IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

TURTLE RIVER SCHOOL DIVISION

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES,
LOCAL 1897

****

AWARD

****

WILLIAM D. HAMILTON ..... SOLE ARBITRATOR

APPEARANCES

DOUG McLAUGHLIN ..... NATIONAL REPRESENTATIVE (UNION)
MARCIE MacDONALD ..... LABOUR RELATIONS CONSULTANT – MAST (THE DIVISION)
GEORGE COPELAND ..... MAST REPRESENTATIVE (THE DIVISION)
NANCY GAINSFORD ..... CUPE REPRESENTATIVE
DENNIS LEWYCKY ..... CUPE REPRESENTATIVE (UNION)

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TURTLE RIVER SCHOOL DIVISION
(hereinafter referred to as the "Division" or the "Board")

- and -

CANADIAN UNION OF PUBLIC EMPLOYEES
LOCAL 1897
(hereinafter referred to as the "Union)

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AWARD

****

(I) INTRODUCTION - GENERAL COMMENTS AND JURISDICTION OF ARBITRATOR

This is an interest arbitration arising under a Memorandum of Agreement signed by the Division and the Union on January 20, 2006 (the "*Memorandum*").

On June 22, 2001, the parties entered in to a collective agreement for a term of three years running from January 1, 2001 to December 31, 2004 (the "Agreement"). After proper notice to renegotiate the Agreement was given, the parties exchanged initial proposals and commenced collective bargaining. There were a number of bargaining sessions held between the parties throughout 2005. The Union

applied for conciliation on April 13, 2005 and, thereafter, negotiations were mainly conducted with the assistance of a conciliation officer. The Union membership rejected what was characterized as the Division's "Final Offer" on two occasions, namely, September 12 and November 1, 2004. The November membership meeting was convened on the basis that the Division had advised the Union that its position, as tabled on April 11, 2005, was indeed its final offer. The Union's Negotiating Committee took the Division's position to the membership without making any recommendation for or against the Division's position. The Union commenced a lawful strike on November 4, 2005. Various proceedings were launched by both parties before the Manitoba Labour Board but, prior to any of those matters being heard, the parties decided to resolve all outstanding issues through a mediation/arbitration process. This led to the signing of the *Memorandum* and an accompanying Return to Work Agreement on January 20, 2006. The employees ended the strike and returned to work on January 23, 2006.

The *Memorandum* states, in part, as follows:

> "The parties, through counsel, will mutually agree to the name of a mediator/arbitrator and request that the Minister of Labour appoint that individual pursuant to section 95(1) of *The Labour Relations Act* (hereinafter referred to as "*The Act*") no later than Wednesday, January 25, 2006. In determining the individual to be named, consideration will be given to the individual's experience and availability.
>
> In the event the parties are unable to mutually agree to a mediator/arbitrator by Wednesday, January 25, 2006, the parties will request that the Minister appoint a mediator pursuant to *The Act.*
>
> Following his or her appointment by the Minister pursuant to paragraph 1(a) or 1(b) above, the mediator will work with the parties for a period of one (1) week, or such other period as the parties may agree, to resolve the outstanding issues between the parties.
>
> At the end of the time agreed to for the mediation stage, pursuant to paragraph 2 above, or at such time as the mediator declares the parties

have reached an impasse, should all terms of the collective agreement not be settled between the parties, the mediator shall assume jurisdiction as an arbitrator. S/he shall convene interest arbitration as soon as reasonably possible to hear any evidence and submissions by the parties relevant to the outstanding items between the parties, and shall settle the terms of the collective agreement between the parties. For greater certainty, the arbitrator shall not have jurisdiction to amend any of the collective agreement agreed to by the parties prior to the commencement of the arbitration phase.

It is understood that the terms which are settled through mediation or imposed through an interest arbitration are binding on the parties and not subject to ratification by the parties.

Any portion of the cost of the mediation/arbitration that is not paid for from the Consolidated Fund shall be shared equally by the parties.

Matters Before the Manitoba Labour Board

Following the signing of this agreement, and a "**Back to Work Agreement**", the Employer shall immediately seek leave to withdraw its Application in MLB Case NO. 711/05/LRA.

Following the signing of this agreement, and a "**Back to Work Agreement**", the parties shall jointly request that the Employer's Application in MLB Case No. 1/06/LRA be adjourned *sine die*.

Termination of the Legal 'Strike

Upon signing of this Agreement, and the signing of a "Back to Work Agreement" mutually agreeable to the parties, the Union will terminate its legal strike.

Without limiting the scope of the "Back to Work Agreement", the parties agree as part of this Agreement that the "Back to Work Agreement" will contain a provision that the terms and conditions of employees returning to work on the termination of a legal strike shall be governed by the collective agreement that expired on December 31, 2004, until the parties mutually agreed to interim conditions, or the new collective agreement is settled between the parties."

Pursuant to the *Memorandum*, the Minister of Labour and Immigration (the "Minister") appointed me as the mediator/arbitrator. I completed the required Oath of Office and filed it with the Minister on February 13, 2006.

On February 17, 2006, I attended at McCreary, Manitoba, in order to endeavour to mediate the outstanding issues but that process did not result in an agreement between the parties. On April 4, 2006, I attended at McCreary for the purpose of hearing the parties' submissions in my capacity as arbitrator. Prior to the arbitration hearing, the parties filed their written Briefs on March 29, 2006. These Briefs summarized the position of the parties on wages, supported by commentary and accompanying data /exhibits.

In this Award, I will make reference to some of the documents contained in these Briefs. In addition to its main commentary, the Union's Brief contained various Appendices and to the extent I make reference to these Appendices, I will use the abbreviation "U App.•". The Division's Brief was divided into various topics accompanied by supporting documents (identified as Tabs) and to the extent I make reference to these documents I will use the abbreviation "Div T.•". No *viva voce* evidence was called by either party and they relied on their written and oral submissions. Six exhibits were filed by agreement during the hearing and to the extent I make reference to these particular exhibits they will simply be referred to as "Ex.•" in the normal course.

The only matter still outstanding is wages. The parties have resolved all other issues [U App.5 and Div.T.5]. The parties have also agreed that the new agreement shall be for a period of three (3) years, from January 1, 2005 to December 31, 2007. It is also a feature of both parties' positions that annual general across-the-board wage increases of three (3%) percent effective January 1, 2005, 2006 and 2007 respectively are to be included in the new 3-year agreement.

The parties differ on what special adjustments ought to be made to some or all of the classifications beyond the standard increase of 3%. The Union seeks what it characterized in its Brief as a "...significant "parity" wage increase for classifications where an inequity has developed". In support of this position, the Union focuses on the rates being paid by surrounding school divisions but it particularly asserts that it is seeking parity to the wages being paid in the Pine Creek School Division ("Pine Creek"), which is located directly south of the Division. As the Union states at Para.60 of its Brief:

> "...it is the position of the Union that the final Award should contain a wage scheme which reflects the across-the-board wage increase as agreed to by the bargaining team for each party, with the special adjustment to all the classifications to bring them closer to the wage levels of Pine Creek School Division." (my emphasis)

For its part, the Division is prepared to make adjustments to some classifications, namely, Mechanic Helper, Secretary, Educational Assistants/Library Clerks and Cleaners but not to the extent proposed by the Union. The Division asserts that the issue of general parity with Pine Creek was raised by the Union on or about November 25, 2005, some 2 weeks after the strike commenced. Prior to that time, argues the Division, the Union was only seeking adjustments to these 4 discrete classifications based on positions tabled on April 11, 2005 and a statement made by the Union at that time that all of the other classifications were "...in the ballpark" from a parity perspective. Therefore, the Division submits that the Union fundamentally altered its position after the strike commenced and has really re-opened a number of classifications which the Division felt had already been agreed to by the parties. While the Division does not dispute that the Union can legally adopt such a position following a resort to economic sanctions, it nevertheless submits that the issues which the Union identified as priority items prior to the strike commencing ought to be the focus of my inquiry, as arbitrator, because these are the proper benchmarks from which I ought to

assess the parties' positions under the accepted arbitral criteria of "replication" and "comparability". As the Division states in its Brief:

> "The Division's arbitration monetary proposal continues to address the issues that were in disagreement, that CUPE initially recognized, and that CUPE went out on strike over. Therefore, the Division respectfully submits that its proposal meets the two prong test of interest arbitration: try and replicate and negotiate an agreement that is fair and reasonable." (Div.T.23)

While the Division advanced an alternative position that some further monetary increases for certain classifications would be acceptable, this alternative proposal was based on the condition that a 4th year be added to the new collective agreement. I advised the parties that I was not inclined to impose a 4-year agreement at all, given that the parties have agreed on a 3-year term and this term had been the focus of their own negotiations for many months.

The remainder of this Award will be structured as follows:

PART II distils the position of each party on the outstanding issue of wage adjustments.

PART III summarizes the **FACTUAL CONTEXT** which brought the parties to this proceeding;

PART IV contains a summary of each party's submissions on wages;

PART V is the Decision.

It is not my intent to reproduce, at length, the plethora of data, charts and other information which the parties submitted. Rather, I only intend to distil the essence of this information, where required. The parties are well aware of the detailed data submitted by the other party and I have reviewed it carefully.

(II) THE PARTIES' POSITIONS ON WAGES

In order to put the position of each party in a meaningful context, it is useful to reproduce Schedules "A", "B", "C" and "D", from the Agreement and I have done so as *pages* 7 (a), 7(b), 7(c), and 7(d) of this Award. The parties have agreed to delete the "Sweeper" classification and to change the title of "Mechanic – Unqualified" to "**MECHANIC HELPER**".

The **Union's Wage Proposals** (U.App.8) reflects the **WAGE PARITY PROPOSAL** which the Union tabled with the Division on November 25, 2005. It states as follows:

Classification	2005	2006	2007	Pine Creek as at January 1, 2005
Head Custodian	3% 11.60 – 12.66	$0.50 + 3% 12.46 – 13.55	$0.50 + 3% $13,35 – 14.47	13.01 – 14.55
Custodian	$0.25 + 3% 11,10 – 12.12	$0.35 + 3% 11,79 – 12.84	$0.50 + 3% 12.66 – 13.74	
Assistant Custodian	$0.50 + 3% 10.44 – 11.47	$0.50 + 3% 11.27 – 12.33	$0.50 + 3% 12.12 – 13.21	11.48 – 13.01
Cleaner	$0.50 +3% 8.08 – 8.62	$0.50 +3% 8.84 – 9.39	$0.50 +3% 9.62 – 10.19	
Secretary	$0.50 +3% 9.72 – 12.43	$0.80 +3% 10.84 – 13.63	$0.80 +3% 11.99 – 14.86	12.86 – 14.39

Effective January 1, 2001 to
December 31, 2004

S C H E D U L E " A "

Employees shall receive a guaranteed monthly income (on a ten (10) month basis) as follows:

Rates are per month	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
0-50 kms	472.97	484.79	496.91	509.33
0-100 kms	920.32	943.32	966.91	991.08
101-150 kms	1004.08	1029.18	1054.91	1081.28
151-200 kms	1031.38	1057.16	1083.59	1110.68
201-250 kms	1058.73	1085.20	1112.33	1140.14
251-300 kms	1080.58	1107.59	1135.28	1163.66
301-350 kms	1106.20	1133.86	1162.20	1191.26

Extra-curricular trips - Effective January 1, 2001 - $9.14/hr
- Effective January 1, 2002 - $9.37/hr
- Effective January 1, 2003 - $9.60/hr
- Effective January 1, 2004 - $9.84/hr

Bus drivers with changes in route mileage of greater than 10 kms. or less than 10 kms. between existing salary categories and who have driven the new route mileage for 12 consecutive driving days or more shall have their salary adjusted to the new salary classification effective the 13th day of driving in the revised mileage category.

SCHEDULE "B"

CUSTODIAL STAFF *ALL AMOUNTS BELOW ARE PER HOUR*

Head Custodian	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	10.46	10.72	10.98	11.26
Year 1	10.71	10.98	11.25	11.53
Start Year 2	10.94	11.21	11.49	11.78
Start Year 3	11.14	11.42	11.71	12.00
Start Year 4	11.41	11.69	11.99	12.29
Custodian	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	9.78	10.02	10.27	10.53
Year 1	10.00	10.25	10.51	10.77
Start Year 2	10.24	10.50	10.76	11.03
Start Year 3	10.47	10.73	11.00	11.27
Start Year 4	10.70	10.97	11.24	11.52
Assistant Custodian	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	8.95	9.17	9.40	9.64
Year 1	9.18	9.41	9.65	9.89
Start Year 2	9.43	9.67	9.91	10.16
Start Year 3	9.66	9.90	10.14	10.40
Start Year 4	9.88	10.13	10.38	10.64
Cleaner	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	6.81	6.98	7.16	7.34
Year 1	6.94	7.11	7.29	7.47
Start Year 2	7.07	7.24	7.42	7.61
Start Year 3	7.18	7.36	7.55	7.74
Start Year 4	7.31	7.49	7.68	7.87
Sweeper	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	6.36	6.51	6.68	6.84
Year 1	6.59	6.75	6.92	7.10
Start Year 2	6.71	6.87	7.05	7.22
Start Year 3	6.82	6.99	7.17	7.35
Start Year 4	6.93	7.10	7.28	7.46

Hours worked for custodial staff for each school will be dictated by the custodial services formula in Division Policy and local principal decisions concerning job classifications.

Increments are payable commencing the month following the anniversary date of employment.

SCHEDULE "C"

MECHANICS *ALL AMOUNTS BELOW ARE PER HOUR*

Mechanics	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Qualified				
Probation	13.21	13.54	13.88	14.23
Year 1	13.82	14.16	14.52	14.88
Start Year 2	14.43	14.79	15.16	15.54
Start Year 3	15.03	15.40	15.79	16.18
Start Year 4	15.63	16.02	16.42	16.83

	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Unqualified				
Probation	7.68	7.87	8.07	8.27
Year 1	8.16	8.36	8.57	8.79
Start Year 2	8.65	8.87	9.09	9.32
Start Year 3	9.11	9.34	9.57	9.81
Start Year 4	9.59	9.83	10.08	10.33

Increments are payable commencing the month following the anniversary date of employment.

SCHOOL SECRETARY *ALL AMOUNTS BELOW ARE PER HOUR*

School Secretaries	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	8.16	8.41	8.68	8.94
Year 1	8.64	8.91	9.18	9.46
Start Year 2	9.13	9.41	9.70	9.99
Start Year 3	9.61	9.91	10.21	10.51
Start Year 4	10.11	10.41	10.72	11.04
Start Year 5	10.60	10.91	11.24	11.57

Increments are payable commencing the month following the anniversary date of employment.

School Secretaries whose present hourly rate is greater than the above scale shall receive an increase of 2.5% - January 1, 2001, 2.5% - January 1, 2002, and 2.5% - January 1, 2003 and 2.5% - January 1, 2004.

TEACHER ASSISTANTS AND LIBRARY CLERKS

ALL AMOUNTS BELOW ARE PER HOUR

Teacher Assistants Library Clerks	January 1, 2001	January 1, 2002	January 1, 2003	January 1, 2004
Probation	7.78	8.03	8.28	8.54
Year 1	8.26	8.52	8.78	9.05
Start Year 2	8.75	9.02	9.30	9.58
Start Year 3	9.21	9.50	9.79	10.08
Start Year 4	9.70	9.99	10.29	10.60
Start Year 5	10.17	10.47	10.78	11.10

Increments are payable commencing the month following the anniversary date of employment.

Teacher Assistants and Library Clerks whose present hourly rate is greater than the above scale shall receive an increase of 2.5% - January 1, 2001, 2.5% - January 1, 2002, and 2.5% - January 1, 2003 and 2.5% - January 1, 2004.

Educational Assistant	$0.50 +3% 9.31 – 11.95	$0.60 + 3% 10.21 – 12.93	$0.60 + 3% 11.13 – 13.94	12.31 – 13.83
Library Clerk	$0.50 +3% 9.31 – 11.95	$0.60 + 3% 10.21 – 12.93	$0.60 + 3% 11.13 – 13.94	11.62 – 13.15
Bus Driver 0 – 50 km 301 – 350 km.	3% 524.61 1,227.00	3.5% 542.97 1,269.95	3.5% 561.97 1,314.40	
Mechanic	3% 14.66 – 17.33	$0.50 +3% 15.61 – 18.36	$0.50 +3% 16.59 – 19.43	
Mechanic Helper	$1.00 + 3% 9.55 – 11.67	$0.50 +3% 10.35 – 12.54	$0.50 +3% 11.18 – 13.43	

The **Division's Wage Proposals** (Div.T.21) are as follows:

"

Classification	2005	2006	2007
Head Custodian	3%	3%	3%
Custodian	3%	3%	3%
Assistant Custodian	3%	3%	3%
Cleaner	.50 +3%	.25 +3%	.25 +3%
Secretary (on scale and grandfathered)	.50 +3%	.50 +3%	3%

Educational Assistant/Library (on scale)	.25 + 3%	.25 + 3%	.25 + 3%
Educational Assistant/Library (grandfathered)	3%	3%	3%
Bus Driver	3%	3%	3%
Mechanic	3%	3%	3%
Mechanic Helper	$1.00 + 3%	+3%	+3%

Please note that this proposal would meet what CUPE was asking for as of April 11, 2005 (TAB 6), a proposal which they maintained till November 25, 2005, when they then requested wage parity for all classifications with Pine Creek School Division."

Both parties agree that the across-the-board increases and the special adjustments will be applied to each step of the incremental pay scales for the affected classifications.

(III) THE FACTUAL CONTEXT

(a) An Overview of the Division's Operations and the Bargaining Unit

The Division is a rural school division. It is located on the west side of Lake Manitoba. Immediately to the south of the Division is Pine Creek. There are 3 other school divisions in the surrounding area to which the parties made reference in their Briefs. These are Mountain View School Division ("Mountain View"), Lakeshore School Division ("Lakeshore") and Park West School Division ("Park West"). There was also some reference to Rolling River School Division ("Rolling River"). The geographic boundaries for all of these divisions are revealed in the maps which both parties attach to their Briefs [see Union App.11].

As of September 30, 2004, the K-S4 enrolment for each of the foregoing divisions was as follows:

Division	Enrolment
Lakeshore	1,365
Mountain View	1,364
Park West	2,135
Pine Creek	1,301
Rolling River	2,093
The Division	831

The figures furnished by the Division satisfy me that the Division, in relation to the other divisions, *supra*, have a ...higher dependency on government funding due to the fact they have a limited tax base in which to make up the remainder of the required funding". In this regard the Portioned Assessments for the 2005 taxation year for these same divisions were as follows:

Lakeshore	$131,958,090
Mountain View	$391,019,440
Park West	$323,198,550
Pine Creek	$167,558,810
The Division	$ 91,530,850

These assessments are based on the value of urban farm residential buildings and farm and land buildings primarily although there are "other" valuations calculated for reaching the total Portioned Assessments.

The Union filed excerpts from Finance Reporting and Accounting in Manitoba Education, FRAME 2003/4 Expenditures, Department of Education

("FRAME"). These excerpts were contained in U.App.8 and they disclose that for 2003/2004 the actual Operating Fund Expenditures "per pupil" were as follows:

Lakeshore	$8,324
Mountain View	$8,176
Pine Creek	$7,705
The Division	$ 723

FRAME discloses that the provincial average for 2003/2004 was $7,764 and the average for the foregoing 4 rural divisions was $8,232 [U.App.8]. Other detailed figures from FRAME were provided by the Union for various functions such as regular instructions, exceptional instruction, administration, transportation, operations and maintenance, trustees and staff development. Figures from the FRAME 2004/2005 Budget allocations for the Division, Pine Creek, Mountain View and Lakeshore were shown in Fig.1 of the Union's Brief (p.15), all for the purpose, argues the Union, of showing that the Divisions do have a degree of discretionary control over their budgets.

(b) Profile of Bargaining Unit

There are approximately 85 support staff employees in the bargaining unit represented by the Union. The largest number of employees are in the Educational Assistant classification. There are some 45 Educational Assistants. There are some 22 Bus Drivers. I was provided with the following documentation by the Division:

- External Job Postings for permanent positions and the number of applicants for each posting from May of 2005 to February of 2006 [Div.T.18];
- An up-to-date seniority list as of January, 2006 showing the start date of each employee [Div.T.19];

- A list of resignations from employees in the bargaining unit for 2004, 2005 and into January of 2006 [Div.T.20]. A brief summary of the reasons why each employee left was distilled in this Tab. Of the 16 employees who left during this period, 6 were on account of retirements. This data was not challenged by the Union.

I was furnished with excerpts or copies of various collective agreements [Ex.2 to 6], all of which expired on December 31, 2004 and are now part of Mountain View. These separate agreements are currently subject to renegotiation. I do not intend to review these separate agreements in detail except to note that the wage rates for many classifications (from former divisions such as Inter-Mountain, Dauphin Ochre and Duck Mountain) differ in many respects.

(c) History of Negotiations

On November 24, 2004, the Union gave notice to commence collective bargaining and submitted its initial proposals (U.App.2). In these proposals, the following appeared:

> "The Union is seeking parity with surrounding divisions during the term of this Agreement".

The Division's opening proposals were tabled on February 10, 2005 (Div.T.3) and its opening position on wages was that wage increases were "...to be negotiated". Based on the material filed by both parties, I accept the following:

- Negotiating meetings were held on February 10, February 15, February 24 and April 11 of 2005;

- The Union applied for conciliation on April 13, 2005 and a conciliation meeting was held in McCreary, on June 20, 2005;
- The last position tabled by the Division on April 11, 2005 was "left open" at the meeting of June 20, 2005;
- No meetings were held over the summer months. The Union took the Division's package offer of April 11, 2005 to a ratification meeting on September 12, 2005. That proposal was rejected by the membership;
- The Division thereafter re-affirmed its April 11, 2005 offer (then characterized as a Final Offer) and this position was again taken to the Union's membership on November 1, 2005. The membership rejected this position and a strike commenced on November 4, 2005;
- On November 19, 2005, the Division tabled an amended proposal with the Union in respect of Library Clerks and T.A's (on scale) and Secretaries (on scale and grandfathered) and expressly stated that "...ALL OTHER ITEMS AS AGREED TO [Div.T.8];
- Following the appointment of a new conciliation officer, the Union tabled its **WAGE PARITY PROPOSAL** on November 25, 2005 (U.App.8) which was based on achieving parity with Pine Creek.

In Div.T.11, entitled **HISTORY OF NEGOTIATIONS**, the Division summarized, in detail, the monetary positions which had been tabled by both the Division and the Union at the various negotiating meetings, including the Union's proposal of November 25, 2005. This summary encompasses 8 pages and I do not intend to reproduce it in this Award. During the hearing, and in answer to my question, Mr. McLaughlin confirmed, on behalf of the Union, that this Summary, insofar as it reflected tabled positions of the parties,was accurate. I pause to note that, for a number of classifications in Div.T.11, the Division has "...**AGREED**" recorded in the margin. This notation applies to Head Custodian, Custodian, Assistant Custodian, Cleaners, Bus Drivers, Mechanic, and Mechanic Helper (Unqualified). This notation reflects the

Division's position that these classifications and the wage increases noted were agreed to by both bargaining committees at the appropriate meeting. The Union, for its part, does not seriously challenge the fact that there was a tentative agreement (at least) reached at the bargaining table on these classifications but it submits that, when an overall settlement was not achieved for all classifications and the Division's position of April 11, 2005 was rejected then the Union was entitled to table a new (and admittedly higher) position on November 25.

A critical exchange took place at the meeting of April 11, 2005. At 6:15 p.m. the Division tabled a "without prejudice" Package Proposal. In this proposal, the Division recorded that the Union was proposing an overall wage increase for all classifications of 3% per year and the Division responded by agreeing to these scale increases of 3% on January 1 of each of 2005, 2006 and 2007. Further, the Division proposed the following specific adjustments:

"Library Clerks and Teacher Assistants

January 1, 2005	25¢ plus negotiated wage increase – i.e. 3%
January 1, 2006	25¢ plus negotiated wage increase – i.e. 3%
January 1, 2007	Negotiated wage increase – i.e. 3%

Secretaries (on scale and grandfathered)

January 1, 2005	50¢ plus negotiated wage increase – i.e. 3%
January 1, 2006	Negotiated wage increase – i.e. 3%
January 1, 2007	Negotiated wage increase – i.e. 3%"

At 7:35 p.m. on April 11, 2005 the Union tabled the following:

"The Union Proposes a Package Deal as follows:

On Scale Library Clerks and TA's

Jan. 1, 2005 -	25¢ plus negotiated increase
Jan. 1, 2006 -	25¢ plus negotiated increase
Jan. 1, 2007 -	25¢ plus negotiated increase

Sec. on Scale and G.F.

Jan. 1, 2005	50¢ plus negotiated increase
Jan. 1, 2006	50¢ plus negotiated increase
Jan. 1, 2007	3%

On November 19, 2005, the Division amended its position on the foregoing classifications as follows:

"Library Clerks and TAs (On Scale)

January 1, 2005	$0.25 + 3%
January 1, 2006	$0.25 + 3%
January 1, 2007	$0.15 + 3%

Secretaries (On Scale and Grandfathered)

January 1, 2005	$0.50 + 3%
January 1, 2006	$0.25 + 3%
January 1, 2007	3%

ALL OTHER ITEMS AS AGREED TO"

So, the Division, in order to reach a settlement, was prepared to make some adjustments to these 2 classifications after the Union went on strike on November 4, 2005 (Div.T.8).

The Division referred to a proposal which had been tabled by the Union on February 15, 2005 (Div.T.4). This proposal and a statement which was made by the Union representative at the time were summarized in documents filed with the Manitoba Labour Board. The excerpts from these filings contain the following statements on behalf of the Union (supported by statutory declaration):

> "18. The Union is seeking an across-the-board increase for all rates of pay for the classifications contained within the collective agreement and, in addition to the general increase in wages for all classifications; the Union was seeking additional "Parity" adjustments to four classifications covered by the collective bargaining agreement. As of February 15, 2005, the Union's position regarding these four classifications was as follows:
>
> a) Mechanic's Helper – 3% plus $3.00 per hour
>
> b) Secretary – 3% plus $1.00 per hour
>
> c) Teaching Assistants (TA's) and Library Clerks – 3% plus $1.00 per hour
>
> d) Cleaners – 3% plus $1.00 per hour
>
> 19. On February 15, 2005, the Union maintained its position that the wages for these classifications had to be "brought into the ball park" with surrounding divisions. Classifications covered by the agreement that are not listed above were considered to be already "in the ball park" if a wage increase of approximately 3% in each year of a multiyear agreement were to be put in place."

In its Brief, the Division filed details of previous monetary settlements for this bargaining unit from January 1, 1998 to date. One agreement covered the term January 1, 1998 to December 31, 2000 and the predecessor agreement to the Agreement covered the term January 1, 2001 to December 31, 2004 (Div.T.12). In the 2001-2004 agreement the overall scale increase was 2.5% for all classifications in each

year of that agreement. There were some additional adjustments for Cleaners, Sweepers, Teacher Aid Assistants and Library Clerks, School Secretaries, and Bus Drivers.

(IV) SUBMISSIONS OF THE PARTIES – A SUMMARY

I only intend to highlight the essence of each party's written and verbal submissions.

(a) The Union

The Union submits that its members are entitled to a reasonable across-the-board increase in wage rates "...and a significant parity wage increase for classifications where an inequity has developed" (Un.Brief p.2). The Union emphasizes that its members have accepted substandard settlements in the past and asserts that wage parity is the basic principle underlying the Union's position. Throughout its Brief, the Union emphasizes that it is seeking parity with Pine Creek although comparative figures were given for other Divisions. At para.10 of its Brief, the Union states:

> "Therefore there are 2 issues to be resolved in this Arbitration:
>
> (i) What standard or criteria should be used to determine wages levels in the Division for the duration of the new collective agreement; and
>
> (ii) When will the wages be implemented?
>
> In other words, the main difference between the Union and the Employer is how much wages will increase in each of the next few years to achieve a parity standard.
>
> **The Union seeks wages increases which will establish wage parity or a near approximation for employees of**

the Division with their counterparts in a comparable division."

On the matter of parity, the Union submits that the employees of the Division are paid significantly less than what is paid in neighbouring divisions and the Union particularly notes that, for the same job classifications in Pine Creek, employees of Pine Creek are paid an average of 9.9% more than what is paid by the Division. It also notes that employees in Mountain View, doing the same work, are paid about 12.5% more (Un.App.6) than what is paid by the Division. The Union submits that support workers in the Division have been subsidizing the educational costs for the Division for a number of years and says that employees have lost wages in comparison to Pine Creek and Mountain View (see Un.App.7). In the result, at para.19 of its Brief, the Union states:

> "Therefore, the Union's position is to bring wages in the Division closer into line with those of Pine Creek School Division. Wage increases were then developed and proposed in November, 2005. These increases remain the Union's position."

In its Brief (pp.7-10), the Union stresses the principle of comparability and quotes from a well-known author that comparability is "...the touchstone of interest arbitration". Reference was made to the following quotation from a teacher's arbitration issued in June of 2005 (*Prairie Rose*) where the arbitrator stated:

> "..it is a generally accepted principle of industrial relations and workers doing the same work in the same workplace for the same employer and with the same qualifications should receive the same salary and other benefits."

The Union asserts that while support workers in the Division and comparable neighbouring divisions do work for different employers, this is a distinction without a significant difference.

The Union relies on the principles of "equity and fairness" and asserts that employees of the Division have not been treated fairly. In fact, it says that the employees have been "bullied" in past collective bargaining. The Union notes the comments of Professor Kenneth Swan in 1978 where he stated that fairness is an essentially "relative concept" and that a plea for fairness "...inevitably comes around to a comparability study".

On the principle of ability to pay (more accurately called an inability to pay), the Union stresses that this argument has largely been discounted in public sector interest arbitrations. The Union submits that the Division does have the ability to "...re-allocate its existing resources, can increase its revenue by partitioning its funder, or ultimately increasing school taxes".

In addition, the Union asserts that any "inability to pay" position advanced by the Division is irrelevant in any case because the Division has the financial means to bring wages up to a parity standard (p,14). The Union submits the Division is spending more on a per pupil basis for each department or area of spending than neighbouring divisions (see Union Brief at p.9). Here, the Union relies on the extracts from FRAME. The Union also notes that the Division has been generating surpluses over the past few years and that these surpluses have been in the annual range of 7% to 8% (of operational expenses) and that the 2004-2005 surplus of approximately $460,000 was 6.6%. The Union argues that these surpluses have been accumulating at the expense of the employees and that the employees have been subsiding the community with wages "...that have been kept artificially low". A summary of the surpluses from 1999 to 2004 is found in Fig.2 at p.16 of the Union's Brief. In its Brief the Union maintains that

the Division has sufficient room to increase its taxes (i.e. the mill rate) in order to pay the wage increases sought. On the principle of comparability, the Union asserts at Para.56 of its Brief:

> "The Union has chosen Pine Creek as the most appropriate comparable Division because of parallel conditions and the Union wanted to choose a division that would offer a reasonable and implementable parity standard. The work in the two divisions appears to be organized in a similar fashion and the breakdown of employees is about the same. Also the divisions seem to have about the same rural to urban composition and distances for transporting students."

The Union provided an estimate of what the costs to the Division would be if the Union's proposals were implemented.. Based on the assumptions made, (Un.App.12), the Union calculates that its proposed special adjustments to the classifications would amount to an annual cost of $149,458.40 whereas the specific adjustments proposed by the Division would result in an annual cost of $46,955.

> ***Arbitrator's Note:*** *During the hearing, it became apparent that the costs of the special adjustments excluded the annual general increases of 3% per year. Un.App.12 has to be read together with Un.App.2 where the cost of the 3% annual increases was estimated. The annual cost (non-compounded) of the 3% annual general increase is approximately $33,795.82. So, when these 2 Appendices are read together and multiplied by a factor of 3 to account for the total cost over a 3-year agreement, the total estimated cost of each party's wage proposals are as follows:*
>
> Union - $549,761.46
> Division - $242,052.46

I accept the general accuracy of these figures, as did the parties at the hearing.

In its verbal submission, the Union stressed that it did not go on strike over what should to be paid to 3 classifications only. It asserts that the history of bargaining is not relevant and that the positions recorded by the Division as "...AGREED" simply reflected efforts made by the bargaining committees to reach a deal at the times mentioned. Mr. McLaughlin emphasized that employees are free to accept or reject a proposed agreement tabled by an employer through the ratification process (Sec.71 of *The Labour Relations Act*). He also referred to the comments of Arbitrator Teskey in **Faroex v. United Food and Commercial Workers' Union, Local 832 [2004] MGAD No.25.** *I pause to note that I advised the parties I was very familiar with the Faroex circumstances given that I was involved in that interest arbitration process. That case was decided in the context of a "final offer" selection memorandum.*

(b) The Division

The central premise of the Division's position is that, at the time the strike commenced, there were only 3 classifications in dispute, arising out of the April 11, 2005 exchanges. And then, the amended proposal tabled by the Division on November 19, 2005 further narrowed the issues. However, the Union tabled an entirely new proposal for wage parity with Pine Creek on November 25th. This abrupt change of direction took place after the strike. To put this aspect of the Division's submission in perspective, it is useful to reproduce the following statements from Div.T.6:

- "During the course of negotiations, it is the Division's position that agreement was reached on a number of these issues (Tab 11):
    - Mechanic Unqualified (Helper) - $1.00 per hour
    - Cleaner – January 1, 2005 (.50 + 3%), January 1, 2006 (.25 + 3%, January 1, 2007 (.25 + 3%)

  - Percentage Increase – January 1, 2005 (3%), January 1, 206 (3%), January 1, 2007 (3%)

- It is the Division's position that the only items outstanding at the time of the strike were monetary for two classifications: TAs/Library Clerks (on scale) and School Secretaries (on scale and grandfathered) and that both parties recognized this and were attempting to come to an agreement on these outstanding issues (Tab 7).

- Through Conciliation, the Division offered a monetary proposal to address these two issues, leaving the parties $0.10 apart on TA's/Library Clerks and $0.25 apart on School Secretaries (Tab 8)

- Following this proposal, CUPE responded to the Division's proposal by proposing wage parity with the Pine Creek School Division (Tab 9)

- Therefore, CUPE was now proposing higher wages than those outlined in their opening "defined" monetary proposal and re-opening all classifications, including those which had been agreed to."

In its Brief, the Division's summarizes its overall position, as follows:

"As CUPE clearly indicated in their application to the Labour Board RE; Section 87.1(1), "classifications covered by this agreement that are not listed above were considered to be already in the ball park if a wage increase of approximately 3% in each year of a multiyear agreement were to be put in place (Tab 4).

As a result, the parties came fairly close in their respective positions before CUPE declared a strike. The Division continued to negotiate based on CUPE's position outlined above, however, CUPE abruptly changed their position on November 25, 2005 and proposed wage parity with Pine Creek School Division. This proposal not only re-opened a number of classifications that the Division felt were already agreed to, but also opened a number of classifications that the Division felt were already agreed to, but also goes beyond CUPE's initial detailed monetary proposal. For several classifications where CUPE had initially been satisfied with a 3% increase (approximately a 9% increase compounded over three years), CUPE was now seeking increases ranging from 10% to 23.79% over three years.

> The Division's arbitration monetary proposal continues to address the issues that were in disagreement, that CUPE initially recognized, and that CUPE went out on strike over. Therefore, the Division respectfully submits that its proposal meets the two prong test of interest arbitration; try and replicate a negotiated agreement that is fair and reasonable.
>
> ...
>
> The Division believes there is no need to move beyond the monetary proposals it has put forward. The Division has continued to keep pace with other school divisions following the trend of percentage increases, and has continued to make adjustments where necessary to ensure that wage scales remain competitive; keeping in mind the economic climate in which they live. The Division has demonstrated they do not encounter any recruitment and retention issues in regards to those classifications covered by the agreement and are comparable in terms of salaries to other industries within the area.
>
> The Division respectfully submits that to move beyond the Division's monetary proposal is unnecessary when considering all these factors. The salaries proposed by the Division meet the test of being "in the ballpark", considering the "league" in which we're playing." (Div.T.23)
>
> The costs of the two proposals are detailed at Div.T.10.

The Division furnished me with historical data relating to unionized non-teaching settlements throughout the Province from 2002 to 2007 (Div.T.15) and it also filed summaries of major public sector wage settlements from 1997 to 2007 (Div.T.16). The Division also provided details of what is paid in the local area surrounding the Division (Div.T.16).

At Div.T.17, the Division states as follows:

> "In looking at how Turtle River School Division compares with other school divisions, it must be noted that while Turtle River is the smallest of the School Divisions, they are able to maintain a competitive pupil/teacher ratio consistent with other school divisions.

1. Economic: In regards to funding, Turtle River has a higher dependency on government funding due to the fact that they have a limited tax base in which to make up the remainder of required funding. The total portioned assessment for taxing available to Turtle River is 91,530,850 whereas Pine Creek has a portioned assessment of 167,558,810.

   Currently, the Turtle River School Division is sitting with a surplus of approximately 3% of their operating revenue. Both the General Auditor and the Minister of Education recommend that Divisions maintain a surplus between 3% and 5% for contingency purposes, such as rising fuel costs, h eating costs, insurance or increased employee benefit costs. This leaves the Division with two options. One is to review program needs and reduce staff which impacts on the quality of education provided to children. The second option is to look at taxes, and this can be looked at in two ways: the ability to pay or the willingness to tax.

   It is the Division's submission that the Division's approved budget clearly outlines its willingness to tax, which is a decision made annually by the Board of Trustees, who are held accountable for these decisions every four years; the next election being October 2006. Each year the Division looks at the money received from Government and determines what additional funds are required due to increasing demands on programs, salary and benefits costs, maintenance for facilities, increased costs for electricity, enrolment fluctuations. In the end the Division has to have a balanced budget with no deficit, taking into consideration all of the above.

2. Recruitment and Retention: Turtle River School Division has no problem recruiting qualified applicants for the positions that become available throughout a given school year. As well, Turtle River School Division has a number of long term employees, demonstrating that retaining these qualified employees has not proven to be a challenge. When employees have chosen to leave their employment with the Division, it's primarily due to retirement or moving out of the area."

In its verbal submission, the Division stressed that there has been considerable confusion over what the Union has really been asking for throughout the negotiations. In February and April of 2005, the Union specifically defined what it was looking for in terms of special adjustments in order to be "...in the ballpark" on the parity

principle but it then tabled an entirely new proposal on parity with Pine Creek after the strike commenced. Ms. MacDonald stressed that the Pine Creek collective agreement has no comparable classifications for Custodian, Cleaner, Bus Driver, Mechanic or Mechanic Helper. ***Arbitrator's Note:*** *I accept the accuracy of this statement and the Union's own November 25, 2005 proposal corroborates this view.*

Accordingly, asked Ms. MacDonald, where did the figures for these 5 non-comparables come from?

Ms. MacDonald stressed that many of the assertions in the Union's Brief rely on factual assumptions for which there is no supporting documents or evidence. Ms. MacDonald emphasized that I must have regard to a number of increment steps which may be contained in any collective agreement. In Pine Creek, for example, there are 8 steps to maximum whereas the Division's employees generally reach maximum after 5 steps (Div.T.14).

Ms. MacDonald said that the Union's submission to the effect that employees have subsidized the community and have "...lost wages" as a result are inaccurate. There are no lost wages when one considers that prior agreements were freely negotiated and then ratified by the employees. She submitted that the Division's statistics point to the fact that there have been no recruitment and retention problems. Turnover falls within well accepted norms.

The Division asserted that no documentation (e.g. job descriptions) was filed by the Union to illustrate how the employees in Pine Creek can be regarded as performing comparable work of the employees in the Division. In the absence of such evidence, the Union cannot assert, as it does in Para.22 of its Brief, that individuals are doing the "...same work in comparable divisions". Although the Union made reference

to the healthcare sector, the Division pointed out that this healthcare sector is 100% Government funded. This is not the case with school divisions.

The Division recognizes that "...ability to pay" is not a determining factor in structuring a wage settlement in the public sector. However, the financial condition and accompanying data for any public sector employer must be a consideration. It was stressed that when trying to achieve comparability, all of the terms and conditions of employment among suggested comparables must be examined. The Division's proposal of a 3% across-the-board increase cannot be regarded as "...modest" and the specific adjustments which the Division has proposed for some classifications do fall within the ball park (to adopt the Union's term).

It was submitted that relying on "per pupil" costs (i.e. **FRAME**) is not an accurate representation of what is occurring in a particular school division. The difference in the number of pupils (Div.T.17 at p.10, *supra*), must be taken into account and this discrepancy in the number of pupils disclose that comparing divisions on a per pupil cost basis is very dangerous. For example, the cost of transporting students on a bus will essentially be the same from an operational perspective whether that bus carries 12 or 20 students.

The Union's submission is based on the premise that the Division can re-allocate resources. However, the expenditures referred to in Un.App.9 cannot be regarded as "extras". Rather, they are simply the cost of running the Division.

As to surpluses, the Division agreed that, at the end of June 2004, there was a surplus of 6.4% but, based on budgetary estimates, the surplus at the end of 2007 will be approximately 2.9%. According to the Minister of Education, surpluses in the range of 3% to 3.5% are acceptable (Div.T.17).

In its Brief, the Division provided excerpts from various interest arbitration awards which discuss the criteria to be applied by interest arbitrators. The excerpts stress the principle of "replication". Applying this principle, the Division submits that the outstanding classifications at the time of the strike commenced were Teacher Assistants/Library Clerks and Secretaries and, even then, the parties were fairly close in their respective positions (i.e. differences of 15¢ and 20¢ per hour). The Division submitted that its monetary proposal reflects what likely would have occurred had parties been able to strike a deal at that time. The Union's position of November 25 resiled from positions previously tabled in order to reach an agreement.

(V) DECISION

General Arbitral Principles

It is appropriate that I take some time to review the general criteria which governed my task as an interest arbitrator. This is important because those who will be bound by this award should know of the objective principles which arbitrators have developed to assist them in the resolution of disputes of this nature, beyond subjectivity alone.

I had occasion to distil these principles in an interest arbitration award between **Communication, Energy and Paperworkers' Union of Canada, Local 3404,** and **Crown Packaging Ltd., Winnipeg Holding Carton Division (unreported, March 8, 2000)** the ["**Crown Packaging Award**"]. In that case, the parties had entered into an arbitration protocol as part of their collective agreement under which an arbitrator was to resolve the outstanding issues for the final 3 years of a 6-year agreement. In exchange for normal binding arbitration, the parties agreed to forego their right to strike or lockout. The 6 or 7 outstanding issues in that case were essentially economic ones and arose in

factual circumstances which are admittedly quite different from the factual context before me. At pp.49 to 53:

> "***First***, this is a consensual referral to arbitration which itself was a product of free collective bargaining. This fact distinguishes this adjudication from those situations where *compulsory* arbitration is imposed upon parties by legislative edict, either under a permanent legislative scheme (e.g. teachers and firefighters) or on an *"ad hoc"* basis (e.g. the passing of back to work legislation to end a work stoppage in an "essential" sector such as grain handling and imposing binding third party adjudication as a means of resolving the dispute). This consensual referral is also to be distinguished from the mandatory referral either to arbitration or to the Manitoba Labour Board under the provisions of Section 87 of *The Labour Relations Act* where binding third party intervention can be invoked by one party to settle the terms of a *first* collective agreement. Insofar as the outcome of this arbitration is concerned, it is my view that no useful purpose is served by attributing any (particular) degree of strength or weakness to one side or the other when they voluntarily agreed in 1995 to include the arbitration protocol in the Agreement. In point of fact, it did reflect a mutual agreement, given the circumstances in which the Company found itself at that time, and both parties were content to give up their right to economic sanctions and resort to binding arbitration for the last three years of the Agreement. I reasonably conclude that both parties saw an advantage in agreeing to this process...
>
> ***Second***, the agreement to arbitrate outstanding issues for this private sector company does mean that the "ability to pay" criterion is subject to a different perspective or assessment from the perspective that would govern the application of this criterion in the public sector. There is a plethora of authority which defines the scope, limitations and the meaning of the "ability to pay" factor when (mandatory) arbitration is invoked in a public sector environment. But, in the private sector, the "ability to pay" factor is a valid factor which an arbitrator can assess in accordance with basic economic benchmarks or tests provided, as the Company correctly noted in its

Submission, that "...sufficient evidence is placed before the arbitrator to make that assessment". So, if an employer wishes to rely on the ability to pay criterion, (perhaps more appropriately characterized as an "inability to pay") then the onus lies on the employer to establish this fact through objective evidence.

Third, the overwhelming trend in arbitral jurisprudence is that the task of an interest arbitrator is to fashion an award which will replicate, as close as possible, the result(s) that would have been achieved through free collective bargaining. This is not, of course, a precise standard and I rather share the caution expressed by Mr. David Bowman, Q.C. in **Manitoba Health Organizations Inc. and International Union of Operating Engineers Local 827 (unreported, June 5, 1991)** where, in an award issued under the then final offer selection provisions of *The Labour Relations Act*, he observed:

> "The standard, although admirable in concept, is less than easy to apply in practice. If "free" collective bargaining" had been able to work, I Would not be dealing with the matter."

Mr. Bowman's observation certainly makes sense where arbitration is invoked under a mandatory statutory scheme. Again, however, this consensual arbitration is a product of free collective bargaining itself where the parties agreed to forego their right to resort to normal economic sanctions.

Put another way, the process before me is not one where the collective bargaining process has been interrupted by arbitration but rather it is part and parcel of the process, having been voluntarily agreed to by the parties well in advance of its potential invocation. Having made these cautionary remarks, I still accept that the general consensus of arbitrators was expressed by Mr. Donald Munroe in 1986 in **University of Toronto and University of Toronto Faculty Association** when he said:

> "The modern arbitral consensus is that <u>the replication model</u> does represent the ideal. That is because, of any of the models for third

> party intervention, it is the least inimical to the accepted norm of free collective bargaining. Accordingly, it helps to maintain the acceptability – to employers and employees alike – if interest arbitration is to be an alternative to strikes and lockouts in public essential industries." (my emphasis)

On the principle of replication, I also share the views expressed by Mr. Alan Hope in **Re: Beacon Hill Lodges of Canada and Hospital Employees Union (1985) 19 L.A.C. (3rd) 288** where, at p.304, he stated:

> "...it is essential to realize that *a board* of arbitration *is not expected to embark on a subjective or speculative process for* divining what might have happened if collective bargaining had run its full course. Arbitrators are expected to achieve replication through an analysis of objective data from which conclusions are drawn with respect to terms and conditions of employment prevailing in the relevant labour market for work similar to the work in issue." (my emphasis and italics)

Fourth, when evaluating the cost implications of any proposed award to the employer, it is well accepted that the *overall* cost of the award *inclusive* of the cost of matters agreed to by the parties prior to the arbitration must be taken into account on a global basis. In 1990, Arbitrator Samuels, in an award between **Meadow Park Nursing Home and CUPE**, expressed this principle as follows:

> "Firstly, in the end one cannot consider each proposed change to the collective agreement in isolation, rather, one has to take into account the overall increase in wages and benefits in order to determine the real demands that are being made of the employer. If it is decided that an overall increase of X% is fair and reasonable, this increase can be made up of improvements to various parts of the compensation package. There are tradeoffs to

> be made. Significant increases in one area may necessitate little or no increase in other areas.
>
> Secondly, when comparing the wages and benefits of one group of employees to another group, it is essential to do this on a total compensation basis, rather than a simple comparison of the treatment of one area. It is the overall comparison which is significant, not the piece by piece comparison. For example, Group A may have foregone some wages in order to have a very rich health and welfare package. It would not be fair for Group B to demand the same health and welfare package as Group A if it insisted on retaining its more generous wage structure.
>
> In a similar vein, it is not very helpful to make a comparison with one set of collective agreements and then another set of collective agreements on another issue. To do this is to ignore the concept of total compensation altogether. This is an attempt to have the best element of each individual collective agreement and is not a useful way of determining what would happen if the parties were subject to free market forces".

In my view, the parties recognized this "total compensation" perspective in Article 26.03 of the Agreement when they required me to "...consider the overall package that has been negotiated to that point in time", when ruling on any outstanding issues.

Fifth, arbitrators have consistently used "comparability" as a central criterion for making wages (and economic) awards. Comparisons can be made to settlements made within the same corporate enterprise itself. There can be external comparisons to settlements in the same industry or, if not in the same industry, to settlements where the work is of a similar nature. The problem is often finding a group that is comparable. There is no doubt that employees

> doing the same work in the same industry have always been accepted as a legitimate comparator. But, I also agree with Mr. Woods that employees who do work of a "similar" nature in a sister/similar industry are also useful comparators. Most statutory schemes which set forth the criteria which interest arbitrators must consider or take into account refer to comparators in these terms. For example, in the first contract provisions of *The Labour Relations Act, Section 87(6)* states that the Board or an arbitrator *may* take into account:
>
> > "...the terms and conditions of employment, if any, negotiated through collective bargaining for employees performing **the same or similar functions** in the **same or similar circumstances** as the employees in the unit." (my emphasis)
>
> Almost identical wording is found in the first contract provisions of the *Canada Labour Code* [Sec.80(3)(b)].
>
> Further, the prevailing range of settlements in the private sector generally is another relevant factor to be considered when assessing what the parties might have fashioned as a settlement during normal bargaining."

Another expression of the "replication" principle is found in **Golden Dawn Senior Citizens Home v. Service Employees International Union, Local 21 (Wages Grievance) [2000] O.L.A.A.No.5** as follows;

> "Interest arbitrators are required to replicate, to the extent possible, a collective agreement that the parties would have reached had they been left to their own devises to freely negotiate a collective agreement including the use of economic sanctions by either party in order to bring about a settlement."

In addition to the foregoing criteria, account is properly taken of the prevailing *cost of living* when fashioning awards. It is sometimes the case that special

consideration must be given to the criterion of *recruitment/retention* when a particular employer has encountered difficulties in attracting and retaining a competent and qualified workforce to fulfil its needs. This can lead to a "catch-up" argument regarding wages and other monetary benefits.

While the Division and the Union emphasized the principle of comparability, they differed (not surprisingly) on the relevant comparable(s). Comparables, of course, have to be carefully assessed in order to determine how much weight should be given to them. The amount of weight will depend on how precise the comparison is and how germane to the problem it might be.

Some general comments on the "replication" criterion, as it applies to this case, are in order because, after the Union commenced the strike on November 4, 2005, the parties agreed, some weeks later, to end the strike and seek an arbitrated settlement. So, economic sanctions had been in place for some weeks. Yet, neither party changed the essence of their last tabled positions at arbitration.

When applying the replication principle, I must assess what terms and conditions of employment, including wages, the parties would reasonably have been expected to conclude had the strike continued, without recourse to arbitration.

General Findings

I believe this is a case where some critical findings must be made at the outset because these findings provide the context for my ultimate award. There is no question that the 2 critical principles underlying this dispute are "comparability" and "replication". As to the latter principle, it is appropriate that I comment on the history of bargaining and its relevance to the dispute.

This is not a final offer selection arbitration where the parties are bound by either their last positions or by pre-filed positions with the arbitrator which cannot be changed. Indeed, in answer to my query, the Division confirmed it was not arguing that the Union was prohibited from changing its position after the strike commenced even though a "tentative" agreement had been reached on all but 3 classifications. It is of particular importance that the Union's submission of the Division's April 11, 2005 "Final Offer" to the membership on 2 occasions was not accompanied by a "recommendation" of the Union's bargaining committee. Rather, the Union simply sought the views of the membership and the offer was rejected. This distinguishes the situation before me from those cases where a signed memorandum of settlement, to be positively recommended by both bargaining committees, is later rejected. In such circumstances, arbitrators generally view a "recommended settlement" as the *prima facie* starting point for an imposed settlement and the party seeking to depart from a "recommended settlement" bears a significant onus to satisfy the arbitrator that something "more" is appropriate. To find otherwise would interfere with the free collective bargaining process. Nevertheless, the history of positions which were tabled during bargaining are relevant because these positions do tell an arbitrator what issues were of importance to the parties themselves at the relevant time(s) [particularly at the time when economic sanctions were invoked] and they assist the arbitrator to apply the principle of replication, based on objective data.

In answer to my question, Mr. McLaughlin candidly acknowledged that, had the Division tabled (i.e. agreed to) the Union's April 11, 2005 position on Library Clerks/Teaching Assistants and Secretaries then the likely result would have been a recommendation to the membership by the Union's bargaining committee. This would have included the 3% overall increases that had already been agreed to by the parties and the special adjustments that appeared to be mutually agreeable to both parties for Mechanic/Unqualified Cleaner. It was these positions which were held in abeyance over the summer months and I have no doubt that these outstanding 3 classifications

continued to be the focus up to the time of the strike. Nevertheless, the Division itself was prepared to submit an amended offer for Secretaries and Library Clerks and Educational Assistants on November 19, 2005, some 2 weeks after the strike commenced. However, I must say that the Division reasonably and legitimately focused on the classifications which had been the stumbling blocks to achieving an overall settlement the previous April. In my view, absent compelling reasons to the contrary, my focus ought to be on the 3 classifications which remained in dispute between the parties at the time the strike commenced, particularly in light of the (uncontested) statement made on behalf of the Union in February of 2005 that, aside from Mechanic's Helper, Secretary, TA's and Library Clerks and Cleaners, the other classifications were already "...in the ball park" (from a parity perspective) should a wage increase of 3% in each year be agreed to by the parties

As to criterion of comparability, the failure to file copies of the collective agreements from the surrounding divisions presents some difficulties for me when applying the comparability principle. I say this because there are 5 classifications in the Agreement which are not contained in the Pine Creek agreement. There are 8 steps to maximum in Pine Creek and this is not a feature of the Division's Agreement. I also know that the vast majority of employees in this bargaining unit are at or fast approaching the maximum step in their respective classifications. However, as the arbitral authorities reveal, a proper application of the comparability principle must assess not only wages in isolation but should also assess other (monetary) terms and conditions of employment among the comparables placed before the adjudicator. For example, differences in benefit plans, vacations, overtime, sick benefits and the like may have an impact on finalizing a wage settlement because employees in one bargaining unit may seek benefits in such other areas, beyond wages, during their negotiations. Be that as it may, I reasonably infer, at some risk, that the agreements are likely, by and large, comparable but I must say the paucity of information regarding the divisions which were put forward as comparables does make it more difficult to

assess their validity as comparables with the degree of certainty I would otherwise desire.

In my view, the 3% across-the-board increases (compounded) in each of the 3 years of the new agreement more than take into account projected increases in the cost of living. It is also reflective of the trends evident in public sector settlements generally. As Ms. MacDonald stated, the Union does not seek to depart from this particular "agreement" made in February/April of 2005.

I am satisfied that no special adjustments are required on account of "recruitment/retention" considerations. The demographic profile of the bargaining unit, my general sense of local wages paid by both union and non-union employers in the immediately surrounding geographic area and the turnover data justify this conclusion.

As to the plethora of data filed with me by the parties concerning funding, budgetary considerations and FRAME, I agree with the Division that data relating to "per pupil" costs among the various divisions is not of great significance because there will be a number of variables which will affect the usefulness of that figure. On balance, I do not accept the Union's submission that the manner in which the Division has allocated funds to various operational areas discloses that it has the discretion to pay the wage increases which the Union now seeks. While there was no dispute on the surplus figures, I am satisfied that the Division accurately projected that there will be a 2.9% surplus at the end of 2007 (Div.T.17). This estimated surplus was not disputed by the Union. In my view, comparability, in the sense suggested by the Union, must be balanced against the enrolment figures in the various divisions and the Portioned Assessment figures, *supra*. It does justify the statement made by both parties in their Briefs that each Division is separate and operates with a degree of local autonomy.

Based on the comparability figures furnished to me (primarily through Div.T.14 where the ranges of salaries in 4 other divisions are shown), I am satisfied that the parties would have compromised the positions which they had "on the table" as of the date the strike commenced, all in order to achieve a settlement. Interestingly, in the proposals tabled with me in this proceeding, the Division increased what it was prepared to pay to Educational Assistants/Library Clerks and Secretaries beyond what it had tabled on November 19, 2005.

I am not prepared to award any increases beyond the 3% across-the-board increases for the classifications of Head Custodian, Custodian, Assistant Custodian, Bus Driver and Mechanic. I am content to adopt the Division's position on Cleaner and Mechanic's Helper because I accept that the adjustments which were made to these classifications were satisfactory and they represent reasonably substantial increases in their own right. Based on the data before me, these increases are also reasonably comparable with other divisions.

I am satisfied that, in order to bring the strike to an end, the parties would have modified their positions on Secretaries, Educational Assistants and Library Clerks to some degree because, by and large, I accept, as did the parties themselves, that these classifications were worthy of some special adjustments.

Award on Wages

Accordingly, for the period January 1, 2005 to December 31, 2007, I AWARD the following increases:

Classification	January 1, 2005	January 1, 2006	January 1, 2007
Head Custodian	3%	3%	3%
Custodian	3%	3%	3%
Assistant Custodian	3%	3%	3%
Cleaner	.50 +3%	.25 +3%	.25 +3%
Secretary (on scale and grandfathered)	.50 +3%	.50 +3%	.50 + 3%
Educational Assistant/Library (on scale and grandfathered)	.35 + 3%	.35 + 3%	.25 + 3%
Bus Driver	3%	3%	3%
Mechanic	3%	3%	3%
Mechanic Helper	$1.00 + 3%	+3%	+3%

Both parties agree that the across-the-board increases and the special adjustments will be applied to each step of the incremental pay scales for the affected classifications.

For greater clarity, the following principles also apply to the Award I have made, namely:

i. The increases shall be retroactive to January 1, 2005 and retroactivity shall be calculated in accordance with the normal practice which the parties have

followed in previous years. I reasonably conclude that the parties can address this issue themselves in accordance with their normal past practice;

ii. For those classifications which have been awarded special adjustments, these adjustments are to be applied and calculated prior to adding the 3% across-the-board increases in each year of the new agreement; and

iii. As noted, *supra*, all grandfathered employees are to receive the same special and scale adjustments. This applies to the classifications of Secretary, Educational Assistants and Library Clerks.

I have not reproduced the actual wage scales at all increment levels in this Award because to do so would only add to the length of this Award. I am satisfied that the principles are clear and I am content to leave it to the parties to do the detailed calculations and construct the appropriate Wage Schedules.

Summary

As I observed in *Crown Packaging* and as I have repeated in other awards, it is difficult to structure settlement for two parties because, even using generally accepted principles as objective guidelines (as I have done here, based on the data supplied to me) fashioning an award is an exercise of judgement at the end of the day. The task is made more difficult when the parties have resorted to economic sanctions based upon firmly held positions on the outstanding issues. Nevertheless, I have determined that the terms I have awarded approximate, to a reasonable degree and to the extent possible, the terms which the parties would ultimately have negotiated in free collective bargaining in order to bring the strike to an end, taking all objective factors and the Factual Context into account.

The Rulings made in this Award and all items previously agreed to by the parties are to be incorporated into the new three year collective agreement. I retain jurisdiction for the purpose of clarifying this Award or to resolve any dispute between the parties over precise wording or calculations which may have to be incorporated into the collective agreement in order to give effect to any ruling I have made.

In closing, I express my sincere appreciation to the representatives of the parties for their written Briefs, oral presentations and co-operation with each other.

Issued this 25th day of May, 2006.

William D. Hamilton