IN THE MATTER OF AN ARBITRATION

BETWEEN:

SIMON FRASER UNIVERSITY

(the "Employer")

AND:

TEACHING SUPPORT STAFF UNION

(the "Union")

(FINAL OFFER SELECTION)

ARBITRATOR:	Vincent L. Ready
COUNSEL:	Dr. Jonathan Driver for the Employer
	Karen Dean for the Union
HEARING:	November 27, 2015 Vancouver, BC
DECISION:	April 21, 2016

33161

The parties agreed to appoint me as a final offer selection ("FOS") arbitrator pursuant to a Memorandum of Agreement (the "MOA") dated October 21, 2015 which reads:

1. Subject to the process as outlined in paragraph nine (9) below, the Parties agree to engage in the Vince Ready Final Offer Selection process as set out in Mr. Ready's letter to the parties dated September 14, 2015.

2. In addition, as acknowledged on Sunday, September 13, 2015, the FOS Arbitrator's jurisdiction extends to awarding monetary changes which must be within the total fiscal mandate as specified by the Public Sector Employers' Council Secretariat: a 5.5% increase in total compensation costs to the employer with the implementation dates for general wage increases reflected in the September 13, 2015 SFU Monetary "Option A" on page one therein.

3. For the outstanding items that are to be the subject of the FOS process, any such items which fall within the changes referenced in (2) above will be costed. The University will provide accurate costing of such items along with an explanation of the methodology employed at the outset of the FOS process, and during the process as necessary.

4. The FOS process, as specified in clause #2 of Arbitrator Ready's September 14th correspondence, means that upon conclusion of the Parties' submissions, Arbitrator Ready's award will then be incorporated into the Collective Agreement.

5. Upon TSSU's agreement as noted in 9 below, the Union will cease all strike action and immediately release all grades and marking and the University will not commence any lockout or other modification of the terms and conditions of employment. The University's notice regarding the termination of health and welfare benefits dated October 5, 2015 will be rescinded.

6. That the following proposals are withdrawn (inclusive of any counter-proposals arising therefrom):

   TSSU Proposals for changes to the following articles to be withdrawn:

   a. Article XXX – Definitions "Hour"
   b. Article XXIII – Technological Change
   c. Article XXI – OH & S
   d. Article VIII C., E., & F – Withdrawal of Services
   e. Article XIII TAs – Merger with XVI TMs
   f. Article XVI TMs – Merger with XIII
   g. New Article XV ELC/ITP – all proposals except those tabled by TSSU on September 24, 2015
   h. Article XIII TAs – all proposals except those tabled by TSSU on September 24, 2015
   i. Article XVI TMs – all proposals except those tabled by TSSU on September 24, 2015

SFU proposals for changes to the following articles are to be withdrawn:

a. Article V – Union Representation
b. Article VII – Union Information copies of CA
c. Article X – Grievance, Informal Problem Solving
d. Article XI – Arbitration
e. Article XIII – TUG/Workload form (Also Article XV)
f. Article XV.C.2.c
g. Article XV – F.1. and F.2.a – Appointment Priority
h. Article XIV D.2 – Sessionals (Monetary)
i. L Article III.3; L Article V A.7.b (Monetary); L Article V A 4 & 5 (Monetary); L Article D; L Article IX.E 1, 2 & 3; Article XXV.D1 (Monetary); Article XXV.D.2 personal leave; L Article XI Time off for Union Business (Monetary); L Article XII.B (Monetary).

7. That each Party will immediately agree to and sign the University's last offer on changes to Article XXVIII TSSU Membership Child Care Fund, tabled September 12, 2015; and

8. That each Party will immediately agree to and sign the University's last offer on changes to Article VI Union Facilities, tabled September 12, 2015.

9. Upon the completion of 6, 7, 8 above, the Union Bargaining Committee will recommend that the TSSU membership accept referral of all unresolved issues to the FOS process as outlined in Vince Ready's correspondence to the Parties dated September 14, 2015. In the event that the TSSU membership accepts the recommendation, the FOS process shall commence.

10. In the event that the TSSU membership does not accept the recommendation referenced in nine (9) above, then the agreements as specified in 6 above will be void and the Union and the University will resort to their prior positions.

THE BARGAINING UNIT

The bargaining unit consists of the current bargaining unit which includes Teaching Assistants ("TAs"), Tutor Markers ("TMs"), Sessional Instructors ("SIs"), as well as English Language and Culture Instructors ("ELC Instructors") and Interpretation and Translation Program Instructors ("ITP Instructors") (collectively, the "ELC/ITP Instructors"). There are between 1200-1400 employees in the bargaining unit represented by the Teaching Support Staff Union (the "Union"). It has been certified to represent all non-Faculty teaching staff of Simon Fraser University (the "University").

HISTORY OF NEGOTIATIONS

The previous Collective Agreement expired April 30, 2014. The parties entered into negotiations in May 2014. It would be an understatement to state that this has been a long arduous set of negotiations which has lasted almost 20 months in duration.

There was limited strike action spanning two semesters despite mediation attempts. On October 21, 2015, approximately 18 months after bargaining commenced, the parties signed a back to work agreement and an agreement to engage in a process to finalize this round of collective bargaining.

The parties held numerous meetings in direct negotiations. They engaged in mediation under the able assistance of Provincial Mediator Grant McArthur and a further mediation with me on September 11, 12 and 13, 2015. In the end, the parties were unable to conclude a Collective Agreement. At the conclusion of mediation on September 13, 2015, I proposed the parties seriously consider submitting the outstanding issues to a Final Offer Selection process (the "FOS Process"). I confirmed that proposal in writing on September 14, 2015.

The parties eventually proceeded to the FOS Process pursuant to the MOA set out, in part, above.

I advised the parties that I would deal with the final offer selection process on an issue-by-issue basis. I have also been guided by the headings provided by the parties within those main issues.

THE ROLE OF A FINAL OFFER SELECTION ARBITRATOR

The Final Offer Selection process has been in existence for more than 50 years. Generally speaking, an FOS process empowers an arbitrator to select the final negotiating position of either party and impose the chosen position

upon both parties. The FOS arbitrator has no authority to make any amendments or modifications to the final negotiating positions and must choose between the final offers as they stand when presented. The chosen position will then become the final and binding resolution of the parties' impasse.

The FOS process has been described as a process involving the "last best offer" of each party. It is intended to encourage each party to take a long, serious look at their proposals and focus on what is most important to them when advancing their final offer to the FOS Arbitrator. There is a risk to each party because the FOS process is a "winner take all" process. (See *Simon Fraser University and Simon Fraser University Faculty Association*, April 30, 2013 (Taylor)).

As I have noted in previous decisions, the FOS Arbitrator is not confined to a package-by-package approach but, instead, may consider proposals individually to craft an outcome that is most consistent with the result that would have been achieved by the parties at the bargaining table if the process had continued. (See *573131 British Columbia Ltd. DBA Cooper's and Big Buy Foods and United Food and Commercial Workers' Union, Local 1518*, December 5, 2007, unreported, (Ready).

Similar to an interest arbitration, the arbitrator in cases of this nature in making their selection, will take into consideration the following factors:

(a) internal comparators;
(b) external comparators;
(c) the efficacy of the proposals advanced, within the context of the bargaining relationship;
(d) the employer's operational structures; and
(e) any other factor the arbitrator deems appropriate.

In the current matter, external comparators have included sources such as: the University of British Columbia; York University; the University of Victoria; and the University of Northern British Columbia. Internal comparators have included reference by the Union to other employees the Union believes are performing similar work within the University and discussions regarding the TAs/TMs who are graduate student TAs and TMs and those who are not. In addition, there is reliance on the recent Collective Agreement proposal dated August 28, 2015 advanced by the University in bargaining with the Canadian Union of Public Employees ("CUPE") dated August 28, 2015.

The bargaining history and relationship were largely not in dispute and there was little dispute about the University's day-to-day operational structures. A prevailing goal shared by both parties was a desire to conclude a Collective Agreement within the parameters provided by the mandate created provincially by the Public Sector Employers' Council Secretariat (the "PSEC mandate" or the "mandate"). In plain language, both parties have agreed to be bound by the PSEC mandate. Therefore, there is no dispute that any agreement they would have reached on their own at the bargaining table would have necessarily been within those financial parameters.

The Union has raised a preliminary issue with respect to the costing commitment outlined in the MOA.

Other than the Union's preliminary position, the issues in dispute to be determined under the FOS process, were identified and argued under the following categories:

1. Sessional Instructors – Seniority
2. ELC/ITP Instructors – Equity

3. Integrity of the Pay System – TAs
4. *Employment Standards Act* – Statutory Holidays
5. Monetary

Bargaining Themes

Before delving into those issues, I think it prudent at this point to set out the general themes and overarching positions of each party relative to the issues before me.

a) Priorities of the Union

For its part, the Union asserts that the important issues for the Union's membership, which the Union has been directed to address in this round of bargaining are: seniority rights for sessional instructors; enhanced fairness and equity for ELC/ITP Instructors; a priority given to graduate students for TA/TM work; integrity of the pay system including payment of wages; and Child Care. The Union indicated that its members will rely on the provisions of the *Employment Standards Act*, RSBC 1996, c. 113 to resolve issues pertaining to payment of wages. With respect to Child Care, the MOA, at paragraph 7, confirms that the parties have resolved the Child Care issue and the parties agreed to sign the University's last offer on Article XXVIII TSSU Membership Child Care Fund as tabled on September 12, 2015.

b) The University's Interests and Requirements

The University, on the other hand, points to *Air Canada and the Air Canada Pilots Association (2012) 112 C.L.A.S. 40 (Stanley)* for its focus on replication, gradualism and demonstrated need. In order to replicate the result, the University asserts that I must determine which of the parties' proposals most closely resemble the result that would have been achieved at the bargaining table. The University argues that over the years, it has continued to proceed on the basis of gradualism with progress being made in successive Collective Agreements; this ongoing progress was made

incrementally and in a collaborative manner with the Union. In contrast, the University argues that the Union has not agreed to a single one of its proposals throughout this course of collective bargaining. The University also argues that the Union has not provided information to establish a demonstrated need for any of the changes it has proposed.

The University stresses the need to operationalize any proposed changes, a process using measurable factors which are defined empirically and quantitatively. According to the University, this has been challenging because of the interrelationship of the Union's proposals including non-monetary proposals which contain hidden costs and also due to the Union's drive to curtail management's rights; a focus which the University believes to be contrary to its ongoing commitment to collaborative bargaining.

Monetary Proposals
Initial Issues Emanating From the Final Offers

i) The University Failed to Meet Its Obligation to Provide Costing and Data as Required in the MOA; and

ii) The Union's Proposal Exceeds the PSEC Mandate.

Union Preliminary Objection

i) The University Has Failed to Meet Its Obligation to Provide Costing and Data as Required in the MOA

The Union raised a preliminary issue with respect to the costing provided by the University. As noted above, the October 21, 2015 Memorandum of Agreement contains the following clause:

> For outstanding items that are to be the subject of the FOS process, any such items which fall within the changes referenced in (2) above will be costed. The University will provide accurate

> costing of such items along with an explanation of the methodology employed at the outset of the FOS process, and during the process as necessary.

The Union confirms that it has provided its proposals, including a monetary proposal, as required and outlined in my letter of September 14, 2015. However, the University has not kept its commitment with respect to costing and is not carrying out its commitment in good faith. Therefore, it is difficult for the Union to craft its monetary proposal when it does not have sufficient information to be on equal footing with the University.

The Union accuses the University of laying in the weeds (with respect to withholding proper disclosure) in order to advance its own proposals in the FOS process. The Union argues that the obligation for clear and unequivocal disclosure is well-established in law and yet, the University has failed to meet its legal duty. For example, the Union points out that the University's response to its monetary proposal is to assert that the Union's monetary proposal is over the PSEC mandate. A similar assertion was advanced by the University regarding the benefits for the ELC/ITP instructors.

Yet, according to the Union, the University has not provided the total value of the 5.5% total compensation permitted under the PSEC mandate nor has the University advised the Union how the value was derived. In other words, the Union is aware of the percentage allowed but the University has failed to provide the translation of that percentage into actual dollars. The Union also claims it cannot cost the savings realized from the delays in the wage increases proposed by the University.

Without this information, and the disclosure on the methodology, the Union is not able to determine how many dollars are represented by each percentage of a wage increase. Without that information, it was difficult for the

Union to craft a monetary package since it could not determine whether some of the 5.5% increase could be moved from wages to purchase other items for the Union's membership; and, if so, what percentage would be required to be forfeited from a wage increase to purchase these other items.

In addition, the Union takes issue with the method of costing used by the University to cost the ELP/ITP benefit proposal (an issue previously outlined above). The Union relies on a line of jurisprudence including *Royal Diamond Casinos Inc.* BCLRB No. B18/2002 which involved the failure of an employer to disclose a direct and accurate source of (financial) information; seeking to have the union accept information about the basis for its proposals was misleading or inaccurate. The employer was found to have breached its duty to bargain in good faith because it provided inaccurate information to that trade union and failed to take steps to correct the information. Currently, the Union argues it is entitled to know how much money there is available to spend under the PSEC mandate and the basis for that number. For example, the Union believes it must be based on the most recent data available (FY2015). (See *BC Rail Ltd. and Council of Trade Unions on BC Rail*, (2003) BCLRBD No. 308).

The Union argued that under these conditions, and in light of the University's position that the monetary proposal advanced by the Union exceeds the PSEC mandate, the Union argues that its monetary final offer may need to be withdrawn and adjusted once proper costing information and data is received from the University.

The University strongly rejects the Union's accusation. According to the University, the Union has had ample time to ask any questions about the costing and many opportunities to express concerns. The parties had a conference call which provided an opportunity for the Union to raise any concerns about the FOS process or any perceived unfairness.

The University agreed to provide costing by November 20th which gave the Union a fair opportunity to review that information and come back to the University if more information was required. Yet, the University states that the Union actually asked very few questions at that time about the costing.

In addition, the University argues that the Union could have contacted the arbitrator to address any concerns once I was involved in the process. The University declines to deal with the statements regarding methodology at this point when there could have been discussion and questions. The University also opposes the Union's reference to the CUPE settlement since the Union was not present for that bargain. Instead, the University wants to direct my attention to the parties' respective proposals and move forward.

Finally, the University points out that this is an FOS process which necessarily means that each party must submit a position. Therefore, the parties should move forward with the FOS process and review the proposals.

In reply, the Union claims to be shocked by the University's response because the costing was at the heart of the discussions between the parties and the University agreed to provide it. The Union has been placed in a position where it cannot proceed with its monetary proposal until it has sufficient information to ensure it is advancing a monetary proposal that is within the PSEC mandate. Regarding the CUPE document, the Union confirms that it intends to rely on the information on the face of the document and so the University's concern that the Union was not present is immaterial.

Decision re Union's Preliminary Objection

The Union sought specific costing information. To address the situation, I wrote the parties prior to issuing my award and requested certain costing clarification from both parties. The parties responded on February 5, 9 and March 4, 2016. The costing information sought and received included

questions posed by the Union and answered by the University. I have now received and reviewed the costing information. I am satisfied that the financial information provided by the parties is sufficient for me to render my decision based on the proposals provided.

ii) The Union's Proposals Exceed the PSEC Mandate

The University asserts that the cost of the Union's proposals is substantially over the established PSEC mandate; a limitation specifically acknowledged and accepted by both parties to this FOS process as outlined in Clause 2 of the MOA. The University argues that the Union's proposals must be rejected because the Union should have ensured its final offer complied with the PSEC mandate in order to bring its final offer within the terms of the MOA which established my appointment as an FOS Arbitrator.

One significant area where the University takes issue is the understated financial commitment represented by part of the Union's equalization proposals: the principle that ELC/ITP continuing instructors receive benefits (including medical, extended health, dental, tuition waiver, long term sick leave disability and life insurance) based on the same entitlement as permanent and temporary employees belonging to the Association of Administrative and Professional Staff (the "AAPS").

The University also submits that there is a significant difference between the parties as to the financial commitment required by the benefit portion of the ELC/ITP proposal. The estimated cost of the financial outlay required by the University is significantly greater under the PSEC methodology.

Where the Union claims this proposal should be costed based on a realistic assumption involving the actual employees and predicting which employees would seek to be added to the existing AAPS benefit plan, the

University maintains that the financial commitment represented by this proposal must be based on an uptake of benefits by the total ELC/ITP group rather than just costing based on an estimate of the number of employees that might choose to access the benefit. PSEC requires costing of this type of proposal to be done by the external providers of benefits insurance. The University also opposes the Union's estimate based on the AAPS plan uptake for another reason: the demographics of the new ELC/ITP group would also be different from the existing group which would lead to different actual benefit coverage costs.

For those reasons, the University strongly asserts that the Union has dramatically understated the financial commitment required of the University for this change (the University is the sole payor of the benefits sought). Therefore, rather than commit to a potentially expensive expansion of benefits the University prefers to provide a fixed amount into a fund that the Union can utilize to purchase benefits for these members; as stated in its monetary proposal.

Furthermore, the University argues that the Union's proposals exceed the PSEC mandate not only because the true cost of the Union's expansive benefits proposal is underestimated (due to the Union's belief that the actual benefit uptake will be small), but also because there are hidden costs attached to the Union's non-monetary proposals that would push the financial commitment required of the University beyond the PSEC mandate.

The University argues that these hidden costs include the Union's changes to statutory holiday pay, equivalencies, the mixed delivery teaching model and attendance at lectures. The University claims the statutory holiday pay changes alone would create a financial burden of an additional 4.17% in Year Two when the mandate allows only an additional 1% in Year Two.

In addition to the issue of the cost of the proposal, the University also opposes the Union's concept of equalizing the compensation for TAs and TMs who are not graduate students on the basis that such equalization is inconsistent with the basic purpose of the scholarship payment to graduate students: to support graduate students financially during their studies and research which is based on the legitimate interplay between teaching a subject and learning a subject. In order words, this scholarship is based on their status as graduate students not their work as TAs/TMs. The base pay for TAs/TMs is already the same regardless of whether they are graduate students or not.

The University argues that if the Union sought to realize gains in benefit coverage at the bargaining table it would be required to trade off a portion of its general wage increase to fund those improvements. Where both parties have agreed to be bound by the PSEC mandate, the University asserts that it would be inequitable for an FOS arbitrator to allow such gains in benefits without that corresponding reduction in the general wage increase.

In short, the University asserts that the Union's proposal regarding increased benefits and its proposals in other areas (labeled as non-monetary), pushes the cost of the Union's final offer beyond the financial mandate and therefore, the offending proposals cannot be accepted in the FOS process. Therefore, the Employer's monetary proposal must be accepted as well as the University's proposals in the offending areas.

This argument will be considered with the balance of the FOS submissions. I turn now to address the specific areas in dispute.

Monetary

Turning to the monetary proposals, the parties were bound at all material times to the mandate established by the PSEC. Therefore, as an FOS

Arbitrator, replicating the agreement that would have been reached by the parties, it is logical to presume that their monetary proposals would necessarily have complied with the PSEC mandate because this fact is specifically stated in the MOA.

The University argues that its proposal must be accepted because it complies with the PSEC mandate as well as the University's recent settlement reached with CUPE.

The Union presented a comprehensive monetary package and is seeking fair compensation and benefits for its membership. The Union's proposal is consistent with its membership's direction to forego part of a wage increase and instead use those monies to enhance compensation and benefits for the ELC/ITP instructors. The benefits sought for the ELC/ITP include: improvements to the ELC/ITP wage scale; a tuition waiver; and enhanced vacation pay. The change to the ELC/ITP wage scale is described as the removal of the bottom three steps of the wage scale and the addition of a step at the top of the wage scale. Further, the Union is requesting that its members who decide to enroll in the Extended Health Benefit plan (the "EHB"), which it submits are approximately 5% of its members, should be entitled to do so and have their premiums paid by the University.

The Union's monetary package also includes a Child Care bursary for the membership and funding increases for the lowest paid TAs and TMs. According to the Union, the proposal guarantees that the University will not exceed their mandate and yet allows Union members to access all of the increases provided within that mandate.

Decision Re Monetary

Having considered the submissions of both parties and the comparators provided, I conclude that the University's monetary proposal is the most

acceptable because it is conclusively consistent with the PSEC mandate as well as the recent settlement reached by the University and CUPE.

With respect to the Extended Health Benefits Plan ["EHB"] proposed by the Union, there remains a significant difference between the parties as to the costing of this benefits package. On the submissions before me, I am unable to reconcile that difference. Therefore, since I cannot conclude with confidence that the Union's proposal would not exceed the mandate, I decline to award any improvement in the EHB. Furthermore, I observe that the majority of members have access to medical coverage through an alternate plan.

In the result, I award the following:

- Effective May 1, 2015, the University will provide a 1% general wage increase;
- Effective May 1, 2016, the University will provide a 0.5% general wage increase;
- Effective May 1, 2017, the University will provide a 1.5% general wage increase;
- Effective May 1, 2018, the University will provide a 1.5% general wage increase;
- Effective April 30, 2019, the University will provide a 1% general wage increase;
- Economic Stability payment as provided in the Letter of Agreement entitled "Economic Stability Payment", (attached hereto as Appendix "A");
- The salary savings achieved the by salary implementation dates as noted above result in one time funds that will be used to establish a fund in order to provide ELC/ITP instructors with additional benefits. The University will make three payments to the fund on the following dates in the following amounts:

- $41,473 effective May 1, 2016
- $43,314 effective May 1, 2017
- $44,544 effective May 1, 2018

As per #7 of the MOA, the parties agreed to changes to Article XXVIII TSSU Membership Child Care Fund (as tabled by the University on September 12, 2015). Therefore, my award includes the following statement and commitment (which formed part of the University's monetary proposal):

> The Union will be responsible for, and have sole discretion of, the administration of the [Child Care] Fund.
>
> - Effective May 1, 2016, the University will provide an additional $5,150 per year to the TSSU Membership Childcare Fund.
> - Effective March 1, 2017, the University will provide an additional $750 per year to the TSSU Membership Childcare Fund.

Sessional Instructors – Seniority – Article XIV

The Union asserts that the proposal regarding Sessional Instructors ("SIs") is one of its key proposals. The heart of its proposal is the right of a qualified senior applicant to attain an appointment. The Union characterizes its proposal as being consistent with the rest of the workforce at the University who build seniority based on prior semesters of employment. The Union claims that there are no teaching staff at the University whose value is calculated based on specific courses. In contrast, the Union says that SIs work from semester to semester without any guarantee of ongoing employment. The SI's situation at the University can be contrasted with the rights of SIs at post-secondary comparators such as the University of British Columbia and the University of Victoria.

The Union also seeks to address the concerns arising from the fact that SIs have experienced a marked increase in their class sizes over the last decade. The Union claims there has been significant class size increases and cites increases of up to 40% increase in the number of students per class. The Union argues there is insufficient recognition for the increase in workload caused by the growing class sizes.

The University argues that the Union's position does not represent a position that would have been achieved in bargaining. The University claims that the Union's position is flawed because it allows for accumulation of seniority through work outside the bargaining unit and does not afford graduate students sufficient priority of assignment. The parties have more work which must be done before making significant changes to the language involving SIs. Transitional issues would arise if the Union's proposal is selected because the rights of some employees who have already earned the Right of First Refusal and appointment priority have not been protected. Additionally, the situation is not critical because the SIs currently have the ability to earn a Right of First Refusal and a priority of appointment. Therefore, the University asserts that I should reject the Union's proposal and the current Collective Agreement language should remain unchanged.

Decision Re Sessional Instructors – Seniority

Having reviewed the submissions and oral arguments as well as the external comparators contained in the collective agreements of other universities such as the information provided from the University of British Columbia; the University of Victoria; and the University of Northern British Columbia, I am satisfied that the Union has made out its case. I believe that the Union's proposal most closely resembles the result that would have occurred at the bargaining table. Accordingly, I award the Union's proposal regarding sessional instructors.

Further, I also accept the submission and proposal made on behalf of the University by Dr. Jonathan C. Driver, Provost, and Vice President, Academic, of Simon Fraser University, that if I award the Union's proposal, there may be a need for the parties to establish a transitional process so as not to jeopardize the rights of employees who, under the current Collective Agreement, may have acquired rights to employment as of the date of this award. I leave it to the parties to work out the appropriate transition provision, if necessary. It is not my intention to tamper with or alter those rights should they exist.

With that understanding in place, I award the following:

Article XIV: Sessional Instructors

E. Employment Priority and Right of First Refusal

1. A Sessional Instructor may be appointed only when no faculty member is available to undertake the teaching responsibilities.

2. Except as modified below, all Sessional Instructors should be hired on the basis of written applications and open competitions. If after such consideration two or more applicants for an appointment are qualified, the one with the most seniority shall be appointed. Seniority will be based on the number of semesters the applicant has taught as a Sessional Instructor or as a faculty appointment, commencing with the first appointment as a Sessional Instructor.

   A Sessional Instructor who has taught a given course within the last three (3) semesters shall be sent the posting for that given course by email at least ten (10) days before the application deadline. Such individuals may then apply for that course offering through the regular application process. The department will make every reasonable effort to ensure the email notification is sent, and given that effort, inadvertent failure to notify will not then be grievable.

3. It is recognized that teaching related experience in her/his field of study can be of value to a graduate student or postdoctoral fellow. Therefore, each department may invoke a right to hold in reserve certain Sessional Instructor positions for Graduate Students and Postdoctoral Fellows, as provided herein:

a) This reserve shall consist of up to twenty-five (25) percent of the appointments in a given department that may be reserved for and awarded to qualified Graduate Students or Postdoctoral Fellows;

b) The number of such appointments shall be calculated based on the number of Sessional Instructor positions in the yearly teaching plan for each department. Any fractions are to be rounded up to the nearest integer;

c) Appointments to the Reserve Sessional Instructor positions shall be provided to qualified Graduate students and Postdoctoral fellows first; however, in the event that the positions are not filled therefrom, they shall be released for appointments to any qualified applicant as per this Article.

4. All positions must be posted according to Article XVI (Postings).

5. Seniority shall be lost when a Sessional Instructor:

a) is terminated for just cause, unless the Sessional Instructor is subsequently reinstated through the grievance procedure;
b) does not receive a teaching appointment within twenty-four (24) months of the end date of their most recent appointment;
c) voluntarily resigns.

6. Semesters spent on maternity/parental leave will count for the purposes of seniority accrual as if one course was taught each semester.

7. Timely refusal of an offer of appointment shall not prejudice future employment at the University.

F. <u>Term of Appointment</u>

1. The term of appointment of a Sessional Instructor shall normally be four (4) months less a day or in Intersession or Summer Session, two (2) months.

2. If, at the time an appointment is being made for one (1) semester, an appointment for a subsequent semester is also approved, the offer of appointment may include both semester appointments.

3. Individuals who have tougher an average course load equivalent to four (4) courses per year over four (4) years, shall be offered a Limited Term Lecturer position, with an appointment ranging from 50% - 100% for a minimum of one year. The calculation of the average course load equivalent may include courses taught while a

graduate student, but a graduate student may not be offered a Limited Term Lecturer appointment of more than twelve (12) months.

G. For position posting, offers of employment and conditional upon enrollment, see Article XVI and XVII.

* A Seniority list will be provided to TSSU within two months of ratification. An updated Seniority list will be provided by no later than the sixth week of each semester.

ELC/ITP Instructors – Equity

Generally speaking, the Union seeks to gain ground for the ELC/ITP instructors in several areas. The University opposes those changes because of the nature of the ELC/ITP program and the belief that the changes are contrary to a sound business model for the ELC/ITP program. However, prior to addressing the disputed proposals, it is necessary to provide clarification of a few issues that have been resolved.

First, for clarity, I am advised that the parties have already agreed to reduce the requirement for temporary instructors to be placed on the seniority list from 12 weeks of employment in the program to 9 weeks employment in the program (as referenced in L. Article VIII (D) Seniority) with one exception: the University did not agree to change the word appointment to assignment. However, the change in the number of weeks has been agreed and as such the language will now read:

> Temporary instructors will be placed on the seniority list after completing a total of nine (9) weeks employment in the program. Their seniority date shall be the start of their first appointment assignment and shall be adjusted to reflect the time elapsed between assignments.

I am further advised that the change in the language of L. Article V: Terms of Assignment and Workload, specifically L. Article V.A.4 and L. Article

V.A.5, from 42 to 40 weeks of instructional time are merely housekeeping changes because the amount of instructional time in those portions of the Article has always effectively been 40 weeks. Therefore, the language of L. Article V.A.4 and L. Article V.A.5 will be amended to read:

> 4. The standard work year shall be understood to comprise forty (40) weeks of work in which instruction occurs.
>
> 5. The forty (40) weeks of work are referred to in Article (A.4) and/or the standard full-time work week referenced to in Article (A.3) may be extended for one or more instructors by mutual agreement of the instructor and the Director, in the event of operational requirements. In the event that an instructor works additional weeks, they shall be paid their regular contact hour rate and not overtime pay.

I am also advised that new language for Article XV involving the *Employment Standards Act* has been resolved.

I now turn to address the remaining areas of dispute: definitions, benefit entitlement, posting language and the melding of the language covering ELC/ITP instructors into the main body of the Collective Agreement rather than its current position as an Appendix, often referred to as "L".

In the submission of the Union the language changes involving the rights of the ELC/ITP instructors are very important to its membership. In the Union's survey, the membership voted strongly to forego a one of the General Wage increases (0.5%) so as to fund improvements for the ELC/ITP employees. Fundamental to the Union is the proposal to bring the language governing ELC/ITP instructors into the body of the Collective Agreement so the ELC/ITP language will take its place within the appropriate category-specific articles, moving from its current position isolated in an Appendix ("L"). I will address each of these areas in turn.

a) English Language and Culture/Interpretation and Translation Program Instructors – L. Article III.A: <u>Definitions</u>

With respect to the definitions, the Union seeks changes to the definitions currently located in L. Article III (A)2. At the heart of this proposal is the Union's strong belief that the ELC/ITP instructors are entitled to an objective test for the right to be considered to be continuing employees rather than the current test which it describes as being "subjective and arbitrary".

The Union's proposal significantly expands the definition of a continuing employee by making every employee who is hired with no predetermined termination date a continuing employee. Even a temporary employee (defined as an instructor with a predetermined termination date) can change status and become a continuing instructor simply by completing 16 weeks of work.

In contrast, the current language divides continuing employees into two categories: full-time and part-time. To be considered a continuing full-time instructor under the current language, an employee with no predetermined termination date must work 35 hours per week for at least 42 weeks of the year; a significantly higher threshold. To be considered a continuing part-time instructor under the current language, an instructor with no predetermined termination date can work less than 35 hours per week but still must work a minimum of 42 weeks per year. The requirement to work a minimum of 42 weeks is eliminated in the Union's new proposal.

The Union submits these changes in definition are needed to protect the rights of its members and prevent arbitrary treatment such as having some of the ELC/ITP instructors erroneously categorized by their respective department as being temporary or laid-off. In the Union's view, once continuing status is merited, it should be unequivocally recognized and this proposal will attain that goal. The Union points to other universities which have similar language and/or recognition of service, such as the University of Victoria.

The University argues that the Union's proposals represent fundamental shifts to the current model of operation and do not provide much-needed flexibility in staffing levels required to be responsive to ongoing fluctuations in enrollment. The University claims that the changes would force programs to rely on continuing employees which would result in layoffs. According to the University, the current language contains sufficient flexibility to allow the parties to continue and should be maintained without any changes.

b) Benefits – Article XXV – Benefits and Leave, B ELC/ITP Instructors: Medical/Extended Health/Dental Plan

Article XXV.B.1 requires the University to "maintain the Medical Services Plan, extended health benefits plan and a dental care plan for all eligible continuing employees". The Union seeks the right of employees to earn their way to entitlement for benefits, which can be distinguished from the question of whether those employees would meet the criteria for eligibility for benefits; the Union's focus is on entitlement not eligibility. Currently, the eligibility benefits for ELC/ITP instructors can be found separately in Article XXV.B.2 (Medical Services Plan) and Article XXV.B.3 (Extended Health Plan). The Union also advised that there is an outstanding issue regarding eligibility that has been referred to arbitration. Therefore, the Union specifically acknowledges that eligibility is a separate issue from the entitlement they seek in this FOS process.

The Union notes that it has direction from its general membership to forego a 0.5% general wage increase "to buy equity in benefits" for ELC/ITP Instructors" (to use the wording from the TSSU Contract Committee's survey). In terms of the benefit entitlement, the Union argues that the ELC/ITP employees must have a right to access benefits if and when they become so entitled (and eligible). The Union claims that absent the proposed definition language, which clearly endows continuing status on its members in an easily

understandable language, Union members were arbitrarily being denied access to benefits even when they technically met the threshold due, for example, to differences in administration between departments and confusion about application of the existing language.

The Union claims there were 17 continuing instructors in 2007, 14 temporary instructors and 3 continuing ITP instructors but by 2008 the ITP program was operating entirely with temporary instructors. By 2011, the ELC program had dropped to 15 continuing employees with 17 temporary employees. Although the argument was not worded as directly, in essence, by expanding the definition of continuing employees (as outlined above), more of the Union's membership would be entitled to benefits that are fully paid by the University. This change would fulfill the Union's purpose because not only would additional Union members become entitled to benefits but their entitlement would be clear to the administration of all departments so there would not be any room for error or delay.

In addition to its position on the operational issues that would be created by the Union's changes (as outlined in the "Definitions" section above), the University also takes strong issue with the change in language from the word "appointments" to the word "assignments". The University argues that this move is intended by the Union to attempt to broaden benefit eligibility. The University further opposes the expansion of the entitlement to benefits on the basis that such a change in language is really a thinly disguised monetary item with a significant cost. As such, the Union's proposal should not be accepted because the cost of the (definitions and benefits) proposals would create a financial obligation beyond the permissible PSEC mandate.

The University argues that the ELC/ITP program, offering non-credit programs, is funded by student tuition not by the University. There are many variables that affect the viability of the ELC/ITP programs such as competition

from other language schools, international factors (such as natural disasters abroad) and changes in Canadian immigration regulations affecting the processing of student visas. Therefore, the need for flexibility is of paramount importance to the viability of the program. The Union's proposals reduce flexibility and will create inconsistency by eliminating part-time assignments. In essence, the University argues that the Union's proposals will interfere with its management rights and the Union has failed to demonstrate the need to implement the changes created by its proposals.

In reply, the Union challenges the assertion that there are significant costs and maintains that any actual costs, such as the cost for any benefits uptake, would be minimal, far below the extreme costs outlined by the University.

Decision Re: a) Definitions and b) Benefits

Having reviewed the submissions on the parties, I conclude that I must decline to award the Union's proposals. I do not believe that the Union would have been successful in attaining the University's agreement to these proposals in the current round of bargaining. Having fully exhausted the PSEC mandate with its monetary proposal, the University simply would not have been in a position to agree to an expansion of benefit entitlement, even if it sincerely wanted to do so – which it does not. Therefore, I believed that the Employer's position – maintaining the status quo – would have replicated the outcome at the bargaining table.

c) Posting Requirements – L. Article II – Job Postings

The Union also seeks to expand the application of posting rights for the ELC/ITP instructors. Specifically, the Union seeks to remove the language of L. Article II.A and L. Article II.D. Currently, L. Article II.A requires only continuing positions in ELC/ITP program to be posted 10 working days prior to hiring in prominent places in the department such as the bulletin board with a

copy to be provided to the Union. The Union seeks to improve that language by requiring all positions (i.e., not only continuing positions) to be posted not only on the bulletin board but also on the central website.

Similarly, L. Article II.D currently only requires posting for a temporary vacancy longer than twelve weeks. Vacancies shorter than twelve weeks can be filled by the University as long as the Union is notified within seven working days after the temporary employee has accepted the position. Since the Union proposes that all positions be posted and placed on the central website, there is no need to distinguish between postings for continuing and temporary positions and, as such, the language of L. Article IID is not required and should be removed.

The Union asserts that this change to the posting requirements and website access would bring the ELC/ITP language into line with other employees of the University.

The University argues that the posting language should remain the same because the Union cannot demonstrate that the change in necessary. The University argues that the reason for the central posting system (used for TA/TM/SI positions) is the fact that the positions can be located across three campuses and via distance education and potential candidates (such as graduate students) are also widely dispersed. The ELC/ITP instructors are all located at a central campus and have easy access to the bulletin board and posting information as well as external websites that also show the postings. The Employer notes that managers have an obligation to contact laid-off employees when positions become available.

Decision Re ELC/ITP – Job Posting

Having reviewed the arguments and positions, I award the Union's proposal. I find that it is reasonable and consistent with the standard criteria

described by the University such as gradualism (this seems like a logical next step in the development of this posting language) and represents a replication of the bargain that the parties would have achieved on their own. I also note that the postings will now be administered using an electronic method similar to the ones currently used by the University for other bargaining units. To be clear, the University will post all positions in the ELC/ITP program in prominent places in the department, such as the ELC/ITP bulletin board, as well as the central website used for other TSSU postings.

d) Appendix "L" Language – Integrating All of the Language Governing ELC/ITP Instructors into their Respective Sections in the Main Body of the Collective Agreement

As stated above, the Union seeks to merge the language pertaining to ELC/ITP Instructors into its respective category-specific locations within the main body of the Collective Agreement rather than having most of the language in a self-contained form at the back of the Collective Agreement, often referred as the "L" Agreement because of the fact that its Article are preceded by the letter "L" for identification purposes.

The University seeks to continue with the current Collective Agreement set up and keep Appendix "L" at the back of the Collective Agreement. The University argues that the Union has not demonstrated any need to change the structure and location(s) of the ELC/ITP language.

Decision Re Integrating Appendix "L" Language into main body of the Collective Agreement

I understand there is a symbolic importance to the change but I am not convinced that the University would have agreed to merge all of the language governing the ELC/ITP Instructors from Appendix "L" into the category-specific sections of the main body of the Collective Agreement. I further note that the Union withdrew this proposal in bargaining. The Union has also not convinced

me that there is a demonstrated necessity to make this change. Therefore, I award the University's proposal which maintains the status quo.

Integrity of the Pay System

The Union has also advanced proposals intended to address situations wherein, according to the Union, its members working as TAs, are not receiving adequate, appropriate or any compensation for work performed. These situations and proposals are divided by the Union into three general categories:

a) The use and review of work performed within the Time User Guideline (TUG) including specific recognition of the need for attendance at course lectures

The Union seeks acknowledgement that the TA must attend the course lectures and payment for the hours required to do so.

b) Equivalencies including departmental variations in pay calculations, the need for a joint determination of new equivalencies and the request for survey to determine actual hours versus perceived hours required

The Union seeks to review the equivalencies on the basis that its members are working more hours than provided in the current equivalencies. It also seeks to survey TAs and then, following the results of the survey, to add new equivalencies. The Union seeks to have those new equivalencies determined jointly rather than the current unilateral determination by the University through the Learning and Instructional Development Centre.

c) Mixed delivery models which increase the size of the class without additional compensation

The Union seeks new language which recognizes the additional workload. The Union also argues that this change is consistent with the recognition already accorded the TMs for these sessions.

The University seeks to maintain the status quo. It argues that there are hidden costs in these proposals which will be outside the mandate. The parties have agreed that they are bound by the mandate.

Decision on the Integrity of the Pay System

In my view, the proposal described above contains cost items and cannot be funded within the mandate governing these negotiations since the monetary proposal of the University has been granted and the available monies have been spent. I cannot grant a proposal that would exceed the PSEC mandate (a fact acknowledged by the parties in the MOA).

I note that the Union acknowledges that its members have the ability to grieve violations of the Collective Agreement where they occur, including any incidents of unpaid work. Therefore, I am not persuaded that there is any demonstrated need for the language changes outlined in the Union's proposals.

Therefore, I decline to award the Union's proposals on these matters. Therefore, in terms of language, the status quo will be maintained.

***Employment Standards Act* – Statutory Holidays – SIs and TAs/TMs**

The Union notes that the issue has been resolved with respect to the ELC/ITP instructors but remains alive for the SIs and the TAs/TMs.

The Union argues that its membership has not been properly compensated and so, in the new language, the Union seeks to solidify that entitlement. The Union seeks to replace the current language with the following proposal:

> The parties agree that the following shall be inserted in the articles as referenced below.

"Entitlement and payment etc. in relation to Statutory Holidays, shall be as provided in the Employment Standards Act."

a) current Article XIII (TA's) as a replacement for the current D.2.c.
b) current Article XV (TMs) as a replacement for the current D.1.h.
c) current Article XIV (Sessional Instructors) as a new D.7; and
d) current L Article VA Definitions new A.9

Memorandum of Agreement

The parties agree that in applying Part 5 – Statutory Holidays of the Employment Standards Act of B.C. to Teaching Assistants (Article XIII), Tutor Markers (Article XV), and Sessional Instructors (Article XIV) the following shall constitute an agreement that the terms of this Memorandum constitute full compliance with the application of the Act to these employee groups:

1. For Teaching Assistants
   To compensate for all statutory holidays which may occur in a semester, the TA shall receive 4.3% in Statutory Holiday pay in each pay period, which corresponds to an average 11/3 statutory holidays in terms of 17 weeks of 5 work days per week.

2. For Tutor Markers
   To compensate for all statutory holidays which may occur in a semester, the Tutor Marker shall receive 4.3% in Statutory Holiday pay in each pay period, which corresponds to an average 11/3 statutory holidays in terms of 17 weeks of 5 work days per week.

3. For Sessional Instructors
   To compensate for all statutory holidays which may occur in a semester, the Sessional Instructors shall receive 4.3% in Statutory Holiday pay in each pay period, which corresponds to an average 11/3 statutory holidays in terms of 17 weeks of 5 work days per week.

And:

To compensate for all statutory holidays which may occur in a semester, the TA (TM or Sessional Instructor) shall receive 4.3% in Statutory Holiday pay in each pay period, which corresponds to an average 11/3 statutory holidays in a term of 17 weeks of 5 work days per week.

The Employer seeks to maintain the status quo.

Decision Re *Employment Standards Act* – Statutory Holidays

Having reviewed the Union's proposal with care, I find these items would create costs and as such, would places the parties in a situation where the financial commitment was beyond the costs outlined in the PSEC mandate

governing these negotiations; a limitation confirmed by the parties and outlined in the MOA. Therefore, I decline to award the Union's proposal on this matter.

PREVIOUSLY AGREED ITEMS

Any matters agreed between the parties either in direct negotiations or mediation processes shall form part of this Award and be incorporated into the renewed Collective Agreement. Any issues not specifically mentioned in this award shall be deemed to be withdrawn by the party making the proposal.

CONCLUSION

Having concluded this Final Offer Selection process, I want to thank the parties for their helpful submissions and frank discussions.

I will remain seized of any issues that may arise in the implementation of this award with jurisdiction to issue a final and binding award.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 21st day of April, 2016.

Vincent L. Ready

APPENDIX "A"

LETTER OF AGREEMENT

Between

Simon Fraser University
(the "University")

And

Teaching Support Staff Union
(THE "Union")

Re: ECONOMIC STABILITY DIVIDEND

Definitions

1. In this Letter of Agreement:

"Collective agreement year" means each twelve (12) month period commencing on the first day of the renewed collective agreement. For example, the collective agreement year for a collective agreement that commences on May 1, 2014 is May 1, 2014 to April 30, 2015 and each period from May 1 to April 30 for the term of the collective agreement;

"Economic Forecast Council" means the Economic Forecast Council appointed under s. 4 of the *Budget Transparency and Accountability Act*, [S.B.C. 2000] c. 23;

"Forecast GDP" means the average forecast for British Columbia's real GDP growth made by the Economic Forecast Council and as reported in the annual February budget of the government;

"Fiscal year" means the fiscal year of the government as defined in the *Financial Administration Act* [1996 S.B.C.] c. 138 as 'the period from April 1 in one year to March 31 in the next year';

"Calendar year" is a twelve (12) month period starting January 1st and ending December 31st of the same year based upon the Gregorian calendar;

"GDP" or "Gross Domestic Product" for the purposes of this LOA means the expenditure side value of all goods and services produced in British Columbia for a given year as stated in the BC Economic Accounts;

"GWI" or "General Wage Increase" means a general wage increase resulting from the formula set out in this LOA and applied as a percentage increase to all wage rates in the collective agreement on the first pay day after the commencement of the eleventh (11^{th}) month in a collective agreement year;

"Real GDP" means the GDP for the previous fiscal year expressed in constant dollars and adjusted for inflation produced by Statistics Canada's Provincial and Territorial Gross Domestic Product by Income and by Expenditure Accounts (also known as the provincial and territorial economic accounts) and published as "Real Gross Domestic Product at Market Prices" currently in November of each year.

The Economic Stability Dividend

2. The Economic Stability Dividend shares the benefits of economic growth between employees in the public sector and the Province contingent on growth in BC's real GDP.

3. Employees will receive a general wage increase (GWI) equal to one-half (1/2) of any percentage gain in real GDP above the forecast of the Economic Forecast Council for the relevant calendar year.

4. For greater clarity and as an example only, if real GDP were one percent (1%) above forecast real GDP then employees would be entitled to a GWI of one-half of one percent (0.5%).

Annual Calculation and publication of the Economic Stability Dividend

5. The Economic Stability Dividend will be calculated on an annual basis by the Minister of Finance for each collective agreement year commencing in 2015/16 to 2018/19 and published through the PSEC Secretariat.

6. The timing in each calendar year will be as follows:

(i) February Budget – Forecast GDP for the upcoming calendar year;
(ii) November of the following calendar year – Real GDP published for the previous calendar year;
(iii) November – Calculation by the Minister of Finance of fifty percent (50%) of the difference between the Forecast GDP and the Real GDP for the previous calendar year;
(iv) Advice from the PSEC Secretariat to employers' associations, employers and unions of the percentage allowable General Wage

Increase, if any, for each bargaining unit or group with authorization to employers to implement the Economic Growth Dividend.

7. For greater clarity and as an example only:

For collective agreement year 3 (2016/17):

(i) February 2015 – Forecast GDP for calendar 2015;
(ii) November 2016 – Real GDP published for calendar 2015;
(iii) November 2016 – Calculation of the fifty percent (50%) of the difference between the 2015 Forecast GDP and the 2015 Real GDP by the Minister of Finance through the PSEC Secretariat;
(iv) Direction from the PSEC Secretariat to employers' associations, employers and unions of the percentage allowable General Wage Increase, if any, for each bargaining unit or group with authorization to employers to implement the Economic Growth Dividend;
(v) Payment will be made concurrent with the General Wage Increases on the first pay period after respectively May 1, 2016, May 1, 2017, May 1, 2018 and April 30, 2019.

Availability of the Economic Stability Dividend

8. The Economic Stability Dividend will be provided for each of the following collective agreement years: 2015/16 (based on 2014 GDP); 2016/17 (based on 2015 GDP); 2017/18 (based on 2016 GDP); and, 2018/19 (based on 2017 GDP).

Allowable Method of Payment of the Economic Stability Dividend

9. Employers must apply the Economic Stability Dividend as a percentage increase only on collective agreements wage rates and for no other purpose or form.

For the University	For the Union
Date	Date