

IN THE MATTER OF AN ARBITRATION

BETWEEN

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
("BCPSEA")

AND

BRITISH COLUMBIA TEACHERS FEDERATION
("BCTF")

Re: Summer School Teachers

APPEARANCES: Delayne M. Sartison, for BCPSEA

Carmella Allevato, for BCTF

ARBITRATOR: Mark J. Brown

DATES OF HEARING: April 6 and 7, 2010

DATE OF AWARD: April 21, 2010

I. ISSUE

The matter before me is the subject of a Letter of Understanding dated January 19, 2010 titled "Discussion Protocol – Inclusion of Summer School Teachers" signed by the parties. The Letter of Understanding states in part:

Whereas the BCTF is seeking voluntary recognition of summer school teachers teaching educational programs which:

- (a) fall within the definition of educational program set out in section 1 of the School Act, and;
- (b) are programs or courses that are a part of a student's K – 12 curricular program of study.

Whereas the BCPSEA is prepared to engage in discussions regarding the BCTF request;

The parties agree as follows:

- 1) All discussions between the parties on this matter are without prejudice and precedent to the BCPSEA, any Boards of Education, the BCTF and its local associations. Further, should the matter proceed to the arbitration process described below, none of the information exchanged between the parties during the discussions is admissible in the arbitration proceeding unless mutually agreed to between the parties.
- 2) The parties will attempt to resolve the issue of inclusion and any disputes regarding the application of specific collective agreement provisions prior to February 15, 2010. In the event the parties are unable to resolve these issues prior to February 15th, 2010, the matter will be referred to the following expedited arbitration process:
 - i) Mark Brown will be named as arbitrator.
 - ii) Arbitrator Brown's jurisdiction is limited to dealing with the inclusion issues referenced in this Letter of Understanding for summer school teachers teaching educational programs who are not, as of the date of this agreement, members of the BCTF bargaining unit in school districts that, as of the date of this agreement, offer summer school educational programs;
 - iii) Subject to ii) above, Arbitrator Brown will:
 - (a) determine whether summer school teachers teaching educational programs should be included in the BCTF bargaining unit; and
 - (b) if he finds that summer school teachers teaching educational programs should be included in the BCTF bargaining unit in whole or in part, Arbitrator Brown will determine which terms and conditions of the collective agreement will apply to newly included summer school teachers. Arbitrator Brown will also have the authority to determine rates of pay for the newly included summer school teachers in affected school districts.
 - iv) The Parties will use Arbitrator Brown's reasoning and criteria to determine by agreement which summer school teachers teaching educational programs in

districts that decide to offer summer school programs following the date of this agreement are included in the BCTF bargaining unit and failing agreement will refer the matter to Arbitrator Brown for determination. The terms and conditions of employment for those teachers will be determined in accordance with Article A.1.4. of the Collective Agreement.

- v) Subject to the availability of Arbitrator Brown, the hearing will be held during the month of March, 2010.
- vi) The hearing will not exceed two days in length.
- vii) Within ten working days of the hearing, Arbitrator Brown will rule on the issues referred to him as set out above.
- viii) Arbitrator Brown's decision will be binding on the parties.
- ix) The parties agree to share the costs of the expedited arbitration process.
- x) Arbitrator Brown will remain seized of implementation issues including seniority and other issues of integration related to his award.

To be clear, there are a limited number of School Districts that employ summer school teachers who are not members of the BCTF bargaining unit and who teach educational programs and therefore fall within the scope of this Letter of Understanding. The following School Districts will be directly impacted by this Award:

Vernon, Quesnel, Richmond, Burnaby, Coquitlam, Sooke, Campbell River, Fraser-Cascade and Nisga'a

I should note however, that during the hearing it became clear that this list may need to be amended by the parties after the Award.

A larger number of School Districts that already treat summer school teachers as members of the BCTF bargaining unit will not be impacted by this Award. Those School Districts include:

Southeast Kootenay, Kootenay Columbia, Chilliwack, Abbotsford, Langley, Surrey, Delta, Vancouver, New Westminster, Maple Ridge North Vancouver, West Vancouver, Powell River, Howe Sound, Prince George, Nicola Similkameen, Greater Victoria, Okanagan Skaha, Qualicum, Alberni, Comox Valley, Kamloops Thompson, Mission and Cowichan Valley.

As I understand it, the above noted Districts have agreements in place with BCTF and/or the local association outlining terms of the collective agreement that apply to summer school teachers.

Districts not referenced in either of the groups above do not employ summer school teachers.

There was no oral testimony at the hearing. Counsel provided all the background information by way of oral submissions and documents.

There are essentially two issues before me. First, are the summer school teachers included in the BCTF bargaining unit? If not, I do not need to address the second issue. If yes, I need to address the second issue which is to determine what collective agreement provisions apply to the summer school teachers.

II. BACKGROUND

For purposes of this decision, and given the expedited nature of it, the background can be set out briefly.

The matter was first raised by BCTF in a letter dated June 11, 2009 to BCPSEA. The letter stated in part:

We write to confirm our opinion that summer school teachers working for boards of education in the province are included in the teachers' statutory bargaining unit. Given the very clear provisions of the *Public Education Labour Relations Act*, R.S.B.C. 1996, c. 382 ("PELRA") and the *School Act*, R.S.B.C. 1996, c 412, we assume that BCPSEA will agree with this interpretation and will not oppose any steps we may take to formalize the inclusion of these teachers into the statutory bargaining unit.

It is clear that summer school teachers are employed by a board of education to provide an educational program to students in a school (definition of "teacher", *School Act* s. 1) and thus fall within the statutory bargaining unit set out in s. 5 of *PELRA*. Section 5(1) specifically provides that the bargaining unit consists of all teachers. Further, given the definition of "school year" in the *School Act* includes the summer months, it is abundantly clear that summer school teachers fall within the teachers' statutory unit.

Finally, we note that over the last few years, the Ministry of Education has provided increasing levels of funding for summer learning such that we say that, for all these reasons, summer school teachers are included and assume that BCPSEA would agree.

In a letter dated June 30, 2010, BCPSEA responded in part:

Based on a preliminary review of district practices, the bargaining certificate and the collective agreement, we find a variety of approaches to summer school teachers and union representation. In a majority of Boards of Education in the province, it appears that summer school teachers have never been included in the BCTF bargaining unit. With respect to dues and fees, until this month the union had not requested that dues and fees be deducted for these employees. It is our understanding that Boards of Education have not submitted dues on behalf of these employees. In a form letter to districts for the 2008-2009 school year, the BCTF advised as follows:

The percentage of salary deduction for the basic membership fee for the 2008-2009 school year is 1.45% of gross salary for full or part-time teachers, and 0.36% for teachers on call. Fees are not remitted for limited duration contract employees who teach summer school. Fees are remitted for teaching summer school if it forms a part of the employee's yearly contract. SIP fees are deducted if the employee receives time off during the regular school year for summer work.

The position you have outlined in your letter for the 2009-2010 school year is a departure from the practice in the past.

Notwithstanding the traditional composition of the bargaining unit, a blanket request for inclusion of all summer school teachers is not appropriate for a number of reasons. For example, not all such teachers are involved in delivering educational programs prescribed by the Ministry. In addition, the collective agreement was not, with the exception of some provisions that date back to local teacher association – school district bargaining, constructed with the parties having contemplated summer school teachers as members of the bargaining unit.

As the inclusion of summer school teachers was not contemplated when the parties entered into the provincial collective agreement, the inclusion of such teachers would have collective agreement implications. Inclusion of employees in a bargaining unit requires a considered assessment and, where necessary, the modification of provisions such that the terms and conditions incorporate the unique characteristics of the group of employees contemplated for inclusion. The BCTF and BCPSEA have dealt with a number of inclusions in the past.

In order to provide a full response to your letter, we require clarification regarding the scope of your request for inclusion. In the first sentence of the second paragraph of your letter, you refer to summer school teachers employed “to provide an education program to students ...” In the last sentence, there is a general reference to “summer school teachers”. Is it your intent to “formalize” the inclusion of all summer school teachers or only those delivering educational programs to students? Your response to our request for clarification will allow us to respond in a more complete and timely manner.

In a letter dated July 24, 2009, BCTF responded in part:

In response to your request for clarification, we say it is the summer school teachers providing an educational program to students that automatically fall within the statutory bargaining unit pursuant to Section 5 of *PELRA* and the definition of teacher in the *School Act*. It was those summer school teachers that we were addressing in our June 11, 2009 letter, not summer school teachers providing other types of programs.

In regard to your comments regarding the collective agreement implications of including summer school teachers, the BCTF is prepared to negotiate consequential amendments to the collective agreement.

Section 5 of the *Public Education Labour Relations Act* (“*PELRA*”) established a teachers bargaining unit:

5(1) For the purpose of teacher collective bargaining, the bargaining unit is deemed to consist of all teachers and francophone teachers, as defined in the *School Act*, and includes those employees of a board of education referred to in Schedule 1 or included in the bargaining unit under subsection (2).

(2) The Labour Relations Board may include additional employees in the bargaining unit or exclude employees from the bargaining unit if it considers that the inclusion or exclusion of the employees would be consistent with the purposes of this Act.

The *School Act* defines teachers as:

A person holding a certificate of qualification who is employed by a board to provide an educational program to students in a school, but does not include a person appointed by a board as superintendent of schools, assistant superintendent of schools, principal, vice principal or director of instruction.

Educational program is also a defined term and:

means an organized set of learning activities that, in the opinion of

(a) The board, in the case of learning activities provided by the board ...

is designed to enable learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic and a prosperous and sustainable economy.

School districts are not obligated to offer courses in the summer. Students are not obligated to take any courses offered and teachers are not obligated to teach. However, students may find themselves in a position where they need

to access summer school courses in order to meet graduation requirements in the normal time frame.

The standard school calendar records the closure of school at the end of June. While school districts may develop unique calendars subject to Regulations and prior consultation with parents and employees, none of the Districts directly affected by this Award operate under school calendars that include the summer months.

In general terms, the summer educational programs for the K – 12 curriculum offered by the districts include remedial and full courses. Remedial courses are attended by students who either did not successfully complete the course during the regular school year or who are attempting to improve their grade. Full courses are for students who have not taken the course before.

Both remedial and full courses are taught during two to three hour blocks over a three to six week period. The amount of instructional time compared to the regular school year is comparable but not identical as the instructional time is abridged due to the compressed time during which the course is taught.

Enrolment for summer courses is not confirmed until late June or early July and not all school sites are utilized. Neither is there full administrative support for the summer programs.

Prior to the summer of 2008, districts typically charged fees for attendance at summer school. Effective the summer of 2008, districts were instructed to cease charging fees for summer educational programs for credit in the K – 12 program. The Ministry of Education has provided the same funding since that date. It ranges from \$200 to \$400 per student depending on the grade and course offered.

For the Districts directly affected by this Award, the employment of summer school teachers has been in place for many years in some cases (i.e. since the early 1970's) and for a shorter period of time in other Districts (i.e. since 2003). The summer school teacher selection process varies in the Districts, in all but one case benefits are not provided, and rates of pay are not arrived at in a consistent manner across the Districts. Rates of pay may be a flat course fee, a specific hourly rate regardless of where the teacher may fall on the provincial scale, or payment based on the provincial scale.

III. ARE THE SUMMER TEACHERS SUBJECT TO THIS AWARD IN THE BCTF BARGAINING UNIT?

BCPSEA submits that the summer school teachers that BCTF has long acquiesced to exclude from the bargaining unit should not now be included absent a successful variance application to the Labour Relations Board: *Automatic Electric (Canada) Limited*, BCLRB No. 26/76, [1976] 2 CLRBR 97 (“*Automatic Electric*”); *Tourism British Columbia*, BCLRB No. B299/2001.

BCPSEA argues further that when an excluded job is filled and a union knew or ought to have known about it but did not seek to represent the employee in a reasonable period of time, the union’s later right to represent those employees may be lost: *BC Hydro and Power Authority*, BCLRB No. B60/97; *British Columbia Workers’ Compensation Board*, BCLRB No. B364/2001; and, *City of Vancouver*, BCLRB No. B247/2003.

BCTF submits that summer school teachers teaching educational programs are included in the statutory bargaining unit and that all provisions of the collective agreement, including the pay rate set out in the agreement apply to such teachers. Summer school teachers are teachers as defined by the *School Act* and are therefore *prima facie* deemed to be in the bargaining unit.

BCTF argues that Section 5(1) of *PELRA* states that “for purpose of teacher collective bargaining the bargaining unit is deemed to consist of all teachers...” The wording is mandatory and inclusive. It does not reference only some teachers or only those teachers who teach in the regular school year.

BCTF argues further that Section 5(2) of *PELRA* allows the Labour Relations Board to “include additional employees in the bargaining unit or exclude employees from the bargaining unit...” This section applies to non-teachers. BCTF argues that inclusion/exclusion policies of the Labour Relations Board do not apply to teachers.

BCTF also refers to the purposes Section of *PELRA* (Section 2) and Section 6 of *PELRA* that deems BCTF to be the certified bargaining agent for teachers subject to Sections 18, 19 and 33 of the *Labour Relations Code*. BCTF argues that had the legislature intended Labour Relations Board policy to apply to

inclusion/exclusion issues it would have referenced the same as it did in Section 6 of *PELRA*.

BCTF argues that summer school teachers are deemed to be within the bargaining unit and that I have no jurisdiction to exclude them unless their exclusion is consistent with *PELRA*. The BCTF argues that BCPSEA bears the onus of proving that their exclusion improves collective bargaining practices and procedures and promotes positive working relationships in the public school system.

BCTF argues that the *Automatic Electric* line of cases has no application by virtue of Section 5 of *PELRA*. Furthermore, the case law is based on the premise that employees excluded for a period of time develop a different community of interest from employees in the bargaining unit. That is not the case for summer school teachers because they are in the bargaining unit for ten months of the year. They are already members of BCTF.

BCTF argues further that it has not acquiesced to the exclusion of summer school teachers. Until 2008 the summer school programs were private programs as fees were charged to students. As of 2008 the summer school programs are government funded. BCTF acted immediately when that change occurred to assert its right over inclusion of summer school teachers in the bargaining unit.

I have reviewed all of the case law cited by Counsel and summarize key aspects of the cases that relate to this first issue.

In *Automatic Electric* the union was granted an all employee bargaining unit excluding supervisory staff. While the employer employed clerical and sales staff, the parties negotiated a collective agreement that dealt with terms and conditions of employment for clerical staff not sales staff.

Several years later the union applied to the Labour Relations Board asserting that sales staff should be included in the bargaining unit. The Board noted that parties can agree to expand or contract the scope of the bargaining unit after a certification is granted and that the Board should respect those agreements. The Board stated:

Once the parties have agreed to define the precise scope of the unit which the union will represent, there are good industrial relations reasons why the Board should respect that

bargain. When the parties do put into effect an agreement which excludes a particular group from the scope of the bargaining unit, a group such as the sales employees in this case, then that decision has a real-life momentum of its own. The employees in question operate outside the bargaining unit, they do not participate in union affairs, they do not have their employment conditions set by collective bargaining. After a period of time, for this very reason, they perceive themselves as having quite a different community of interest from the remaining employees who are included in the heart of the bargaining unit. Suppose some years later that one of the parties wishes unilaterally to upset that arrangement, perhaps because of a shift in personnel. That change of attitude can take place in a variety of situations; in each case, if the Board were to permit it, this could have an obviously unfair impact on the other party. Suppose a decertification application is brought, a vote is ordered, and excluded personnel such as the sales group show up to vote against the union. Should they be allowed to vote? Suppose that another union launches a raid against the incumbent, which then argues that the sales group should be counted as part of the total bargaining unit. Should the raiding union have to secure an overall majority membership among the larger unit before it can have a representation vote among those employees actually interested in which union should be the bargaining agent? Finally, as in this case, suppose the employees have for a long time operated outside the unit and have adjusted their affairs on that basis. Should they be suddenly swept into the unit and under the collective agreement by a Board decision, irrespective of whether the union has any significant support among that group of employees?

In our view, the proper answer in each of these situations is that the sales group should not be deemed to be included in the bargaining unit and involved in its affairs. The Board should not take a broad unit description, written a long time ago in a certification which served to get collective bargaining under way, and apply it in a literal fashion in the real-life employment environment which has been shaped by a later agreement by the parties about the precise scope of the unit. If, in fact, the effective unit specified by the collective agreement is a coherent and appropriate one and if the union had not violated its duty of fair representation in negotiating it, then this Board should accept that unit as the basis for further proceedings and, if necessary, vary the wording on the certification so that it will accurately reflect the current realities. If the union then wishes to expand the scope of its bargaining authority over a group of employees whom it has not hitherto represented, such as the sales staff in this case, it should first organize these employees (see *Olivetti Canada* 91975) 1 Canadian LRBR 60). (pages 3 – 4)

In *Tourism British Columbia*, supra, the union argued that certain employees in historically excluded positions were encompassed in its original certification and it never agreed to exclude them. The employees were excluded by virtue of an amendment to legislation. Later when the legislation ceased to apply to the employees, the union asserted its right to represent the employees.

Even though the exclusion from the bargaining unit was driven by legislation, the Board applied the reasoning in *Automatic Electric* and concluded that the union had to apply for a variance to represent the employees in question.

In *British Columbia Workers' Compensation Board*, *supra*, the union was certified for an all employee bargaining unit. The parties had been at odds over the scope of the bargaining unit for years. In addition to applying the reasoning in *Automatic Electric* the Board commented on the issue of acquiescence:

Thus, there are several important factors to consider when determining if the parties agreed or if a union acquiesced to the exclusion of a position. First it is not only the parties' words but also their conduct that is at issue. The fact the parties treat a position as excluded may determine whether the Union agreed or acquiesced to an exclusion. Second, the conduct necessary to effectively assert representational rights lies in a claim either by way of a grievance or an application to the Labour Relations Board. That claim must be advanced and prosecuted in a reasonable period of time once the union is both aware of the nature of the work and that the employer excluded the position. An employer's interest may be considered in this equation in so far as it may have relied on the state of affairs to order its business and negotiate terms of employment with excluded persons.

The importance of these factors flows directly from the rationale underpinning the Board's policy in *Automatic Electric*. That rationale is premised on the recognition that individuals develop a distinct community of interest when they work outside the collective bargaining regime for a period of time. To avoid this consequence it is necessary that a claim to represent excluded persons be prosecuted in a reasonable time following the employer's initiative. Moreover, the claim must be founded in a grievance or a Labour Relations Board application. The parties may choose to complain to one another, discuss the merits of their respective positions and even "agree to disagree". However, if a union waits for too long then at some point, enough time will have passed that the individuals excluded will have developed a separate community of interest, thus triggering the policy concerns articulated in *Automatic Electric*. Accordingly, the Union's acquiescence to the exclusion of a position may be inferred from its failure to advance a claim to include it in the unit.

In *British Columbia Hydro and Power Authority*, *supra*, the Board did not specifically address the issue of what constitutes adequate notice of the creation of a new position and what constitutes unreasonable delay in pursuing an objection. However the facts are weighed in an analysis of these issues, if there is uncertainty about what was intended, an objective test is used to determine whether the union acquiesced to the exclusion or otherwise agreed to reduce the scope of the unit. This requires an analysis of how a reasonable would interpret the words and conduct of the parties: *Corporation of the City of Cranbrook*, BCLRB No. B294/2001, at para70. (paragraphs 87 – 89)

In *City of Vancouver*, supra, the union applied for a declaration that employees occupying thirty-nine positions had been improperly excluded from the bargaining unit by the employer. In applying the Board's policy from *Automatic Electric* and the *Workers' Compensation* case, the Board concluded that the union had delayed in bringing its application for all thirty-nine positions and that the union had acquiesced in the exclusion of the positions.

In *Vancouver School District No. 39 v. Vancouver Teachers' Federation* [2001] B.C.A.A. No. 23, the parties were at odds with respect to whether one teacher was covered by the collective agreement when she taught a particular summer school course. The issue was whether the course was included within the scope of an "academic summer school program". The award sets out the history of negotiations between the parties in the early 1990's where the employer extended voluntary recognition to summer school teachers teaching academic summer school programs. After a review of the course (Books and Cooking for K to Grade 2) the arbitrator concluded that the course did not fall within the scope of the parties' agreement to include this particular program under the terms of the collective agreement.

In *British Columbia Public School Employers' Assn v. British Columbia Teachers' Federation*, [2007] B.C.A.A. No. 47, the employer established a summer school course called Rec' N Reading. In 2003 and 2004 the program was funded by community organizations. In 2005 the program was funded by a Ministry Literacy Now grant. When the program was funded by the government in 2005, the union asserted it was work of the bargaining unit and subject to the terms of the collective agreement. The arbitrator concluded that the course did not meet the definition of an educational program and therefore was not covered by the statutory framework or the collective agreement.

Turning now to my conclusions with respect to the first issue, I note at the outset that I am not persuaded by BCTF's argument regarding private versus public funding. I acknowledge that until 2008 the summer programs were funded by the School Districts charging fees for all summer programs. However, the funding source is not a factor under *PELRA* and the *Labour Relations Code* with respect to the bargaining unit structure and whether an individual is included in, or excluded from, the unit.

The definition of teacher and bargaining unit under the legislation does not include a reference to funding source. The School Districts within the scope of the legislation operate the summer school program. The summer school programs are not excluded from the scope of the legislation simply by virtue of funding source. While the funding may impact the viability of the courses because they are optional in nature, the funding source does not impact the inclusion/exclusion issue.

Absent the effect of *PELRA* and the *School Act*, I would agree with BCPSEA and apply the *Automatic Electric* line of cases and conclude that BCTF needed to apply for a variance to include the summer school teachers in the bargaining unit. Such an exercise would not be difficult and would just possibly delay the inevitable. BCTF could use dues deduction as membership evidence to apply to the Labour Relations Board under Section 142 of the *Labour Relations Code*. A representation vote would be scheduled within a specific time frame, and if the vote was affirmative, the parties would then need to once again discuss the applicability of the collective agreement to summer school teachers.

However, given that *PELRA* and the *School Act* state that the bargaining unit consists of all teachers as defined under the *School Act*, I conclude that the summer school teachers are included in the bargaining unit. The legislation is clear and unequivocal. I conclude that I have no jurisdiction to exclude the summer school teachers from the bargaining unit, regardless of the parties conduct to this point.

However, the parties past conduct does have an impact on the second question as set out below.

IV. WHAT TERMS AND CONDITIONS OF EMPLOYMENT APPLY TO THE SUMMER SCHOOL TEACHERS SUBJECT TO THIS AWARD?

BCPSEA submits that I must not start from an assumption that the whole of the collective agreement automatically applies but rather I should determine the level of application to which the parties would likely have agreed had they bargained about summer program teachers: *North Shore Union Board of Health*, [1996] B.C.L.R.B.D. No. 326 (Kelleher), BCLRB No. B326/96; *Nanaimo Daily News*, [1997] B.C.C.A.A.A. No. 622 (Dorsey); *BCPSEA v. BCTF*, [2005] B.C.A.A.A. No. 199 (Kinzie).

BCPSEA submits further that even though I am acting as a rights arbitrator, it is appropriate to consider principles typically applied by interest arbitrators in similar circumstances, including those set out in *City of Richmond and Richmond Fire Fighters' Association*, [2009] B.C.C.A.A.A. No. 106 (McPhillips).

BCPSEA submits that I should consider the distinct work and obligations of the summer school teachers, the distinct structure of and staffing arrangements for summer programs provided according to a district timetable outside of the school year, the distinct funding arrangements for summer programs, including the viability of optional summer programs in the face of increased costs and in the current environment in which the school districts are prohibited from charging fees for summer programs and the expiry of the collective agreement in June of 2011.

BCPSEA argues that these factors support unique arrangements for summer school teachers and argues that the provisions freely negotiated in Vancouver and Surrey School Districts should form a template for the districts subject to this Award.

BCTF submits that the collective agreement is applicable in its totality to summer school teachers. BCTF argues that the first three cases relied upon by BCPSEA involved extending the collective agreement to classifications that were not covered by the collective agreement; the last case involving the Richmond Fire Fighters involved a renewal collective agreement.

BCTF argues that the Vancouver and Surrey terms and conditions of employment were bargained at a time when summer school was privately funded and therefore are not appropriate for replication. However, the

current collective agreement was bargained for teachers who teach K to 12 courses in publically funded school programs and is a more appropriate reference point. There is no fundamental difference between teaching the course during the regular school year and in the summer.

BCTF argues that principles that apply to first collective agreements should not be applied in the case at hand. Furthermore, BCTF argues that the onus to prove the financial state of the Districts is on BCPSEA .

Turning to my conclusions regarding the second issue, the case most often referred to when adjudicators are considering whether a collective agreement applies to a varied in group of employees is *W.G. McMahon Limited*, BCLRB No. 13/78, [1978] 2 CLRBR 222. In *Nanaimo Daily News*, [1998] B.C.L.R.B.D. No. 67, the Board reviewed the *McMahon* decision and subsequent cases. The Board concluded:

In considering whether a varied in group of employees is covered by the existing collective agreement, McMahon set out four factors: a fair reading of the scope clause in the collective agreement; consideration of extrinsic evidence relating to negotiations; the past practice of the parties; and, the inherent capability of the existing collective agreement to reasonably define the terms of employment for the varied in employees.

We conclude that subsequent Board decisions have consistently addressed these factors. Even in *Arbutus Club*, where the panel made obiter comments about the potential automatic application of a collective agreement to a varied in group of employees, in the end the case was determined by applying the McMahon factors. (paragraphs 34 and 35)

We agree with the Union that when a disparate group of employees is varied into an existing bargaining unit, consideration of the parties' intent at the original negotiations is artificial. It is unlikely that a collective agreement would be negotiated with the intent that a disparate group of employees would eventually be covered by it. However, the consideration of extrinsic evidence relating to negotiations is only one of the McMahon factors. In assessing whether a collective agreement should apply to a varied in group of employees, the four McMahon factors are considered when applying reasoned judgment to the circumstances of the case. (paragraph 37)

Although the parties argue that I am not an interest arbitrator in the case at hand, both parties have referred to interest arbitration cases for principles that should guide my analysis in determining terms and conditions of employment for the summer school teachers.

I agree that I should consider what the parties would have negotiated had the collective bargaining process included the summer school teachers in the Districts subject to this Award. Arbitrators engaged in this type of task adjudicate based on objective data as it is not a subjective exercise.

I do not agree with BCTF that I can amend provisions of the collective agreement. The Letter of Understanding states that I am to “determine which terms and conditions of the collective agreement will apply to newly included summer school teachers”. The Letter of Understanding does not give me the jurisdiction to amend provisions of the collective agreement, with the exception of determining the rates of pay.

The parties are at odds with respect to the work and obligations of summer school teachers as compared to the work during the regular school year. Given my conclusions below, based on the parties past conduct, I do not need to reconcile those differences for purposes of this decision.

In considering the *McMahon* factors, three of the factors do not support BCTF’s argument that all the provisions of the Collective Agreement apply to the summer school teachers. The extrinsic evidence relating to negotiations, demonstrated by the parties past practice, recognizes that the terms and conditions of employment set out in the Collective Agreement for the regular school year, were not necessarily capable of being applied to the summer school programs without amendments.

For those Districts that have agreements in place with respect to summer school teachers, the parties did not apply all the provisions of the Collective Agreement. Although most of those agreements were negotiated some time ago, they have been renewed by the parties, and most importantly, have been renewed after *PELRA*.

The BCTF position of applying the total Collective Agreement to the Districts affected by this Award would be a very different result from that freely negotiated by the parties in other Districts over many years. It would create an inequitable result, and one that I conclude based on the parties past practice, would not be the result had the parties freely negotiated the terms and conditions of employment for the summer school teachers subject to this Award.

Given the past practice of the parties, I conclude that the summer school teachers should not be covered by all the provisions of the Collective Agreement.

I was not provided with copies of the agreements from the Districts that already have agreements in place. I was however given a summary of provisions that are applied in the Vancouver and Surrey School Districts. For the Districts that already have agreements in place, the Vancouver and Surrey School Districts cover approximately 66% of the summer school teachers. Therefore, I conclude that those Districts can be used as a reasonable reference point.

I have set out below, provisions from the Collective Agreement that should apply to the summer school teachers in the Districts affected by this Award. I have used the Article numbers from the Vernon School District Collective Agreement:

- A.1 Term, Continuation and Renegotiation
- A.2 Recognition of the Union
- A.3 Membership Requirement
- A.4 Local and BCTF Dues Deduction
- A.6 Grievance Procedure
- A.20 No Contracting Out
- A.21 Teachers' Assistants
- A.23 Exclusions From the Bargaining Unit
- A.28 Bulletin Boards
- A.29 Access To Facilities
- A.32 Picket Lines
- B.7 Reimbursement For Personal Property Loss
- B.10 Reimbursement For Mileage and Insurance

- B.21.2 Placement on Schedule – Experience
- C.2 Seniority
- C.21 Discipline & Dismissal for Misconduct
- D.20 Mainstreaming/Integration
- D.23 Supervision
- D.29 Health and Safety
- E.2 Harassment/Sexual Harassment
- E.20 No Discrimination
- E.26 Personnel Files
- E.30 Falsely Accused Employee Assistance
- F.20 Professional Autonomy

If the Districts affected by this Award already provide coverage under other provisions of the Collective Agreement, that coverage shall be maintained.

Two provisions that I included above that are not included on the lists that I was provided with during the hearing process relating to the Surrey and Vancouver School Districts deserve comment.

I have included B.21.2 Placement on Schedule – Experience as I conclude that the teacher’s work during the summer program should be taken into consideration in movement within the salary grid. It is teaching experience related to the same programs that are offered during the regular school year.

I have also included C.2 Seniority as I conclude that the teacher’s service during the summer should be counted toward seniority, recognizing that there is a cap to seniority in the Collective Agreement so a regular fulltime teacher teaching during the regular school year and summer, will not surpass a regular fulltime teacher teaching only in the regular school year.

Had I been able to amend provisions of the Collective Agreement, I may have included other provisions in the above noted list. However, as I concluded above, I was not given the jurisdiction to do so. For example, the method of

posting and filling vacancies as set out in the Collective Agreement is one that does not meet the administrative needs of the parties as it relates to the summer programs. However, changes to it could possibly be agreed to by the parties.

Turning now to wage rates, the Districts that already have agreements in place and those affected by this Award have different wage rates in place for summer school teachers. They range from a flat fee structure to placement on the Collective Agreement wage grid in the normal fashion.

If the teachers were required to teach summer school, I would have no hesitation in awarding placement on the wage grid in the normal fashion. However, the Districts are not obligated to schedule summer school courses, students are not obligated to enrol in the courses and teachers are not required to teach the courses. All aspects of summer school are optional.

Therefore, I conclude that a wage rate using Surrey and Vancouver as a reference point is more appropriate as it will more accurately reflect what the parties may have freely negotiated based on their past practice.

Accordingly I conclude that the summer school teachers shall be paid at the rate of 1/1000 of Category 5/PB Step 0 per hour of instruction. The instructional time shall include a minimum of five percent (5%) of non-instructional time which shall include one (1) teaching day prior to the first day of student attendance. Convenors shall be paid an allowance of \$1173.00.

If any of the Districts affected by this Award are currently paying a higher wage rate, that wage rate shall be maintained.

With collective bargaining for a renewal Collective Agreement commencing next year, the parties will no doubt need to turn their minds to the terms and conditions of employment for summer school programs.

I remain seized of any issues arising from the implementation of this Award.

Mark J. Brown

Dated this 21st day of April, 2010.