IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BRITISH COLUMBIA SCHOOL EMPLOYERS' ASSOCIATION /
SCHOOL DISTRICT NO. 71 (COMOX VALLEY)

(the "Employer")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION /
COMOX DISTRICT TEACHERS' ASSOCIATION

(the "Union")

(General - Hours of Work - Provincial Matters Grievance
regarding the Scheduling of Preparation Time)

ARBITRATOR:	John B. Hall
APPEARANCES:	Peter A. Csiszar, for the Employer Craig Bavis, for the Union
HEARING:	September 7, 8 & 9, (Courtenay) October 27, (Nanaimo) November 18, and December 12, 2016 (Courtenay)
AWARD:	January 5, 2017

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AWARD

I. INTRODUCTION

The Union has filed two grievances over the decision by School District No. 71 - Comox Valley (the "District") to implement what the parties refer to as Alternative Instructional Week ("AIW") schedules for the 2016-2017 school year. One of the AIW schedules applies to secondary schools in the District and led to the first grievance (the "Secondary Grievance"). The other applies to elementary schools and is the subject of the second grievance (the "Elementary Grievance"). The grievances were consolidated for hearing and referred to expedited arbitration by agreement between the principal bargaining representatives.

The AIW schedules were implemented in response to a budget shortfall for the current school year. The central complaint in both disputes is the District's decision to schedule preparation time for teachers outside of instructional time. As well be explained more fully below, preparation time has traditionally been scheduled during instructional hours and used by teachers for a variety of purposes. Preparation time is still being scheduled within the overall school day under both AIW schedules. However, for secondary teachers, all of their preparation time is now being scheduled outside of instructional hours; for elementary teachers, a portion of their preparation time is now being scheduled outside of instructional hours. The consequence is that teachers are spending more time instructing students. The Union characterizes this change as an increase in workload for full-time teachers without a commensurate increase in compensation. The instructional workload for part-time secondary teachers has not been affected, but their compensation under the AIW model has been reduced.

As will be seen, the Collective Agreement contains provisions for determining the average maximum time per week that teachers may be required to provide classroom instruction. The Employer maintains that both AIW schedules comply with the

applicable average, and emphasizes the absence of any contractual entitlement to preparation time. The Union relies on past practice to submit that preparation time is implied, and has always been intended as unstructured time provided to teachers during instructional hours for which they are relieved from instructional duties. Alternatively, the Union relies on the doctrine of estoppel to assert that the District is precluded from implementing the AIW schedules for the duration of the current Collective Agreement. In respect of the Secondary Grievance, and in the further alternative, the Union submits the instruction time under the secondary AIW schedule exceeds the Collective Agreement maximum of 24 hours per week averaged over the course of the school year. During opening statements at arbitration, the Union withdrew its initial complaint that the elementary AIW schedule exceeds the applicable average. But the Elementary Grievance raises a further issue because of the District's decision to eliminate the traditional morning recess for elementary teachers.

As indicated, the grievances were referred to expedited arbitration. Unfortunately, the case could not be completed as originally scheduled, and there were unavoidable delays in arranging additional days to conclude the hearing. The parties are now anxious to receive a decision as early as possible in the second half of the school year. My review of the evidence will accordingly be condensed, and more attention has been given to answering the parties' submissions on the various issues raised by the grievances.

II. RELEVANT COLLECTIVE AGREEMENT PROVISIONS

Collective bargaining in the provincial education sector has resulted in a local agreement within each School District, as well as an overarching Provincial Collective Agreement. The usual subjects for negotiation are now relegated specifically to one of the two arenas. Preparation time is a matter for Provincial bargaining in accordance with Appendix 1 of the Provincial Collective Agreement (see D.2). Nonetheless, there is still language in the local agreement for this District (which I will refer to as the "Collective

Agreement") governing the matters in issue. And, as will be explained below, preparation time was originally negotiated at the local level in this District; however, the language was replaced many years ago with the current averaging provisions. The relevant terms in the present Collective Agreement are as follows:

ARTICLE D.21: REGULAR WORK YEAR

1. The annual salary established for employees covered by this Agreement shall be payable in respect of the teacher's regular work year.

2. The regular work year for teachers shall include:

    a. the requisite number of days, hours of instruction, and professional development days as required by legislation, regulation, or ministerial order;

    b. no fewer than four (4) days for professional development. The Superintendent in consultation with the Association will determine the scheduling of the days. The content of the days shall be determined by the Joint Professional Development Committee, subject to the approval of the Superintendent;

    c. no fewer than two (2) days for community-parent-teacher interaction for the school years 1993/94 and 1994/95 (if applicable);

    d. no fewer than one (1) day for parent-teacher interviews or conferences;

    e. one (1) year-end administrative day.

3. Where the Superintendent authorizes in writing a specific assignment and the employee agrees, work performed by the employee during the months of July and August shall be paid at the rate of 1/195th of the employee's annual salary per diem.

4. Upon acceptance of an assignment referred to in Article D.21.3, the employee may elect to take compensatory time in lieu of salary. The scheduling of compensatory time shall be determined jointly by the employee and the employee's supervisor.

5. Work beyond the school year is voluntary.

ARTICLE D.22: SCHOOL CALENDAR

1. The school calendar shall be established, in accordance with the *School Act* and after consultation with the Association, by the board before December 1st of the preceding year or a mutually agreed upon date.

ARTICLE D.23: HOURS OF WORK

1. Teachers with full time classroom teaching assignments at elementary schools shall not be required to provide classroom instruction of more than twenty-three (23) hours and twenty (20) minutes per week averaged over the course of the school year.

2. Teachers with full time classroom teaching assignments at other than elementary schools shall not be required to provide classroom instruction of more than twenty-four (24) hours per week averaged over the course of the school year.

3. Teachers with 0.5 time or greater classroom teaching assignments shall have their required classroom instruction time prorated; e.g., a teacher with a 0.75 time appointment in a secondary school shall not be required to provide classroom instruction of more than eighteen (18) hours per week averaged over the course of the school year.

Duration of School Day

4. An elementary teacher shall not be required to offer instruction beyond an interval of six (6) hours, inclusive of:

   a. instructional time not to exceed five hours, inclusive of fifteen (15) minutes of recess;

   b. a regular noon intermission.

5. A secondary teacher shall not be required to offer instruction beyond an interval of six (6) hours and thirty (30) minutes, inclusive of:

   a. instructional time not to exceed five (5) hours and thirty (30) minutes, inclusive of homeroom and time for students to change classrooms;

   b. a regular noon intermission.

The language in the Provincial Collective Agreement regarding preparation time applies only to elementary teachers. Although the subject of preparation time for secondary teachers has apparently been raised at the Provincial level, no consensus has been reached on applicable terms. The clause in the 2013-2019 agreement reads:

> **ARTICLE D.4 PREPARATION TIME**
>
> 1. Each full-time elementary teacher shall receive 100 minutes of preparation time per week scheduled in accordance with the Previous Collective Agreement.
>
> 2. Effective June 30, 2019, each full-time elementary teacher shall receive 110 minutes of preparation time per week scheduled in accordance with the Previous Collective Agreement.
>
> 3. Preparation time for part time teachers shall be provided in accordance with the Previous Collective Agreement.

III. THE ISSUES

Based on the Union's framing of its case, the following issues arise for determination:

(a) The Secondary Grievance

(i) Do Articles D.23.2 and D.23.5 of the Collective Agreement provide secondary teachers with preparation time of 12.5% of instructional hours?

(ii) In the alternative, if the Collective Agreement does not provide secondary teachers with preparation time, is the District is estopped from changing its consistent past practice of providing preparation time of 12.5% of instructional hours?

(iii) In the further alternative, if the District is not required to provide preparation time as above, does the secondary AIW schedule exceed the weekly average hours of classroom instruction in Article D.23.2?

(b) The Elementary Grievance

(i) Do Articles D.23.1 and D.23.4 of the Collective Agreement provide 100 minutes of preparation time for elementary teachers scheduled during instructional hours?

(ii) Does Article D.23.4 of the Collective Agreement require the District to schedule recess?

(iii) In the alternative, if the Collective Agreement does not require the above scheduling in elementary schools, is the District is estopped from changing its consistent past practice of providing preparation time during instructional hours and scheduling recess?

(c) Both Grievances

In any event, are the AIW schedules and their impact on teachers unreasonable?

(d) Remedy

If the Grievances succeed in whole, or in part, what remed(ies) are appropriate?

While my analysis will address the issues as framed by the Union, I note the Employer's fundamental disagreement with this approach. It maintains the essential issue is whether the AIW schedules comply with the Hours of Work provisions in Article D.23 of the Collective Agreement. It submits further that "the only relevant issue … is

whether the weekly average hours of classroom instruction" under the secondary and elementary AIW schedules are in compliance with that provision (reply at p. 5).

IV. BACKGROUND

(a) Past Scheduling of Preparation Time and Recess

Previously, the schedule for secondary schools in the District was a semester system, with four courses in four blocks of 75 minutes per day. Courses typically ran for one of the two semesters, for a total of eight blocks in the school year. Another schedule was a linear system, where eight courses ran for the entire year in eight blocks. Yet another model was a 10 block schedule in the District which was in effect at Highland Secondary School for a number of years. Thus, while there were variations, what I will refer to as the "four and four" schedule was the prevailing model at the secondary level for many years, dating back to the first Collective Agreement between the parties in 1988-1990.

Under the four and four schedule, full-time enrolling teachers at the secondary level were typically assigned to teach seven out of eight blocks over the school year (this also applied to the linear system). The remaining block was assigned as preparation time, and was scheduled during instructional hours. Under the current Collective Agreement, with its averaging provisions, preparation time for secondary teachers may be assigned over the entire school year. Therefore, a teacher could be assigned 3.5 blocks of instruction per semester, instead of three blocks in one semester and four blocks in the other semester. But whatever the assignment, under the four and four schedule, the remaining time within instructional hours was allocated to preparation time. Under the 10 block model, secondary teachers received two blocks (or 20% instructional time) as preparation time.

Part-time enrolling secondary teachers did not receive preparation time under the four and four schedule. They instead received additional pay. For instance, a part-time secondary teacher with a 0.5 FTE workload (i.e., teaching four blocks over the school year) would receive 0.5625 of full-time salary. That is, there was a 12.5% payment in lieu of preparation time. In the rare circumstances where a secondary teacher taught four blocks in one semester, but did not work in the next semester, the teacher was paid approximately 112.5% of pay to compensate for the lack of preparation time. A resolution to this effect is described at page 4 of the *Paine* award discussed below.

The evidence reveals that both secondary and elementary teachers use preparation time for a variety of purposes such as: marking; preparing lessons; cleaning up from a prior lesson; contacting or reporting to parents; sourcing equipment; photocopying materials; communicating with other teachers; meeting with administration; talking with counselors; or, simply taking a break from the demands of actively instructing students.

Until the AIW schedules were implemented, preparation time for elementary teachers was also scheduled during instructional hours. The amount of preparation time has incrementally increased over the years, and most recently changed from 90 to 100 minutes per week under the Provincial Collective Agreement. Elementary schools also had a recess period in the morning. This was regarded as instructional time for purposes of the Collective Agreement (see Article D.23.4.a above) but teachers did not instruct students. Elementary teachers could, however, be directed by their administrators to supervise students during recess breaks as contemplated by Section 4(1)(b) of the School Regulation. The extent to which they performed supervisory duties depended on the size of the school and the number of teachers available to perform this duty.

The evidence of the District in this proceeding was that “recess has never been a break for teachers [but] is a break for students”. However, aside for being directed to perform supervisory duties, other unchallenged evidence reveals elementary teachers were historically able to use the recess break at their option for a variety of activities similar to those carried out during preparation time. It could also be taken as “a very

valuable break" from teaching. Other unchallenged evidence from the Union indicates supervising students on the playground is qualitatively different than delivering instruction in the classroom.

(b) Reasons for the AIW Schedules and Consultation

The District has faced what it describes as "historical annual budget challenges" since at least 2012. This has previously resulted in reductions to teacher and support staff levels. For the 2014-2015 school year, the "challenge" was $2.164 million. The District's senior management team decided that it could not continue to simply cut resources and there needed to be "structural change".

Various options were discussed with the CDTA during the 2014-2015 school year, but proposals such as a four day work week did not comply with all of the relevant Collective Agreement terms. Discussions resumed during the 2015-2016 school year with the formation of a District committee. One of the options which emerged was rearranging preparation time to Friday afternoons. The District believed that it could schedule preparation time outside of instructional hours provided it was still within the school day intervals provided respectively by Article D.23.4 and D.23.5 for elementary and secondary teachers. Another option that emerged was treating recess differently.

The District began consulting with the Union (as well as other stakeholders) over the AIW schedules in early 2016. Various drafts were produced and discussed during the ensuing months. Some of the communications were in the form of email messages, and several sent to the District by Nick Moore, the President of the CDTA, were reviewed in detail at arbitration.

The Employer does not assert that the Union agreed to the AIW schedules. Nonetheless, it relies on some of Mr. Moore's emails to show he agreed with the District's calculations for determining the average weekly instructional hours under the secondary AIW schedule, and also points to what he wrote about recess in relation to the

elementary AIW schedule. On the other hand, the Union maintains that Mr. Moore was opposed throughout to both AIW schedules, and so advised the District.

There is a degree of merit to both parties' positions. A constant theme of Mr. Moore's communications to the District was the Union's opposition to any schedule that would result in the layoff of teachers. Further, in an early email, he identified a number of items that "are currently making teachers berserk at the school level" (February 11). On the other hand, it is readily apparent why the District took comfort from some of his messages. Among other things, Mr. Moore urged the District to make a decision on the schedule, and advised: "… the CDTA will work with you to make it fit within our collective agreement if possible" (April 4). Subsequent discussions with Tom Demeo, then the Acting Superintendent of Schools, as well as an email of May 27 to Lynda-Marie Handfeld, the Director of Human Resources, would have reasonably led the District to believe Mr. Moore agreed with its determination that the secondary AIW schedule complied with the averaging requirements of the Collective Agreement. Another of his emails asked whether the District would consider recess as instructional time for teachers, and stated: "I'm sure we could find a way to make that happen if the district was open to the idea" (May 3).

Mr. Moore tried to disassociate himself during cross-examination from these and other messages. Although his May 27 email refers expressly to "my calculation", he said the attached table was *not* his calculation; was only done for part-time teachers; and, was "based on the Employer's point of view". He stated the May 3 email regarding recess was "suggested by Nick Moore the person, and not the President", although it was plainly sent over his name and CDTA position.

More generally, the District should have understood from the communications as a whole that the Union opposed the AIW schedules because they would result in layoffs, and that all of the drafts were highly unpopular with teachers. However, the Union did not otherwise complain about specific features of the schedules and Mr. Moore's emails, if anything, objectively conveyed an assurance that they complied with the Collective

Agreement and the Union "would make it fit". Mr. Demeo was therefore (and understandably) "surprised in terms of the Article being grieved" when the Secondary Grievance was received.

I have commented on the Union's communications at this point because they were canvassed in considerable detail by both counsel during evidence and argument. Whether my observations have any legal significance in terms of the issues raised by the grievances is an entirely separate question. I will accordingly return to the subject if necessary, and to the extent required, in my analysis below.

(c) Implementation of the AIW Schedules

While both the secondary and elementary AIW schedules were examined comprehensively during the hearing, they can be described in relatively general terms for purposes of determining the issues raised by the grievances.

Secondary schools in the District are still operating on a semester system, with a total of eight blocks in the school year. However, full-time enrolling secondary teachers are now assigned to teach all eight of the eight blocks. There is flexibility within the schedule, but the broad outline contemplates the school day being 320 minutes per day on Monday through Thursday, and 240 minutes per day on Friday when students are released early. Some blocks are now longer than 75 minutes. Preparation time for secondary teachers is scheduled before school for the first four days of the week and during the afternoon on Friday. These times are within the "work day" as the Employer characterizes the six (6) hour and thirty (30) minute interval in Article D.23.5 for secondary teachers.

As a result of the secondary AIW being implemented, approximately 18 enrolling secondary teachers were laid off across the District. The Employer notes, however, that the layoffs would have occurred in any event, and the schedule allowed non-enrolling specialist teachers to be preserved in order to better support the needs of vulnerable

students. Documentation prepared by administration at one secondary school confirmed the budget shortfall was addressed "by moving teacher prep time outside regular class time", and advised the AIW "saves approximately $1.7 million because it allows for a 12% reduction in secondary teaching staff". Further, the new schedule results in "teachers teaching more classes and therefore seeing more students, but overall teaching time will remain the same". The common scheduling of preparation time outside of instructional hours has additional implications. For instance, and without being exhaustive, secondary teachers must "compete" simultaneously for resources such as counselors and photocopying, and it is difficult to avoid interruptions by students during the morning preparation time because they are not in the classroom.

The elementary AIW schedule also has a shorter day for students on Friday. Some preparation time (40 minutes) for elementary teachers has been removed from instructional hours and scheduled on Friday afternoon when students are no longer at school. The other 60 minutes of preparation time are scheduled in two 30 minute periods during instructional hours earlier in the week. Recess has been eliminated throughout the week, such that elementary teachers no longer have a scheduled morning break. The District has suggested, however, that a morning break can be determined and supervised by the classroom teacher within instructional hours and used as part of Daily Physical Activity ("DPA") time.

The Union estimates the effect of the elementary AIW schedule has been a reduction of about five teachers across the District. These teachers would otherwise have been employed to teach classes while other elementary teachers had their preparation time during instructional hours.

(d) The Hood-Tanner Grievance

The Hood-Tanner Grievance (as it is described by the parties) was brought forward in 2009 and ultimately affected a number of part-time teachers at the secondary level. The grievance alleged the District was not properly compensating part-time

secondary teachers in lieu of preparation time over the school year. The matter was resolved by the parties. A document prepared by the then Superintendent of Schools, which forms part of the settlement package, set out a calculation whereby a part-time teacher "should receive the same ratio of preparation time as a [full-time] teacher". In the case of a part-time teacher with a 0.75 FTE (i.e., teaching six of eight blocks) the equivalent salary calculation was stated to be 0.86238 FTE. This figure was intended to match the total preparation time that a full-time teacher received.

The Union puts forward the Hood-Tanner Grievance settlement as evidence of the parties' mutual understanding that the Collective Agreement requires preparation time because monetary compensation was provided previously to part-time teachers who did not get relief from instructional time. The Employer argues the settlement has been overtaken by a June 3, 2016 email headed "A Joint Message from SD71 and the CDTA Re: Part time teacher FTE calculations". The message deals with the FTE calculations for part-time teachers at both the elementary and secondary levels under the AIW schedules. The Employer says it reflects "an agreed approach" to the FTE determinations for part-time teachers in respect of both the calculation of a teacher's FTE and the rate of pay. The Union responds by relying on Mr. Moore's testimony that he was not agreeing to the District's approach, but it was necessary to move forward with part-time postings for the pending 2016-2017 school year.

I have recorded the settlement of the Hood-Tanner Grievance at this stage because it forms part of the Union's practice evidence in respect of both its primary position under the Secondary Grievance and its alternate estoppel argument. The question of whether the settlement has continued application in relation to the AIW schedule can be set aside for now.

(e) The Present Grievances

The Union did not formally grieve until after the District announced that the AIW schedules would be in effect for the 2016-2017 school year. The Secondary Grievance was dated June 9, 206 and read (italics in original):

> Grievance - Alternate Instructional Schedule 2016-17 (2016-01)
>
> In accordance with Article A.6 of the Collective Agreement - Grievance Procedure - the Comox District Teachers' Association hereby initiates a grievance of general application. The Union alleges that the employer has violated the Provincial Collective Agreement, including but not limited to Article D.23 - Hours of work.
>
> Specifically, the union alleges that the employer has violated Article D.23.2, which states:
>
> *Teachers with full time classroom assignments at other than elementary schools shall not be required to provide classroom instruction of more than twenty-four (24) hours per week averaged over the course of the school year*.
>
> The employer's proposed alternate schedule for the 2016/17 school year violates the intent and spirit of this Article.
>
> There are 24 full weeks in your 2016-17 School District calendar, and each has an instructional time of 1520 minutes (25.3 hours). That is 80 minutes over the 1440 minutes (24 hours) established in Article D.23.2.
>
> This proposed alternate schedule will increase the instructional time for teachers at secondary school by a minimum of 60 hours (approximately 11 days) over current 2015-16 levels.
>
> In addition, secondary teachers in SD71 will be the only teachers in the province required to teach 8 blocks out of 8. That is unfair and it also violates the spirit and intent of Article D.23.
>
> As remedy, the Union requests that the employer immediately rescind the proposed alternate instructional schedule for the 2016/17 school year or alter it to conform to secondary teachers' current instructional time.
>
> Consistent with Article A.6.5.b of the Provincial Collective Agreement, the CDTA requests a Step 3 meeting at your earliest convenience.

The Elementary Grievance was dated June 24, 2016 and cast a somewhat broader net, including the allegation that the elementary AIW schedule violated Article D.23.4.a through the elimination of recess. The BCTF's letter seeking mutual agreement to refer both grievances to expedited arbitration was dated July 11, 2016.

V. ANALYSIS

Before turning to the grievances, I acknowledge the importance placed by the Union on preparation time for its members. Its many purposes are apparent from the evidence in this arbitration and the discussion found in numerous awards. For instance, the parties before Arbitrator Lanyon in *School District No. 68 (Nanaimo/Ladysmith) -and- Nanaimo District Teachers Assn.*, [2007] BCCAAA No. 16, ("*Nanaimo/Ladysmith*"), agreed that "preparation time [is] essential to the quality of instruction" (para. 10). It was later noted that "[p]reparation time is an integral part of weekly instruction which, in turn, is part of the regular work year" (para. 104). Another example is *School District No. 73 (Kamloops/Thompson) -and- Kamloops Thompson Teachers' Assn.*, [2007] BCAAA No. 60 (Kinzie), ("*Kamloops/Thomson*"), where a school principal agreed that "preparation time is sacred to teachers" (para. 6). Arbitrator Kinzie went on to describe the various uses of preparation time, in a passage which reflects the testimony in this proceeding:

> Teachers use their preparation time for a variety of activities. They include preparing lesson plans and means for assessing students on what they have learned, marking those assessments, collaborating with colleagues such as the learning assistance teacher regarding their students, discussions with the principal concerning discipline and behaviour issues in their classes, meeting and otherwise communicating with parents of students in their classrooms, and reviewing professional journals regarding matters relevant to what is going on in their classrooms. Preparation time is not just free time to be used by teachers to do whatever they want. (para. 7)

The same authorities demonstrate that the terms of a collective agreement are critical to determining the entitlement of teachers to, and the scheduling of, preparation time. While some common themes can be detected, the outcomes have varied depending on the precise language negotiated by the parties. The point was made in *British Columbia Public School Employers Assn. -and- British Columbia Teachers' Federation (Preparation Time Grievance)*, [2008] BCCAAA No. 14 (Pekeles), ("*Kootenay Lake*"):

> … Since the primary resource for interpretation is the collective agreement language itself, all words in a collective agreement should be given meaning, if possible. This is in keeping with the fundamental principle of respecting the parties' agreement. (para. 59)

It was held in the same award that "… the particular language before me does not entitle elementary school teachers to have lost preparation time [due to statutory holidays etc.] made up" (para. 63), and earlier awards reaching the opposite conclusion were distinguished based on different language.

Some of the provisions raised by the immediate grievances have received prior arbitral scrutiny: *Board of School Trustees of School District No. 71 (Comox Valley) -and- Comox District Teachers' Association (Sandra Paine - Preparation Time)*, unreported, July 10, 2004 (Orr), (the "*Paine* award"). The issue was quite different, and involved the entitlement to preparation time of a teacher who had been absent during the fall semester and then returned to full-time employment in the spring semester. The central conclusion of the award is that the averaging language in Article D.23.2 (then Article D.6.3) "… applies to the individual teacher and not to the teaching assignment (in the abstract)"; that is, "[w]hile it allows for averaging over the school year, the averaging cannot be intended to be applied between different teachers" (p. 8). Although there was no suggestion of preparation time being scheduled outside of instructional time when the *Paine* award was decided, Arbitrator Orr's observations about the Collective Agreement language bear repeating because there has been no material alteration to the Hours of Work provisions during the intervening years:

> It is significant that this particular collective agreement, unlike several other teachers' agreements, makes no reference to "preparation time". It must be assumed that in negotiating this agreement the parties were aware of the other agreements and the long history of collective bargaining in relation to "preparation time". It is evident that the parties negotiated a different way of approaching instructional time. A flexible approach was taken giving the Employer the ability to structure teaching assignments over the school year provided the Employer complies with [now Article D.23]. (p. 8)

More generally, in addressing the interpretive questions raised by the Union's grievances, I adopt by reference the rules of interpretation summarized in *Pacific Press -and- GCIU, Local 25-C*, [1995] BCCAAA No. 637 (Bird), quoted in *Nanaimo/Ladysmith*, at para. 103. I similarly reference the guidance provided at paragraphs 63-65 of the *Kamloops/Thompson* award, where Arbitrator Kinzie later observed that past practice evidence can be used for two different purposes:

> In my view, past practice evidence can be used for two different purposes. One is to assist the arbitrator in determining what the parties' intentions were when they agreed to a particular provision in a collective agreement where a *bona fide* doubt exists from a consideration of the words they used alone. A second purpose arises where there is no doubt about what the parties' intentions were. An established practice inconsistent with those intensions which has been acquiesced in by the other party may form the basis of an estoppel against that other party enforcing its collective agreement rights until the estoppel is brought to an end by reasonable notice. (para. 95)

The Union's arguments here based on past practice obviously require a consideration of both purposes.

(a) <u>The Secondary Grievance</u>

(i) *Interpretation of the Collective Agreement and Past Practice*

I repeat the Hours of Work language found in Article D.23 of the current Collective Agreement as it applies to secondary teachers:

2. Teachers with full time classroom teaching assignments at other than elementary schools shall not be required to provide classroom instruction of more than twenty-four (24) hours per week averaged over the course of the school year.

* * *

5. A secondary teacher shall not be required to offer instruction beyond an interval of six (6) hours and thirty (30) minutes, inclusive of:

   a. instructional time not to exceed five (5) hours and thirty (30) minutes, inclusive of homeroom and time for students to change classrooms;

   b. a regular noon intermission.

It is common ground that this provision makes no reference whatsoever to the concept of "preparation time". This omission cannot be regarded as merely accidental when contrasted with the language found in the parties' first Collective Agreement (1988-1990). It made express reference to the subject:

Article 21 PREPARATION TIME

21.1 Teachers with a full-time classroom teaching assignment at secondary schools shall be entitled to a minimum of 12.5% preparation time.

21.2 Effective March 1st, 1989, teachers with full-time classroom assignments at elementary schools, excluding kindergarten teachers, shall be entitled to a minimum of 40 minutes of preparation time per week, averaged over the course of a school year.

21.3 Effective September 1st, 1989, teachers with full-time classroom assignments at elementary schools shall be entitled to a minimum of one hour of preparation time per week, averaged over the course of a school year.

21.4 Effective September 1st, 1989, teachers with a half-time (.5) or greater classroom teaching assignment shall be entitled to preparation time on a pro-rata basis.

The foregoing terms, which have been absent from the parties' bargaining relationship since their 1990-1992 Collective Agreement, more closely resembles the provisions found in teachers' collective agreements elsewhere in the Province. The Union seeks to overcome the current deficiency by pointing to what it describes as a longstanding past practice regarding the scheduling of preparation time. Indeed, for purposes of its arguments, the Union defines "preparation time" to have "the same meaning as the common usage in the District and the across the K-12 system: unstructured time provided to teachers during instructional hours in which they are relieved from instructional duties, reducing their workload from 100% of instructional hours". It submits removal of the express reference to preparation time was not intended to change the practice of scheduling preparation time within instructional time, and was only intended to allow the District flexibility to schedule all secondary preparation time in one semester, because the weekly average of 24 hours could only be met by secondary teachers instructing 7 out of 8 blocks over the course of the school year. It argues further that the "7 teaching block and 1 preparation block secondary teaching model" is supported by language negotiated after the second Collective Agreement which set secondary class size maximums of 30 students and a maximum secondary teaching load of 210 students.

The Union relies as well on the following evidence to support a past practice relevant to both its interpretation of the Collective Agreement and its alternative estoppel argument:

- The 2009 settlement of the Hood-Tanner Grievance where it was recognized by the Superintendent that part-time teachers receive monetary compensation beyond that for the number of blocks they instruct because they do not receive relief from instructional time (i.e., a teacher who instructs 6 of 8 blocks has the FTE assignment calculated at 0.86238 and not 0.75 for purposes of salary).

- The foregoing was consistent with the practices referred to in the *Paine* award of providing relief from instructional hours for full-time teachers and compensation in lieu of preparation time for part-time teachers.

- In the rare circumstances where a temporary teaching assignment was four blocks in only one semester, the teacher received approximately 112.5% of pay to compensate for the lack of preparation time.

- Preparation time was included in instructional time when the Employer followed a 10 block scheduling model for a period of time at Highland Secondary School.

- The "prevailing" Province-wide practice across the public education system for secondary scheduling is the seven block teaching and one block preparation semester system used previously by the Employer.

When it comes to using practice evidence as an aid to interpretation, arbitrators have for many years followed the "strict limitations" laid down originally in *Re International Association of Machinists, Local 1740 -and- John Bertram & Sons Co. Ltd.* (1967), 18 LAC 362 (P.C. Weiler):

> Hence it would seem preferable to place strict limitations on the use of past practice in our second sense of the term. I would suggest that there should be (1) no clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations context; (2) conduct by one party which unambiguously is based on one meaning attributed to the relevant provision; (3) acquiescence in the conduct which is either quite clearly expressed or which can be inferred from the continuance of the practice for a long period without objection; (4) evidence that members of the union or management hierarchy who have some real responsibility for the meaning of the agreement have acquiesced in the practice. (p. 367)

In this case, the Union's reliance on past practice for interpretative purposes encounters an insurmountable barrier at the initial stage (moreover, the remaining prerequisites are seemingly absent as well). Put simply, the Collective Agreement admits

of no ambiguity and the clear preponderance in favour of the Employer's interpretation is reinforced by the labour relations context. Despite its important and valuable attributes, preparation time is not mandated by statute or regulation, and remains "a collective agreement benefit negotiated by the parties": *Kootenay Lake*, at para. 60.

The fact that preparation time was removed as an express term of the parties' Collective Agreement severely undermines the Union's assertion that it remains an "implicit" element of the current Hours of Work language. Its position is further weakened by scheduling practices elsewhere in the Province because other Districts are governed by explicit terms. One example is *Kootenay Lake* where an article headed "Preparation Time" provided in part: "Preparation time in secondary schools, in order to accommodate time table variations, may vary from ten percent (10%) to twelve and one-half percent (12.5%) *of instructional time"* (italics added). In *Mission School District No. 75 -and- British Columbia Teachers' Federation*, [2005] BCCAAA No. 94 (Burke), the applicable article read in part: "… the maximum weekly instructional assignment for a full-time secondary teacher shall be 1545 minutes per week, *less 193 minutes which shall be provided for the purpose of preparation*" (italics added). It will be recalled as well that, under Article D.23.5 of the immediate Collective Agreement, the daily "instructional time" of a secondary teacher is not to exceed five hours and 30 minutes "inclusive of homeroom and time for students to change classrooms". Unlike some collective agreements in other Districts, "preparation time" is not included explicitly in the calculation of "instructional time".

The foregoing distinctions take on added significance when one recalls the observations in the *Paine* award from 2004 that these parties have negotiated "a different way" of approaching preparation time, and "[i]t must be assumed that [they] were aware of the other agreements and the long history of collective bargaining in relation to 'preparation time'" (p. 8). My interpretative judgment must be founded on the language chosen by the parties. Accepting the Union's primary position under the Secondary Grievance would effectively constitute a substantive amendment to Article D.23 and the accompanying arguments must accordingly be rejected.

(ii) *Estoppel*

There is greater force to the Union's reliance in the alternative on estoppel. While the District implemented the AIW schedules due to pressing budgetary constraints, there has been a decidedly detrimental impact on both secondary and elementary teachers. The modern doctrine of estoppel focuses broadly on "what is unfair or unjust in respect to a sound sense of the equities, rights and conduct of the parties": *Litwin Construction (1973) Ltd.* (1988), 29 BCLR (2d) 88 (BCCA), cited in *Lake City Casinos Ltd*, BCLRB No. B11/2004, at para. 44. Despite this broad focus, there nonetheless remain certain foundational elements which must be established by a party seeking to invoke the doctrine. It is sufficient for present purposes to refer to the formulation found in *Harbour Cruises Ltd. -and- Pulp. Paper and Woodworkers of Canada, Local No. 3*, BCLRB No. B181/2004. After reviewing several prior Board decisions, the panel wrote:

> As was set out in *Eurocan* [(1990), 14 LAC (4^{th}) 103 (Hickling)], the granting of benefits through grace or indulgence will not give rise to an estoppel. However, the existence of a practice may be sufficient to found an estoppel as a representation need not be made by words, and can be made by conduct. In order to establish an estoppel by past practice, there must be clear and unequivocal commitments (either oral, in writing or by conduct) made from one party to the party claiming estoppel. Further, the other elements necessary for a finding of estoppel must be present: 1) the representation was intended (or was reasonably construed as intended) to affect the legal relations between the parties; 2) the party to which it is directed places some reliance in the form of some action or inaction on the representation; and 3) detriment results therefrom. (para. 44)

The *Harbour Cruises* decision was cited in *West Fraser Mills Ltd*., BCLRB No. B194/2006, where the doctrine was encapsulated by this statement: "What is clear from the cases it that in order for an estoppel to be established the party against whom it is being established must have made an unequivocal representation, either by statement or by conduct, that is does not intend to rest on its strict legal rights, which is relied upon by

the other party to its detriment" (para. 20). The vice-chair then elaborated on what is required to found an estoppel based on past practice:

> As the panel in *Fording Coal Limited*, BCLRB No. B2/2003, correctly notes, these comments recognize that before an estoppel by practice is established, *there must be something upon which it can reasonably be construed that one of the parties has made a promise or commitment to do or not do something. The mere existence of the practice alone is insufficient.* The reason that this is so is because absent something more, the practice alone can be construed either as an abridgement/waiver of legal rights or as a mere indulgence. *That is to say, a practice on its own is equivocal, not unequivocal.* The reason that an equivocal representation is insufficient to establish an estoppel is because it would be unreasonable for the party attempting to rely on an equivocal representation, even if it did so to its detriment. Parties are only entitled to the protection of the equitable doctrine of promissory estoppel if it can be said to be reasonable to rely on a representation: See *Fording Coal Limited*, BCLRB No. B2/2003; *Corporation of the District of Maple Ridge*, BCLRB No. B209/2001 (Leave for Reconsideration of BCLRB No. B295/2000). (para. 21; italics added)

In the *West Fraser Mills* proceeding, the arbitrator had found the practice in question had never been discussed between the parties. The vice-chair addressed this state of affairs in the following manner:

> … The parties did not discuss the matter at all, let alone in collective bargaining. There appears to be no evidence of the Employer misleading the Union, either by words or conduct, to believe that the practice would continue. Consequently, the fact that the Employer did not raise its intention to alter its practice cannot be considered to be evidence of an unequivocal representation that the Employer would continue the whistle chasing practice.
>
> This approach to the application of the modern doctrine of estoppel is consistent with the duty under Section 2(e) of the Code: to promote conditions favourable to the orderly, constructive and expeditious settlement of disputes. If parties are required to first raise in collective bargaining an intention to alter a practice the likely result would be that both parties would come to the bargaining table armed with a proposal to eliminate all practices not expressly provided for in the collective agreement and require the other party to bargain for their reinstatement. That would be a recipe for more collective bargaining disputes. Instead,

> the Board has consistently taken a different approach. That is, absent something more than a long standing practice, the party who is the beneficiary of the practice, which is not supported by the collective agreement, must either accept the fragility of the existence of the practice or it must place the matter squarely on the bargaining table to ensure that it becomes entrenched in the collective agreement.
>
> The Arbitrator's reliance on the lack of a mistake by the Employer or the Employer's failure to raise the matter in collective bargaining before altering the practice to establish that an unequivocal representation was contrary to the principles which underpin the modern doctrine of estoppel. … (paras. 26-28)

The vice-chair proceeded to find that the "logical implication of the arbitrator's conclusion [was] that practice alone is sufficient to constitute an unequivocal representation that the practice will continue" (para. 28). This was held to be inconsistent with the fundamental approach to the application of the modern doctrine of estoppel, and the award was set aside.

I am unable to find anything in the more recent *Nor-Man* judgment which alters the Board's approach (see *Nor-Man Regional Health Authority Inc. -and- Manitoba Association of Health Care Professionals*, 2011 SCC 59). The estoppel there admittedly originated from an employer practice. But a closer examination of the circumstances reveals that the union had acquiesced to the practice by its silence, and the employer was reasonably entitled to rely on that acquiescence. In other words, the practice itself was not put forward as the representation; rather, the representation was the union's acceptance of the employer's practice. The employer was entitled to rely on the union's silence and not seek to negotiate a change to the collective agreement. That is quite different than the present circumstances, but entirely consistent with what was expressed years ago by our Labour Relations Board in *Re Corporation of the City of Penticton -and- Canadian Union of Public Employees, Local 608* (1978), 18 LAC (2d) 307 (P.C. Weiler), a decision quoted with approval in the Supreme Court's judgment.

The Union maintains the District represented by practice that preparation time would be provided within instructional hours, and argues:

> The District represented both through consistent practice and the Hood-Tanner Grievance settlement that it accepted a full time secondary teaching load was 7 out of 8 blocks and that preparation time was provided as relief from instructional hours when it scheduled and compensated teachers accordingly. There is no suggestion that providing preparation time until the current school year was an indulgence by the District or gratuitous under the Collective Agreement or that it provided preparation time when it was not required to do so. Rather, the District treated preparation time as a contractual obligation, representing its shared understanding with the Union through conduct. (written submission at para. 121)

It is also the case that the District provided preparation time within instructional time when the 10 block model was implemented briefly at Highland Secondary School. Nonetheless, at the end of the day, the Union is unable to point to anything other than practice evidence to assert a representation by the Employer. Moreover, for some of the period since Article D.23 took its present form, the Employer was constrained by legislative requirements which precluded the scheduling of preparation time outside of instructional hours. For instance, when the second Collective Agreement was negotiated in 1990, the School Act Regulation required 190 instructional days and 1045 instructional hours for secondary students. This translated into 5.5 hours of instruction per day, or 27.5 hours per week, which was the maximum weekly hours of work for secondary teachers. As the Union points out, the weekly average of 24 hours in the Collective Agreement could only have been met by secondary teachers if they instructed 7 out of 8 blocks during the course of the school year. The same observation effectively applies to the secondary class size maximums and the secondary teaching work load maximum negotiated after the second Collective Agreement.

The fact that the District scheduled preparation time within instructional time when it had no alternative cannot be construed as a representation that the practice would continue if the restrictions were removed. Further, what the District effectively did in the past was to comply with Article D.23 under various forms of instructional models. This cannot be elevated to a representation that preparation time would always be scheduled within instructional time if a different model was adopted in the future -- provided, of

course, the alternate schedule otherwise complies with the Collective Agreement. And, like the situation in *West Fraser Mills*, there is nothing on the record to indicate the practice was ever discussed between the parties, let alone an assurance given by the Employer that the arrangement would continue. Additionally, as a consequence of the *Paine* award published in 2004, the Union had received an arbitral warning that Article D.23 represented "[a] *flexible approach* … giving the Employer the ability to structure teaching assignments over the school year" provided it complied with the provision (p. 8; italics added).

But even assuming the District's past scheduling of preparation time amounted to an unequivocal representation, the Union must demonstrate reliance. Its complete submission on the second element of the doctrine is put forward in the following two paragraphs:

> The Union relied upon the representation of the District that preparation time was provided in instructional time and that a 7 out of 8 block bad was a full time teaching assignment by accepting the Hood-Tanner Grievance settlement and in not bargaining changes to the Collective Agreement to include an express reference to preparation time or an increase in salary to compensate for increased workloads.
>
> Salaries and preparation time can only be bargained by the BCTF and BCPSEA. Leaving aside the argument advanced above that the District and the Union do not have the authority on their own to set aside an agreement on workload or salary issues, the changes to teacher working conditions and salary with the AIW were not identified during or prior to bargaining the current Collective Agreement. The Union and BCTF relied upon the District's consistent practice of providing preparation time and did not seek changes to teachers salary to reflect the increased workload or bargain additional restrictions on changing the hours of work, per the evidence of [former BCTF President] Jim Iker. (paras. 125-126)

Mr. Iker testified that salaries, working conditions and preparation time are all matters for Provincial collective bargaining. During the last round of negotiations in 2013-2014, he understood the working conditions for secondary teachers in this District were based on the "seven out of eight timetable, and one block (or 12.5%) was preparation time". This was described as a "standard model" for other Districts in the

Province, although there are deviations. Mr. Iker was asked if there was any discussion about a change in workload for secondary teachers, and replied in part: "Salary is [negotiated] in conjunction with the amount of work and it is understood teachers get preparation time and it is paid for". He later stated that the BCTF negotiate salaries based on a full-time teacher and, in secondary schools, "[preparation time] is 12.5% of time and the time is not beyond the [instructional] day. I note, however, that there is no evidence of actual discussions between the parties over the matters now in dispute. This is not surprising given Mr. Iker's acknowledgement in cross-examination that the negotiations concluded well before the AIW schedule "came to the fore".

Useful guidance regarding what must be shown to establish reliance in the present circumstances can be taken from *Pacific Forest Products Ltd. -and- PPWC, Local 7* (1983), 14 LAC (3d) 151 (Munroe), which was quoted at considerable length in *Delta School District No. 37 -and- CUPE, Local 1091*, [2000] BCCAAA No. 230 (Somjen). Both awards addressed estoppel based on a change in employer practice. Mr. Munroe issued the following caution in the earlier award:

> Be that as it may, the doctrine of estoppel is not something which an arbitrator should seize upon to justify the imposition of an individualized, intuitive, and ill-defined brand of "justice"- It has its limits. Obviously, it should not be utilized to lend contractual or quasi-contractual significance to a wholly gratuitous benefit or indulgence which clearly was not intended to carry any contractual freight, and upon which the beneficiary has placed no identifiable reliance, even though the abrupt withdrawal thereof might strike the arbitral eye as "unfair" or as "bad industrial relations". (p. 161)

Mr. Munroe later remarked that he was "… not particularly influenced by every *ex post facto*, self-serving assertion to the effect that 'we would have negotiated and perhaps struck over the issue if we had known that the employer might alter the practice'" (p. 162). There were other circumstances before him which showed that was probably the case; that is, he was "spared the kind of self-serving testimony" and presented with "more concrete evidence", including events during past negotiations and a later meeting with management which would reasonably have lead union officers to

believe "there was no necessity to clutter up the bargaining table when it came time to negotiate the succeeding collective agreement" (p. 163).

Such "concrete" evidence is absent from the Union's case here, and the assertion of reliance is based solely on what Mr. Munroe somewhat pejoratively characterized as "self-serving testimony". More critically, the record as a whole shows that the Union never relied on the Employer's past scheduling practices when the AIW drafts were being discussed over several months in the spring of 2016. The Union was unquestionably opposed to the schedules because they would result in teacher layoffs. But there was no suggestion that the District could not implement the AIW schedules because preparation time must be included in instructional time, or that the Union had relied on past models which had scheduled preparation time in that manner.

The Secondary Grievance of June 9 alleged "the intent and spirit" of Article D.23.2 was violated by the AIW. The Union asserted the proposed alternate schedule would result in an instructional time average of 25.3 hours per week, and complained it would increase the instructional time for secondary teachers by a minimum of 60 hours over the school year. Nothing was said about the now asserted requirement for preparation time to be scheduled as part of instructional hours; nor was there any reference to past practice, or a suggestion that the Union had relied on a practice or representation by the District. While the later request by the BCTF to refer both grievances to expedited arbitration was "not intended to define the scope of the grievance", the same observation can be made. That is, the increase in instructional time and the modified instructional week were said to contravene the Collective Agreement but there was no mention of past practice.

As part of its arguments on estoppel, the Union cites *Conventions Unlimited*, BCLRB No. B487/99, for the proposition that it "… does not have to prove that the District represented it would never schedule preparation time outside of instructional hours [and] only has to prove the District represented that preparation time was provided within instructional hours" (written submission at para. 124). That decision can quite

readily be distinguished. In the course of multi-employer negotiations with the union, a majority of the companies successfully proposed language removing the requirement to use a union sign carpenter. This removed the need for the companies to use the employer for signs (it was the only one of the companies with a union signmaker), and also allowed the employer to close down its sign shop and use a non-union service. It took this step and laid off its union signmaker. However, the employer later realized that the language additionally allowed it to substitute a non-union signmaker "in-house". When the employer hired a non-union employee the union grieved. The arbitrator found the exchanges during negotiations constituted a representation, and held the employer was estopped from hiring the non-union signmaker. On review, the Board upheld the estoppel ruling:

> Thus, the Arbitrator found the amendments to the collective agreement were initiated by the companies in order to achieve a specific purpose which was discussed during bargaining. When assessed from the Union's perspective, the representations (including the April 28 letter) carried the consequence that the Employer might close its sign shop and have the work done elsewhere, as was the practice of the other companies. But there was no suggestion that the Employer might lay off a union carpenter and do the work in-house using a non-union employee.
>
> I accept the Employer's argument that it did not make any representation concerning the use of non-union signmakers (again, it made the same submission at arbitration). But there is an obvious frailty in the Employer's position: the absence of this specific representation does not equate to the lack of any representation upon which the Arbitrator could base an estoppel. The doctrine requires some form of "unequivocal conduct" by one party, as assessed from the perspective of the other party, which makes it inequitable for the former to enforce its strict legal rights. At the risk of belabouring the point, the Arbitrator found here that certain representations were made during bargaining and were also contained in the Employer's April 28 letter. When assessed from the Union's perspective, this conduct warned that the Employer might close its sign shop, but did not signal the "very different" and "serious" consequence of assigning the work to a non-union employee. The Arbitrator was entitled to reach these findings of fact (and his characterization of the letter as "a strong message to the same effect" as the discussion during bargaining effectively precludes any suggestion of ambiguity). The Arbitrator was additionally entitled to find it would be inequitable for the Employer to

> enforce the collective agreement during its currency given these representations. (paras. 20-21)

Thus, while the employer in *Conventions Unlimited* had not said anything about the use of a non-union "in-house" signmaker, there were nonetheless exchanges between the parties during (and surrounding) the negotiations which the arbitrator found constituted a representation upon which to found the estoppel. There is no evidence before me about what might have been said when these parties removed preparation time from their first Collective Agreement and substituted the present wording. Nor can the Union point to any other representation aside from practice. And, for reasons given already, the practice evidence falls short of demonstrating an unequivocal representation.

I accordingly find that the necessary prerequisites to invoke the doctrine of estoppel have not been established, and the Union's alternative argument under the Secondary Grievance must be rejected.

(iii) *Determining Average Weekly Hours of Instruction*

This brings me to perhaps the most challenging aspect of the case. Determining the average hours of instruction per week would initially seem to be a fairly straightforward calculation. However, in actual practice, the exercise encounters a number of interpretative variables and potential options. The two provisions most directly involved in the analysis are Articles D.23.2 and 5:

> 2. Teachers with full time classroom teaching assignments at other than elementary schools shall not be required to provide classroom instruction of more than twenty-four (24) hours per week averaged over the course of the school year.
>
> * * *
>
> 5. A secondary teacher shall not be required to offer instruction beyond an interval of six (6) hours and thirty (30) minutes, inclusive of:

a. instructional time not to exceed five (5) hours and thirty (30) minutes, inclusive of homeroom and time for students to change classrooms;

b. a regular noon intermission.

The parties take quite different approaches to what was intended by this language, and each has advanced different interpretations since the initial discussions over the draft AIW schedules were presented by the District.

Leaving aside for now the averaging calculations proffered by Mr. Moore during those discussions, the Union advanced the following interpretation in the secondary grievance:

> There are 24 full weeks in your 2016-2017 School District calendar, and each has an instructional time of 1520 minutes (25.3 hours). That is 80 minutes over the 1440 minutes (24 hours) established in Article D.23.2.

The suggestion that only "full weeks" should be included in the calculation finds no support in the Collective Agreement. Indeed, the Union proposed an entirely different formulation at arbitration, and submits:

> … the hours of work calculation must be made on the actual days of instruction worked, an approach which takes into account statutory holidays and non-instructional days (the "Instructional Week Calculation"). The Union's Instructional Week calculation divides the annual instructional hours by the number of instructional days in the school year (185 days or 37 weeks) to determine the weekly average: 25.6 hours/week. (para. 140)

The Union's calculation counts only days when teachers have instructional duties; it omits working days when they have other duties, as well as statutory holidays and other non-working days during the school year. The approach is based on the *Kamloops/Thompson* award where a "week" was held to mean five instructional days, and not a calendar week or school week.

As the District points out, the language in *Kamloops/Thompson* was quite different in stipulating that "teachers shall be provided with a minimum of eighty (80) minutes preparation time per week". Most notably, there was no averaging of instructional hours whatsoever, let alone "over the course of the school year". For reasons that will be developed below, I agree with the Union that non-working days (e.g., statutory holidays) should be excluded from the calculation. However, there is no contractual basis for excluding non-instructional working days, especially when Article D.21.2 makes clear that the "regular work year for teachers" shall include four other types of working days, in addition to the number of instructional and professional development days required by legislation, regulation or ministerial order.

While the school year by virtue of the *School Act* is July 1 to June 30, the Employer does not maintain that all weeks within that period must be included. With reference to the 2016-1027 School Calendar for the District, the Employer says there were 41 weeks in the school year (the calculation eliminates July and August, as well as September 1 and 2 because school had not started, and does not count winter and spring breaks when there were no instructional days). The Employer says this should be "the denominator" for determining the average. It then totals the number of "classroom instruction" hours teachers are engaged in during the school year; divides the total by 41; and the result is an average of less the 24 hours per week. In another calculation, the Employer eliminates the week of June 26-30 entirely because there will be no classroom instruction. But even with a denominator of 40 weeks the average remains below 24 hours per week.

As foreshadowed, the difficulty I have with the foregoing approaches by the Employer is that they both include non-working days during weeks when teachers provide classroom instruction and/or perform other duties. Perhaps anticipating this critique, the Employer advances an alternative position based on the analysis found in *Calgary Roman Catholic Separate School District No. 1 -and- Alberta Teachers' Assn. (Hours of Work Grievance),* [2009] AGAA No. 62 (Jones). The collective agreement there contained a weekly maximum for hours of work (as opposed to the daily maximum

in Article D.23.4.a), as well as comparable language for determining a weekly maximum average for instruction:

> 11.1 Hours of Work. Effective September 1, 2005, a school-based full-time equivalent teacher not in receipt of any salary allowance will not be assigned duties in excess of thirty (30) hours per week, averaged over the school year. *A maximum of one thousand four hundred and thirty (1,430) minutes (23.83 hours) per week, averaged over the school year, shall be devoted to the instruction of students*. The remainder of the assignable hours shall be devoted to professional duties including, but not limited to, supervision of students, preparation, staff meetings, consultation, parent-teacher conferences, and administrative tasks... . (italics added)

There were three issues placed before the board hearing the *Calgary* arbitration. The third question was posed in these terms: How many and which days are to be included in calculating the maximum weekly limits "averaged over the school year" for (a) "instructional time" and (b) "assigned duties"? The answer to both parts of the question was the number of days in the school year:

> In my opinion, the 2005-06 "school year" consisted of 197.5 days, and this is the proper number to be used for determining the denominator for calculating both averages.
>
> * * *
>
> With respect to the limit on instructional duties, I do not accept the [Association's] argument that it is necessary to use 190 days in the denominator in order to compare "apples to apples". In the first place, this is not what Article 11.1 says. It does not say that the limit is 1,430 minutes "averaged over the number of *instructional days* in the school year". On the contrary, the reference in Article 11.1 is to the "school year", which on its face must mean the whole school year and not just part of it. … (paras. 197 and 200; italics in original)

This analysis provides a further reason for rejecting the Union's calculations which include only instructional days during the school year. A similar approach to *Calgary* was taken in *Lacroix -and- Treasury Board* (*Fisheries and Oceans*), [2003] CPSSRB No. 61, where the collective agreement provided that instructors "… shall not be required to provide classroom or similar instruction in excess of an average of twenty

(20) hours per week averaged over a four (4) month period". The board member hearing the grievance calculated the weekly average hours of instruction based on the number of working days during each four month period (see para. 69). Applying the same approach here results in a total of 193 days for the 2016-2017 school year.

The next question is what comprises "classroom instruction" time for purposes of the calculation? The Employer says these words must be applied literally, and periods when a teacher is not engaged in "classroom instruction" should be excluded. The Union relies on definitions of "instruction" in the School Regulation which encompass any "board approved provision of educational programs to students" and includes examinations. It submits these broader definitions should apply, and notes the Employer's alternative approach was not adopted when the AIW schedules were being developed by the District.

Article D.21.2.a provides in part that the regular work year for teachers shall include "the requisite … *hours of instruction* … as required by legislation, regulation, or ministerial order" (italics added). The parties can reasonably be taken by this language to have intended that "instruction" would have the meaning propounded by the Union. The challenge for the Union is that they used different terminology throughout Articles D.23.1 to D.23.3 (i.e., "classroom instruction"). The problem is compounded because the unmodified word "instruction" is used later in the same provision a total of four times (see Articles D.23.4 and D.23.5).

Two of the accepted rules of interpretation in *Pacific Press* are that all words in a collective agreement should be given meaning where possible and, where an agreement uses different words, the parties are presumed to have intended different meanings. The Union's interpretation of the averaging language runs counter to both of these rules, and effectively amends the Collective Agreement by ignoring or deleting the word "classroom" in at least three places. The Employer's admittedly "eleventh hour" interpretation must be preferred.

Based on the Employer's unchallenged "math", when the total number of classroom instruction hours during the school year is divided by 193 days, the average is 4.74 hours per day or 23.7 hours per week. Even if one excludes only the week of June 26-30 when no classroom instruction occurs from the total of 947 instructional hours in the year (for a total of 925 "classroom instruction" hours), the resulting averages are 4.79 hours per day and 23.95 hours per week. I accordingly find that the secondary AIW schedule does not contravene the maximum weekly average restriction in Article D.23.2 of the Collective Agreement.

(b) The Elementary Grievance

(i) *Preparation Time*

Although there is a considerable overlap between the two grievances, there are some material differences. One of the more critical distinctions is that the Provincial Collective Agreement includes language regarding preparation time for elementary teachers. I repeat Article D.4 in full:

> 1. Each full-time elementary teacher shall receive 100 minutes of preparation time per week scheduled in accordance with the Previous Collective Agreement.
>
> 2. Effective June 30, 2019, each full-time elementary teacher shall receive 110 minutes of preparation time per week scheduled in accordance with the Previous Collective Agreement.
>
> 3. Preparation time for part time teachers shall be provided in accordance with the Previous Collective Agreement.

Preparation time is now designated as a Provincial Matter for purposes of collective bargaining. Over the years, there have been incremental increases to the amount of preparation time that elementary teachers are entitled to receive. In the last round of negotiations, the allotment was increased by ten (10) minutes. As a direct consequence, the maximum weekly average in Article D.23.1 for elementary teachers

was decreased from "twenty-three (23) hours and thirty (30) minutes" to "twenty-three (23) hours and twenty (20) minutes". In my view, and unlike the situation with preparation time for secondary teachers, these changes over time reveal a "link" between elementary preparation time and instructional time. A similar conclusion was reached by Arbitrator Lanyon in *Nanaimo/Ladysmith* where he wrote:

> … the collective agreement provisions as a whole directly link preparation time to instructional time. Not only is preparation time included within the definition of instructional time, its primary purpose is to increase the quality of instruction. Thus, this direct conceptual link arises not only in the language but underlies the very purpose of the provisions as a whole. (para. 108)

The "conceptual link" is admittedly not as strong in the Collective Agreement before me because preparation time is not included within the definition of instructional time." Article D.23.4.a stipulates that "instructional time [is] not to exceed five hours, inclusive of fifteen (15) minutes of recess" and, unlike some public education collective agreements, does not expressly include preparation time. Nonetheless, the consequential changes to Article D.23.1 brought about by increases in the minimum Provincial elementary preparation time language reveal a shared understanding that the additional minutes are intended to be relief from instructional time.

Any ambiguity on this front is resolved by returning to the Provincial language. There is an unequivocal direction throughout all of Article D.4 that elementary preparation time "shall … [be] scheduled in accordance with the Previous Collective Agreement". Thus, while local Article D.23 may be silent on the subject, Provincial Article D.4 provides an express entitlement for elementary teachers, as well as direction on how their preparation time will be scheduled. This direction restricts the District's ability to depart from established scheduling practices under the Previous Collective Agreement. To the extent that the elementary AIW reduced preparation time for elementary teachers and/or removed it from instructional time, the District breached the relevant contractual provisions and this aspect of the Elementary Grievance succeeds.

(ii) *Recess*

The remaining branch of the Elementary Grievance challenges the elimination of recess and can be considered in relatively succinct terms. Article D.23.4 provides:

> 4. An elementary teacher shall not be required to offer instruction beyond an interval of six (6) hours, inclusive of:
>
> a. instructional time not to exceed five hours, *inclusive of fifteen (15) minutes of recess*;
>
> b. a regular noon intermission. (italics added)

The Employer maintains the emphasized wording "does not mandate a 15 minute recess but provides that if there is a recess, it is included in that 5 hour calculation" (written submission at p. 12). I find that accepting this interpretation would effectively add words to the Collective Agreement (e.g., "inclusive of fifteen (15) minutes of recess *if scheduled*" or "inclusive of *any* fifteen (15) minutes of recess"). It would also lead to the seemingly absurd result that there is no requirement for a regular noon intermission, and noon intermission is only part of the six (6) hour school day if it is scheduled at the Employer's discretion. On the other hand, the Union's interpretation flows naturally from the construction of Article D.23.4.a; namely, there will be 15 minutes of recess, and the time is to be scheduled within the five hour maximum. In other words, recess is not discretionary and is part of instructional time.

I acknowledge the Employer's point that elementary teachers have traditionally provided supervisory duties during recess. However, the extent has varied depending on the size of the school, and elementary teachers have historically been able to accomplish a variety of other tasks at their option during their 15 minute break from instructional time. There is also a material difference between the general supervision of students on the playground and classroom instruction. Nor can it be said that the DPA time which forms part of the elementary AIW schedule satisfies the District's contractual obligation. It may constitute a break from instruction, but it cannot be characterized as "recess" as

that concept has long been understood in the public education sector. Finally, I do not accept that Mr. Moore's email of May 3 can be used to interpret the relevant Collective Agreement language.

The elementary AIW accordingly contravened Article D.23.4.a of the Collective Agreement through its elimination of the standard morning recess.

(c) Reasonableness

In light of the conclusions reached to this point, it is necessary to address the Union's "backstop" argument that the secondary AIW is unreasonable. Once again, there can be no serious dispute that the instructional workload of enrolling secondary teachers has been increased without any change in salary, and the monetary compensation for part-time secondary enrolling teachers has been reduced without any change in workload. The Union submits it is fundamentally inequitable to increase hours of work without increasing compensation and, as such, the doctrine of *quantum meruit* applies and teachers should be compensated for the additional work they perform. It also argues that the same doctrine can be applied to restrict work performance to that which is reasonably agreed or contemplated by the Collective Agreement. Finally, "[e]ven without an express breach of the Collective Agreement, the arbitrator can still find the AIW was unreasonable and provide remedies" (written submission at para. 173).

The Employer disputes the latter assertion, and maintains it has "no legal merit". It notes there is no allegation of bad faith, discrimination or arbitrariness regarding development of the AIW, and says the secondary schedule must be assessed against the requirements of the Collective Agreement and not some notion of reasonableness held by one of the parties.

I find the authorities put forward by the Union under the heading of reasonableness can all be distinguished. The oft-quoted words of former Chief Justice Laskin in *Winnipeg Teachers' Association No. 1 of the Manitoba Teachers' Society v.*

Winnipeg School Division No. 1, [1976] 2 SCR 695, invoked a standard of reasonableness in assessing "the degree to which an employer or a supervisor may call for the performance of duties *which are not expressly spelled out*" (QL P. 9; italics added). That is to say, in a situation where the subject is not addressed by the collective agreement. The words were quoted in *Avon Maitland District School Board -and- Elementary Teachers' Federation of Ontario (Policy Grievance)*, [2007] OLAA No. 516 (Brent), where such circumstances existed; i.e., "there [was] nothing, either in the collective agreement or in the legislative framework" (para. 7) which governed the subject in dispute -- being the extent to which the employer could require teachers to attend divisional meetings outside of instructional time.

Although the Collective Agreement here is silent on the question of preparation time for secondary teachers, there is express language concerning Hours of Work and, more specifically, the maximum average hours per week for classroom instruction. Provided the District complies with those provisions, a subjective standard of reasonableness cannot be used to imply further restrictions or found a claim for additional compensation.

Likewise, the awards in *Leeds Grenville County Board of Education -and- Ontario Secondary School Teachers' Federation (Class Size Grievance)*, [1999] OLAA No. 160 (Kaplan), and *Insurance Corp. of British Columbia -and- Canadian Office and Professional Employees' Union, Local 378 (Policy and Group Grievance)*, [2012] BCCAAA No. 112 (Taylor), do not advance the Union's case. In the first award, the board of arbitration had unanimously upheld a union policy grievance alleging a violation of the maximum class size provisions in the collective agreement; in the second, the employer had (among other violations) acted contrary to the collective agreement by insisting that compensable overtime had to be pre-authorized. Thus, while both awards granted compensation on the basis of *quantum meruit*, the remedy was preceded by an arbitral determination that the collective agreement had been contravened. In that regard, our Labour Relations Board has determined in at least one Section 99 review application that Part 8 arbitrators do not have authority to grant relief in the absence of a contractual

breach or other violation. The Union's final plea in regard to the Secondary Grievance must accordingly be rejected.

(d) Remedy

In the result, the Union's Secondary Grievance is dismissed and its Elementary Grievance is upheld.

In reaching these determinations, it has not been necessary to consider the status of the Hood-Tanner Grievance settlement in light of Mr. Moore's June 3 email regarding FTE calculations for part-time teachers. The email read in part: "Elementary: No change to the current method of figuring out part time FTE" so it has no bearing on the Elementary Grievance. And, most obviously, the Hood-Tanner Grievance concerned secondary teachers. While I have considered the impact of the secondary AIW on part-time secondary teachers, I do not have jurisdiction to address their compensation as the Secondary Grievance was plainly directed to full-time teachers. In any event, the Union has subsequently filed at least one other grievance in respect of part-time secondary teachers.

I hereby declare that the elementary AIW schedule contravenes the Collective Agreement with respect to both the scheduling of preparation time and the elimination of recess. The District must implement a compliant elementary schedule at the earliest practical opportunity, having regard to the associated logistics and legitimate considerations such as the impact on students and parents.

The Union additionally claims "full redress within the current school year for all affected teachers" and particularizes various orders being sought. Any further relief is being referred back to the parties for consideration. The reasons include the fact that the parties' submissions to date have focused more on the secondary AIW, and the Union's indication in final argument that it would consider remedies "in kind" going forward as opposed to monetary compensation. At the same time, while the question of further relief

is being remitted, I reiterate the concern expressed to Union counsel in final argument over the equity of granting retroactive remedies given Mr. Moore's communications to the Employer during consultations over the AIW schedules. The concern arises most prominently (but not exclusively) in relation to the elimination of recess.

VI. CONCLUSION

As set out above, the Union's grievance regarding the secondary AIW schedule is denied while its second grievance regarding the elementary AIW schedule is upheld. These divergent outcomes are the consequence of material differences in the contractual language governing preparation time as between secondary teachers and elementary teachers in the District. Unfortunately for the Union, the absence of language providing preparation time for secondary teachers within instructional hours cannot be overcome by relying on past practice to imply restrictions not found in the Collective Agreement; nor can the Secondary Grievance be upheld on equitable grounds despite the increase to the instructional workload of enrolling secondary teachers.

The arbitral remedy being granted at present is set out in the preceding part of this award. I reserve jurisdiction to provide a final and conclusive resolve to the Elementary Grievance failing agreement between the parties.

DATED and effective at Vancouver, British Columbia on January 5, 2017.

JOHN B. HALL
Arbitrator