IN THE MATTER OF IMPLEMENTATION OF THE FRAMEWORK FOR SETTLEMENT

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

("BCPSEA" or the "Association")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION

("BCTF" or the "Federation")

Re: Signing Incentive, Seniority, Sick Leave, Preparation Time, Optional 12-Month Pay Plan

MEDIATOR:	Irene Holden
REPRESENTATIVES:	Jacquie Griffiths, Managing Consultant, Collective Bargaining Services, for BCPSEA
	Jinny Sims, President, for BCTF
DATES OF SUBMISSIONS:	October 18 and 25, 2006
DATE OF AWARD:	January 16, 2007

BACKGROUND

In the Fall of 2005, following the collapse of negotiations between the British Columbia Public School Employers' Association (hereinafter referred to as "BCPSEA" or the "Association") and the British Columbia Teachers' Federation (hereinafter referred to as "BCTF"or the "Federation"), there was a province wide strike by the teachers. The parties had met on numerous occasions, but failed to agree on a single item. This was not unusual given the parties' collective bargaining history.

Prior to 1987, full collective bargaining and the right to strike were not available to teachers in British Columbia. In 1987, collective bargaining took place at the local level between individual school boards and local teacher associations and unions. The BCTF coordinated the bargaining on a provincial level, but there was no corresponding Employer organization for the school boards.

In 1994, following the final report in the Korbin Commission which reviewed many facets of the public service and public sector, including collective bargaining and related organizational and structural issues, there was a move towards centralized provincial bargaining for education in the grades kindergarten through 12 or "K-12" sector. Legislation established BCPSEA and BCTF as the provincial bargaining agents for employers and local unions respectively.

From that time forward, the parties' collective bargaining was inconclusive in the main and often unproductive. In 1996, the parties ratified a Transitional Collective Agreement which extended existing terms and conditions of the local collective agreements and established the basis for continued negotiations. There followed several years of unsuccessful

bargaining between the parties, resulting in two collective agreements imposed by the provincial government via legislation.

The last collective agreement imposed by the provincial government expired in 2004 and the teachers began to strike on October 7th of 2005. On October 10, 2005, Vince Ready was appointed as an Industrial Inquiry Commissioner by the provincial government not only to assist the parties and facilitate an end to the strike, but also to look into other labour relations matters between the BCTF and BCPSEA. The strike ended on October 24, 2005 following Mr. Ready's recommendations as to how to facilitate a settlement and an orderly return to work by the teachers. In December of 2005, Mr. Ready's terms of reference were expanded to include a wider examination of bargaining structures between the parties. Mr. Ready requested and was granted an extension of time in which to complete the expanded review.

In the interim, however, collective bargaining was looming. The current Collective Agreement had been extended for a year until June 30, 2006. Consequently, on April 6, 2006, Commissioner Ready issued Interim Report #2 for Transitional Negotiations to assist the parties with their upcoming set of negotiations. Commissioner Ready's guidelines included the following:

- The BCPSEA and the BCTF each appoint bargaining committees of a maximum of five representatives each. The Government shall appoint at least one senior representative to act on its behalf to convey Government's position on mandates and on policy issues relative to collective bargaining.

- Appoint Ms. Irene Holden as a facilitator/mediator to assist the parties with negotiations.

- The BCPSEA and the BCTF shall develop and exchange realistic bargaining proposals prior to April

15, 2006, and shall immediately commence collective bargaining.

- The BCPSEA, in conjunction with the Government representative referred to above, shall prepare a serious settlement offer no later than May 15, 2006.

- In the event that a settlement is not reached prior to June 1, 2006, the mediator will issue a report to the Minister and the parties identifying the issues resolved and in dispute.

- By agreement of the parties or at the request of the Minister, the Commission or another third party may be requested to become involved in providing further assistance in settling matters in dispute.

- Nothing in the foregoing procedure prohibits or precludes either party from exercising their right to strike or lockout under the provisions of the *Labour Relations Code.*

- The parties to the recently established Learning Roundtable will continue their discussions with a view of resolving the issues of class size, class composition and the other matters being dealt with within the same time frame as the collective bargaining process outlined above; however, this process should not interfere with bargaining.

BCPSEA, BCTF and the provincial government accepted the above recommendations and I was appointed to assist the parties in their collective bargaining in April of 2006. Throughout April and until the last week of June, I attended 28 bargaining sessions with the parties. Negotiations were at times slow, but the parties succeeded in reaching the objectives as outlined in the Ready report above.

In the last week of June of 2006, I requested that the parties enter into discussions with me towards signing a Framework for Settlement. I further requested that the parties' bargaining teams, although housed in the same facility, had to be smaller and only two principals from each team met with me directly. Reporting and dialogue continued to take place between

the principals and their teams. There were also a couple of subcommittee tables established to deal with less significant issues. To their credit, the parties succeeded in reaching a Memorandum of Settlement which was titled a Framework for Settlement. This agreement was achieved in the final hours of June 30, 2006, at which point the parties had been negotiating for almost 48 hours.

This Framework for Settlement was ratified by the parties in the Fall of 2006 and became their new Collective Agreement – the first Collective Agreement ever bargained between them. As the mediator in that process, I remained seized of any implementation issues associated with the Framework for Settlement.

As a result there were a number of issues which the parties needed to place before me. Before I address these issues, let me say that this is not uncommon after a bargaining history such as this, and the process which needed to be utilized in the final hours of collective bargaining. The necessity for this award is therefore not a negative reflection on the ability, credibility and forthrightness of those involved. Nor should it be deemed as a negative reflection on the parties' ability to solve problems, although the parties are going to have to work on that aspect of their day-to-day relationship.

THE ISSUES

As a preamble before addressing the issues, let me first of all say that I tried to synopsize the parties' positions for purposes of this award. Regardless of this synopsis, the parties can be assured that I have carefully reviewed and considered their full positions on all the issues.

The general approach I took in deciding the issues was one of a rights arbitration in which the parties' mutual intent is investigated and collective agreement language interpreted, rather than an interest arbitration in which terms and conditions are determined based often on internal and external comparisons and the theory of replication. My prime focus was to assist the parties to enable them to implement the Collective Agreement and move forward with building a more positive relationship. As a result, there will not be an in depth analysis of Human Rights issues under the *B.C. Human Rights Code,* for example. Nor will the award mirror a normal arbitral proceeding. Further, my own notes and recollections from the collective bargaining mediation are taken into account, as well as the parties' submissions. In this regard these circumstances are somewhat unusual since I have the advantage of being the mediator of record and privy to conversations to which most arbitrators are not privy.

Signing Incentive

The Framework for Settlement provided for a Letter of Understanding regarding the Early Incentive Payment. The incentive was provided by the provincial government in this past round of public sector collective bargaining for those union members who signed a tentative collective agreement by the expiry of their collective agreements. The language regarding such an incentive in the BCPSEA/BCTF Framework for Settlement read as follows:

LETTER OF UNDERSTANDING
BETWEEN:
BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION
AND:
BRITISH COLUMBIA TEACHERS' FEDERATION

Re: Early Incentive Payment

Should the parties reach a tentative collective agreement by June 30, 2006 which is subsequently ratified by the parties, each bargaining unit member who is an employee of the School District on June 30, 2006 shall be eligible to receive a one- time lump sum incentive payment.

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 for teachers on call, a full-time equivalent teacher on call is a teacher on call 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

The one-time lump sum incentive payment is subject to the legal and statutory deductions. This payment is not included as pensionable earnings nor is it included for calculations of benefits.

The incentive payment shall be paid to employees upon receipt of funding from the government and as soon as practicable for the school district to calculate the individual payment amounts and distribute the funds.

In addition to the above, each full-time equivalent employee shall receive a one-time payment of $300 in recognition of past purchases of professional resources, to be paid in the same manner as above.

In distributing the incentive payment, BCPSEA excluded the following teachers based on the above language, which was crafted by BCPSEA:

i. Teachers on Long Term Disability ("LTD") prior to 2005-2006;
ii. Teachers on the Salary Indemnity Plan ("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;
iii. Retired or resigned teachers;
iv. Teachers on maternity leave extended for the school year;
v. Teachers on Call ("TOCs") on pregnancy leave under the *Employment Standards Act;*
vi. Teachers on Union leave (including TOCs on Union leave);
vii. Teachers on leave where there is more than one local president (in the amalgamated school districts).

BCPSEA argues that the original sum of money for the incentive payment was $129,000,000. The Association submits that, just as in other sets of negotiations in the broad public sector, the parties bargained restrictions to be placed on which employees would receive or not receive the incentive. BCPSEA asserts that demographic data challenges necessitated a modified approach. First, it defined the eligible group, and then the Association resorted to setting a dollar amount per employee once the eligible group was defined. In this way, its approach was no different than many other groups in the broad public sector.

BCTF contends that all of its members should receive the incentive because the incentive bonus is designed to appeal to those who have the ability to ratify a collective agreement. Since all of its members in the bargaining unit have the legal right to vote during the ratification process,

this affords them the right to receive the incentive. In contrast to BCPSEA's argument, BCTF denies engaging in any discussions regarding the cost of the incentive, nor did it engage in defining those eligible to receive the incentive. Further, BCTF's President has a clear recollection of stating, as she signed the language found in the Letter of Understanding, that she did not agree with the list of those who would receive the incentive.

The parties' specific arguments can be found when they refer to the specific exclusions:

i. Teachers on LTD prior to 2005-2006

BCTF argues that although the language in the Letter of Understanding appears to uphold BCPSEA's right to exclude those on disability, Ms. Sims, President of BCTF, has a clear recollection that she had an agreement that the "list could be worked out later". To exclude those teachers on LTD would be discriminatory in BCTF's view and a violation of their human rights on the basis of health and/or disability. According to BCTF, other public sector union members on LTD received the incentive.

BCPSEA feels that the language of the Letter of Understanding is clear on its face; that only those employees on SIP, which commenced between July 1, 2005 and June 30, 2006, would receive the incentive. Those on LTD are not on leave with pay and are not part of any other group that is identified in the Letter of Understanding as being eligible for the incentive payment. To accept the BCTF's position would require a rewrite of the collective agreement language and not within my jurisdiction, asserts the Employers' Association.

Regarding BCTF's argument that Ms. Sims did mention, during the signing of the Letter of Understanding, that she had difficulties with the list,

BCPSEA acknowledges that Ms. Sims did make mention of such difficulties but at no time does BCPSEA recall an agreement that the "details could be worked out later".

As for BCTF's argument that the language is discriminatory and would violate the employees' human rights if excluded from receipt of the incentive, BCPSEA argues that providing different levels of compensation to different groups of employees is not in itself discriminatory. It argues that prohibited discrimination only occurs when the distinction is based on one of the prohibited grounds found in the *Human Rights Code*, such as disability in this case. BCPSEA cites two companion cases of the Saskatchewan Court of Queens Bench which dealt with similar issues and urges me to review these cases: *Real Canadian Superstore v. United Food and Commercial Workers, Local 1400,* [1999] SJ No. 777 (Sask. Q.B.), and C*oca Cola Bottling Limited v. United Food and Commercial Workers, Local 319W,* [1999] SJ No. 777 (QB), aff'd (2000) 187 DLR (4th) 759 (CA).

BCPSEA further asserts that the appropriate comparator group in this case is those employees who were on unpaid leave. BCPSEA asserts that these employees were treated precisely the same, in that their unpaid hours do not count for the purpose of calculating the incentive amount. Thus, the denial of the benefit to disabled employees on long term disability is not based on their disability, but rather is based on their absence from work on unpaid leave.

Having said that, BCPSEA then argues that the parties negotiated exceptions to this general rule and included some groups of employees on unpaid leave under certain circumstances: such as those on SIP which commenced July 1, 2005 through June 30, 2006, as well as those on

maternity and parental leave during the July 1, 2005 to June 30, 2006 calendar year.

Finally, BCPSEA asserts that the incentive payment is a benefit closely tied to receipt of wages or "actual time worked". For the majority of the bargaining unit, the amount of actual time worked will determine the amount of the signing bonus the employees receive. In BCPSEA's view, the parties have negotiated an exception to the general principle that the bonus is based on actual time worked and have agreed to extend the bonus to identified categories of employees on leave who are not providing services under certain circumstances.

Decision

I have checked my notes and can find no mention of the parties agreeing to "working out the list later". I do recall Ms. Sims making a comment that there may be problems with the language found in the Letter of Understanding and Ms. Griffiths' response that these problems could be "worked out". However, Ms. Sims did not identify the specifics, nor the breadth, of the problems. In fairness to both parties, there was no luxury of time, at that stage of collective bargaining, in which to discuss the nature of the problems, nor to address them.

Consequently, the parties are left with very clear language which excludes certain employees from receiving the incentive payment. I have also checked to see whether or not other groups in the broad public sector included those on LTD. Their practice varies. Some, as in the health sector, chose to include this group; others placed eligibility requirements on the group – for example, there was a requirement for provincial government workers to return to work from LTD by a given date. My intent in reviewing other public sector groups was not so much for comparative purposes, but

to see if I could find commonality of approach which may have influenced BCPSEA in taking the approach it did.

Regarding the argument that to exclude those on LTD would be discriminatory, I accept BCSPEA's argument that the correct comparator group has to be chosen in order to determine whether certain employees are being treated differently because of their disabilities. The correct comparator group is those on unpaid leave. There were lots of individuals which this language excluded from receiving the incentive. If the Association had said that no other group on unpaid leave should be excluded but those on LTD, then I may find this group's exclusion as discriminatory. But the Association allowed those on SIP within a certain timeframe to be eligible even though their SIP was unpaid and may ultimately lead to LTD. BCPSEA also allowed individuals on WCB within a certain timeframe, which could conceivably be another form of disability, to be in receipt of the incentive payment. I therefore do not find that the language is discriminatory. Based on the clear language of the Letter of Understanding, I consequently find that those teachers on LTD prior to 2005 – 2006 are not eligible to receive the signing incentive.

ii. 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

BCPSEA argues that these teachers are accessing accumulated sick leave which in some collective agreements is rejuvenated every year. So for example, a teacher would commence SIP in the 2004-2005 school year, return to sick leave in the 2005-2006 school year, and when sick leave was exhausted the teacher would return to SIP in 2005-2006 without having to serve an eligibility period and never having to return to work. BCPSEA further argues that since SIP, in this instance, has commenced prior to the

July 1, 2005 and June 30, 2006, as stipulated in the Letter of Understanding, the employees would not be eligible for the incentive payment. Such employees, BCPSEA asserts, have not returned to active duty and their status on SIP remains in place.

Conversely, BCTF argues that BCPSEA is incorrect as to how SIP operates. According to the Federation, a member who returns to paid sick leave after being on SIP must first re-qualify medically and complete a series of forms in order to return to the plan. In any event, paid leaves, including sick leave, are clearly covered by the incentive language, as is SIP which begins again during the 2005 – 2006 school year. Finally, BCTF submits that nowhere in the Letter of Understanding does it refer to those on "active duty".

The language in the Letter of Understanding clearly states that those days spent on the Salary Indemnity Plan which **commenced** between July 1, 2005 and June 30, 2006 will not be deducted for purposes of the incentive calculation. However, the plan stipulates that an employee's sick leave is the "first payor" in terms of benefits. Once that sick leave is utilized, then the employee resumes benefits under the Salary Indemnity Plan to a maximum benefit of 120 work days. The employee still has to fill out the appropriate medical forms, but the claim is the same claim for purposes of the plan. As such the employee has not commenced SIP in the timeframe between July 1, 2005 and June 30, 2006, but has resumed or recommenced his claim. The language found in the Letter of Understanding would therefore not apply to this particular employee.

iii. <u>Retired or resigned teachers</u>

BCPSEA points to the language in the Letter of Understanding which refers to those eligible to receive the incentive payment as "each bargaining unit member who is an employee of the School District on June 30, 2006". Consequently, it argues that the relevant service is limited only to the active service with a school district as of 30 June 2006 for employees who worked in more than one school district in the 2005-2006 school year. BCPSEA further asserts that school districts only received funding for the incentive for the period of time the teacher worked in her/his current district.

BCTF argues that many teachers resign or retire in one district, only to work on call or part – time in another district. In its view, there is no reason to exclude these individuals. Further, the Framework Settlement is a provincial framework, not a local one and these members should be included, says BCTF.

I recognize that the overriding principle in the Letter of Understanding can be found in the preamble to the Letter of Understanding ("an employee of the School District on June 30, 2006"). The balance of the Letter is more definitive as to what is meant by this overriding principle and defines full time employees in a certain way, as it does with teachers on call. The employees that the balance of the Letter is trying to define, however, is tied to those on staff as of June 30, 2006.

If a teacher retires and/or resigns and does not go to work for another school district, then I accept that as of June 30, 2006 her/his employment is severed. I further recognize that the following scenario appears grossly unfair: if a teacher works virtually as a full time employee in one school district but, retires or resigns prior to June 30, 2006, only to work on call in another school district for a short period of time that the teacher's incentive is based on the limited on call service and the full time service is not taken into account.

If this were one employer such an approach would not make sense. However, this is an association of stand alone employers and as such the ties to one another exist only as they are defined in the provincial Collective Agreement and what rights have been bargained for them from one employer to the next. Inequities in such a system are inevitable and resolution to all these inequities may lead to other inequities in other scenarios. Consequently the employees' entitlement to the incentive payment is based on their status as of 30 June 2006 in a particular school district. Since the teachers in question would be deemed retired or resigned as of 30 June 2006 in that school district, then they would not be entitled to the incentive payment.

iv. Teachers on maternity leave extended for the school year

As I understand it, the parties have reached a resolve to this issue, although BCTF reserves the right to submit the issue to me at a later date if the issue is not resolved to their satisfaction.

v. Teachers on Call on pregnancy leave under the *Employment Standards Act*

According to BCPSEA, TOCs are casual employees who are not entitled to leave. When these members are in receipt of pregnancy benefits under the *Employment Standards Act*, they are not considered employees on maternity or parental leave as defined under the Collective Agreement nor under the Letter of Understanding. There is no position from which a TOC can take leave, argues BCPSEA. As such, the leave provision in the Letter of Understanding would not apply to TOCs and the incentive money that TOCs receive should be based solely on hours worked, contends the Association.

BCTF argues that such an approach is discriminatory. Maternity leave is specified in BCPSEA's incentive language to be a leave that is covered, regardless of whether it is paid or not.

For similar reasons that I did not find the exclusion of those on LTD as discriminatory, I do not find the exclusion of TOCs on pregnancy leave as discriminatory. The appropriate comparator group in this case would be other TOCs from all genders who were unavailable for work from July 1, 2005 until June 30, 2006 for a variety of reasons. TOCs received the incentive for hours worked. No TOCs received the incentive for hours not worked, nor did they receive the incentive for hours in which they were unavailable for work. The entire group was treated consistently. There is no distinction made for those TOC's who were unavailable for work due to pregnancy leave.

Regardless of the discrimination issue, what about the argument that those on pregnancy leave could be deemed the same as those on maternity leave, as referenced in the Letter of Understanding? In my view, a leave of absence is just that; it is either a paid or unpaid leave granted from one's employment. When an employee is on call, he or she is not on leave from his or her employment, but rather unavailable to be called to work – no matter what the reason. The employee merely notifies the employer that he or she is not available for work. The casual employee does not request the leave, as would a full time employee.

I therefore do not find that Teachers on Call who are on pregnancy leave under the *Employment Standards Act* are covered by the maternity and/or paternity leave referenced in the Letter of Understanding regarding the signing incentive.

vi. <u>Teachers on Union leave (including TOCs on Union leave)</u>

BCPSEA argues that Union leave is not a leave with pay and as such the time on the leave would not be covered by the calculation for the incentive payment. In spite of this, a without prejudice agreement was reached between the parties regarding Union officers on full time Union leave. These individuals were granted the incentive payment. According to BCPSEA, this agreement was not extended to any teacher on any type of Union leave, but only to full time Union officers.

As for the TOCs who may be doing work for the Union, these members are not on leave from the employer and the agreement was not extended to these individuals either, says BCPSEA. BCPSEA then reiterated its argument regarding TOCs found in item v. above.

It is BCTF's position that all members on Union leave should receive their full signing incentive. BCTF argues that the incentive, by its very nature, is an incentive for union members to agree to the settlement. In this case, Union activists and leaders worked harder than anyone to secure and ratify the agreement. The high ratification result is proof of that, says BCTF.

Further, BCTF asserts that BCPSEA's position extends to school Union representatives who take Union leave on occasion for Union work or training. Their pay, says BCTF, is never deducted and their pay slips show no disruption in terms of salary or employment. One could not know from a pay slip that Union leave was taken. Pay is continued and reimbursement is for the teacher on call who replaces the teacher on Union leave. In the view of BCTF, it would cost more to calculate the leave than to pay it. To date, no district to BCTF's knowledge has made these deductions from the incentive payment.

As for the Teachers on Call, BCTF argues that it would be unfair to penalize them in such a manner. Further, BCTF contends that denial of the incentive to those who participated in Union activity would be discriminatory under the BC *Labour Relations Code*. The Federation submits that the deduction from the incentive of those who had participated in any Union work would create a reluctance on the part of the members to actively be involved in such work.

In my view, if payment of salary is seamless for these individuals engaged in Union activity, then so should the calculation be for the incentive. In this regard, the leave acts as a paid leave and the employers should not be deducting this leave from the calculation for the incentive. The little the employers would save would cost them dearly in poor labour relations. Although I do not agree that BCPSEA has violated the *Labour Relations Code* in British Columbia, the result may border on such a violation by discouraging the members from actively engaging in Union activities. BCPSEA and BCTF, because of the history, have to learn to work more productively together and denial of the signing incentive to teachers on union leave is no starting point for a positive relationship.

As for the TOCs, my ruling is the same as in item #v. above. Being unavailable for work is not the same as being on a leave from one's employment. The Letter of Understanding is clear that the calculation for the incentive to TOCs is based on actual hours worked. If I were to rule otherwise, it is my view that the calculation would be very difficult to determine.

vii. <u>Teachers on leave in districts where there is more than one local president (amalgamated school districts)</u>

As I understand it, in approximately 2002-2003 nine school districts were amalgamated. As a result of the amalgamation only one local union and one local president was recognized by the amalgamated school districts. The parties resolved the transitional issues by signing two Letters of Understanding and one Memorandum of Settlement. The crux of these agreements was that all the local presidents were officially recognized as being on Union leave for a one year period only. After that one year period of time, the local presidents are all released full time with salary and benefits, sick leave and seniority, but BCTF reimburses the school boards for the additional presidents' salaries.

BCPSEA argues that the collective agreements in these nine amalgamated districts only call for a certain number of union officials and since these individuals in question have been granted additional leave without pay then they would not qualify for the incentive under the terms of the Letter of Understanding. BCPSEA maintains its position that employees on Union leave are not eligible, but on a without prejudice basis it offered the incentive to those full time Union officials who received Union leave under the terms of their Collective Agreement. This offer was not extended to the additional individuals in the amalgamated school districts.

BCTF makes a similar argument for the payment of the incentive to these individuals as it did for the others on Union leave.

I see no basis to differentiate between these individuals and those in item #vi. above. Technically BCPSEA may have a valid argument, but from a labour relations point of view, such differentiation would continue to foster any lingering hostility regarding the amalgamation of the school districts. In the interests of labour relations peace, I award that the Association extend its offer and pay the incentive to the individuals in question in the nine amalgamated school districts.

Seniority

The parties agreed to the following language regarding seniority in the Framework for Settlement:

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.*

The contentious areas arising from this Article have to do with clause 2 and the portability of seniority. There are two issues in dispute and are posed as questions below:

i. Does a break in service cancel the right to port seniority; and
ii. Can an employee who receives a continuing contract port seniority from more than one school district?

I will deal with the issues as posed by the parties in their submissions:

i. <u>Does a break in service cancel the right to port seniority?</u>

BCPSEA maintains that Article C.2.2. was intended to allow a teacher to port up to 10 years of seniority when he or she terminated employment in one school district in order to accept employment with another. It further contends that the parties recognized that it is not always possible to immediately secure a continuing contract position in the new district, and therefore provided that the porting of seniority would be activated once the continuing contract status was achieved. However, at no time, says

BCPSEA, was the intent to allow a teacher to reach back and reactivate seniority credit that had been extinguished.

BCPSEA submits that although the seniority scheme varies from district to district, there is some commonality – for example seniority is most commonly defined and useable when a teacher achieves continuing contract status. There are a few collective agreements in which an employee is able to reactivate seniority lost as a result of severed employment, but there is always express language to that effect. In the absence of such specific language here, BCPSEA contends that it would be an absurdity to permit an employee who moves to a new school district to reach back and reactivate seniority credits which s/he would not have been able to reactivate in the very district in which the credits were accumulated.

BCPSEA states that portability of seniority was entirely a Union initiative. Initially it argues that its employers were not interested in porting seniority and it was only when it introduced the language, "effective September 1, 2006", which it maintains provided a prospective application to the clause, that BCPSEA alleges it could offer any porting of seniority.

Consequently, it is BCPSEA's position that for a teacher to port seniority between school districts, the teacher's employment between these two districts must be continuous. BCPSEA accepts that such continuity is not broken by periods of time during which school is not in session. However, it does not agree that a teacher can port seniority credits which have previously been extinguished by resignation or termination. BCPSEA also agrees that the teacher does not have to secure a continuing contract position immediately in order to activate the portability. It does not however propose a timeframe in which the teacher could be expected to receive a continuing contract position, and hence be eligible to reactivate the portability provision.

BCTF urges me to look at the language found in Article C.2. In its view, Clause 1 clearly states that seniority for the Article means "an employee's aggregate length of service with the employer as determined in accordance with the provisions of the Previous Collective Agreement". Nowhere does the language speak about a break in service, asserts BCTF.

In BCTF's view, the use of the word "aggregate" not "continuous" and the reference to porting from more than one district indicates that the language contemplates breaks in service and ensures that no disruption of porting occurs.

In reply, BCPSEA cites two arbitration awards which the Association maintains refer to or define the term "aggregate" in a very different manner than that being put forward by BCTF: see *British Columbia Public School Employers' Association, Board of Trustees, School District No. 68 –and- British Columbia Teachers Federation, Nanaimo Teachers' Association* [2005] (Korbin); and *British Columbia Teachers' Federation –and- Bulkley Valley Teachers' Union* [2001] (Dorsey). BCPSEA contends that both Arbitrators Korbin and Dorsey contemplate an employee holding various positions within a school district but would not be credited for seniority as a result of a resignation, termination for cause, layoff etc.

BCTF accepts these arbitral definitions of "aggregate". In its view, however, Article C.2.1 means what the clear language says: that from now on, all seniority in the various collective agreements is aggregate. The calculation is a simple one, in the Federation's estimation, since it is determined in Article C.2.1 by the provisions of the Previous Collective Agreements. In terms of the effective date utilized for this Article, ie. September 1, 2006, BCTF argues against BCPSEA's position by stating the

effective date merely prevents employees who have moved districts in the past from porting seniority now.

BCPSEA is correct that the portability of seniority was a BCTF initiative and as a consequence I have to give a fair amount of weight to what BCTF believes it achieved in the language found in Article C.2.2. – just as I gave similar weight to BCPSEA's position as the crafter of the language for the incentive payment. Having experienced many discussions amongst the parties at the bargaining table and in their respective caucuses regarding the portability of seniority, I am fully aware of the language's evolution. What started out as province wide seniority with full portability, ended up with aggregate seniority being defined by the local collective agreements and the portability of ten years' worth of seniority. I also recall the employers being concerned that such language would impact its ability to recruit and retain employees in the remote and rural communities; whereas the Union saw it as being utilized as an incentive for a young teacher to go to these same communities, knowing that she or he would be able to port some seniority when the teacher decided to apply in more favourable locations.

Consequently, when I review the specific language on which the parties finally settled, I agree with the Union's interpretation of its meaning. I do not agree that the language is prospective, as argued by BCPSEA.

However, the calculation of such seniority is not as easily captured, in my view, as BCTF suggests. Consequently I propose a joint seniority review committee be established at the provincial level and one at the local level. The joint committee at the provincial level will establish guidelines as to what may or may not be deemed aggregate service if the collective agreement is silent on a particular issue, and come up with some guidelines as to portability. So for example if an employee was terminated for cause in one

school district, then the parties may determine that his or her seniority should not be counted; or if the break in service is fairly lengthy (2-3 years) then the parties may want to consider whether the seniority can be utilized no matter what amount of time constitutes the break. Most of the collective agreements speak to a two or three year break in this regard.

The provincial committee should also consider how long an employee can take before acquiring a continuing contract at which point s/he can port his/her seniority. The issues identified herein are not all inclusive. The parties themselves should determine the issues, and attempt to reach consensus on these larger issues. However, in the event that the parties are unable to resolve them, and given the fact that the effective date of September 2006 has already passed, the issues need to be resolved in an expeditious manner. The issues should therefore be referred to me in a troubleshooter role with the ability to rule on the issues as a final dispute resolution mechanism.

Once the general guidelines are established at the provincial level, then the local seniority committees should be charged with producing a mutually accepted seniority list by the end of the following month. This local committee will be guided by the provisions in the local collective agreements and those guidelines established by the provincial committee. Any disputes will immediately go to the joint committee at the provincial level for resolution. I will also act as final arbiter for these disputes as well. Any employee caught in the delay and, as a result his/her circumstances adversely affected, will be dealt with by the parties on a case by case basis with the utilization of my services in an expeditious arbitral role.

I recognize that the procedure outlined above is rough at best, but I see this as an opportunity for the parties to work together, establish their

own guidelines, with the ability of having a final dispute resolution mechanism to conclude the issue if needed.

ii. Can an employee port seniority from more than one school district?

BCPSEA argues that in future years this may be possible but currently it is not possible to port seniority from more than one district. BCPSEA asserts that the only seniority which 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. It argues that the reference to "districts" in the language found in Article C.2.2. was intended to recognize the accumulation of service which the employee will earn as he or she makes successive moves to new districts over a number of years.

BCTF again draws my attention to the clear language found in Article C.2.2. It contends that the language speaks to an accumulation of seniority from various districts. The Federation believes that the reference to multiple school districts is indicative that porting of seniority is contemplated from more than one district by a single employee. BCTF also argues that teachers on call who work in more than one district should also be able to use such seniority once the TOCs achieve continuing contract status.

BCPSEA in its reply submission states that for TOCs to be able to port seniority and further be able to port seniority from multiple districts is totally inconsistent with the objective Article C.2.2. was purported to address. Further, the Association argues that it is inconsistent with current provisions for TOCs, as well as Vince Ready's award which gave rise to TOC seniority.

I agree with BCTF that the language contemplates an employee being able to port seniority from more than one school district, once that employee achieves continuing status in the receiving district. As for the TOCs there is no differentiation made in the language between a TOC and any other kind of employee, once the TOC achieves a continuing contract. I do not recognize an inconsistency in the notion of a TOC porting seniority and the Ready award. The Ready award, as I read it, merely gave TOC's seniority for days or time worked. The issue of portability was not addressed, nor contemplated at the time.

Logistically, however, these issues need to be addressed at the provincial joint committee level by individuals who can speak to the reality of such a calculation, with the ability of a dispute resolution mechanism in place (as described above). It would serve neither party's interests to have me attempt to do so within the embodiment of this award.

Sick Leave

The parties agreed to the following language regarding the portability of sick leave in the Framework for Settlement:

> **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.
>
> *(Note: Any provision that provides superior sick leave portability shall remain part of the collective agreement.)*

The issues regarding the portability of sick leave are the same as the portability of seniority and the parties have used the same arguments in both. Therefore, I find that on a plain reading of the language the Union's position should be accepted.

However, regarding implementation, a similar structure should be utilized in trying to calculate the sick leave as that I proposed for the portability of seniority. Different individuals could be used for the process, but the concept is the same. In my view, this issue should be a lot simpler for working committees to deal with since there may not be as many variations in collective agreements as to how individuals accumulate sick leave as there will conceivably be for the accumulation of seniority. All the issues may centre around the mechanics of portability. I will leave that for the parties to address.

My role as troubleshooter in this regard should be utilized as well. The parties will therefore be able to implement the provision from the Framework for Settlement in as expeditious a fashion as possible, with a dispute resolution mechanism which is more efficient and cost effective than arbitration.

Preparation Time

The parties agreed to the following language in the Framework for Settlement regarding preparation time for elementary school teachers:

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 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.

The issues in dispute are as follows:

1. Does the language in Article D.8 mean that preparation time is weekly and there is an obligation to make up preparation time lost due to statutory holidays and non-instructional days for example;

2. Does the language mean that all elementary teachers' preparation time in Year 2 must be weekly;

3. As an alternative to question #2, does the language mean that at least the first 90 minutes of preparation time for all elementary teachers is weekly?

These questions will be posed in the order in which they were submitted by the parties. The parties' positions will be outlined in this manner as well, but all three questions will be answered at once.

1. <u>Weekly preparation time and the obligation to make it up when lost due to statutory holidays and non-instructional days for example</u>

The issue behind these questions relates to the definition of weekly preparation time and whether or not the employers are obligated to provide 90 minutes on a weekly basis to those teachers who lose preparation time due to statutory holidays and non-instructional days. The concept has become known as "averaging" and has been the subject of one arbitration award in Mission: *School District 75 (Mission) –and- British Columbia Teachers' Federation/Mission Teachers' Union,* (April 26, 2005) Burke (hereinafter referred to as "*Mission*"). The issue is also currently the subject of two arbitral proceedings, and a number of outstanding local grievances.

BCPSEA contends that its intent by the language found in Article D was to increase the preparation time in those school districts which did not have a base of 90 minutes of preparation time for elementary teachers. For the purpose of transition in the first year of the Collective Agreement, BCPSEA asserts that those districts which would be faced with increased preparation time needed the ability to average the increase in the first year since the increase was effective at the beginning of the 2006 school year and the agreement was signed on June 30, 2006. Most districts, according to BCPSEA, had already completed their staffing process by the time the Framework for Settlement was signed.

It is very clear to BCPSEA that as of September 1, 2007, or Year 2, the parties revert back to the preparation time provisions in the previous local agreements. BCPSEA submits that it never gave up any position regarding the so called averaging of preparation time whereby school districts would be obligated to make up time lost due to statutory holidays and non-instructional days.

BCTF contends that BCPSEA's position, if accepted, would create an absurd result wherein teachers would receive more preparation time in Year 1 than in Year 2. The Federation urges me to review the language which, it

says, clearly states that elementary teachers "shall receive 90 minutes of preparation time per week scheduled in accordance with the Previous Collective Agreement". BCTF refers to the recent *Mission* arbitration, cited above, in which Arbitrator Burke ruled that preparation time must be received weekly based on the language found in the Mission collective agreement: "The maximum weekly instructional assignment for a full-time elementary teacher shall be 1425 minutes per week less 90 minutes which shall be provided for the purpose of preparation". BCTF contends that the new language in Article D is even clearer than the Mission collective agreement language. If the parties had not intended that the preparation time be weekly, in the face of the *Mission* award and the upcoming arbitration awards, it would not have stated it so clearly, says the BCTF.

2. Application to all teachers in Year 2

BCPSEA contends, as it did in question #1, that this language has no application to any group beyond those districts in which elementary preparation time was less than 90 minutes. It asserts that the language is clear.

BCTF argues that if BCPSEA' s interpretation is accepted, there will be greater disparity amongst the working conditions for various teachers. Weekly preparation time is a huge issue for teachers, according to BCTF, since some teachers currently do not have preparation time on that basis and time lost due to statutory holidays for example is not made up. BCTF believes that it would be counter to the clear intent of this agreement to allow weekly preparation time for some teachers in some districts, but not others.

3. Application to all teachers for the first 90 minutes of preparation time in Year 2

Given its position on question #2 and the inequity it would cause if BCPSEA's position is adopted, BCTF argues that, in the alternative, the language should require 90 minutes of all preparation time for elementary teachers be deemed weekly. This would mean that if a teacher currently is entitled to 100 minutes of preparation time, then 90 minutes of that time should be scheduled weekly and made up if lost. To deem otherwise would cause more inequity amongst the school districts, according to the Federation. Ironically, those teachers who currently have more preparation time would end up with less than those whom the agreement attempts to bring closer to the provincial norm, says BCTF.

Conversely, BCPSEA argues that BCTF's "hybrid model" described in the previous paragraph is unworkable and never contemplated by the parties. Nor is it reflected in the language. Finally, BCPSEA reiterated that the language has no application beyond those districts in which the elementary preparation time is less than 90 minutes.

Decision

I cannot comment on the issues which are currently before other arbitral panels. As for the *Mission* case, Arbitrator Burke decided the issue based on the language of the collective agreement and the practice in that particular school district. For purposes of this award, I must concentrate on the language before me and the intent of the parties. I have reviewed my notes and recalled various conversations which took place regarding preparation time at the bargaining table. BCTF initially proposed 200 minutes of preparation time for elementary school teachers and then resiled to a proposal of 100 minutes as the norm or minimum. BCPSEA consistently proposed 90 minutes as the minimum. At no time was the concept of "averaging", as found in the *Mission* arbitration award, discussed.

When “averaging” as found in Year 1 of the language, was referred to, it was explained that the reference was to those districts which did not currently have 90 minutes preparation time and may already have concluded its scheduling for a lesser amount of preparation time.

In the face of the *Mission* arbitration award and the upcoming arbitral proceedings on the same issue, it does not make sense for BCPSEA to give away such an issue without reference to that award. It is not unusual for grievances to be settled at collective bargaining tables – more so in the private sector than the public sector. However, the parties in those instances refer to the specific grievances – unlike this case where no mention at all was made about the “averaging” issue, as found in *Mission*.

As to the applicability of this clause to which school districts, although I understand BCTF’s arguments regarding equity, I cannot insert and/or read into language words which do not exist. Therefore, I must concentrate on a plain reading of the language as it exists. In my view, the language is clear when it comes to the applicability of the Article. One cannot overlook the clause which defines to which teachers this language applies: those “in districts where elementary teachers are entitled to less than 90 minutes of preparation time each week”. No matter how inequitable this is perceived to be, the application of Article D.4.1 and D.4.2. goes no further than these districts which are entitled to less than 90 minutes per week. Consequently, in Year 1, elementary teachers in those districts will receive an average of 90 minutes of preparation time per week; but in Year 2 they are entitled to receive 90 minutes of preparation time per week.

Further, when I review the language found in the local collective agreements regarding preparation time, there are many references to weekly preparation time but the practice regarding such language is not often defined. Consequently, the phrase “scheduled in accordance with the

Previous Collective Agreement" must be given the meaning the Employer has proposed. The issue of averaging and the meaning of the phrase "per week" must therefore be left to the appropriate arbitral proceedings. I decline to interfere with that process which is currently underway.

Optional 12-Month Pay Plan

During discussions in the final week of collective bargaining, the parties agreed to the following language (on June 25, 2006) regarding an optional 12-month pay plan. The language was included in the Framework for Settlement signed on June 30, 3006 and reads as follows:

> **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.
>
> 2. A continuing employee, or an employee hired to a temporary contract of employment no later than September 30 that extends to June 30, may elect to participate in an Optional Twelve-Month Pay Plan (the Plan) administered by the employer.
>
> 3. An employee electing to participate in the Plan in the subsequent year must inform the employer, in writing, on or before June 15. An employee hired after that date must inform the employer of her/his intention to participate in the Plan by September 30th. It is understood, that an employee appointed after June 15 in the previous school year and up to September 30 of the subsequent school year, who elects to participate in the Plan, will have deductions from net monthly pay, in the same amount as other employees enrolled in the Plan, pursuant to clause 5 of this Article.
>
> 4. An employee electing to withdraw from the Plan must inform the employer, in writing, on or before June 15 of the preceding year.

> 5. Employees electing to participate in the Plan shall receive their annual salary over ten (10) months; September to June. The employer shall deduct, from the net monthly pay, in each twice-monthly pay period, an amount agreed to by the local and the employer. This amount will be paid into the Plan by the employer.
>
> 6. Interest to March 31 is calculated on the Plan and added to the individual employee's accumulation in the Plan.
>
> 7. An employee's accumulation in the Plan including her/his interest accumulation to March 31st shall be paid in equal installments on July 15 and August 15.
>
> 8. Notwithstanding clause 8 of this article, interest earned by the Plan for the period September 1, 2006 to August 15, 2008 shall be retained by the employer. Thereafter, interest earned by the Plan in the months of April through August shall be retained by the employer.
>
> 9. The employer shall inform employees of the Plan at the time of hire.
>
> 10. Nothing in this Article shall be taken to mean that an employee has any obligation to perform work beyond the regular work year.

There is a note at the top of the signed document which corrects items 6, 7 and 8 and reads as follows:

> Change is to #8 – 2007 is now 2008 and interest is retained by the employer is now April through August – Corresponding changes in 7 and 6

The issues in dispute regarding the Optional 12-Month Pay Plan relate to those plans established prior to provincial language and the interest sharing related to these plans. More specifically, BCTF structures the question as follows:

> "a. In districts where no interest, or less interest than required under the new language, is provided to teachers currently on a 12-month pay option, are they now required to pay a minimum of the interest to teachers per this article?"

BCPSEA argues that the language is clear on its face and 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 previous provisions are inferior, according to BCPSEA.

BCTF argues that there was an attempt in this set of negotiations to create minimum standards wherever possible. In this case, teachers who bargained locally the option of a 12-month pay plan are disadvantaged by being excluded from a benefit bargained provincially. Since the inception of provincial bargaining, all mid-contract modifications agreed to between the provincial and local parties have included payment of interest to teachers.

I agree with the Employer's position. The language in clause one of this provision is clear that the items which follow and which define the provisions of the 12-Month Optional Pay Plan, including the interest and how it is to be paid, pertain only to those collective agreements which do not have provisions for such a pay plan. If different provisions were bargained via the mid-contract modification process, then those provisions should also remain.

CONCLUSION

In conclusion, because of the number and complexity of the issues, it is necessary to summarily list my decisions in this award:

1. Teachers on long term disability prior to 2005-2006 are not eligible to receive the early incentive payment.

2. Teachers on the salary indemnity plan prior to July 1, 2005 who returned to accumulated sick leave in the 2005-2006 school year, and then returned to the salary indemnity plan, for the same illness and in conjunction with the same claim, shall not be eligible to receive the early incentive payment.

3. Teachers who have retired or resigned prior to June 30, 2006 shall not be eligible to receive the early incentive payment, unless they were employed as a teacher as of June 30, 2006. If they were employed as a teacher as of June 30, 2006, their eligibility for the early incentive payment is determined by their status as of the June 30th date.

4. The maternity leave provisions in the Letter of Understanding on the early incentive payment do not encapsulate those teachers on call who were on pregnancy leave under the *Employment Standards Act.*

5. Teachers on union leave, not including teachers on call, shall be eligible for the incentive payment.

6. Teachers on leave as full time union officials in the amalgamated school districts shall receive the incentive payment.

7. Teachers, including teachers on call, are able to port up to 10 years worth of seniority from one school district to another, despite a break in service, once they have achieved a continuing contract in the receiving school district. Teachers will also be able to port seniority from multiple school districts.

   Joint committees will be established, provincially and locally, to deal with the calculation of the seniority as well as the rules governing the seniority's portability. A dispute resolution mechanism will also be implemented.

8. Teachers will also be able to port sixty accumulated sick leave days when hired to a new school district or on exchange within the district. The mechanics of this portability will also be determined by a joint committee, similar to that one established for the portability of seniority, with a similar dispute resolution mechanism.

9. The minimum preparation time has been increased for elementary school teachers to 90 minutes each week. The interpretation of "each week" has been left to the arbitral proceedings which are currently underway.

10. The optional 12-month pay plan, including how the interest is paid, only applies to those school districts which did not have such an option in their collective agreements or via the mid-contract modification process.

Dated at Vancouver, British Columbia, this 16th day of January 2007.

"*Irene Holden*"

IRENE HOLDEN, Arbitrator