IN THE MATTER OF: Union grievance 18-GVTA-11 dated October 20, 2017 alleging failure to make best efforts toward compliance with class size and composition provisions under the March 9, 2017 Memorandum of Agreement.

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION (BCPSEA)/BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 61 (GREATER VICTORIA) (GVSD),

Employer,

- and -

BRITISH COLUMBIA TEACHERS' FEDERATION (BCTF)/ GREATER VICTORIA TEACHERS' ASSOCIATION (GVTA),

Union,

AWARD

Appearances:

Michael Hancock and Reut Amit, counsel for the Employer.
Patrick Dickie, counsel for the Union.

Hearing dates and location:

February 28, 2019; Additional written submissions March 9-10, 2019;
Victoria, B.C.

Arbitrator
Arne Peltz

Date of award:

March 11, 2019

Background

1. This case has its genesis in provincial legislation dating back to 2002 deleting class size and composition provisions in teacher collective agreements. The provisions in question had been negotiated during local bargaining between 1987 and 1994, as well as provincial bargaining beginning in 1994. The Union challenged the legislation in court. In Letter of Understanding No. 17, part of the current collective agreement between the parties (Ex. 1, 2013-2019), it was agreed that if the final court judgment fully or partially restored the 2002 language, the parties would reopen the agreement on this issue. They would bargain to implement and/or change the restored language.

2. In *British Columbia Teachers' Federation v. British Columbia*, [2016] S.C.J. No. 49, the court found the impugned legislation to be unconstitutional. The court ruling was issued on November 10, 2016. Negotiations commenced between BCPSEA, BCTF and the Ministry of Education ("the Provincial Parties"), culminating in a Memorandum of Agreement signed on March 9, 2017 ("the MOA", Ex. 1-2).

3. The Provincial Parties opened the MOA with a Shared Commitment to Equitable Access to Learning (para. 1). Then they committed to develop a Schedule of the deleted collective agreement provisions that will be implemented, to be attached as Schedule "A" (para. 2). It was agreed that school staffing will comply with the restored provisions commencing in September 2017, subject to the terms of the MOA (para. 3).

4. In paragraph 13 of the MOA, the parties agreed to implement the deleted class size language effective the start of the 2017/18 schoolyear. Primary classes were limited to 20 students in Kindergarten and 22 students in grades 1-3 (para. 14). Class size maximums were set for combined classes (para. 15-16). In cases where certain restored language provided superior class sizes, it was agreed the superior provisions applied (para. 17). Grade 4-12 class size limits that were deleted by the legislation were restored effective the start of the 2017/18 school year (para. 18).

5. In paragraph 19, the parties agreed to implement deleted class composition language upon the commencement of the 2017/18 school year, subject to individual student needs, as stated. Local collective agreement clauses often limited the number of special needs students per regular class. These provisions were restored. Given the complexity of class composition issues and changes in special education designations over the years, the Provincial Parties established a Class Composition Joint Committee (para. 20).

6. Paragraph 21 declared a provincial approach to compliance efforts and remedies, applicable to all school districts, and also attached the restored class size and composition provisions as Schedule "A" to the MOA. I was told that there is not yet complete certainty regarding all restored language but for purposes of the present case dealing with Greater Victoria School District, the parties agreed on the relevant local Schedule "A" language.

7. In Paragraph 22 of the MOA, it was agreed that school districts "will make best efforts to achieve compliance with the collective agreement provisions regarding class size and composition for the commencement of the 2017/2018

school year and thereafter." "Best efforts" was non-exhaustively defined and includes reorganizing the existing classes within schools to meet any class composition language, "where doing so will not result in a reduction in a maximum class size" by more than the numbers specified in paragraph 22(D) (five in K-3, four in certain secondary labs and shops, and six in all other grades) ("the Floors"). In addition, a specific Floor of 14 students was set for K-1 split classes in seven named school districts (hereafter "the Excepted Districts"). Finally, it was agreed that these class size reductions "shall not preclude a Superintendent from approving a smaller class."

8. In paragraph 23, the Provincial Parties recognized that notwithstanding best efforts, there might still be non-compliance, again with a non-exhaustive list of possible reasons. Paragraphs 24 and 25 set forth remedies and a dispute resolution process.

9. The foregoing is merely a summary of the most pertinent provisions of the MOA. For contextual completeness, the full MOA is attached to this award as an appendix.

10. GVTA grieved on October 20, 2017, alleging that classes were not compliant with the collective agreement and the provisions of the MOA. It was asserted that the Greater Victoria District failed to make best efforts as required by paragraph 22. I was appointed as arbitrator on April 5, 2018 and at the request of the parties, there was an intensive case management and mediation process. The result was a Consent Order dated January 30, 2019 resolving outstanding issues for both the 2017/18 and 2018/19 school years, except for two

interpretation issues, both relating to paragraph 22(D) of the MOA. These matters were remitted to arbitration.

11. The first interpretive question was framed as follows by the parties:

> Whether the maximum class size referred to in section 22(D) of the MOA refers to the unadjusted class size under article D.1.1 of the collective agreement between the Board and the Association, or to those class sizes reduced by other articles.

12. Article D.1 of the collective agreement is entitled "Class Size and Class Composition." Article D.1.1 lists a "Class Size Limit" for a series of grades from Primary 1 (20 students) to Secondary (30 students), with specific provision for split classes and various particular subjects or programs, as follows:

D1.1 Class size limits for the allocation and deployment of classroom teachers shall be:

	Class Size Limit	Teachers Total Student Load
Primary 1 (K)	20	
Primary 2-4 (Grades 1-3)	25	
Multiage, Primary Split	23	
Intermediate 1-4 (Grades 4-7)	29	
Multiage Intermediate Split	26	
Secondary (8 to 12)	30	210
Except:		
English/Socials	25	175
Computer Science	25	175
Science Labs/Home Ec.	24	168
I.E. Workshop	22	154
Min. Essentials	20	140
Special Education		
Mildly Mentally Handicapped MMH – Formerly Program 1	12	
Severe Learning Disabled SLD – Formerly Program 2	12	
Severe Behaviour Disorder SBD- Formerly Program 3	10	
Hearing Impaired	8	
Trainably Mentally Handicapped TMH	8	

The following class size language is significantly affected by the "Memorandum of Agreement – K-3 Primary Class Size" which is appended to this Agreement.

Subject to the terms of the Agreement in Committee (as attached) the **basics** of the Memorandum provide the following **maximum class sizes**:

	98-99	99-00	00-01
K	20	20	20
1	25	23	22
2	23		22
3	23		22

For further details on split classes and other details, the actual Memorandum should be consulted.

In the event of non-renewal of this Memorandum of Agreement on Primary Class Size (K-3), class size and composition provision(s) in the Previous Collective Agreement shall continue to apply.

13. Article D.1.3 and D.1.4 provide for situations where class size may be either smaller or larger than the class size limits stated in Article D.1.1, as follows:

D.1.3 When students with special needs are integrated into a regular class, that class shall be smaller than the class size limit and the flexibility factor will not apply.

D.1.4(a) The above class size limits shall be established as soon as possible after the opening day of school. Additional enrolment after September 30

> may result in class size limits being exceeded by up to a maximum of two students in the elementary grades.

14. Thus, Article D.1.3 provides for smaller classes when special needs students are integrated. The clause itself does not specify a number but it was agreed by the parties that in Article D.1.3, the words "that class shall be smaller" mean the class will have one less student than the class size limit. This was referred to by the parties as a "Click-Down".

15. Article D.1.4(a) allows class size limits to be exceeded due to additional enrolment after September 30. This was referred to by the parties as a "Flex Factor" and has sometimes been called a "fudge factor". This provision recognizes that after September 30, the school year is well underway and it is more difficult to make changes for purposes of adherence to class size limits. However, as stated in Article D.1.3, the Flex Factor does not apply when there are special needs students in a regular class.

16. Article D.3 deals with Mainstreaming and Integration. Clause D.3.7 states that "the Board shall make every effort to ensure that no more than two students with special needs are integrated in any regular classroom at the same time."

17. The foregoing represents the basic framework in which the disputed interpretive question has arisen. These are complex arrangements. In practice, administration of the MOA and collective agreement has been challenging. During mediation, the parties made remarkable progress in reaching a practical resolution to the grievance. They settled most issues relating to class size and composition for both the 2017/18 and 2018/19 school

years. Clarifying the first interpretive question, with the issuance of this award, will further assist the parties going forward.

MOA Floors and the Click-Down

18. As noted, the present dispute between the parties is whether the maximum class size referred to in paragraph 22(D) of the MOA refers to the unadjusted class size under Article D.1.1 of the collective agreement, or to those class sizes reduced by other articles. The Employer takes the former interpretation and the Union urges adoption of the latter.

19. The Union submits that when there are special needs or "designated" students in a regular class, first the Click-Down should be applied to adjust the maximum class size, and then the MOA reduction should be applied. Under this approach, the Floor will be lower due to the Click-Down. Put another way, the District will be required to reorganize using smaller classes, which is more costly and operationally challenging. In the Employer's view, Floors should be calculated using the unadjusted maximum class size limits set out in Article D.1.1 of the restored language, *ie*, without any Click-Down.

20. The following chart, adapted from Exhibit 5, illustrates the various maximum class sizes and the respective positions of the parties regarding reductions pursuant to paragraph 22(D) of the MOA:

Elementary	Class Size No Designated	Class Size 1 or 2 Designated	Employer Floor <3 Desig.	Union Floor <3 Desig.
Kindergarten	20	19	15	14
K/1 Split	20	19	15	14
Grades 1-3	22	21	17	16
Primary Split	22	21	17	16
Grade 3-4 Split	24	23	18	17
Grades 4-5	29	28	23	22
Intermediate Split	26	25	20	19

Middle	Class Size No Designated	Class Size 1 or 2 Designated	Employer Floor <3 Desig.	Union Floor <3 Desig.
Grades 6-7	29	28	23	22
Grade 6/7 Split	26	25	20	19
Grade 8 General	30	29	24	23
Grade 7/8 Split	25	24	19	18
Grade 8 Eng/SS/ Com Sc.	25	24	19	18
Home Ec.	24	23	20	21
IE Workshop	22	21	18	17

Secondary	Class Size No Designated	Class Size 1 or 2 Designated	Employer Floor <3 Desig.	Union Floor <3 Desig.
Grades 9-12 Except:	30	29	24	23
English/Socials	25	24	19	18
Computer Science	25	24	19	18
Science Lab/Home Ec.	24	23	20	19
IE Workshop	22	21	18	17

21. This dispute calls for an interpretation of paragraph 22(D) in the context of the best efforts provisions, the MOA as a whole and the collective agreement between the parties. In full, paragraph 22 of the MOA states as follows:

> *Best Efforts to Be Made to Achieve Compliance*
>
> 22. School Districts will make best efforts to achieve full compliance with the collective agreement provisions regarding class size and composition for the commencement of the 2017/2018 school year and thereafter. Best efforts shall include:
>
> A. Re-examining existing school boundaries;

B. Re-examining the utilization of existing space within a school or across schools that are proximate to one another;

C. Utilizing temporary classrooms;

D. Reorganizing the existing classes within the school to meet any class composition language, where doing so will not result in a reduction in a maximum class size by more than:

- five students in grades K-3;
- four students for secondary shop or lab classes where the local class size limits are below 30, and;
- six students in all other grades.

These class size reductions shall not preclude a Superintendent from approving a smaller class.

Note: For the following School Districts, class sizes for K-1 split classes will not be reduced below 14 students:

- School District 10 (Arrow Lakes)
- School District 35 (Langley)
- School District 49 (Central Coast)
- School District 67 (Okanagan-Skaha)
- School District 74 (Gold Trail)
- School District 82 (Coast Mountain)
- School District 85 (Vancouver Island North)

E. Renegotiating the terms of existing lease or rental contracts that restrict the School District's ability to fully comply with the restored collective agreement provisions regarding class size and composition;

F. Completing the post-and-fill process for all vacant positions.

Employer argument

22. By agreement, the Employer presented its argument first, without prejudice to the onus of proof. There was an exchange on the question of whether or not the Union, as the grieving party, bore a special burden to establish its interpretation of the collective agreement in this case. Counsel for the parties stipulated for present purposes that there is no such onus on the Union. The objective here is to ascertain the intent of the parties and thereby determine the correct interpretation of the provisions in dispute.

23. The Employer summarized its position as follows (Written Argument, para. 6):

> 1. A reading of the MOA as a whole, and the plain language of Article 22.D, does not support the Union's position. The Class Size Limits, as modified for K-3 in the MOA, are the only maximum class size limits defined in the Restored Language and the MOA.
>
> 2. A purposive interpretation weighs in favour of the Employer. Article 22.D requires the Employer to use Best Efforts to meet class composition language. Class composition language, in this context, refers to the Click-Down. The mutual intention of the Parties in the MOA was to address the effect of the Click-Down by introducing a uniform threshold in the MOA. The threshold is intended to ensure that Best Efforts to meet the various forms of composition language in the restored languages across School Districts did not result in unreasonably small class sizes. The Floor was thus contemplated as a limit on an unbridled reduction to class size. Calculating the Floor on the Adjusted Class Size essentially applies the Click-Down to the very thing, the Floor, which was intended to limit its effect.

3. The interpretations sought by the Union would result in significant anomalies, including the following:

    i. In School Districts where the click-down language in the collective agreement places no limit on how small class sizes may become, the interpretation sought by the Union results in the Floor being calculated on a perpetually moving target of the Adjusted Class Size rather than on the permanent Class Size Limits. In such a circumstance, the Floor would serve no purpose as it would move in tandem with the Adjusted Class Size;

    ii. The Union's interpretation would result in different Floors between School Districts, between schools, and between classrooms of the same grade within the same school, and in the same classroom over time;

    iii. The interpretation sought by the Union would result in the Floor being in a perpetual state of flux depending on whether designated students were added or removed from a class; and

    iv. If the Union's interpretation that the Floor ought to be calculated on the Adjusted Class Size is accepted, the same interpretation would naturally apply to all adjustments to class size in the MOA, including Flex Factor language. The effect would be that the Reduction Factor would be applied to a class size larger than the Class Size Limit and the Floor would be higher, despite the fact that designated students are included in the classroom along with more non-designated students. This necessary conclusion adds another layer of non-uniformity and further demonstrates the absurdity of the Union's position and how it would result in scenarios counter to the Restored Language, the MOA and the Parties' intentions at the bargaining table.

24. The Employer observed that there is no ambiguity in the GVSD-GVTA collective agreement language on maximum class size. Article D.1.1 sets out class size limits. The MOA revised class size limits for K-3, incorporating them in local agreements, but otherwise the MOA restored local collective agreement language. The MOA was a provincial agreement and paragraph

22 (D) reveals no intent to apply different standards in different school districts, aside from the note dealing with K-1 splits in the Excepted Districts. It therefore follows that when the MOA refers to "reduction in a maximum class size", this means a reduction from the stipulated maximums in Article D.1.1.

25. The Employer emphasized the impracticality of shifting Floors, given the manner in which school districts do their planning in the spring, followed by adjustments in September when students actually arrive in schools. The Click-Down is modest under the Greater Victoria agreement but there are some districts where class size clicks down for every designated student, such that the Click-Down could be unlimited. The result would be absurdly small classes, contrary to the whole purpose of the Floors.

26. The Employer's position was consistent with the *LOU Memorandum of Agreement Interpretation Guide* produced by BCPSEA in April 2017 (Ex. 2B). The Employer stated that the Guide was available to the Union and no objection was received until the current proceeding. As a result, according to the Employer, the Guide should be taken into account. Counsel acknowledged the Guide was a unilateral Employer publication not endorsed by the Union. The Guide itself states (at p. 2) that it "provides guidelines only and does not replace established collective agreement interpretation."

27. The Employer cited *Mission School District No.75 v. CUPE, Local 593*, [2002] B.C.C.A.A.A. No. 399 (Foley) at para. 49-51, adopting the well-known *Pacific Press* award by Arbitrator Bird, for general principles of interpretation. In *Health Employers Association of British Columbia v.*

Hospital Employees' Union, [2002] B.C.C.A.A.A. No. 130 (Gordon), the guiding principles of interpretation were summarized as follows (at para. 13-15):

> The task for this Board is to determine the meaning which was mutually intended by the parties for the words they used in their collective agreement. In fulfilling this task, arbitrators adhere to certain rules of interpretation including the following.
>
> The primary resource for interpretation is the collective agreement. The search for the purpose of a particular provision may serve as a guide to interpretation. Significant benefits and obligations are likely to be clearly and unequivocally expressed in the language used by the parties. When interpreting two provisions, a harmonious interpretation will be preferred to a conflicting one. Wherever possible, all words and provisions should be given meaning. Words in the agreement should be viewed in their normal and ordinary sense unless that would lead to some uncertainty or inconsistency with the rest of the collective agreement or unless the context establishes the words were used in another sense. The words used in the collective agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole. When faced with the choice between two linguistically permissible interpretations, the reasonableness and administrative feasibility of each may be considered. Additionally, the parties are presumed to be aware of relevant jurisprudence.
>
> Where extrinsic evidence shedding light on the parties' mutual intention is proffered, arbitrators consider both the language of the disputed provision and the extrinsic evidence when determining whether there is any *bona fide* doubt or ambiguity about the meaning of the language in the agreement. If, after considering the language and the extrinsic evidence, the arbitrator finds there is no doubt about the proper meaning of the provision, the arbitrator will reach an interpretive judgment without regard to the extrinsic evidence. On the other hand, if the arbitrator finds there is some doubt about the proper meaning of the disputed provision, the arbitrator is entitled to, but need not, use the extrinsic evidence to resolve the ambiguity. See *Nanaimo Times Ltd. and Graphic Communications International Union, Local 525-M,* [1996] B.C.L.R.B.D. No. 40, BCLRB No. B40/96 (upheld on reconsideration [1996] B.C.L.R.B.D. No. 151, BCLRB No. B151/96).

28. In the present case, context is important, said the Employer. The grievance was filed under the GVSD-GVTA collective agreement but the MOA is province-wide, with impacts on many districts. About 40% of districts have a Click-Down and 70% have a Flex Factor in their agreements. The Employer stressed that the parties would not have agreed to language that created significant anomalies or unworkable results. If there are two linguistically permissible interpretations, arbitrators are guided by the reasonableness of each possible interpretation, administrative feasibility and whether one of the interpretations would give rise to anomalies: *Teck Coal Ltd. (*Fording *River Operation) v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, Local Union 7884*, [2013] B.C.C.A.A.A. No. 112 (MacDonald) at para. 32.

29. In its primary submission, the Employer relied upon the plain and ordinary meaning of the relevant provisions. Paragraph 22(D) allows a reduction in "maximum class size" by not more than the specified number of students. Restored Article D.1.1 expressly establishes maximum class size limits: "Class size limits for the allocation and deployment of classroom teachers shall be …". For K-3, there is a modifying text box overlaid on Article D.1.1 as an interpretive aid, also referencing "maximum class sizes". This wording makes clear that when the Provincial Parties spoke of "reduction in a maximum class size" in paragraph 22(D), they meant the class size limits in the restored language, *ie*, Article D.1.1.

30. Under the Click-Down provision in Article D.1.3, when special needs students are integrated into a regular class, "*that class* shall be smaller than the class

size limit …". The effect of the Click-Down is understood by reference to the stated class size limits. The Click-Down does not create a *new* class size limit but rather, a requirement that a classroom with special needs students must be *smaller* than the existing class size limits. The Union position entails two or more sets of class size limits but this is directly contrary to the plain language of the MOA and the collective agreement. Nowhere in the MOA or the restored language is there any reference to a second, adjusted maximum class size. The arbitrator should apply the plain and ordinary meaning of the language.

31. In its second main submission, the Employer called for a purposive interpretation of the MOA and the collective agreement. Paragraph 22(D) requires school districts to meet class composition language by reorganizing classes but not to the extent that maximum class sizes drop below the defined Floors. The clear purpose was to avoid unreasonably small class sizes. In the seven "Excepted Districts", for K-1 split classes, the restored local language would have resulted in maximum class sizes lower than the MOA, given that paragraph 17 provides that superior class size clauses shall apply. Applying a reduction factor of five students to set Floors in the Excepted Districts, the Floors could have ranged from 10 to 13 students (Ex. 2B, Arrow Lakes, "below the provincial average"; Ex. 2E, Langley, maximum 15: Ex. 2H, Central Coast, maximum 15; Ex. 2J, Okanagan Skaha, maximum 15; Ex. 2K, Gold Trail, maximum 18; Ex. 2L, Coast Mountains, maximum 16; Ex. 2M, Vancouver Island North, maximum 17).

32. The Employer emphasized this negotiated exception for the Excepted Districts whereby K-1 split classes will not be reduced below 14 students. If

the Union's position should be adopted, the parties' intent to avoid unworkably small classes would be defeated. Strangely, the Excepted Districts would be the only ones with a uniform Floor, regardless of Click-Down. The Employer argued that these results would be illogical and starkly contrary to the evident intent of the parties.

33. Similarly, said the Employer, the results would be anomalous for secondary shop or lab classes under the Union interpretation. To illustrate, the Employer compared two districts with a Class Size Limit of 30 for labs and shops. One district has Click-Down language and the other does not. The district with Click-Down and a designated student in the class would have a reduction factor of four (second bullet in 22(D)) and a Floor of 25 (30-1-4=25). A district without Click-Down in its agreement would have a reduction factor of six (third bullet, "all other grades") and a Floor of 24 (30-6=24). The scenario with a designated student yields a higher Floor. In the Employer's submission, "maximum class size" in paragraph 22(D) must mean the unadjusted class size, to avoid illogical effects and achieve the intent of the parties.

34. Next, the Employer noted that the intent of paragraph 22(D) was to create a uniform maximum reduction in class sizes by way of defined Floors. This was necessary, in part, because of concerns arising from Click-Down language in various local agreements. However, the Union's position leads to an absurd result. Due to the application of Click-Down under paragraph 22(D), class sizes may fluctuate as more designated students are included in a classroom or removed from the class. Applying the reduction factor to a moving target would cause the Floor to move in tandem with class size. A

moving Floor serves no purpose as it merely mirrors the movement of the class size rather than enforcing a threshold.

35. The absurdity is pronounced in districts where the Click-Down can result in unlimited reductions in class size, which negates the whole notion of a Floor. The Employer cited School District No. 58 (Nicola-Similkameen), where the agreement provides as follows (Ex. 2-2I):

> 1.5 Administrative officers shall make reasonable efforts to ensure that no more than two (2) low incidence or severe behavioural students (as identified by the Superintendent of Schools and agreed to by the Ministry of Education) are placed in any one regular class. Where there are more than two (2) students as defined above or severe learning disabled in a class, class size as listed in Article D.1.3 will be reduced by one (1) student for each additional such student.

36. In School District No. 85 (Vancouver Island North), the agreement states as follows (Ex. 2-2M):

> 1.1.5 Where one or more low incidence exceptional children, as defined in Article G.5.l.l, are in a regular class, the class size limits shall be reduced by one for each low incidence exceptional child.

37. Similarly, in School District No. 33 (Chiliwack), Article D.1.5 provides (Ex.2-2D):

4.

5. Class size limits shall be two (2) less than the number stated in D.1.1 for each low incidence student included in a regular class for fifty percent (50%) or more of the instructional day. With respect to visually and hearing impaired students, it is understood that this refers to profound impairment.

38. Class sizes would rapidly decrease under such Click-Down language as a greater number of students are designated. Classes could be tiny. If the Floor were to be calculated by applying the reduction factor to the Adjusted Class Size in any of the above-noted school districts, then Article 22(D), which on its face was intended to thwart unreasonably small class sizes, would require the Employer to reduce an already adjusted class size. Furthermore, that Floor would change with each additional designated student added or removed from a class. The MOA Floor provisions would be rendered meaningless, said the Employer.

39. The Employer acknowledged that some Click-Down provisions contain an internal limit on reductions. School District No. 93 (Conseil scolaire francophone), for example, has the following Click-Down language in Article D.3.5 (Ex. 2-2N):

> b. A teacher of any regular classroom shall not be required to enrol more than three (3) special needs students. Up to one (1) special needs student with severe behavioural disorder, as defined by the Ministry of Education guidelines, may be among the three (3) students.
>
> b. Class size limits shall be two (2) less than the number stated in the class size and composition article for each low incidence student included in a regular class with respect to visually and hearing impaired students, this refers to profound impairment.

40. In the present case, the local parties have agreed on the interpretation of Article D.1.3 of the GVSD-GVTA restored language, such that the first designated student in each class counts as two non-designated students and the class size adjustment is limited to one less student, regardless of how many designated students are actually in the class. Still, said the Employer, even

with such internal limits, the Union position creates an anomaly. It results in a moving Floor to the point of the internal limit.

41. The Union's interpretation would result in a further anomaly in that the Floor would differ between school districts with different Class Size Limits, and between schools and classrooms of the same grade within a school, depending on how many designated students were placed in a classroom. The Floor would continue to shift as classes were reorganized, students were added or removed from a classroom, or as students were designated. Apart from the impracticality of organizing compliant classrooms within such a system, this result would contradict the parties' intention to create a uniform reduction factor to address the effects of the various forms of composition language among school districts. The intent was to prevent restoration from requiring unsustainably low class sizes.

42. Beyond that, if the Floor is to be calculated on the Adjusted Class Size and includes Click-Down, the same logic presumably must apply to all adjustments in the MOA, including Flex Factor language, said the Employer. The Floor could actually be higher in districts with Flex Factor language. As examples, the Employer cited School District No. 5 (Southeast Kootenay), Article D.44 and D.46 (Ex.2-2A); School District No. 42 (Maple Ridge & Pitt Meadows), Article D.2.2.2 (Ex. 2-2F); and School District No. 43 (Coquitlam), Article D.2.3 (Ex. 2-2G). A raised Floor could occur despite the fact that designated students are included in the classroom, depending on the language. This adds yet another layer of non-uniformity. The Employer argued that this possibility shows the absurdity of the Union's position. It

would result in scenarios in contrary to the intention of the parties at the bargaining table.

Union Argument

43. The Union did not take issue with the general principles of interpretation cited by the Employer. Like the Employer, the Union relied upon the plain and ordinary meaning of the language in question. The parties are presumed to have intended what they said: Brown, Beatty & Deacon, *Canadian Labour Arbitration*, 4th ed. at 4:2100; Snyder *et al*., *Palmer & Snyder: Collective Agreement Arbitration in Canada*, 6th ed., at 2.10 – 2.12.

44. The Union summarized the lengthy history of conflict between BCTF and government, as follows, and suggested this be considered in determining the current interpretive issue (Written Argument, para. 6-11):

> Provisions broadly similar to those found in D.1 were negotiated in local bargaining between other school districts and local teacher associations in various rounds of local bargaining between 1987 and 1994. Commonly these provisions establish base class sizes (like D.1.1), which may then be adjusted downwards (as per D.1.3) or upwards (as per D.1.4), depending on a variety of factors. These provisions also commonly address class composition - the maximum number of students with various special needs in a class (as per D.3.7).
>
> After province-wide bargaining was introduced by the *Public Education Labour Relations Act* ("PELRA") in 1994, these locally negotiated class composition provisions were rolled into the transitional 1996-1998 provincial collective agreement. They were then continued in the 1998-2001 provincial collective agreement, together with certain provincially negotiated class size provisions and non-enrolling staffing ratios.

In the summer and fall of 2001, the parties bargained to renew the 1998-2001 collective agreement. At that time BCPSEA was aware that government officials viewed class size and class composition provisions as inappropriate matters for collective bargaining and it was secretly consulted by the government on the development of the legislative policy in that regard, and bargaining consequently reached an impasse. The facts in this regard are set out in *British Columbia Teachers' Federation v. British Columbia,* 2011 BCSC 469.

On January 23, 2002, the Union applied to the Labour Relations Board ("LRB") seeking an order requiring BCPSEA to bargain in good faith. Two days later the government tabled the *Education Services Collective Agreement Act,* SBC 2002 c.1 ("Bill 27") which imposed a new collective agreement and the *Public Education Flexibility and Choice Act, SBC 2002 c.1* ("Bill 28") which voided collective agreement provisions dealing with various subject matter, including class size and composition. Bill 27 and 28 were passed on January 27 and 28, 2012 and the LRB dismissed the Union's application by concluding that Bills 27 and 28 rendered the Union's application moot. The facts in this regard are set out in *British Columbia Teachers' Federation v. British Columbia,* 2011 BCSC 469.

Bill 28 also set up an arbitration process to identify the specific collective agreement provisions that had been voided. An arbitrator was appointed and issued a decision (the "Stripping Award"). However, the BCTF successfully challenged the Stripping Award in Court (*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2004 BCSC 86). The Government then enacted the *Education Services Collective Agreement Amendment Act,* SBC 2004 c.16 ("Bill 19") which amended Bill 27 to specifically delete various collective agreement provisions. The BCTF then successfully challenged portions of Bill 28 and Bill 19 in Court (*British Columbia Teachers' Federation v. British Columbia*, 2011 BCSC 469). The Government then passed the *Education Improvement Act*, SBC 2012, c.3 ("Bill 22") which re-enacted the same amendments to Bill 27 that Bill 19 had enacted.

In 2016 the Supreme Court of Canada invalidated the parts of Bill 22 that voided the class size and class composition provisions (*British Columbia Teachers' Federation v. British Columbia*, 2016 SCC 49). The parties subsequently entered into the MOA.

45. The Union noted that a variety of terms were used by the parties to express the nominal or base class size limits. Moreover, depending on the circumstances and the other terms of the collective agreement, the numbers may increase or decrease. Under the Greater Victoria language, there is not a great deal of variation – Click-Down by one, Flex Factor increase by up to two. However, in other local collective agreements, there are different base numbers and different variations, both up and down.

46. As examples, the Union referred to the following. In School District No. 5 Southeast Kootenay, class size maximum may be exceeded by two students when the principal, considering an elementary student's educational needs, cannot reassign the student to another smaller class in the school or reassign to an adjacent school: Ex. 3-5, Article D.44(e). In School District No. 23 (Central Okanagan), maximum class size guidelines can be exceeded by 10% before any staffing assistance must be provided: Ex. 3-23, Article D.1.4. In School District No. 37 (Delta), maximums may be exceeded by no more than two students: Ex. 3-37, Article D.8.5.

47. In School District No. 35 (Langley), class size guidelines shall not be exceeded by more than three pupils in grades 4-12, with an exception for "Changes in government funding which cause maintenance of class size guidelines to be beyond the Employer's control": Ex. 3-35, Article 80.3(iv). The Langley agreement also provides for emergency assignment of a student to a classroom by the principal where she believes there is no immediate practical alternative, for up to two weeks: Article 80.5. Langley further provides for a Click-Down when students with learning disabilities or emotional disorders are included in the class: Article 82.3(c).

48. In School District No. 36 (Surrey), maximum class sizes are subject to the availability of government funding: Ex. 3-36, Article 22.22. There is a Click-Down in Article 22.254 and a detailed Flex Factor in Article 22.30.

49. The Union said that there is a diversity of provisions for reducing class size in various districts. The weightings are varied. There are agreements in which class size is reduced by two per special needs student. Sometimes the presence of designated students has the effect of shielding against an upward flex, as in Greater Victoria Article D.1.3 and Surrey Article 22.254. It all depends on what was negotiated during the 1987-94 period between local teacher associations and the school districts.

50. The overall picture shows a multitude of permutations across the spectrum of school districts.

51. The Union submitted that the most relevant interpretive principle, not mentioned by the Employer but well established in the arbitral jurisprudence on class size and composition, is that clear language is required to restrict the application of class size limits, which are negotiated benefits for teachers: *Vancouver School District No. 39 and Vancouver Teachers' Federation*, [1993] B.C.C.A.A.A. No. 373 (Greyell); *British Columbia Public School Employers' Association and British Columbia Teachers' Federation*, [1999] BCCAAA No. 370 (Taylor) (hereafter "*BCPSEA*"); *Vancouver School District No. 39 and Vancouver Teachers' Federation*, [1999] B.C.C.A.A.A. No. 467 (Jackson); *British Columbia Public School Employers' Association and British Columbia Teachers' Federation (Class Size Limits for Combined Primary and Primary/Intermediate Classes)*, [2000] B.C.C.A.A.A. No. 43

(Dorsey) (hereafter "the Dorsey award"). The Union argued that the MOA was bargained against the backdrop of this established legal principle.

52. In *Vancouver School District* (Greyell), the employer exceeded class size limits for classes with special needs students. The employer sought to rely on a fudge factor clause in the agreement, as follows:

> Subject to Clause C. below, after an elementary school has been in session for twenty (20) teaching days the class size limits set out above shall have been met. The limits may be exceed subsequently, but not by more than two (2) pupils, due to an influx of pupils new to the school.

The arbitrator upheld the grievance and applied the following principles of interpretation (at para. 12):

> The class size limit language contained in Article 9.B. is couched in mandatory, not permissive, language. The opening words of the Article provide generally that class size "shall be" of a certain size. In view of this language (under which the parties have operated under for a least several Collective Agreements) I am of the opinion that express and clear language is needed to create an exception. As Arbitrator Chertkow stated in an early case between these parties *School No. 39 (Vancouver) and Vancouver Teachers Federation*, (Unreported, May 8, 1990):
>
> > I concur with counsel for the employer that disputed language in a collective agreement must be interpreted in a purposeful fashion. I am persuaded on the evidence that the class size limits set out in article 9 constitute a restriction on management's right to assign work to teachers in the Vancouver School District at its pleasure, including in the instant case, the assignment to Ms. Colvin.
> >
> > I am also persuaded that the workload limits must be construed as a benefit attained by teachers in collective bargaining. So too, in my view, the language of the relevant provisions is clear and unambiguous as to the extent and meaning of those benefits. Thus,

> the *Noranda* and *Wire Rope* cases, *supra*, cited by Mr. Francis are not applicable to the instant dispute.

53. In *BCPSEA, supra*, the dispute arose from a legislated provincial collective agreement (the PCA) consisting of four documents, one of which was the Memorandum of Agreement K-3 Primary Class Size (hereafter "the K-3 MOA"). The PCA provided that terms and conditions of the previous collective agreement continued, except where modified. It also provided that where the previous agreement contained additional or superior provisions, those provisions would remain part of the PCA. In the K-3 MOA, the parties committed to reducing class size in the primary grades and to providing funding to achieve that objective. Maximum class sizes were stipulated but there was no reference to classes containing children with special needs. As stated by the arbitrator (at para. 13), the objective of the K-3 MOA was "to improve working and learning conditions by placing lower limits on classes with young children." The arbitrator was called upon to interpret section 11 of the K-3 MOA, which stated as follows:

> Where class size or workload maximum/restrictions contained in the Previous Collective Agreement are lower than those provided in this Memorandum of Agreement, the maximums from the Previous Collective Agreement shall apply.

54. In *BCPSEA*, the employer position was that the phrase "class size or workload maximum/restrictions" in section 11 referred to the entirety of previous collective agreement provisions which were relevant to determining the applicable class size maximum for a particular class, such as integration language which required adjustments in light of class composition. The employer said that the prior limits would continue only if they were lower

based on the application of the previous agreement, as a whole, to a particular class (para. 19). In other words, the employer argued for a comparison based on adjusted maximums. By contrast, BCTF said that integration provisions were not relevant to the section 11 process. The comparison should be based on unadjusted levels (para. 20). However, BCTF further argued that integration provisions (the local Click-Down provisions) must be applied to whichever version is lower: "Integration provisions must be applied directly to the MOA class size maximums or to the pre-existing class size maximums where those maximums, unadjusted, are lower than the MOA maximums" (para. 20). The employer disagreed and countered that the PCA was not intended to pyramid prior collective agreement provisions on integration with K-3 MOA class size maximums (para. 37).

55. The Union in the present case cited the following passages from *BCPSEA* addressing the context of the PCA and the public policy objectives at play (at para. 39-50):

> **39** No contracts are made in a vacuum. There is always a setting in which they have to be placed. It is instructive to look beyond the language and consider the context in which the words were used and the object appearing from that context which the draftspersons had in view.
>
> **40** If not all, then the overwhelming majority of Local Agreements in British Columbia contain basic class size limits. Those provisions have been interpreted by arbitrators in a purposeful manner as benefits for teachers and students to preserve a positive learning environment …

41 Most Local Agreements contain additional provisions which address class composition where children with special needs are introduced into the class. Many, but by no means all, of those agreements require a reduction of the allowable class size in order to support the philosophy of mainstreaming and integration of children with mental and physical disabilities in the classroom. Many other Local Agreements do not provide for a reduction in the allowable class size but do contain provisions designed to provide support to classroom teachers in other ways such as limits on the number of special needs children per class, assistance from care aides or other support staff and involvement of school-based team members.

42 The bargaining of mainstreaming and integration language in collective agreements was the result, in large part, of the Ministerial Order 150-89 which formalized the Government's commitment to educate special needs students in regular classrooms wherever possible …

43 The Terrace and Mission agreements in evidence in these proceedings … are examples of collective agreements which stipulate allowable class sizes with additional provisions requiring a reduction of the allowable class sizes to provide teachers with assistance to meet the "extra challenges" arising from mainstreaming and integration …

44 The purpose of these additional provisions is to support the public policy of requiring school districts to provide special needs students with an educational program in classrooms where such students are integrated with other students who do not have special needs …

45 In *Board of School Trustees of School District No. 62 (Sooke) and Sooke Teachers' Association*, [1995] B.C.C.A.A.A. No. 27, Arbitrator McPhillips observed:

> The issue of the integration of students with special needs into regular classrooms is and was a critical issue for the parties in bargaining. (p.27)

46 He went on to say that the reduction in allowable class sizes where special needs students are introduced into the class was:

> ...clearly designed to put a limit on the work-load of the teacher in certain circumstances. The teachers wished to ensure that the integration of special needs students did not affect the quality of the education of both the regular and special needs students as well as unfairly increasing the workload of the teacher. (p.27)

47 That purpose, concluded Mr. McPhillips, must be considered when construing class size and composition provisions.

…

50 The Ministerial Order promulgated under the *School Act* concerning mainstreaming and integration … remains in effect. Most Local Agreements in British Columbia continue to contain provisions which address this philosophy in addition to the basic class size limit provisions. It is within this context that the PCA came into existence.

56. The Union noted that the Ministerial Order cited in *BCPSEA* in 1999 remains in effect today. In the result, Arbitrator Taylor upheld the BCTF position and concluded as follows (at para. 69, 72):

> **69** The purpose of Articles A.1.3 and A.1.4 of the PCA is to ensure that specific provisions, previously affording benefits to teachers, are not lost by the operation of the PCA; those benefits may be superior to those contained in the PCA or may be benefits in addition to those provided in the PCA. In the face

> of that, it would take clear language to eliminate the benefit to teachers from the mainstreaming and integration of special needs students. That clear language is not present.
>
> …
>
> **72** Considered as a whole, the PCA provides that pre-existing benefits continue except as they may be expressly replaced by the PCA. The MOA does not encroach on the provisions of Local Agreements which are additional provisions designed to address the consequences for teachers and children of the mainstreaming and integration principles embraced by the parties. Had the intention been to restrict or eliminate the additional assistance accorded teachers with special needs students, clear language would have been used given the importance of mainstreaming and integration issues in the bargaining relationship of these parties.

57. The Dorsey award, *supra* (at para. 9), alluded to Arbitrator Taylor's finding that there was no clear language eliminating the benefit negotiated by teachers. Dealing with the issue of combined class sizes under the K-3 MOA, Arbitrator Dorsey stated as follows (at para. 56):

> … What are the "class size or workload maximum/restrictions" referred to? They are not simply the base numbers in a local agreement for primary classes without any agreed adjustments or other restriction which apply to those numbers because of combined grades. They are the entirety of the class size limits and restrictions in the local agreement.

58. Similarly, in *Vancouver School District No. 39 and Vancouver Teachers' Federation* (Jackson), *supra*, it was confirmed (at para. 9) that "a purposive interpretation is appropriate to class size and composition provisions which provide a benefit to teachers … Restrictions on these benefits should not be implied … ." In the present case, "maximum class size" in paragraph 22(D) of the MOA should be interpreted as the class size adjusted pursuant to the Click-Down in Article D.1.3. The benefit of the Click-Down cannot be

restricted without clear language, said the Union. Considering the full context, as set forth in the authorities cited above, it makes no sense to use merely nominal numbers for "maximum class size", without adjustment for the entirety of the collective agreement regime.

59. Responding to the Employer submission relating to the seven Excepted Districts, the Union said that if further exceptions or restrictions were intended, the parties could easily have added them to the MOA, but this was not done. The parties did address exceptions to the Floors and this is the sum total. No inferences can be drawn from the Excepted Districts. Some of them could not have been reduced to class sizes below 14 students so it is not apparent why the parties used a limit of 14 students. Again, clear language is needed to restrict negotiated teacher benefits and there is none here.

60. The Union responded to the Employer submission that applying the Click-Down to Floors would or could result in non-viable, small classes. While not accepting this factual argument, the Union said that the improvidence of a bargain is not a proper arbitral consideration. This is especially true given the tortured history between the parties whereby class size was negotiated, stripped and restored over an extended period of time. In brief, operational problems are irrelevant at this stage. The same response applies to the Employer concern that Floors may be shifting, causing administrative challenges. The Flex Factor also causes shifts but the Employer finds the Flex advantageous and has no objection in that regard. Remedy is paid after applying the Flex Factor.

61. The Union cited *British Columbia School District No. 88 (Terrace) and Terrace District Teachers' Union (Rosengren Grievance)*, [1997] B.C.C.A.A.A. No. 185 (Korbin), a case on the application of a Flex Factor, in which the union grievance succeeded despite absurdities and anomalies alleged by the employer in the union's position (para. 25-26). "In the final analysis, this case must be determined on the language chosen by the parties to reflect their consensus" (at para. 28).

62. Finally, as for the meaning of the phrase "maximum class size" in paragraph 22(D), the Union said there is no reason it should not be read as including a Click-Down. Local agreements have various provisions dealing with special needs students, and the presence of these students may cause a reduction in class size or the necessity to create a new, smaller class. Thus, Click-Down is a class size issue. It is properly included in the paragraph 22(D) process of reducing maximum class size. The local agreements themselves are varied in their structure. Ultimately, the present case ought to be decided on the "clear language" principle that emerged long ago from the arbitral jurisprudence concerning class size and composition. The kind of restriction sought by the Employer in the MOA must be expressly negotiated.

Employer reply argument

63. In reply to the Union submission that only clear and express limitations will be recognized, the Employer said that the MOA provisions in issue do constitute a clear limitation on fully restored language, where compliance may not be possible. Therefore, this interpretive principle does not assist the Union.

64. The Union's historical review of the stripped agreements and ensuing litigation is not germane. The events did occur as recounted but after all of that happened, the parties negotiated the MOA in order to address their situation going forward. This case calls for an objective interpretation of the provisions in dispute, in the context of a best efforts restoration.

65. In *BCPSEA*, ironically, BCTF argued the position advocated by the Employer in the present case. BCTF urged that unadjusted class size be used at that time. The arbitrator agreed and decided based on raw class sizes without Click-Down. Now the Union has the opposite position, saying that mere raw numbers are not enough and reductions under paragraph 22(D) are cumulative. The reductions in maximum class size should include both the reduction factor and the Click-Down, the Union now claims. This cannot be correct. Paragraph 17 of the MOA (superior provisions) is substantially the same as the equivalent provisions of the PCA and K-3 MOA. In the Dorsey award issued after *BCPSEA*, it was stated that "local agreement reductions in class size when special needs students are included in a class are to be applied after the class size limit is determined" (at para. 9). Therefore, both prior arbitrators adopted the use of raw, unadjusted class size maximums for the comparative process under the K-3 MOA. This was the framework in place when the last round of litigation ended and the Provincial Parties negotiated the current MOA. The previous case law should still apply, said the Employer.

66. Regarding the Excepted Districts and K-1 split class sizes, it is clear that the intent was to keep these classes from getting too small. It was agreed that

classes will not be reduced below 14 students. This is the same intent that pervades paragraph 22(D) as a whole. It provides that classes will be reorganized but not so as to reduce maximum class size by more than the stipulated numbers. The intent of the parties should be upheld.

Analysis and conclusions

67. "No contracts are made in a vacuum. There is always a setting in which they have to be placed. It is instructive to look beyond the language and consider the context in which the words were used and the object appearing from that context which the draftspersons had in view" (*BCPSEA, supra,* at para. 39). In that case, reference was also made (at para. 45-47) to comments by Arbitrator McPhillips in a Sooke School District decision about the integration of special needs students and consequential reductions in class size as being critical collective bargaining issues. The outcome in *BCPSEA* turned on this context and a purposeful interpretation of the particular language (at para. 69).

68. Much has happened in the school sector since then, as reviewed by the Union in its historical summary. Class size and composition language was stripped from teacher collective agreements and is now being restored in accordance with the MOA. The context for the present case, arising from paragraph 22(D) of the MOA, is therefore somewhat different. Important teacher rights are being reinstated. School districts must make best efforts to achieve compliance by reorganizing existing classes, among other measures. At the same time, the parties have recognized that non-compliance with class size

and composition language may occur despite best efforts. Remedies and processes have been negotiated.

69. The obligation to reorganize existing classes within a school to meet any class composition language, as part of best efforts, is subject to limitations. Paragraph 22(D) defines Floors and provides that districts are not required to reorganize classes to the extent that maximum class sizes fall below the applicable Floor. The clear mutual intent was to avoid classes becoming too small. For K-1 split classes in the Excepted Districts, there is an absolute Floor of 14 students, but otherwise the Floors are defined by reduction factors. This is where the dispute has arisen. However, again, the mutual intent is to achieve as much compliance as best efforts can produce. As would be expected given the complexity of class size and composition issues, and the lengthy passage of time since the stripping, the MOA parties contemplated there may be an imperfect state of compliance.

70. The Union rested much of its argument on the principle that clear language is required to restrict the application of class size limits, given that these are a negotiated benefit in teacher collective agreements. The Employer did not challenge this principle. I accept and endorse it. However, adoption of the interpretive principle does not resolve the disputed issue. The question remains whether paragraph 22(D), in context, is sufficiently clear that an arbitrator should find it refers to unadjusted maximum class sizes, without the application of a Click-Down.

71. I find in paragraph 22(D) a clear and express intent to limit reduction of maximum class size by a defined, fixed number of students. As the Employer

said, the language calls for a uniform reduction whereas the Union position would result in shifting reductions. Leaving aside the matter of operational feasibility, the plain and ordinary language specifies uniform reductions.

72. Paragraph 22(D) allows a reduction in "maximum class size" by not more than the specified number of students – five, four or six. What is the meaning of "maximum class size"? Restored Article D.1.1 provides the answer. This clause expressly establishes maximum class size limits: "Class size limits for the allocation and deployment of classroom teachers shall be …", after which follows a table listing grades, classes and the numerical class size limits. For K-3, flowing from the K-3 MOA, there are modified maximum class sizes in the text box overlaid on Article D.1.1. Again the same words are used: "the following maximum class sizes." It is clear that when the Provincial Parties spoke of "reduction in a maximum class size" in paragraph 22(D), they meant the class size limits in the restored language, *ie*, Article D.1.1., as further modified for primary classes.

73. What about the Click-Down provisions? Under Article D.1.3, when special needs students are integrated into a regular class, "*that class* shall be smaller than the class size limit …" (emphasis added). The effect of the Click-Down is understood as a differential from the stated Class Size Limits. I agree with the Employer that the Click-Down does not create a new class size limit but rather, a requirement that a classroom with special needs students must be *smaller* than the Class Size Limits. Similarly, the Flex Factor in Article D.1.4 states that additional enrolment "may result in these class size limits being *exceeded* …" (emphasis added). A class may be *larger* than the Class Size Limits. The maximum class size limit remains but the limit may be exceeded

in this instance. The Union position assumes a variable series of class size limits, depending on the circumstances, contrary to the foregoing language of the MOA and the collective agreement. Nowhere in the MOA or the restored language is there any reference to a second or adjusted set of maximum class sizes.

74. I acknowledge the Union's point that across the districts, there is a diversity of provisions for reducing class size and a multitude of permutations. However, I disagree that this supports an interpretation whereby Floors under paragraph 22(D) can be set in a multitude of ways, sometimes applying only the reduction factors and sometimes adding a Click-Down. The Union's line of argument may better support the contrary position. There is a great diversity of local provisions but in negotiating a provincial MOA, the Provincial Parties opted for simplicity and uniformity in setting the reduction factors. The Union did not expressly deny the Employer's contention that the Union interpretation would result in Floors being calculated on a perpetually moving target. Rather, the Union asserted that the words of the agreement must be given their plain meaning. Operational challenges are not relevant, it said. In my view, the drafting of paragraph 22(D) conveys an intent to avoid such fluctuations.

75. On balance, the hard floor of 14 students for K-1 split classes in the Excepted Districts supports the Employer interpretation. Admittedly, it can be argued that these are exceptions to the Floors regime, and the parties could have added further exceptions to the article by excluding Click-Down from the calculation. Not having done so, it can be suggested, the parties showed they accepted the inclusion of Click-Down under paragraph 22(D). I do not adopt

this reasoning because, as reviewed above, I find the language of paragraph 22(D) in itself to be a clear statement that maximum class sizes apply unadjusted. The Excepted Districts were named to avoid unduly small classes for reasons specific to those Districts This is consistent with the intent of the Floors regime. As stated in *Health Employers Association, supra* (at para. 14), "The words used in the collective agreement should be read in the context of the phrase, sentence, provision and collective agreement as a whole."

76. As reviewed above, there was considerable argument directed to the significance of the 1999 *BCPSEA* award for purposes of the present dispute. In *BCPSEA*, in respect of the section 11 comparison (maximums in the previous collective agreement versus the K-3 MOA), the Employer argued for using the entirety of the previous agreement provisions including Click-Down (para. 19), the opposite of its position in the present case. BCTF argued for an unadjusted class size maximum, without regard to Click-Down, again the opposite of its current position. As the Employer wryly noted before me, it lost the 1999 case but now it is advancing the position that did prevail. The section 11 comparison was to be made based on unadjusted maximums. The Employer insisted this is significant in the disposition of the present matter.

77. The Union responded that in the end, Arbitrator Taylor refused to restrict the benefit of the additional provisions in the local agreements and concluded that reductions must be applied to the MOA class size limits where they are lower, absent clear language to the contrary (para. 74). In effect, the result was a type of pyramiding, which the Employer fiercely resists in the present case, but nevertheless that is what was ordered in *BCPSEA*.

78. I do not find it necessary to rule on these points because in my view, Arbitrator Taylor's decision flowed from his detailed analysis of the particular syntax and language of the documents before him, in the context applicable at that time (para. 66-73). It is my task to interpret the current MOA and the current collective agreement, in the present context.

79. Both sides in the present case have aspirations and apprehensions as the restoration process continues under the MOA. I merely echo the words of Arbitrator Korbin in *School District No. 88 (Terrace), supra* (at para. 28): "In the final analysis, this case must be determined on the language chosen by the parties to reflect their consensus."

80. The answer to the first interpretive question is as follows:

The maximum class size referred to in section 22(D) of the MOA refers to the unadjusted class size under Article D.1.1 of the collective agreement between the Board and the Association.

The second interpretive question

81. The second interpretive question was as follows: "What is the floor for grade three/four combined classes under MOA 22(D) and the collective agreement between the Board and the Association?"

82. By agreement, the question is answered as follows:

For the purposes of Article 22(D) of the MOA, Grade 3/4 combined classes are included in the "other grades" category, with a maximum class size reduction of six (6) students.

Consequently, the floor for Grade ¾ combined classes under Article 22(D) and the collective agreement between the Board and the Association is 18.

Retained jurisdiction

83. Jurisdiction is retained to clarify this award as may be necessary to assist the parties.

DATED March 11, 2019 at Victoria, B.C.

ARNE PELTZ, Arbitrator

MEMORANDUM OF AGREEMENT

Between:

British Columbia Public School Employers' Association ("BCPSEA") and

The British Columbia Ministry of Education ("Ministry of Education") and

British Columbia Teachers' Federation ("BCTF") (collectively referred to as "the Provincial Parties")

RE: LOU NO. 17: EDUCATION FUND AND IMPACT OF THE COURT CASES – FINAL AGREEMENT

WHEREAS the Provincial Parties acknowledge that, as a result of the majority of the Supreme Court of Canada[1] adopting Justice Donald's conclusion[2] that the Education Improvement Act[3] was unconstitutional and of no force or effect, that the BCPSEA-BCTF collective agreement provisions that were deleted by the Public Education Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act are restored;

AND WHEREAS the Provincial Parties further acknowledge that the Supreme Court of Canada's decision triggered Letter of Understanding No. 17 to the 2013-2019 BCPSEA-BCTF Provincial Collective Agreement, which required the Parties to re-open collective agreement negotiations regarding the collective agreement provisions that were restored by the Supreme Court of Canada;

AND WHEREAS the Provincial Parties further acknowledge that Letter of Understanding No. 17 required an agreement "regarding implementation and/or changes to the restored language";

AND WHEREAS this Memorandum of Agreement has been negotiated pursuant to Letter of Understanding No. 17 fully and finally resolves all matters related to the implementation of the Supreme Court of Canada's decision. As such, the Provincial Parties acknowledge that the re- opener process set out in Letter of Understanding No. 17 has been completed.

THEREFORE THE PROVINCIAL PARTIES AGREE THAT:

I. <u>IMPLEMENTATION OF THIS MEMORANDUM OF AGREEMENT</u>

<u>Shared Commitment to Equitable Access to Learning</u>

1. All students are entitled to equitable access to learning, achievement and the pursuit of excellence in all aspects of their education. The Provincial Parties are committed to providing all students with special needs with an inclusive learning environment which provides an

[1] British Columbia Teachers' Federation v. British Columbia, 2016 SCC 49

[2] British Columbia Teachers' Federation v. British Columbia, 2015 BCCA 184

[3] S.B.C. 2012, c. 3

opportunity for meaningful participation and the promotion of interaction with others. The implementation of this Memorandum of Agreement shall not result in any student being denied access to a school, educational program, course, or inclusive learning environment unless this decision is based on an assessment of the student's individual needs and abilities.

Schedule "A" of All Restored Collective Agreement Provisions

2. The Provincial Parties will develop a Schedule of the BCPSEA-BCTF collective agreement provisions that were deleted by the Public Education Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act ("the restored collective agreement provisions") that will be implemented pursuant to this Memorandum of Agreement. This Schedule will be attached to this Memorandum of Agreement as Schedule "A".

Agreement to be Implemented for September of the 2017-2018 School Year

3. Commencing in September of the 2017-2018 school year and thereafter, school staffing will, subject to the terms of this Memorandum of Agreement, comply with the restored collective agreement provisions that are set out in Schedule "A".

Continuation of Existing Funding for the Remainder of the 2016/2017 School Year

4. The Education Fund provisions referred to in Letter of Understanding No. 17 to the 2013-2019 BCPSEA-BCTF Provincial Collective Agreement will remain in place for the remainder of the 2016/2017 school year, following which the Education Fund provisions shall end.
5. The priority measures established pursuant to the January 5, 2017 Memorandum of Agreement Re: LOU No. 17: Education Fund and Impact of the Court Cases – Priority Measures will remain in place for the remainder of the 2016/2017 school year.

Agreement Implementation Committee

6. Following the execution of this Memorandum of Agreement, the Provincial Parties will continue to meet as needed through June 30, 2017 to facilitate implementation of the Agreement for the Spring staffing process. After June 30, 2017, the Provincial Parties will meet to facilitate implementation of this Memorandum of Agreement on a quarterly basis until the opening of the next round of collective bargaining. Specific activities to be undertaken during these meetings include, but are not limited to:

   A. *Restored Language: Housekeeping*

      Housekeeping changes mutually recommended by the local parties will be approved through a four-party process with one representative from BCPSEA, one representative from the BCTF, one representative from the School District, and one representative from the BCTF local. Housekeeping changes will be limited to titles of committees, dates, names of positions, and terminology. This housekeeping process will not delay implementation of any of the restored language.

   B. *Updating Terminology Pertaining to Students with Special Needs*

      Terminology pertaining to students with special needs contained within the restored collective agreement provisions will be updated by the Provincial Parties. This process does not include changes to the definitions and classifications of special education

designations and does not supersede or otherwise affect the work of the Class Composition Joint Committee set out in paragraph 20 below.

C. *Dispute Resolution*

Where a dispute arises regarding the interpretation or application of this Memorandum of Agreement, the following process will apply:

i) The local parties will meet and attempt to resolve the dispute;

ii) Where, after meeting, the local parties are unable to resolve the dispute, the local parties, with the assistance and representation of the Provincial Parties, will meet again and attempt to resolve the dispute;

iii) Where, after meeting, both the local and Provincial Parties are unable to resolve the dispute, either party may file a grievance and utilize the grievance procedure to resolve the dispute.

II. NON-ENROLLING TEACHER STAFFING RATIOS

1. Effective upon the commencement of the regular 2017/2018 school year, all language pertaining to learning specialists shall be implemented as follows:

A. The minimum district ratios of learning specialists to students shall be as follows (except as provided for in paragraph 7(B) below):

i) Teacher librarians shall be provided on a minimum pro-rated basis of at least one teacher librarian to seven hundred and two (702) students;

ii) Counselors shall be provided on a minimum pro-rated basis of at least one counsellor to six hundred and ninety three (693) students;

iii) Learning assistance teachers shall be provided on a minimum pro-rated basis of at least one learning assistance teacher to five hundred and four (504) students;

iv) Special education resource teachers shall be provided on a minimum pro-rated basis of at least one special education resource teacher per three hundred and forty two (342) students;

v) English as a second language teachers (ESL) shall be provided on a minimum pro-rated basis of at least one ESL teacher per seventy four (74) funded ESL students.

B. For the purpose of posting and/or filling FTE, the Employer may combine the non-enrolling teacher categories set out in paragraph 7(A)(iii)-(v) into a single category. The Employer will be deemed to have fulfilled its obligations under paragraph 7(A)(iii)-(v) where the total non-enrolling teacher FTE of this single category is equivalent to the sum of the teachers required from categories 7(A)(iii)-(v).

C. Where a local collective agreement provided for services, caseload limits, or ratios additional or superior to the ratios provided in paragraph 7(A) above – the services,

caseload limits or ratios from the local collective agreement shall apply. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement].**

D. The aforementioned employee staffing ratios shall be based on the funded FTE student enrolment numbers as reported by the Ministry of Education.

E. Where a non-enrolling teacher position remains unfilled following the completion of the applicable local post and fill processes, the local parties will meet to discuss alternatives for utilizing the FTE in another way. Following these discussions the Superintendent will make a final decision regarding how the FTE will be deployed. This provision is time limited and will remain in effect until the renewal of the BCPSEA-BCTF provincial collective agreement. Following the expiration of this provision, neither the language of this provision nor the practice that it establishes regarding alternatives for utilizing unfilled non-enrolling teacher positions will be referred to in any future arbitration or proceeding.

Dispute Resolution

8. Where a dispute arises regarding the interpretation or application of the non-enrolling language, the following process will apply:

    1. The local parties will meet and attempt to resolve the dispute;

    2. Where, after meeting, the local parties are unable to resolve the dispute, the local parties, with the assistance and representation of the Provincial Parties, will meet again and attempt to resolve the dispute;

    3. Where, after meeting, both the local and Provincial Parties are unable to resolve the dispute, either party may file a grievance and utilize the grievance procedure to resolve the dispute.

III. PROCESS AND ANCILLARY LANGUAGE

9. The BCPSEA-BCTF collective agreement process and ancillary provisions that were deleted by the Public Education Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act shall be implemented effective September 1, 2017 or as otherwise set out in paragraph 10 below. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement]**

10. The Provincial Parties recognize that it may take time to transition from existing practices to the processes that are defined in the restored language. The 2017/2018 school year will serve as a transition period for full implementation of the restored process and ancillary language by January 31, 2018 as follows:

    A. School-Based Process and Ancillary Language

    Restored school-based process and ancillary language including, but not limited to, language pertaining to school-based teams, staffing committees, and the role and function of staff committees, shall be implemented upon the commencement of the regular 2017/2018 school year. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement].**

B. District-Based Process and Ancillary Language

The following restored collective agreement provisions shall be implemented as soon as practicable but by no later than January 31, 2018. During this transition period, current practices may be utilized while the necessary supports are put in place to implement the process and ancillary language. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement].**

i) Restored school-based process and ancillary language that makes reference to a district-level process, and;

ii) Restored district-level processes and ancillary language including, but not limited to language pertaining to district committees and screening panels.

11. Where the local parties agree they prefer to follow a process that is different than what is set out in the applicable local collective agreement process and ancillary provisions, they may request that the Provincial Parties enter into discussions to amend these provisions. Upon agreement of the Provincial Parties, the amended provisions would replace the process and ancillary provisions for the respective School District and local union. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement].**

12. Where a dispute arises in anticipation of or during the 2017/2018 school year regarding paragraph 10 above, the following process will apply:

1. The local parties will meet and attempt to resolve the dispute;

2. Where, after meeting, the local parties are unable to resolve the dispute, the local parties, with the assistance and representation of the Provincial Parties, will meet again and attempt to resolve the dispute;

3. Where, after meeting, both the local and Provincial Parties are unable to resolve the dispute, either party may file a grievance and utilize the grievance procedure.

IV. CLASS SIZE AND COMPOSITION

PART I: CLASS SIZE PROVISIONS

13. Effective for the commencement of the 2017/18 school year, the BCPSEA-BCTF collective agreement provisions regarding class size that were deleted by the Public Education and Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act will be implemented as set out below.

Class Size Provisions: K-3

14. Effective for the commencement of the 2017/2018 school year, the size of primary classes shall be limited as follows:

A. Kindergarten classes shall not exceed 20 students;

1. Grade 1 classes shall not exceed 22 students;

C. Grade 2 classes shall not exceed 22 students;

D. Grade 3 classes shall not exceed 22 students;

15. Where there is more than one primary grade in any class with primary students, the class size maximum for the lower grade shall apply.

16. Where there is a combined primary/intermediate class, an average of the maximum class size of the lowest involved primary grade and the maximum class size of the lowest involved intermediate grade will apply.

K-3 Superior Provisions to Apply

17. For primary and combined primary/intermediate classes where the restored collective agreement provisions provide for superior class size provisions beyond those listed in paragraphs 14 through 16 above, the superior provisions shall apply. **[Provisions to be identified in Schedule "A" to this Memorandum of Agreement].**

Class Size Language: 4-12

18. The BCPSEA-BCTF collective agreement provisions regarding Grade 4–12 class size that were deleted by the Public Education and Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act will be implemented upon the commencement of the 2017/2018 school year.

PART II – CLASS COMPOSITION PROVISIONS

Implementation of Class Composition Language

19. The BCPSEA-BCTF collective agreement provisions regarding class composition that were deleted by the Public Education and Flexibility and Choice Act in 2002 and again in 2012 by the Education Improvement Act will be implemented upon the commencement of the 2017/2018 school year. The Provincial Parties agree that the implementation of this language shall not result in a student being denied access to a school, educational program, course, or inclusive learning environment unless this decision is based on an assessment of the student's individual needs and abilities.

Class Composition Joint Committee

20. Given the complexity of class composition issues and the changes that have occurred within the definitions of special education designations and classifications, a Class Composition Joint Committee ("the Committee") will be established upon ratification of this Memorandum of Agreement to examine and resolve outstanding issues related to class composition as follows:

A. After establishing terms of reference, the Committee will meet and attempt to agree upon a consistent approach to how composition impacts class size/teacher workload for those School Districts that have class composition language;

B. If, after meeting, the Committee is unable to agree upon a consistent approach to class composition, the Committee will meet and attempt to agree upon the definitions of special education designations and classifications in the current context of educational service delivery;

C. If the Committee is unable to agree on the definitions of special education designations by June 30, 2018, the matter will be referred to Arbitrator John Hall for a final and binding determination of the definitions and classifications of special education designations in the current context of educational service delivery. Arbitration dates will be pre-booked during the fall of 2018 and best efforts will be made to conclude the arbitration hearing by November 30, 2018. The Provincial Parties will request that Arbitrator Hall's decision be issued as soon as possible and, in any event, no later than January 31, 2019. This decision will be used to determine class organization for the 2019/2020 school year and thereafter until the Provincial Parties negotiate an alternative approach to class composition.

D. Unless the Provincial Parties agree otherwise, during the 2017/2018 and 2018/2019 school year, the current Ministry of Education definitions of special education designations and classifications will apply on an interim and without prejudice basis while the work of the Committee set out in paragraphs 20(A-C) is completed.

E. The Provincial Parties recognize that the interim Committee approach to class composition issues set out in paragraph 20(A, B and D) is agreed to on a without prejudice basis. Neither of the Provincial Parties will refer to this approach or the practices that it establishes regarding class composition in any future collective bargaining, arbitration or proceeding, including the final and binding arbitration referenced in paragraph 20(C).

PART III: CLASS SIZE AND COMPOSITION COMPLIANCE AND REMEDIES

Efforts to Achieve Compliance: Provincial Approach

21. The Provincial Parties agree that paragraphs 22-25 of this agreement establish a provincial approach regarding the efforts that must be made to comply with the class size and composition provisions set out in Schedule "A" to this agreement and the remedies that are available where non-compliance occurs. This provincial approach applies to all School Districts and replaces all restored collective agreement provisions related to compliance and remedies for class size and composition. For clarity, the restored collective agreement compliance and remedy provisions that are replaced by this provincial approach are identified in Schedule "B" to this Memorandum of Agreement. The Provincial Parties commit to reviewing this provincial approach in the 2019 round of negotiations.

Best Efforts to Be Made to Achieve Compliance

22. School Districts will make best efforts to achieve full compliance with the collective agreement provisions regarding class size and composition for the commencement of the 2017/2018 school year and thereafter. Best efforts shall include:

A. Re-examining existing school boundaries;

B. Re-examining the utilization of existing space within a school or across schools that are proximate to one another;

C. Utilizing temporary classrooms;

D. Reorganizing the existing classes within the school to meet any class composition language, where doing so will not result in a reduction in a maximum class size by more than:

- five students in grades K-3;
- four students for secondary shop or lab classes where the local class size limits are below 30, and;
- six students in all other grades.

These class size reductions shall not preclude a Superintendent from approving a smaller class.

Note: For the following School Districts, class sizes for K-1 split classes will not be reduced below 14 students:

- School District 10 (Arrow Lakes)
- School District 35 (Langley)
- School District 49 (Central Coast)
- School District 67 (Okanagan-Skaha)
- School District 74 (Gold Trail)
- School District 82 (Coast Mountain)
- School District 85 (Vancouver Island North)

E. Renegotiating the terms of existing lease or rental contracts that restrict the School District's ability to fully comply with the restored collective agreement provisions regarding class size and composition;

F. Completing the post-and-fill process for all vacant positions.

Non-Compliance

23. Notwithstanding paragraph 22, the Provincial Parties recognize that non-compliance with class size and composition language may occur. Possible reasons for non-compliance include, but are not limited to:

- compelling family issues;
- sibling attendance at the same school;
- the age of the affected student(s);
- distance to be travelled and/or available transportation;
- safety of the student(s);
- the needs and abilities of individual student(s);

- accessibility to special programs and services;
- anticipated student attrition;
- time of year;
- physical space limitations;
- teacher recruitment challenges.

Remedies for Non-Compliance

24. Where a School District has, as per paragraph 22 above, made best efforts to achieve full compliance with the restored collective agreement provisions regarding class size and composition, but has not been able to do so:

A. For classes that start in September, the District will not be required to make further changes to the composition of classes or the organization of the school after September 30 of the applicable school year. It is recognized that existing "flex factor" language that is set out in the restored collective agreement provisions will continue to apply for the duration of the class.

For classes that start after September, the District will not be required to make further changes to the composition of classes or the organization of schools after 21 calendar days from the start of the class. It is recognized that existing "flex factor" language that is set out in the restored collective agreement provisions will continue to apply for the duration of the class.

B. Teachers of classes that do not comply with the restored class size and composition provisions will become eligible to receive a monthly remedy for non-compliance effective October 1, 2017 (or 22 calendar days from the start of the class) as follows:

(V) = (180 minutes) x (P) x (S1 + S2)

V = the value of the additional compensation;

P = the percentage of a full-time instructional month that the teacher teaches the class;

S1 = the highest number of students enrolled in the class during the month for which the calculation is made minus the maximum class size for that class;

S2 = the number of students by which the class exceeds the class composition limits of the collective agreement during the month for which the calculation is made;

Note: If there is non-compliance for any portion of a calendar month the remedy will be provided for the entire month. It is recognized that adjustments to remedies may be triggered at any point during the school year if there is a change in S1 or S2.

C. Once the value of the remedy has been calculated, the teacher will determine which of the following remedies will be awarded:

i) Additional preparation time for the affected teacher;

ii) Additional non-enrolling staffing added to the school specifically to work with the affected teacher's class;

iii) Additional enrolling staffing to co-teach with the affected teacher;

iv) Other remedies that the local parties agree would be appropriate.

In the event that it is not practicable to provide the affected teacher with any of these remedies during the school year, the local parties will meet to determine what alternative remedy the teacher will receive.

Dispute Resolution

25. In the event that a dispute arises regarding whether a School District has made best efforts to achieve full compliance with the collective agreement provisions regarding class size and composition, the following process will apply:

A. The local parties will meet and attempt to resolve the dispute;

B. Where, after meeting, the local parties are unable to resolve the dispute, the local parties, with the assistance and representation of the Provincial Parties, will meet again and attempt to resolve the dispute;

C. Where, after meeting, both the local and Provincial Parties are unable to resolve the dispute, either party may file a grievance and utilize the grievance procedure to resolve the dispute.

IV. EFFECTIVE DATE

26. Subject to ratification by the Provincial Parties, the provisions in this Memorandum of Agreement will become effective on September 1, 2017, unless specified otherwise (including, but not limited to, paragraphs 4 and 5 above).

Dated at Vancouver, British Columbia this 9th day of March, 2017

British Columbia Teachers' Federation

_____
Glen Hansman, President

British Columbia Public School Employers' Association

_____
Renzo Del Negro, CEO

British Columbia Ministry of Education

_____
Dave Byng, Deputy Minister

Public Sector Employers' Council

_____
Christina Zacharuk, President and CEO