BRITISH COLUMBIA
PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION

Submission to Irene Holden: Collective Agreement Implementation

This constitutes the submission of the British Columbia Public School Employers' Association (BCPSEA) on the outstanding implementation issues related to the Framework for Settlement signed by the British Columbia Teachers' Federation (BCTF) and BCPSEA on June 30, 2006 for the term of July 1, 2006 to June 30, 2011.

The framework agreement stipulates that, "Ms. Holden will remain seized on the implementation of the framework." For the purpose of the issues that the parties have mutually agreed to put before Ms. Holden, it is the BCPSEA position that this role is limited to interpreting the agreement reached by the parties during bargaining but does not extend to the ability to rewrite or remake any or all of this agreement. We also believe that any review should be based on the specific language agreed to by the parties as well as the exchanges between the parties on these issues, which may be supplemental.

Ms. Holden may also decide that a particular issue in dispute may be more appropriately determined through a more formal arbitration process independent of the facilitator. For example, the seniority and preparation time issues may require a review of the provisions in previous collective agreements and the past practice in the various school districts.

1. Signing Incentive

- **Language**

The Letter of Understanding re: Early Incentive Payment states:

> The incentive payment shall be equal to a maximum of $3,700 dollars for each full-time equivalent employee and shall be pro-rated for employees working less than full-time. For the purpose of determining the amount of

the incentive payment, a full-time equivalent employee (continuing or temporary) is an employee who worked on a full time basis (183 days) during the period of September 1, 2005 – June 30, 2006. For the purpose of determining the amount of the incentive payment, a full time equivalent employee (teacher on call) is an employee who worked on a full time basis (177 days) during the period of September 1, 2005 – June 30, 2006. The incentive payment for employees who worked less than full time over this period of time shall be pro-rated based on the actual time worked as a percentage of full-time. No employee shall be eligible for a payment in excess of $3,700. Time spent on the following leaves shall not be deducted for the purposes of this calculation:

- All leaves with pay
- Maternity or parental leave
- Days on approved WCB and Salary Indemnity Plan that commenced between July 1, 2005 and June 30, 2006.

- **Issues in Dispute**

a. *Teachers on LTD prior to 2005-2006*
b. *Teachers on SIP prior to July 1, 2005 who have returned to accumulated sick leave in the 2005-2006 school year then returned to SIP when this sick leave is exhausted*
c. *Retired or resigned teachers*
d. *Maternity leave extended for school year*
e. *Teachers on Call (TOCs) on pregnancy leave under Employment Standards*
f. i) *Union leave*
   ii) *TOC on union leave*
g. *More than one local president (amalgamated school districts)*

- **BCPSEA Position**

a. ***Teachers on LTD prior to 2005-2006:*** The group in question is not on leave with pay and is not part of any other group that has been specified as being on leave that is not to be deducted for the purpose of the incentive calculation. This group does not meet the criteria

established by the clear and explicit language in the agreement and should therefore be excluded from eligibility for the incentive payment.

b. ***Teachers on SIP prior to July 1, 2005 who have returned to accumulated sick leave in the 2005-2006 school year then returned to SIP when this sick leave is exhausted:*** Such employees have not returned to active duty and their status on SIP remains in place (no additional qualifying period, etc.). These employees are clearly excluded given their status of having "commenced" SIP.

c. ***Retired or resigned teachers:*** The relevant service for the purpose of the incentive payment is limited only to the active service with the current employer/school district for employees who worked in more than one school district in the 2005-2006 school year.

d. ***Maternity leave extended for school year:*** This matter has been addressed by the parties.

e. ***Teachers on Call (TOC) on pregnancy leave under Employment Standards:*** The framework is clear that pay for TOCs will be based on "days worked." There is no position from which a TOC can take leave. As such, the leave provision in this LOU would not apply to TOCs and the incentive money should, therefore, be based on the actual hours worked.

f. ***i)*** ***Union leave:*** Such leave is not eligible for the incentive.

ii) ***TOCs on union leave:*** The framework is clear that pay for TOCs will be based on "days worked." There is no position from which a TOC can take leave. The incentive money should, therefore, be based on the actual hours worked.

g. ***More than one local president (amalgamated school districts):*** There is only one recognized local per school district and, therefore, it is only possible to have one local president on union president leave per school district (see MOS and LOU). Any additional employees on leave would be granted leave under the collective agreement's leave without pay provision. The Framework LOU is not applicable to these

employees and these employees do not meet the test set out in the subsequent without prejudice agreement to provide the incentive to union representatives on full time union leave.

- **Background**

In November 2005, the Minister of Finance announced a new Negotiating Framework to guide public sector collective bargaining negotiations. This Framework was supported by a $5.7 billion multi-year funding envelope, which was made up of two components: $1 billion for one-time early incentive bonuses and the remaining $4.7 for ongoing compensation [Attachment 1].

The $1 billion set aside for early incentive bonuses was a set amount of money and was to be used as employers and unions saw fit. Minister Taylor said the following:

> *"It is an incentive. So it could be towards your pensions; it could be towards benefits; it could be a one-time cheque for individual employees. But again, I don't want to be prescriptive here. I would like our negotiators to sit at the table and say: what do you think your employees would value the most in terms of this $1 billion?... Again, if you did math, you'd say a billion dollars — all those employees; that would be about a cheque for $3,300 in everybody's pocket. We are not saying that that is the definition of how it will be done."*

Each sector had a portion of the $1 billion set aside and had to work within that amount. Each sector's portion of the $1 billion incentive monies was communicated to the employers' association via the Public Sector Employers' Council (PSEC).

In order for employees to be eligible for incentive payments, originally the Minister of Finance required that employers and unions have a fully ratified memorandum of agreement prior to the expiry of their current collective agreement [Attachment 2]. As the March 31 deadline approached for much of the public sector, this requirement was relaxed to require certainty of reaching a ratified deal. This extension was, however, only an extension to the eligibility requirements. Incentive payments did not go out until the agreement was ratified by the employees and the employers.

In all cases, agreements in the public sector between unions and employers on the incentive money addressed the issue of the fixed money available by specifying the employees that would be eligible. In the case of this set of negotiations, the parties focused on individuals engaged in active service as primary criteria. The incentive language in the K-12 sector was based on the general approach taken in the broad public sector, although each group made their own decisions in bargaining regarding which specific groups would or would not be included. In the case of K-12, the original sum of money set aside for the incentive bonus was $129,000,000. Demographic data challenges necessitated a modified approach (setting a dollar amount per employee once the eligible group was defined). This approach, however, remained premised on a high degree of cost containment and does not change the reality that the funds for this group were limited in the same way they were for the other groups. In all cases in the public sector, the incentive was not paid out to employees until the agreement was ratified by the general membership.

- **Argument**

  a. ***Teachers on LTD prior to 2005-2006:*** The LOU Re. Early Incentive Payment clearly states that time spent "on approved…Salary Indemnity Plan (SIP) that commenced between July 1, 2005 and June 30, 2006" shall not be deducted for the purpose of the incentive calculation. The group in question is not on leave with pay and is not part of any other group that has been specified as being on leave that is not to be deducted for the purpose of the incentive calculation. This group does not meet the criteria established by the clear and explicit language in the agreement and should therefore be excluded from eligibility for the incentive payment. To accept the BCTF's position would require a rewrite of the collective agreement language.

  b. ***Teachers on SIP prior to July 1, 2005 who have returned to accumulated sick leave in the 2005-2006 school year then returned to SIP when this sick leave is exhausted:*** Although these teachers are accessing accumulated sick leave, they have already "commenced" SIP. This access to sick leave may occur, for example, due to a 120 day used cap stipulated in a Previous Collective Agreement which can be revisited

each year until a further 120 days have been exhausted without returning to active service. Such employees have not returned to active duty and their status on SIP remains in place (no additional qualifying period, etc.). The language in the agreement clearly states that employees who have "commenced" SIP prior July 1, 2005 will be excluded. These employees are clearly excluded given their status of having "commenced" SIP.

c. ***Retired or resigned teachers:*** Teachers employed at June 30, 2006 ("each bargaining unit member who is an employee of the school district at June 30, 2006") will receive the incentive prorated to the amount of time worked in the current district. Given the language, the relevant service is limited only to the active service with the current employer/school district for employees who worked in more than one school district in the 2005-2006 school year, as the district paying out the incentive will only receive funding for the incentive for the period of time the teacher worked in that district.

d. ***Maternity leave extended for school year:*** This matter has been addressed by the parties.

e. ***Teachers on Call (TOC) on pregnancy leave under Employment Standards:*** Teachers on Call are casual employees who are not eligible for leave. Although TOCs may or may not be in receipt of maternity and parental leave benefits through Employment Insurance, they are not on leave under Employment Standards nor are they on maternity or parental leave as outlined in the collective agreement. The agreement reached by the parties was intended to calculate the incentive for time worked or leaves with pay in the 2005-2006 school year. The framework is clear that pay for TOCs will be based on "days worked." There is no position from which a TOC can take leave. As such, the leave provision in this LOU would not apply to TOCs and the incentive money should, therefore, be based on the actual hours worked.

f. i) ***Union leave:*** Union leave is not a leave with pay and this leave is not specified as a group that is included in the incentive payment. A without prejudice agreement was reached regarding union

officers on full time union leave as specified in the collective agreement to provide them with the incentive. This agreement did not extend to those on union leave but not full time union officers. Therefore, such leave is not eligible for the incentive. As is the case for many of the other costs of individuals on union leave, if the BCTF wishes to ensure that employees receive the bonus for such days, the cost associated with this can be billed back to the union and the employee can receive the payment.

ii) ***TOC on union leave:*** Although TOCs may or may not be engaged in work for the union, they are not on leave for such work from the employer. The agreement reached by the parties was intended to calculate the incentive for time worked or leaves with pay in the 2005-2006 school year. The framework is clear that pay for TOCs will be based on "days worked." As such, the leave provision in this LOU would not apply to TOCs and the incentive money should, therefore, be based on the actual hours worked.

g. ***More than one local president (amalgamated school districts):*** Through Section 4 of the *Education Services Collective Agreement Act*, nine amalgamated districts had their previous local agreements consolidated by voiding all of the provisions of the Column C agreements and having the provisions from the Column A agreements apply to all teachers employed in each of the applicable amalgamated school districts. As a result, each amalgamated district now has one collective agreement and one recognized local union. In order to deal with the transitional issues of only recognizing one local union per school districts, two Letters of Understanding and one Memorandum of Settlement were signed by BCPSEA and the BCTF [Attachment]. For a one year transitional period (July 1, 2002 – June 30, 2003), the union president leaves under the voided Column C agreements were permitted to apply. Thus, for this one year period only, union president leave would be granted to two union officials and, in the case of SD No. 6 (Rocky Mountain), three union officials. Effective June 30, 2003, this LOU expired and only the union leave provisions of the Column A agreement would apply from that date forward. Therefore, it is only the Column A positions that are eligible to receive the incentive

contemplated in the without prejudice agreement reached by the parties. Employees seeking leaves must do so under the leave provisions of the collective agreement. The leave provisions in the collective agreement dictate the number and conditions to which leave will be granted to employees. The collective agreement allows for only one union president leave per school district. The employees in question are not on union president leave from the district — neither the framework incentive nor the without prejudice agreement apply to the individuals in question. For these reasons, they are not eligible

2. Seniority

- **Language**

Article C.2 Seniority

1. Except as provided in this article, "seniority" means an employee's aggregate length of service with the employer as determined in accordance with the provisions of the Previous Collective Agreement.
2. *Effective September 1, 2006 and despite paragraph 1 above, an employee who achieves continuing contract status in another school district shall be credited with up to ten (10) years of seniority accumulated in other school districts in BC.*
3. Teacher on Call
   a. Effective April 1, 2006, a Teacher on Call shall accumulate seniority for days of service which are paid pursuant to Article B.2.6.b.
   b. For the purpose of calculating seniority credit:
      i. Service as a Teacher on Call shall be credited one (1) day for each day worked and one-half (1/2) day for each half-day worked;
      ii. Nineteen (19) days worked shall be equivalent to one (1) month;

iii. One hundred and eighty-nine (189) days shall be equivalent to one (1) year.

c. Seniority accumulated pursuant to paragraph 3.a and 3.b, shall be included as aggregate service with the employer when a determination is made in accordance with paragraph 1.

4. Effective July 1, 2006, a teacher on a temporary or term contract shall accumulate seniority for all days of service on a temporary or term contract.

5. No employee shall accumulate more than one (1) year of seniority credit in any school year.

6. Any provision in the Previous Collective Agreement which provides a superior accumulation and/or application of seniority than that which is provided pursuant to this article, shall remain part of the Collective Agreement

Note: The provisions of this Article supersede and replace all previous provisions which are inferior to this article.

- **Issues in Dispute:**

1. Do the provisions of C.2.2 include the right to port seniority after a break in service; and

2. Can an employee who receives a continuing contract port seniority from more than one district?

- **BCPSEA's position:**

C.2.2 was intended to be a prospective provision, that effective September 1, 2006, would permit a teacher to port up to 10 years of seniority when s/he terminates employment with one school district in order to accept employment with another. The parties recognized that it is not always possible to secure a continuing contract position at the point of entry, and therefore provided that the porting of seniority would be activated at such time as the teacher "achieved continuing contract status" in the new district. However, it was

never intended that this provision would allow a teacher to reach back and reactivate seniority credit that had been extinguished.

A teacher might make a number of sequential moves between school districts and, over time, the 10 years of seniority may well have included seniority which was accumulated in more than one district. However, as C.2.2 was only effective September 2006, the initial move under this language will only permit the porting of seniority from the last employer. Any seniority rights accumulated under other previous employers have been extinguished.

- **Background**

To fully understand the employer's position with respect to the application of C.2.2, it is necessary to review the development of Article C.2.

With the exception of Clause C.2.2, this article was intended to address the new seniority provisions for TOCs arising from Vince Ready's award dated April 3, 2006, and to correct the anomalous situation for temporary teachers in light of Mr. Ready's award (C.2.3).

Most importantly, Clause C.2.1 was specifically intended to continue the existing definitions of seniority in each of the 60 school districts except for the new provisions set out in the article. It was not intended that there be a wholesale change to the seniority scheme as it existed in the province or within each district; rather, the changes were prescribed and limited in their application.

C.2.2 was a late addition to this article.

The context in which C.2.2.was discussed was the "porting" of seniority when leaving one school district and moving to another, and this context is evident in the bargaining history. When the employer agreed to the union's language in C.2.2, it was in response to union arguments that the porting of seniority would assist in the recruitment of teachers to northern and remote districts; C.2.2 would allow an employee to bring at least some of their seniority (and therefore a measure of their employment security) when moving from one district to another. This language was not intended to give employees the

ability to reach back and gather service for the purposes of expanded seniority or credit for past service.

- **Employer Argument**

  a. ***Break in service:*** The porting of seniority was entirely a BCTF initiative. Their initial proposal dated April 12, 2006 [Attachment 3] contained specific language that would have provided for seniority as "aggregate length of service in the employment of all employers covered by the Collective Agreement." This proposal also sought to "port" seniority to give priority hiring into another school district. Their explanation at the time was that "members have an interest in moving from district to district and retaining seniority and sick leave."

  This language was not achieved in bargaining.

  On June 25, 2006, the BCTF tabled the language which formed the basis of the language now in dispute, and they dropped the definition which had included seniority from all school districts [Attachment 4]. Notably, they accepted clause C.2.1 which maintained the current definitions in each district.

  On June 26, 2006, BCPSEA added the caveat that the clause should be "effective on September 1, 2006" in order to narrow the parameters and limit the effects for districts [Attachment 5]. At no point did the BCTF raise the issue of broken service with respect to credit for seniority from a previous district. Not only was a break in service never contemplated or discussed, it would be inconsistent with the seniority scheme throughout the vast majority of school districts in this province. See Attachment 6 for the current definitions of seniority in each school district collective agreement.

  Had the union wanted to introduce what would be a second new concept for most districts in the province; i.e., the retrieval of extinguished seniority credits after broken service, they would have been required to do one or both of the following:

1. Clearly explain that this language was intended to permit such an aggregation, and/or…

2. Negotiate clear language such as exists in those few districts which do permit teachers to reactivate previous seniority after a break in service. See SD No. 37 (Delta) Article B.4.8 at Attachment 6 as an example of the type of clear language that would be required.

The union did neither of the above.

While it is true that the seniority scheme varies from district to district, there are some norms. Most commonly, seniority is defined and useable at the point of a continuing contract; in almost every agreement there are provisions setting out what periods of employment count for seniority purposes, and what are the implications for Leaves of Absence and layoffs. In the few cases where an employee is able to reactivate some/all seniority lost as a consequence of severed employment, there is express language to that effect. In the absence of such express language, the only service which is aggregated for seniority purposes are the specifically recognized bits and pieces which are totaled at the time the employee meets the criteria in the relevant definition, and it is each of those 60 definitions which have been maintained by C.2.1. It would be an absurdity to permit an employee who moves to a new district to reach back and reactivate extinguished seniority credits, when that same employee would be denied the reactivation of those credits in the very district in which they were accumulated. To impose such a wholesale change to the existing scheme on all 60 districts would require specific language to that effect. The union did not table, and we did not agree, to such language.

From the start, BCPSEA maintained its concern that an expanded definition of seniority would have operational and equity implications for districts in relation to recruitment and retention, post and fill, and layoff and recall. Our members were not interested in any porting of seniority, and we communicated that to the union. It was only when we talked about a prospective application that would permit districts to make reasoned assessments as to the implications of employing teachers from

other districts, that BCPSEA was able to offer any porting of seniority. The interpretation now suggested by the union completely negates the ability of a district, in September 2006, to have made a reasoned assessment as there is no way a prospective employer at that time would know what seniority such a teacher might be seeking to reactivate.

Accordingly, it is BCPSEA's position that for a teacher to port seniority between school districts, the employment between the two districts must be continuous. We accept that such continuity is not broken by periods of time during which school is not in session. We do not agree that a teacher can port seniority credits which have previously been extinguished by resignation or termination.

Although this provision will only apply to teachers who moved directly from one district to another, we agree that it is not always possible to secure a continuing contract position at the point of entry, and therefore the porting of seniority is activated at such time as the teacher "achieves continuing contract status" in the new district. The fact that the employee does not have to obtain a continuing position immediately should alleviate many of the concerns raised by the BCTF on page 2 of their outline:

> "To take BCPSEA's position would mean a teacher who resigns in one district without having a job in another district would not be able to port seniority. This would be an absurd result since the whole intent of the language was to enable those teachers new to a district or on temporary or TOC status to port seniority. Many teachers resign from a district without yet having a position elsewhere. Teachers are often forced to begin their work in a district as a TOC or temporary contract teacher – that is a clear pattern of employment. Many districts will not grant a continuing contract to new hires. Teachers are not always able to get leaves from their districts and have to resign. Many are moving long distances in order to seek employment elsewhere. The interpretation taken by BCPSEA means few would benefit from this article."

BCPSEA's interpretation does not require an employee to move directly into a continuing position in the new district. This portability provision will also apply to an employee moving directly to a new district as a TOC and/or temporary employee, and who subsequently attain a continuing position after September 1, 2006.

b. ***Porting from more than one district:*** BCPSEA agrees that is possible for an employee in future years to port seniority which has been earned in more than one district, however, not this year. Given the September 2006 effective date of this clause, it is not possible for an employee in the 2006-2007 school year to port from more than 1 district. Prior to September 2006, an employee who left the employ of one district to become an employee in another district was unable to carry any seniority with them. Therefore, at this time, the only seniority that can be ported is the recognized seniority (to a maximum of 10 years) from the district with which the teacher was employed in the 2005/2006 school year.

   The intent of the language was to allow an employee to bring service when moving from one district to another. The reference to "districts" in C.2.2 was intended to recognize the accumulation of service which the employee will earn as s/he makes successive moves to new districts over a number of years. With each move, the employee will port accumulated seniority, each successive district recognizes the growing seniority, and up to the 10 year maximum it gets ported to the next.

In summary, it is BCPSEA's view that clear specific language is required for the BCTF to sustain its position with respect to reactivating extinguished seniority credits. There is no clear, specific language included in Article C.2.2 that provides for the recognition of "broken" seniority. Not only would this right be inconsistent with the normal seniority scheme in BC school districts; in the absence of clear language in an agreement, arbitrators have generally been reluctant to uphold seniority credits.

Article C.2.2 provides for the crediting of seniority from other districts. The concept is the continuous employment of the employee in the accrual of seniority credits. Seniority traditionally increases with the continuous increase in service with an employer. What Article C.2.2 does is to treat two employers as one for the purposes of seniority accrual. The employment with those two

employers must be continuous for seniority to accrue as it would be for the accrual of seniority with one employer.

- **Jurisprudence**

  As noted earlier in this submission, had the union wanted to introduce what would be a second new concept for most districts in the province; i.e., the retrieval of extinguished seniority credits after broken service, they would have been required to do one or both of the following:

  1. Clearly explain that this language was intended to permit such an aggregation, and/or

  2. Negotiate clear language such as exists in those few districts which do permit teachers to reactivate previous seniority after a break in service.

  They did neither of the above and the interpretation which the union is seeking is contrary to the established norms with respect to seniority and with a very relevant arbitration decision dated as recently as October 27, 2005.

  The primary resource for interpretation is the collective agreement. Harmonious interpretations must be preferred to a conflicting one. Wherever possible, words must be given meaning. Further, words used in the collective agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. In *Health Employers Assn. of British Columbia v. Hospital Employees' Union*, [2002] B.C.C.A.A.A. No. 130 (Gordon), the arbitration board provided the following guidance (paras. 13-15):

  > [13] The task for this Board is to determine the meaning which was mutually intended by the parties for the words they use in their collective agreement. In fulfilling this task, arbitrators adhere to certain rules of interpretation including the following.
  >
  > [14] The primary resource for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Wherever possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary source

> unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes the words were used in another sense. The words used in the collective agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. When faced with the choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. Additionally, the parties are presumed to be aware of relevant jurisprudence.
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> [15] Where extrinsic evidence shedding light on the parties' mutual intention is proffered, arbitrators consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any bona fide doubt or ambiguity about the meaning of the language in the agreement. If, after considering the language and the extrinsic evidence, the arbitrator finds there is no doubt about the proper meaning of the provision, the arbitrator will reach an interpretive judgment without regard to the extrinsic evidence. On the other hand, if the arbitrator finds there is some doubt about the proper meaning of the disputed provision, the arbitrator is entitled to, but need not, use the extrinsic evidence to resolve the ambiguity. See *Nanaimo Times Ltd. –and– Graphic Communications International Union, Local 525-M*, [1996] B.C.L.R.B.D. No. 40, BCLRB No. B40/96 (upheld on reconsideration [1996] B.C.L.R.B.D. No. 151, BCLRB No. B151/96).

When the BCTF's position that C.2.2. permits an employee to reactivate seniority rights that had earlier been extinguished is considered, and tested against the interpretive propositions set out above, the union's argument must fail:

- The parties did not agree to extend such a significant benefit in clear and unequivocal language;

- This position is not harmonious with the normal application of seniority;

- The October 2005 decision by Arbitrator Korbin specifically rejected such an interpretation which the union tried to advance in School District No. 68 (Nanaimo-Ladysmith) and her decision was consistent with earlier decisions on this point [see pages 18 and 19 of this award found at Attachment 7].

Also, as noted earlier in the submission, the BCTF's position would result in an absurdity as it would permit an employee who moves to a new district to reach back and reactivate extinguished seniority credits, when that same employee would be denied the reactivation of those credits in the very district in which they were accumulated.

In *Board of School Trustees of School District No. 61 (Greater Victoria) and Greater Victoria Teachers' Association* (November 30, 1992), A-323/92 (Kinzie), the arbitrator addresses the interpretive principles to be followed by arbitrators. It is the third principle that is particularly relevant with respect to the absurd result of the BCTF's position:

> "The resolution of the issues raised by this grievance turns on the proper interpretation to be given to various provisions in the parties' collective agreements. In addressing these issues, I have been guided by the following interpretive principles discussed in Brown and Beatty, *Canadian Labour Arbitration* (3rd edition) para. 4:2100."

The first principle is expressed this way:

> "…in determining the intention of the parties, the cardinal presumption is that the parties are assumed to have intended what they have said, and that the meaning of the collective agreement is to be sought in its express provisions." *(at 4-25)*

Secondly, the provisions of a collective agreement are to be read as a whole with the presumption that they were not intended to conflict.

The third principle is that:

> "When faced with a choice between two linguistically permissible interpretations, however, arbitrators have been guided by the reasonableness of each possible interpretation, administrative feasibility, and which interpretation would give rise to anomalies." (at 4-25)

The principle of administrative feasibility has been applied in a number of arbitration awards where the results of a particular interpretation demonstrate the impracticalities of the interpretation. Where "anomalies" or "ill-considered results" occur, absent clear language, arbitrators will favour an interpretation that does not result in such results (*Compwood Products Ltd. and I.W.A. Canada, Local 1-417 (Re)* (2001), 104 L.A.C. (4th) 84 (B.C., Burke)).

BCPSEA submits that the union's position would result in anomalous and ill-considered results and accordingly, on this third principle, their proposed meaning should be rejected.

Lastly, given the lack of clear language, BCPSEA also submits that this is a proper case for the application of the contra proferentem rule of construction. This was BCTF language and at no time did they explain that this language was intended to broadly expand the use of past and extinguished seniority credits. In *Medis Health and Pharmaceutical Services Ltd. –and– Teamsters, Chemical and Allied Workers, Local 424* (2000) 93 L.A.C. (4th), Arbitrator Armstrong stated:

> "Another rule of construction is that a deed or other instrument shall be construed more strongly against the grantor of maker thereof (verba cartarum fortius accipiuntur contra proferentem).This rule is often misinterpreted. It is only to be applied in cases of ambiguity and where other rules of construction fail. Nevertheless, despite certain doubts which have been cast upon it from time to time, the rule has been constantly cited as a rule of construction from Coke's time to the present day. For instance Coke says:" It is a maxim in law that every man's grant shall be taken by construction of law most forcibly against himself"; and in 1949 Evershed M.R. said:
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> "We are presented with two alternative readings of this document and the reading which one should adopt is to be determined, among other things, by a consideration of the fact that the defendants put forward the document. They have put forward a clause which is by no means free from obscurity and have contended… that it has a remarkably, if not an extravagantly, wide scope, and I think that the rule contra proferentem should be applied…"

The justification for the rule has been said that "a person who puts forward the wording of a proposed agreement may be assumed to have looked after his own interests so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not."

BCPSEA submits that this is exactly the case here: it was the BCTF's language; the meaning now being advanced by the union is not clear on its face; such a

meaning would have a remarkably, if not extravagantly, wide scope that is inconsistent with the normal application of seniority and inconsistent with the most recent arbitration award on a related matter. Accordingly, this is a proper case for the application of the principle of contra proferentum and the union's suggested meaning should be rejected.

3. Sick Leave

- **Language**

  Article G.1 Portability of Sick Leave:

  1. Effective September 1, 2006, the employer will accept up to sixty (60) accumulated sick leave days from other school districts in British Columbia, for employees hired to or on exchange in the district.

  2. An employee hired to or on exchange in the district shall accumulate and utilize sick leave credit according to the provisions of the collective agreement as it applies in that district.

- **Issues in Dispute**

  a. The effect of a break in service on the ability to port sick leave
  b. Porting sick leave earned in more than one district.

- **BCPSEA Position**

  a. ***Break in service****:* If the service has been broken, then there is no longer service to accept from a previous district and this provision does not apply. The summer months would not constitute a break in service.

  b. ***Porting sick leave earned in more than one district****:* This language is prospective in nature. It provides employees with the ability to port sick leave from September 1, 2006 forward. It is conceivable, over time, that the accrual may be the result from movement from more than one district

(without a break in service). This language would not allow an employee to reach back to more than one district.

- **Background**

The intent of the parties was to allow an employee to "port" sick leave from one employer to another. The implications of a break in service are that there is no longer any sick leave to port. Sick leave portability language was tabled by the BCTF on April 12, 2006 because of member interest in moving from one district to another. On April 24, 2006, BCPSEA proposed a transfer of up to 30 days of unused sick leave. This proposal was rejected by the BCTF because they viewed it as "front-end loading" as opposed to true portability of sick leave. On May 3, 2006, BCPSEA amended its proposal to "accepts 30 days from other school districts for employees hired to or on exchange…." On May 8, 2006, the BCTF countered with 100 days. On June 19, 2006, the BCTF moved again from 100 to 60 sick leave days and the agreement was signed off in this form.

- **Argument**

a. ***Break in service:*** Although amendments were made to the language to specifically include "employees on exchange," this was never the case for employees on leave of absence from one district or employees with a break in service. If the service has been broken, then there is no longer service to accept from a previous district and this provision does not apply.

b. ***Porting sick leave earned in more than one district:*** As in the case of the seniority provisions, this language is prospective in nature. That is, it provides employees with the ability to port sick leave from September 1, 2006 forward. It is conceivable over time that the accrual may be the result of movement from more than one district (without a break in service). This language would not allow an employee to reach back to more than one district.

4. Preparation Time

- **Language**

  Article D.8 Elementary Preparation Time:

  D.4.1 Effective September 1, 2006, in districts where elementary teachers are entitled to less than 90 minutes of preparation time each week, each full time elementary teacher shall receive an average of 90 minutes of preparation time for each complete week of instruction.

  D.4.2 Effective September 1, 2007, in districts where elementary teachers are entitled to less than 90 minutes of preparation time each week, each full time elementary teacher shall receive an average of 90 minutes of preparation time scheduled in accordance with the Previous Collective Agreement.

  D.4.3 Preparation time for part time teachers shall be provided in accordance with the Previous Collective Agreement.

- **Issues in Dispute**

  a. Weekly preparation time and the obligation to make up preparation time for statutory holidays and non-instructional days (NIDS)
  b. Application to all teachers for all time in Year 2
  c. Application to all teachers for the first 90 minutes of preparation time in Year 2.

- **BCPSEA Position**

  a. ***Weekly preparation time and the obligation to make up preparation time for statutory holidays and non-instructional days (NIDS)****:* The averaging language stipulated for September 1. 2006 is for the purpose of transition. It was established solely for the transition period to give the employer relief in scheduling increased preparation time given the short time between reaching the agreement on June 30, 2006 and implementation at September 1, 2006. As of September 1, 2007, it is very clear that the parties

revert back to the preparation time provisions in the Previous Local Agreement. The BCTF did not make any gains in this area in this round of bargaining.

b. ***Application to all teachers for all time in Year 2****:* This language was only intended to apply to elementary teachers in districts which previously had less than 90 minutes and the averaging provision was intended to apply in Year 1 for only these districts in order to provide such employers with scheduling relief. This language has absolutely no application to any group beyond those districts in which the elementary preparation time was less than 90 minutes. The language is very clear. It refers to "in districts where elementary teachers are entitled to less than 90 minutes of preparation time per week."

c. ***Application to all teachers for the first 90 minutes of preparation time in Year 2****:* As stated above, this language was only intended to apply to elementary teachers in districts which previously had less than 90 minutes and the averaging provision was intended to apply in Year 1 in order to provide such employers with scheduling relief. This language has no application to any group beyond those districts in which the elementary preparation time was less than 90 minutes.

- **Background**

Discussions in bargaining with respect to preparation time by the BCTF were always focused on the issue of increased preparation time for teachers. The global issue of averaging was initially raised by the employer in its May 15 package in conjunction with a proposal to increase preparation time for elementary teachers to a base of 90 minutes. For the purpose of transition in the first year of the agreement only, the employer did assert the need to be able to average any increase in preparation time for districts moving to the 90 minute base. Given the short period of time between the settlement on June 30, 2006 and the effective date of September 1, 2006 for the increased preparation time, the employer required this language to ensure that they were able to schedule the increase. The parties intended that this article apply only to elementary teachers in districts where the current preparation time allocation was less than 90 minutes. With the exception of the transition period, there was never any agreement to change how preparation time would be allocated in and local district. The parties discussed the issue of the outstanding

arbitrations and the Previous Local Agreements on the evening of June 30, 2006 as the memorandum was being concluded and signed. When asked by Brian Porter what effect this language would have on the "Mission situation" and the issue of preparation time scheduling in relation to non-instructional days and statutory holidays, Jacquie Griffiths responded that both parties would "live to fight another day" and acknowledged that the upcoming arbitrations would proceed. It is estimated that the cost of acceding to the position of the union regarding the overall issue of preparation time scheduling and stats and non-instructional days could be somewhere in the range of $30,000,000 per year. The issue of replacement of lost preparation time when a non-instructional day ("NID") or statutory holiday occurs was the subject matter of an arbitration award in SD No. 75 (Mission). The arbitrator upheld the grievance filed by the union based on the particular language in the Previous Collective Agreement. The past practice evidence was rejected by the arbitrator. She labelled it as a "mixed bag" of practice or a mixed practice.

There are currently grievances from two other districts on the same issue of preparation time that are scheduled to be heard by arbitrators in November. In those cases, the language in the Previous Collective Agreements is different, the past practice is consistent, and there may be bargaining history evidence to assist in the interpretation of the collective agreement provisions. There are also a significant number of grievances in other districts on the same issue that are currently under discussion in the local grievance process.

- **Argument**

  a. ***Weekly preparation time and the obligation to make up preparation time for statutory holidays and non-instructional days (NIDS)****:* The language in the Previous Local Agreements and the practices flowing from these agreements remains in place. The idea that the implications of the agreement and the signed language were that the employer had given up its position on preparation time in relation to non-instructional days and stats is incorrect. In fact, the opposite is true. The parties simply agreed that these issues would be dealt with as required in future arbitration. The averaging language stipulated for September 1. 2006 is for the purpose of transition. It was established solely for the transition period to give the employer relief in scheduling increased preparation time given the short time between reaching the agreement on June 30, 2006 and implementation at September 1 , 2006 (most districts had already

completed their staffing process). There were no discussions or agreements by the parties that the averaging concept would bring with it the makeup of time lost due to non-instructional days and statutory holidays. As of September 1, 2007, it is very clear that the parties revert back to the preparation time provisions in the Previous Local Agreement. To take the position that previous language or practice is not relevant would be to make this provision meaningless. BCPSEA never gave up any position regarding preparation time and scheduling of such time for statutory holidays and non–instructional days and, as such, the BCTF did not make any gains in this area in this round of bargaining.

b. ***Application to all teachers for all time in Year 2****:* As stated above, this language was only intended to apply to elementary teachers in districts which previously had less than 90 minutes and the averaging provision was intended to apply in Year 1 for only these districts in order to provide such employers with scheduling relief. This language has no application to any group beyond those districts in which the elementary preparation time was less than 90 minutes. The language is very clear. It refers to "in districts where elementary teachers are entitled to less than 90 minutes of preparation time per week".

c. ***Application to all teachers for the first 90 minutes of preparation time in Year 2****:* As stated above, this language was only intended to apply to elementary teachers in districts which previously had less than 90 minutes and the averaging provision was intended to apply in Year 1 in order to provide such employers with scheduling relief. A hybrid model (as proposed by the BCTF), in which some preparation time would be scheduled without any averaging or reference to the Previous Local Agreement and where additional minutes above this threshold would then revert back to the Previous Local Agreements is unworkable, was never contemplated by the parties and is not reflected in the language used by the parties. As stated previously, this language has no application to any group beyond those districts in which the elementary preparation time was less than 90 minutes.

5. Optional 12-Month Pay Plan

- **Language**

  Optional Twelve-Month Pay Plan

  1. Where the Previous Collective Agreement does not contain a provision that allows an employee the option of receiving partial payment of annual salary in July and August, the following shall become and remain part of the Collective Agreement.

- **Issues in Dispute**

  a. Plans established prior to provincial language and interest sharing.

- **BCPSEA Position**

  a. Plans established prior to provincial language and interest sharing*:* The language is clear on its face that it is intended to only apply "where the previous collective agreement does not contain a provision." There were no allowances made, for example, to protect only superior provisions. Previous savings plans established in the Previous Collective Agreements that allow for payment in July and August should be preserved and not replaced with the new language even if such provisions are inferior.

- **Background**

  The purpose of this article was to establish a 12-month pay provision for districts where such a provision did not already exist.

- **Argument**

  a. Plans established prior to provincial language and interest sharing*:* The provisions established in Previous Collective Agreements were intended by the parties to this agreement to remain in place. If the intention had been to protect only certain previous provisions then the parties would have articulated this as they did in the case of D.8 (Elementary

Preparation Time). The language is clear on its face that it is intended to only apply "where the previous collective agreement does not contain a provision." There were no allowances made, for example, to protect only superior provisions. For these reasons, previous savings plans established in the Previous Collective Agreements that allow for payment in July and August should be preserved and not replaced with the new language even if such provisions are inferior.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of October, 2006.

Jacquie Griffiths
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