel also contends that the “collective agreement context” (in the sense the Union uses that phrase in its submission) does not assist in resolving the issue in the Union’s favour, noting that nowhere else in the collective agree do the parties use the term “access” or the phrase “shall have access”. Rather, Counsel argues, it is the bargaining evidence that is determinative in this case.

As to the bargaining on June 14, 2012, Employer Counsel submits it is apparent that the parties were discussing the existence of plan restrictions on TTOC accessing benefits in the proposed Provincial Plan; that is restrictions excluding TTOC as a class. Counsel notes that it is the Union itself which specifically recognizes that the access it is seeking may be provided subject to a threshold of hours, as in the healthcare sector which they cite as an example.

In regard to June 19th, Counsel argues that there was no discussion or indication that the Union was suggesting a dramatic reversal from its position expressed at the previous bargaining session (June 14th) in which it expressly sought TTOC access to the Plan subject to “obtaining a certain number of hours”.

Whatever the Union now says it subjectively intended, Counsel argues, there is absolutely no indication that the Employer understood the Union to be seeking anything other than ensuring that the provincial plan contained no prohibition on TTOC being

covered by the plan, or that the Employer agreed to TTOC having access to the plan without any limitations whatsoever.

Employer Counsel also contends that a benefit plan with no limitations cannot be obtained in the market as no carrier is willing to provide same, and argues it is equally implausible that the parties would have agreed to put TTOC in a position superior to that of part-time teachers who remain required to satisfy minimum hours of work thresholds in order to receive benefits. Such an interpretation cannot be sustained, it is argued, without express language to support it.

As for the change in language from the June 26, 2012 LOA (i.e., "…will not be precluded from accessing…"), to that in B.11.3 (i.e., "shall have access to…"), Counsel contends this was nothing more than a housekeeping change to eliminate a double negative, notes that neither party retained or submitted any record of discussions regarding this change, and submits that there was no agreement to change the fundamental meaning of the parties' bargain as previously reflected in the LOA language.

Employer Counsel also submits that the Union's interpretation would lead to absurd outcomes the parties cannot have intended:

i) The Union cannot have it both ways and suggest that "shall have access to" means that a precondition requiring a minimum number of hours worked is not permissible but other basic plan limitations, included as standard in all benefits plans, still apply to TTOC (e.g., waiting periods and evidence of insurability).

ii) Under the Union's interpretation, TTOC would be placed in a more advantageous position with respect to benefits than part-time employees, who are subject to a minimum hours threshold as a precondition to participating in the benefits plan.

Employer Counsel cites the following authorities in support of his arguments in this case: *Pacific Press v. Graphic Communications International Union, Local 25-C*, [1995]

B.C.C.A.A.A. No. 637 (Bird); *Wire Rope Industries Ltd.* (1982), 4 L.A.C. (3d) 323 (Chertkow); *Lake District Maintenance Ltd. (LDM) v. British Columbia Government and Service Employees' Union (Olson Grievance)*, [2012] B.C.C.A.A.A. No. 91; *University of British Columbia*, [1976] B.C.L.R.B.D. No. 42; *Black Law's Dictionary*, Tenth Edition, pp. 16 and 1367; *Interactive Digital Media Tax Credit Act*, RSA 2018, c.1-3.1, pp. 1 and 8; *Toussaint v. Canada (Attorney General)*, 2010 FC 810; and *Hallmark Containers Ltd. v. Canadian Paperworkers Union, Local 303*, [1983] O.L.A.A. No. 4 (Burkett).

Counsel submits that in maintaining the pre-existing thresholds for participation in benefits for TTOC consistent with those that apply to part-time teachers, the Employer has not contravened the collective agreement. Employer Counsel asks for the grievance to be dismissed.

Decision:

As an interpretive dispute, this matter stands to be determined on the long-established arbitral principles delineated in *Pacific Press, supra:*

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.

10. Parties are presumed to know about relevant jurisprudence.

Through application of the listed principles, an arbitrator's search for the "mutual intention of the parties" (principle #1) is informed by consideration of a plain meaning reading of the specific provision(s) in dispute (principles #2 & #9), the collective agreement as a whole (principles #6, #7, #8), and available extrinsic evidence (principles #3, #4).

While the parties are at odds as to the degree of focus to be given, and the conclusions to be drawn from, the extrinsic evidence in this case, bargaining history does feature prominently in the final arguments of both sides.

In reviewing the bargaining history, I note at the outset my agreement with the decision of the Labour Relations Board in *University of BC*, [1976] B.C.L.R.B.D. No. 42, in which the Board concluded that:

> Section 92(3) of the Code [now 82(2)] directs the arbitrator to have regard to the "real substance" of the issues and the "respective merit…under the terms of the collective agreement". The parties do not draft their formal contract as a purely literary exercise. They use this instrument to express the real-life bargain arrived at in their negotiations. When a dispute arises later on, an arbitrator will reach the true substantive merits of the parties' positions under their agreement only if his interpretation is in accord with their expectations when they reached that agreement. Accordingly, in any case of which there is a *bona fide* doubt about the proper meaning of the language in the agreement – and the experience of arbitrators is that such cases are quite common – arbitrators have available to them a broad range of evidence about the meaning which was mutually intended by the negotiators.…
>
> …the party [presenting evidence on what transpired at negotiations] does not have to clear a preliminary barrier before that evidence can be utilized, of securing an initial ruling from the arbitrator that the agreement is legally ambiguous on its face. Instead, the arbitrator, when he begins the task of interpretation, will be able to do so with the full appreciation of the relevant exchanges which eventually culminated in the formal document. With that material before him, the arbitrator can decide whether he entertains any

> doubt about the meaning intended for the provision in question and, if so, whether the negotiation history is helpful in resolving that doubt.

I share the Board's opinion that "*bona fide* doubt" about the proper meaning of collective language agreement is common, and conclude that such *bona fide* doubt exists in the instant case.

In my view, the phrase "shall have access to the provincial EHB plan", is not altogether clear on its face. That is supported by the parties' differing submissions on the definition of "access". The Union used a definition from the Oxford English Dictionary – "The right or opportunity to benefit from or use a system or service", while the Employer submits a definition from Black's Law Dictionary, "A right, opportunity or ability to enter, approach, pass to and from, or communicate with <access to the Courts>", and argues "a right, opportunity or ability to do something may be a right, opportunity or ability to do that thing with or without restrictions".

To attempt to glean a clear picture of the parties' mutual intention, what is necessary is a review of the "real-life" material, the "relevant exchanges which eventually culminated in the formal document"; in short, a fulsome examination of relevant bargaining evidence.

Despite the gulf between the positions of the parties, the bargaining evidence is both brief and essentially agreed. There are only two cited exchanges across the bargaining table – June 14th and June 19th, 2012 – and a side-by-side comparison of the Employer's and the Union's bargaining notes (see "Background", above) reveals generally consistent recitations of the bargaining table exchanges in regard to TTOC and benefits.

On June 14th, the parties undertook their first specific discussion, with the Union framing their concern as an "equity issue", and noting that the healthcare industry provides benefits to casuals who attain a "certain percentage of work" or "threshold".

The Employer responded by stating that, “we would have to find a way to pay for it”, perhaps by “balancing thresholds” if more eligible employees are added.

The essence of the June 14th discussion is found in the Union spokesperson’s summary statement when, after noting that there are potentially different eligibility rules and practices in different districts, he states that, “A minimum should be that there is no plan restriction”.

On June 19th, the second and final discussion of the TTOCs and benefits issue occurs and is focused again, in the Union’s own words, on “the assumption is that with standard plan there would be no restriction to access. Access is that the benefit is available for them to buy. Right now TTOCs don’t buy because can’t afford or restriction in plans that don’t enable them to buy.”

Following some limited discussion on current policies and practices at the local levels, the Union spokesperson returns to his principal point, restating the essence of the Union’s position that, the “first issue is accessibility at employee cost. In language it says can join within plan limitations. So what we are saying is if developing common plan then common plan should allow joining at their cost.”

When subsequently discussing potential cost concerns, the Union spokesperson further states that, “so if TTOC would need 900 per year to buy plan. If we decide that TTOCs can join plan subject to plan limitations.”

On the foregoing bargaining evidence, I find no basis on which to conclude that there was mutual intention evident supporting either parties’ position in these proceedings. Neither the Union position that hours of work thresholds were to be eliminated, nor the Employer position that only the restriction barring participation based on a teacher’s status as TTOC was to be removed, can be conclusively established on the cited bargaining evidence.

It is the Union, when citing “healthcare” comparators, that first broaches the notion of “thresholds”, or “a certain percentage of work”, and on June 19th it is the Union that mentions the possibility of a “[decision]” or agreement, “…that TTOC can join plan subject to plan limitations.”

The Union also contends, further to its June 2, 2011 proposal, that its initial approach to 2011/2012 bargaining was predicated on achieving Employer (rather than employee) payment of benefit premiums, and points to the bargaining discussion of June 14, 2012 as supposed evidence that “the Union could not obtain Employer paid benefits for TTOC and it then shifted the discussion to what it said was the minimum that it would be willing to accept – allowing all TTOC to join the EHB plan by paying for it themselves.”

It is certainly not clear that the Union’s Employer paid benefit premiums proposal, introduced more than a year previous (June 2, 2011) should have been understood by the Employer as the bedrock of the Union’s TTOC benefit proposal, and/or that, without any review or clarification whatsoever, the relatively brief exchange of June 14, 2012 somehow “shifted the discussion” to employee paid benefits being coupled with the deletion of minimum hours of work thresholds.

I also note that the only aspect of the bargaining evidence that the Union relies on in its initial written submission is a statement found in the Employer’s notes, which quotes the Union spokesperson at bargaining as stating on June 14th that, “in any common plan, there shouldn’t be a plan restriction; any TOC should be able to get on the plan.” The Union’s reliance on a lone adjective as the linchpin of its bargaining evidence argument simply puts too much weight on a single word. It is an interpretive bridge too far, and without more supporting evidence the Union’s position claiming a mutual intention to eliminate minimum hours thresholds cannot be sustained.

For its part, the Employer points to no particular bargaining exchange specifically confirming Union acceptance of continuing minimum hours thresholds. Rather, it states only that “it is apparent” from bargaining exchanges that the parties were only discussing restrictions excluding TTOC as a class, or that bargaining exchanges reflected a common “understanding of the distinction between a plan that precludes TTOC participation entirely, and a plan that contains no restriction on TTOCs being eligible to participate subject to normal plan limitations”. I do not concur with the Employer’s contention as to any such clarity or “meeting of the minds” being forthcoming from the cited exchanges.

Neither do I see any particular relevance in the difference in language between the “Tripartite TTOC Note from LOU No. 10”, and Article B.11.3. Article B.11.3 is, I conclude, indicative only of a shared desire to eliminate a linguistically inelegant double negative, and note further that both provisions contain the word central to this dispute, “access”/“accessing”.

Rather than clarity as to mutual intent, the bargaining evidence, in my view, reveals only contrary expectations, tangential cross talk, and unsupported assumptions.

Even at the conclusion of the second day of negotiations on June 19th, when the Employer summarized their discussions and listed outstanding issues, a point in time where we would most expect to see a recitation of the specifics of any shared understanding, we find, whether by omission or commission, only generalized statements about “accessing the benefits”, “restrictions in the language”, potential “savings”, and the possibility of a significant funding “infusion”.

Nowhere in that listing, or anywhere else in the bargaining evidence for that matter, is it made clear that only the benefit participation restriction against TTOC as a class is being eliminated (the Employer position), or that hours of work thresholds are also being eliminated (the Union position).

With the bargaining evidence not revealing a “mutual intent”, I return to the interpretive question before me – the meaning of the phrase “shall have access” in Article B.11.3 – unaided by the bargaining evidence.

In arriving at a reasoned, equitable conclusion as to the meaning of the disputed language, it must be remembered what the “lay of the land” was in regard to TTOC benefit access in 2012. The parties are *ad idem* that at that time: “There were historically two such restrictions in some of the local EHB plans: (1) exclusion of TTOC as a class and (2) minimum hours thresholds that many TTOC could not meet” (see Union September 28th reply submission).

If the Employer position is to be upheld, I would have to conclude that one of the principle identified barriers to “access” is to be eliminated, while the other is to be maintained. Without evidence of mutual intent as to that outcome, such a conclusion is counterintuitive and cannot be sustained.

Additionally, I note that in June, 2012, the parties were bargaining language regarding TTOC access to the Provincial EHB Plan against the backdrop of existing collective agreement language on “Teacher On Call Pay and Benefits” in Article B.2, stating that, “…Teachers teaching on call shall be eligible, ***subject to plan limitations***, to participate in the benefit plans in the Collective Agreement, provided that they pay the full cost of benefit premiums.” [*Emphasis added*].

The only real distinction between the language in B.2 and that ultimately agreed to in B.11.3 is the absence of the phrase “subject to plan limitations”. In the particular circumstances of this case, I conclude that the limitation (or restriction or barrier) on specific TTOC benefit access on the basis of minimum hours thresholds remaining in clause B.11.3, despite the absence of a phrase permitting such restriction, is unrealistic and unfounded.

In the result, the grievance is upheld. Any remedies required are remitted to the parties. I retain jurisdiction to deal with any issues arising from implementation of this award.

It is so awarded.

Dated at the City of Vancouver, in the Province of British Columbia this 6th day of March, 2019.

Judi Korbin, Arbitrator