

**IN RE THE MATTER OF AN ARBITRATION
UNDER THE B.C. LABOUR RELATIONS CODE**

BETWEEN:

**BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/
THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 68 (NANAIMO LADYSMITH)**

(the "Employer")

AND:

**BRITISH COLUMBIA TEACHERS' FEDERATION/
NANAIMO DISTRICT TEACHERS' ASSOCIATION**

(the "Union")

AWARD

(Superintendent Report Grievance)

Board of Arbitration	Robert Diebolt, Q.C.
Counsel for the Employer	Judith Anderson
Counsel for the Union	Carmela Allevato
Place of Hearing	Nanaimo, B.C.
Dates of Hearing	December 14, 2009
Date of Award	January 4, 2010

I. INTRODUCTION

This arbitration determines a preliminary issue, namely, whether the matter in dispute is arbitrable. The parties agree that I am properly constituted as a board of arbitration with jurisdiction to hear and determine the issue.

For ease of reference the following abbreviations and acronyms will be used to denote the following entities: The British Columbia Public School Employers' Association ("BCPSEA"); the British Columbia Teachers' Federation ("BCTF"); the Board of Education of School District No. 68 (Nanaimo-Ladysmith) ("Board), and the Nanaimo District Teachers' Association ("NDTA").

The NDTA filed a grievance alleging that the Board violated certain provisions of the *School Act* R.S.B.C. 1996, c. 412. (the "School Act"). The body of the grievance letter reads:

Grievance 68 20 09 Superintendents' Class Size Report

The NDTA believes that the Board is in violation of, but not limited to, section 76.3 of the *School Act* and *Dorsey's* arbitration decision of August 24th, 2009. More specifically, we are referencing 76.3(3) of the *School Act* along with paragraphs 381 and 450 of the *Dorsey Decision*.

76.3(3) of the *School Act* states:

The superintendent of schools for a school district must include in his report a rationale for the organization of any class in the school district that has more than 30 students.

The rationale provided by the Superintendent was inadequate when acknowledging 101 unique classroom environments, each over class size limits. The NDTA believes that a rationale needs to be included for each of the 101 classes with more than 30 students and are a required part of the Superintendents' Class Size Report.

Paragraph 381 and 450 of the *Dorsey Decision* states:

The opinion of the teacher is relevant and important for school planning councils and boards of education (para. 381).

As part of the due diligence, the superintendent must be informed about classes that exceed the class size and composition standard which the teacher of that class agrees that it is a class appropriate for student learning and those classes for which the teacher disagrees or did not express an opinion. Principals, superintendents, boards of education, and, perhaps parents need to know if teachers do not believe their classes are appropriate for student learning (para. 450)

The *Dorsey Decision* clearly outlines the importance of notifying Boards of Education and parents the results of teacher consultations. Whereas this information has not been

provided to our education partners we believe this is a direct violation of the Dorsey decision.

As well, Dorsey states that principals must clearly communicate the results of consultations with the Superintendent. The Superintendent has yet to report the results of teacher consultation and therefore the NDTA believes that this information has not been clearly reported to him. We are confident that if he had received results of class size/composition consultations Mr. Munro would have reported these results to education partners in order to meet his requirement as outlined under the Dorsey decision.

The NDTA is requesting a Step 3 meeting with the Board on October 21, 2009.

Following the Step 3 meeting, the Board responded to the grievance, stating that the grievance was not arbitrable and that it would object on that ground if the matter proceeded to arbitration.

II. Legislative and Adjudicative History

Section 76.3 is an element in a statutory scheme that regulates the size and composition of school classes. Section 76 is a lengthy provision but quotation in full is merited because it contextualizes s. 76.3 and assists in understanding the positions of the parties.

Class size

76.1 (1) A board must ensure that the average size of its classes, in the aggregate, does not exceed

- (a) for kindergarten, 19 students,
- (b) for grades 1 to 3, 21 students,
- (c) for grades 4 to 7, 28 students, and
- (d) for grades 8 to 12, 30 students.

(2) Despite subsection (1), a board must ensure that the size of any primary grades class in any school in its school district does not exceed

- (a) for kindergarten, 22 students, and
- (b) for grades 1 to 3, 24 students.

(2.1) Despite subsection (1) but subject to subsection (2.4), a board must ensure that the size of any class for any of grades 4 to 7 in any school in its school district does not exceed 30 students unless

- (a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
- (b) the principal of the school has obtained the consent of the teacher of that class.

(2.2) Despite subsection (1) but subject to subsection (2.4), a board must ensure that the size of any class for any of grades 8 to 12 in any school in its school district does not exceed 30 students unless

(a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and

(b) the principal of the school has consulted with the teacher of that class.

(2.3) Despite subsections (1) to (2.2) but subject to subsection (2.4), a board must ensure that any class in any school in its school district does not have more than 3 students with an individual education plan unless

(a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and

(b) the principal of the school has consulted with the teacher of that class.

(2.4) Subsections (2.1) to (2.3) apply to a board, in relation to a school year, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10) for that school year.

(3) The Lieutenant Governor in Council may, by regulation,

(a) establish the methods to be used by a board for determining average class size in the aggregate, including, without limitation, methods of providing for students with special needs,

(b) exclude any type of class, course, program, school or student from the determination of average class size in the aggregate,

(c) set dates by which determinations must be made under this section,

(d) define terms used in this section for the purposes of a regulation under this section,

(e) require boards to prepare, submit to the minister and make publicly available, in the form and manner specified by the Lieutenant Governor in Council, for each school district and each school within the school district,

(i) reports respecting class size, and

(ii) plans respecting allocation of resources, services and staff in order to comply with subsection (1),

(f) specify matters that must be considered by a board in preparing a plan under paragraph (e) (ii) and the information required to be included in reports or plans under paragraph (e), and

(g) require a board to establish, in respect of plans and reports under paragraph (e), a process of consultation with parents of students attending school in the school district.

(4) The limits and requirements of subsections (1) and (2) do not apply for the purposes of the 2001-2002 school year.

(5) In this section, "**student with an individual education plan**" means a student for whom an individual education plan must be designed under the Individual Education Plan Order, Ministerial Order 638/95, but does not include a student who has exceptional gifts or talents.

Organization of classes — consultation at the beginning of the school year

76.2 In each school year, the principal of a school must, within 15 school days after the school opening day set out in the school calendar applicable to the school for the school year,

(a) if applicable, obtain the consent of or consult with the teacher of a class as required by section 76.1 (2.1) (b), (2.2) (b) or (2.3) (b),

(b) consult with the school planning council with respect to the proposed organization of classes within that school for that school year, and

(c) provide the superintendent of schools with a proposed organization of classes for the school for that school year that is, in the opinion of the principal, appropriate for student learning.

Organization of classes — report

76.3 (1) In this section:

"class size provisions" means section 76.1 and any regulations made under that section;

"report" means

(a) a report prepared under subsection (2) by the superintendent of schools, or

(b) in the first usage of the term in subsection (10), and in subsection (11), a revised report;

(2) In each school year, the superintendent of schools for a school district must review, and prepare a report on, the organization of classes in the school district.

(3) The superintendent of schools must include in his or her report a rationale for the organization of any class in the school district that has more than 30 students.

(4) The minister may

(a) require additional information to be included in a report, and

(b) specify the form of the report.

(5) The superintendent of schools must date and sign the report to verify that, as of that date, the organization of classes in the school district

(a) is in compliance with the class size provisions, and

(b) is, in the opinion of the superintendent, appropriate for student learning.

(6) On or before October 1 of the school year to which the report relates, the superintendent of schools must submit the signed report to the board and to the district parents' advisory council, if established for the school district.

(7) On or before October 15 of the school year to which the report relates, the board must, at a public meeting of the board,

(a) accept the report, or

(b) instruct the superintendent of schools to revise the report.

(8) If the board instructs the superintendent of schools to revise the report,

- (a) the superintendent must instruct the principal of a school, within the period established by the superintendent,
- (i) if applicable, to obtain the consent of or to consult with the teacher of a class as required by section 76.1 (2.1) (b), (2.2) (b) or (2.3) (b), and
- (ii) to consult with the school planning council with respect to the organization of classes within that school for that school year,
- (b) on or before 15 days from the date of the public meeting referred to in subsection (7), the superintendent must revise the report in accordance with the board's instructions and submit the signed revised report to the board and to the district parents' advisory council, if established for the school district, and
- (c) the board must review the revised report within 7 days of receiving the revised report.
- (9) Subsections (3) to (5) apply to a revised report.
- (10) The board must submit the report to the minister immediately after accepting the report under subsection (7) (a) or after reviewing the revised report under subsection (8) (c).
- (11) The minister must make available to the public a report received under subsection (10).

Organization of classes — changes after date on report

- 76.4** (1) In this section, "**student with an individual education plan**" has the same meaning as in section 76.1.
- (2) If the size of any class for any of grades 4 to 12 in any school in a school district exceeds 30 students, subject to subsection (4), the board of that school district must ensure that the class size does not increase unless
 - (a) in relation to a class for any of grades 4 to 7, the requirements of section 76.1 (2.1) (a) and (b) are met, or
 - (b) in relation to a class for any of grades 8 to 12, the requirements of section 76.1 (2.2) (a) and (b) are met.
 - (3) If any class in any school in a school district has more than 3 students with an individual education plan, subject to subsection (4), the board of that school district must ensure that the number of students with an individual education plan in the class does not increase unless the requirements of section 76.1 (2.3) (a) and (b) are met.
 - (4) Subsections (2) and (3) apply to a board, in relation to a school year, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10) for that school year.
 - (5) Subsection (6) applies if, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10), the size of a class for any of grades 4 to 12 in a school in the school district changes and, as a result of the change, the size of the class
 - (a) exceeds 30 students, or
 - (b) increases, in accordance with subsection (2) of this section.
 - (6) As soon as practicable after the change in the size of a class referred to in subsection (5),

(a) the principal of the school must provide the school planning council with the rationale for the change in the organization of the class,

(b) the superintendent of schools must provide the board and the district parents' advisory council, if established for the school district, with the rationale for the change in the organization of that class, and

(c) the board must provide the minister with the rationale for the change in the organization of that class.

(7) The minister must make available to the public the rationale received under subsection (6) (c).

Special administrator — class size compliance

76.5 (1) In this section, "**class size provisions**" means sections 76.1 and 76.4 (2) and (3) and any regulations made under section 76.1.

(2) The minister, by order, must appoint a special administrator to a school district for a term determined by the minister if, in the opinion of the minister, the board is not in compliance with the class size provisions.

(3) A special administrator appointed under this section to a school district must review the organization of classes in the school district.

(4) After the special administrator reviews the organization of classes in the school district, the special administrator must do one of the following:

(a) if, in the opinion of the special administrator, the board is in compliance with the class size provisions, submit a report to the minister;

(b) submit the matter of the organization of classes in the school district to the board for further review by the board within the period established by the special administrator;

(c) require the board, within the period established by the special administrator,

(i) to vary the organization of classes in the school district, or

(ii) to do any other things necessary,

so as to comply with the class size provisions.

(5) If the matter is submitted to the board under subsection (4) (b), the board must, within the period established by the special administrator under that subsection,

(a) review the organization of classes in the school district, and

(b) submit to the special administrator proposed changes to the organization of classes.

(6) After proposed changes to the organization of classes have been submitted to the special administrator under subsection (5) (b), the special administrator must

(a) accept the proposed changes to the organization of classes and require the board to implement those changes within the period established by the special administrator, or

(b) require the board, within the period established by the special administrator,

(i) to vary the organization of classes in the school district, or

(ii) to do any other things necessary,
so as to comply with the class size provisions.

(7) The board must, within the applicable period established by the special administrator, do the following as applicable:

(a) implement its proposed changes to the organization of classes in the school district if those changes are accepted by the special administrator under subsection (6) (a);

(b) vary the organization of classes in the school district or do any other things necessary as required by the special administrator under subsection (4) (c) or (6) (b).

Special administrator — compliance with consultation and reporting requirements

76.6 (1) The minister, by order, may appoint a special administrator to a school district for a term determined by the minister if, in the opinion of the minister,

(a) a principal of a school in the school district has contravened section 76.2 or 76.4 (6) (a) or an instruction of the superintendent of schools under section 76.3 (8) (a),

(b) the superintendent of schools for the school district has contravened section 76.3 (2), (3), (5), (6) or (8) (a) or (b) or 76.4 (6) (b), or

(c) the board of the school district has contravened section 76.3 (7), (8) (c) or (10) or 76.4 (6) (c).

(2) A special administrator appointed under this section to a school district may require the board, within the period established by the special administrator,

(a) to instruct the employees of the board to comply with the provisions of this Act that were contravened, or

(b) to comply with other procedures established by the special administrator to remedy the contravention.

Special administrator — general

76.7 (1) For the purpose of performing his or her duties and exercising his or her powers under this Act, a special administrator may do one or more of the following:

(a) enter a school building or any other building used in conjunction with the school or offices of the board, or any part of them;

(b) inspect any record of the board;

(c) interview any employee of the board.

(2) The board must pay

(a) the remuneration of the special administrator, at the rate determined by the minister, and

(b) the expenses of the special administrator.

(3) The minister may provide a direction to the special administrator respecting the duties of the special administrator under this Act.

In addition to the present statutory scheme, I was presented with a detailed account of the historical evolution of the current legislation, including aspects of its arbitral and judicial treatment. No witnesses were called. By agreement of the parties the background was presented through counsel. Some but not all of that history is summarized below.

By virtue of the *School Act*, S.B.C. 1989, c. 61, teachers and school districts acquired the authority to bargain collectively with respect to terms and conditions of employment. For some years teachers and school districts bargained locally about class size and composition. The 1992-1995 collective agreement between the Board of School Trustees of School District No. 68 and the NDTA, the last locally negotiated collective agreement between those parties, is an example of a collective agreement containing provisions respecting class size and composition. That agreement contained no provisions respecting reports to the Board of School Trustees (as the Board of Education was then styled) or to Board acceptance of such reports.

In 1994 the *Public Education Labour Relations Act*, R.S.B.C. 1996, c. 382 was enacted, establishing a two-tier bargaining structure under which some matters became subject to provincial negotiation and other matters remained the subject of local negotiation. Class size and composition was removed from the scope of local bargaining and became a matter for bargaining at the provincial level. Pending agreement at the provincial level, however, existing provisions respecting class size in collective agreements between school districts and teachers within each district continued in force.

In 1998 the provincial government entered into an Agreement in Committee and a Memorandum of Agreement with the BCTF respecting a number of matters, including class sizes for kindergarten to grade three. Following rejection of these agreements by the BCPSEA legislation was enacted incorporating their contents as part of the provincial collective agreement. The BCPSEA and the BCTF subsequently negotiated a continuation of these class

size provisions. None of the above agreements contained provisions about class size reports to boards of school trustees or discussions about these matters between boards and school superintendents.

In 2002 the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c.3 (“PEFCA”) was enacted, amending several provisions of the *School Act*. PEFCA amended s. 27(3) of the *School Act* by removing the matter of class size and composition from the collective bargaining process and adding s.27.1. Section 27.1, a transitional provision, established an arbitral process to identify and remove collective agreement provisions which conflicted with s. 27(3) of the *School Act*.

PEFCA also added s. 76.1 to the *School Act*. This provision set statutory limits on class size. It read in part:

76.1 (1) A board must ensure that the average size of its classes, in the aggregate, does not exceed

(a) for kindergarten, 19 students,

(b) for grades 1 to 3, 21 students, and

(c) for grades 4 to 12, 30 students.

(2) Despite subsection (1), a board must ensure that the size of any primary grades class in any school in its school district does not exceed

(a) for kindergarten, 22 students, and

(b) for grades 1 to 3, 24 students.

(3) The Lieutenant Governor in Council may, by regulation,

(a) establish the methods to be used by a board for determining average class size in the aggregate, including, without limitation, methods of providing for students with special needs,

(b) exclude any type of class, course, program, school or student from the determination of average class size in the aggregate,

It should be noted that, unlike the current language of s. 76.1, this earlier version did not contain a mechanism for exceeding the class size limits. A new Class Size Regulation made under s. 76.1(3) provided detailed calculations for the setting of class sizes.

In summary to this point, class size and composition was initially a matter of collective bargaining between individual school districts and their teachers. Subsequently, when two-tier bargaining was established, this subject was removed from the scope of local bargaining and raised to the new provincial level. Ultimately, class size and composition was eliminated from collective bargaining altogether and became matters set by statute.

The arbitrability of the statutory provisions concerning class size was subsequently tested. In late 2002 the BCTF filed a grievance alleging that some school districts had violated the class size maximums set out in s. 76.1 of the *School Act*. The BCPSEA took the position that the grievance did not raise an arbitrable issue within the scope of the provincial collective agreement. Arbitrator Munroe was constituted as a board of arbitration to hear and determine the arbitrability issue: *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, [2004] B.C.C.A.A.A. No. 8.

Citing and quoting extensively from a line of Supreme Court of Canada authority that included *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 and *Regina Police Association v. Regina Board of Police Commissioners*, [2000] 1 S.C.R. 360, Arbitrator Munroe concluded the grievance was not arbitrable. At paras. 43 and 44 of the award he stated in part:

43An arbitral finding that the legislative provisions on class size are implicit in teachers' collective agreements, thus implying back into those agreements provisions of a kind earlier stripped from the agreements by legislative warrant, and legislatively declared not permissibly included now or in the future in teachers' collective agreements, would directly collide with the clearly-stated intention of the Legislative Assembly; and for that reason would be incorrect in adjudicative principle.

44 In my view, I am bound to hold that the dispute is not within the ambit of the parties' collective agreement.

The British Columbia Court of Appeal granted an application by the BCTF for judicial review of Arbitrator Munroe's award, set aside his award on the issue of jurisdiction, and ruled that an arbitrator under the collective agreement does have jurisdiction to determine whether there has been a violation of s.76.1 of the *School Act*, or the *Class Size Regulation*, or both, and to interpret the collective agreement accordingly: *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, 2005 BCCA 92.

Lambert J.A., (for the Court) cited a number of Supreme Court of Canada decisions bearing on the issue of an arbitrator's jurisdiction to hear and determine alleged statutory violations: *McLeod v Egan*, [1975] 1 S.C.R. 517; *St. Anne Nackawic v. Canadian Paper Workers*, [1986] 1 S.C.R. 704; *Weber v. Ontario Hydro*, supra; *Regina Police Association v. Regina Police Commission*, supra; *Allen v. Alberta*, [2003] 1 S.C.R. 128, and *Parry Sound v. Ontario Public Service Employees Union*, [2003] 2 S.C.R. 157. Following a review of the authorities he stated:

[37] It seems to me that it is significant that the subject of class sizes was negotiated in collective bargaining between teachers and school boards before the 2002 legislation and was clearly, in the past, regarded by the parties as a term or condition of employment. The fact that the subject of class sizes can no longer be negotiated nor have any place in the collective agreement of the parties does not make that subject any less a term or condition that affects the employment relationship. The legislation simply transfers those terms or conditions from negotiated determination to statutory determination. So I regard class sizes and aggregate class sizes as a significant part of the employment relationship. If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of s. 76.1 of the ***School Act*** and the ***Class Size Regulation***. But it would also affect other terms of the collective agreement such as a decrease in the number of teaching staff leading to dismissals or lay offs, and such as health issues arising from stress. These are only examples. The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.

[38] Bearing in mind the precepts that I have drawn from the Supreme Court of Canada decisions and which I have set out in Part VI of these reasons, I believe that a flexible and contextual approach to the position that should be adopted by an arbitrator on the application of a statutory provision to the interpretation, operation, and application of a collective agreement, and to an alleged violation, does not depend on an "incorporation" of the statutory provision in the collective agreement but rather on whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the

collective agreement, often, but not exclusively, a violation of the right expressed or implied in the collective agreement to set principles for management of the workforce in accordance with the laws of the Province. In short, the collective agreement must be interpreted in the light of the statutory breach.

Subsequent to this judicial decision, two arbitrations heard grievances concerning class size: *British Columbia Public School Employers' Association and British Columbia Teachers' Federation Re: School Act Class Size Grievance (Scope)*, unreported, September 29, 2005 (Burke), and *British Columbia Public School Employers' Association and British Columbia Teachers' Federation (Class Size Grievance)*, [2006] B.C.C.A.A.A. No. 7 (Munroe).

Resuming the legislative evolution of the statutory scheme, in July 2006 the *Education (Learning Enhancement) Statutes Amendment Act*, S.B.C. 2006, c. 21 ("Bill 33") came into force. It amended the *School Act* in a number of respects. Section 11 of Bill 33 amended s. 76.1(1) of the *School Act* by reducing the class average for grades 4 to 7 from 30 students to 28. That amendment brought s.76.1(1) into its current form as quoted at the outset of this Award.

Additionally, Bill 33 added several subsections to s. 76.1, namely: (2.1); (2.2); (2.3); (2.4) and (5). The first three subsections introduced a qualified flexibility to exceed certain statutory maximums. Subsection (2.1) permits a class size in grades 4 to 7 to exceed 30 students if in the opinions of the district superintendent and the principal the organization of the class is appropriate for student learning and the principal has obtained the consent of the teacher in that class. Subsection (2.2) permits a class size in grades 8 to 12 to exceed 30 students if in the opinions of the district superintendent and the principal the organization of the class is appropriate for student learning and the principal has consulted with the teacher in that class. Subsection (2.3) permits a class to have more than 3 students in an individual education plan if in the opinions of the district superintendent and the principal the organization of the class is appropriate for student learning and the principal has consulted with the teacher of that class.

All of the foregoing subsections are subject Subsection (2.4). Subsection (5) defines the term student with an individual education plan.

Additionally, Bill 33 added sections 76.2 to 76.8. These provisions were also quoted at the outset of this Award. Section 76.2, bearing the heading "Organization of classes – consultation at the beginning of the school year", addresses the time limits for obtaining required consents or conducting required consultations and for providing a superintendent with a proposed organization of classes that is, in the opinion of the principal, appropriate for student learning.

Subsection 76.3, headed "Organization of classes – report", is a detailed provision addressing reports prepared by the superintendent. Because of the focus of the NDTA grievance, its provisions are repeated at this juncture:

76.3 (1) In this section:

"class size provisions" means section 76.1 and any regulations made under that section;

"report" means

(a) a report prepared under subsection (2) by the superintendent of schools, or

(b) in the first usage of the term in subsection (10), and in subsection (11), a revised report;

(2) In each school year, the superintendent of schools for a school district must review, and prepare a report on, the organization of classes in the school district.

(3) The superintendent of schools must include in his or her report a rationale for the organization of any class in the school district that has more than 30 students.

(4) The minister may

(a) require additional information to be included in a report, and

(b) specify the form of the report.

(5) The superintendent of schools must date and sign the report to verify that, as of that date, the organization of classes in the school district

(a) is in compliance with the class size provisions, and

(b) is, in the opinion of the superintendent, appropriate for student learning.

(6) On or before October 1 of the school year to which the report relates, the superintendent of schools must submit the signed report to the board and to the district parents' advisory council, if established for the school district.

(7) On or before October 15 of the school year to which the report relates, the board must, at a public meeting of the board,

(a) accept the report, or

(b) instruct the superintendent of schools to revise the report.

(8) If the board instructs the superintendent of schools to revise the report,

(a) the superintendent must instruct the principal of a school, within the period established by the superintendent,

(i) if applicable, to obtain the consent of or to consult with the teacher of a class as required by section 76.1 (2.1) (b), (2.2) (b) or (2.3) (b), and

(ii) to consult with the school planning council with respect to the organization of classes within that school for that school year,

(b) on or before 15 days from the date of the public meeting referred to in subsection (7), the superintendent must revise the report in accordance with the board's instructions and submit the signed revised report to the board and to the district parents' advisory council, if established for the school district, and

(c) the board must review the revised report within 7 days of receiving the revised report.

(9) Subsections (3) to (5) apply to a revised report.

(10) The board must submit the report to the minister immediately after accepting the report under subsection (7) (a) or after reviewing the revised report under subsection (8) (c).

(11) The minister must make available to the public a report received under subsection (10).

I turn now to the September 30, 2009 report impugned in the NDTA's grievance. It begins by naming the elementary schools in School District 68 and recording there were no divisions with more than 30 students. There is no need to set out that portion of the report. The report then continues as follows:

Rationale for classes that exceed 30 students:

Of the 158 Intermediate divisions (grades 4-7), 0 exceed 30 students.

Of the 6 schools that report band classes in excess of 30 students, these classes have been organized with the consent of the teacher and are based on a rationale of "program support" where a larger grouping of students supports the needs of the program. Beginner band programs usually thrive best when the number of students range between 30 and 40 students. In addition, these schools are only able to offer band to all interested Grade 7 students, or to extend the program to Grade 6 and/or Grade 5, by providing for class groupings of this size.

School Organization: Secondary Schools

Rational of classes that exceed 30 students:

School	Ministry Code	Number of Classes	Classes with more than 30 students
Cedar Secondary	06868007	66	14
Dover Bay	06868010	183	13
John Barsby	06868011	100	27
Ladysmith Secondary	06868002	103	22
NDSS	06868001	143	4
Wellington	06868015	143	7
Woodlands	06868013	93	14

Of the 831 instructional blocks (Grades 8-12), 101 instructional blocks exceed 30 students:

Of the classes with more than 30 students 86 have been organized based on a rationale of "school organization" in support of offering a full array of programs and services.

Of the classes with more than 30 students, 15 have been organized on a rationale of "program support" where a larger grouping of students supports the needs of the program.

I verify that as of the date of this report the organization of classes in the school district is:

- a) In compliance with the class size provisions as defined in the Class Size Regulation
- b) In my opinion appropriate for student learning

 Michael J. Munroe, Superintendent of Schools
 School District 68 (Nanaimo-Ladysmith)

 Date

The copy of the report tendered at the hearing did not bear a handwritten signature of Superintendent Munroe or a specific date, but nothing turned on this at the hearing. Presumably, the original of the report did bear the signature and date.

The Superintendent submitted the report to the Board under s. 76.3(6) of the *School Act* and the Board accepted the report at a public meeting under s. 76.3(7).

III. The Parties' Position

Both parties presented written submissions upon which they elaborated during oral argument. I do not propose to recount exhaustively the arguments advanced, but I have endeavored to be mindful of them in the course of my deliberations. What follows is an outline of what I perceive to be their essential positions.

The Union's essential position at the hearing was that the superintendent's report did not meet the requirements of s. 76.3(3) of the *School Act*. More specifically, with reference to the report's language expressing the rationale for classes exceeding 30 students, the Union asserted that the report was deficient in failing to identify and isolate each class having more than 30 students and in failing to state which rationale or rationales applied to each such class. In addition, it submitted that the report was also non-compliant with s. 76.3(3) in that it did not report individual instances in which teachers disagreed with the organization of the class. As a consequence, submitted the Union, the Board ought not to have accepted the report under s. 76.3(7). Given the asserted deficiencies of the report, the Union submitted that the Board's decision to accept the report cannot be considered a reasonable decision.

In making these submissions, the Union relied on various statements made by Arbitrator Dorsey in an award addressing and determining alleged violations of s. 76.2 of the *School Act: British Columbia Teachers' Federation and British Columbia Public School Employers' Association (Grades 4 to 12 Class Size and Composition-2006-07 and 2007-08 School Years, unreported, August 21, 2009 (the "Dorsey award")*. That award was referenced in the grievance quoted at the outset of this Award.

The Dorsey award determined whether, as alleged by the BCTF, there had been violations of s. 76.2 in the two school years covered by the arbitration. A massive document, the award contains a comprehensive review of the historical background relevant to class size

and composition and a careful, detailed analysis of the requirements and scope of s. 76.2. The award went on to address alleged violations of this provision and, in some cases, determined that violations had occurred.

Specifically, the Union relied on passages in the Dorsey award emphasizing the importance of the consultative process set out in the statutory scheme. In particular, it quoted passages from the following paragraphs of the award. The cited paragraphs are set out in order of their appearance in the award.

[381] Knowledge of teacher disagreement is important in the formation of the principal's opinion if the teacher's role in the consultation is to be a central role. It is important and relevant information to communicate to the superintendent for the formation of his or her opinion. It may be information that school planning councils, district parent advisory councils and boards of education consider relevant in the accountability scheme for class size and composition standards. This may be particularly so when the principal's organization of a class is the consequences of meeting a district average class size in the aggregate or the teacher's disagreement is rooted in district resource allocation of decisions.

[441] The factors to be considered by an arbitrator in reviewing a principal's decision to organize a class that exceeds the class size and composition standard and the principal and superintendent opinions the class is appropriate for student learning are factors that relate to transparency, the reason the class was organized as it is and the basis of the opinions the class is appropriate for student learning.

[442] Transparency will be fulfilled by meeting the consultation and reporting requirements. The reason for the organization of the class involves an explanation of the alternative class organizations explored and the reason the organization in dispute was chosen. The basis for the opinions that the class is appropriate for student learning involves all the reasons and factors that led the principal and superintendent to their opinions the class is appropriate for student learning. These may include teacher requests, class, school and district supports for the class and the students in the class.

[450] As part of the due diligence, the superintendent must be informed about classes that exceed the class size and composition standard with which the teacher agrees it is a class appropriate for student learning and those classes for which the teacher disagrees or did not express an opinion. Principals, superintendents, boards of education and, perhaps, parents need to know if teachers do not believe their classes are appropriate for student learning.

The Union submitted that Arbitrator Dorsey's views are relevant to the interpretation of s. 76.3 and to the arbitrability issue posed in this case. Further, it urged me to follow the modern approach to statutory interpretation, described by Arbitrator Dorsey as one "...which looks to the

text, the intention, the purpose or purposes sought to be achieved and the consequences of the proposed interpretation”, and to read s. 76.3 harmoniously with s. 76.2.

The Union also relied on the decision of the British Columbia Court of Appeal in *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, supra, for the proposition that alleged violations of 76.3(3) and s. 76.3(7) are arbitrable. It characterized the superintendent's report and the board's acceptance of a report as the “last stage” in the determination of class size and composition. A board decision to accept a report, it submitted, is a decision about class size and composition within the scope of the court's ruling on arbitrability.

The Employer's essential position was that the superintendent's report under s. 76.3(3) and, by implication, the Board's acceptance of that report under s. 76.3(7) are inarbitrable because they are not matters arising out of the interpretation, application or operation of the Collective Agreement between the parties. Section 76.3, it was submitted, consists of process provisions addressing public accountability and providing a mechanism for review of compliance with the legislation.

The Employer emphasized that the Union has the right to grieve class size and composition provisions of the *School Act* because they are a significant part of the employment relationship. It disclaimed any intent to deprive the Union of its right to grieve the opinions formed by principals and superintendents respecting the appropriateness of class organizations for student learning, the adequacy of consultations, contraventions of class size maximums, or required class size averages, matters which were addressed in the Dorsey award for the school years 2006-07 and 2007-08. In this connection, the Employer noted the BCTF has filed a general grievance for the school year 2009-10 in which all classes in the Province exceeding 30 students are placed in dispute. The Employer stated it does not object to the arbitrability of that

grievance, which encompasses all the classes in this grievance alleged by the NDTA to be deficiently reported under s. 76.3(3). It should be added that the general grievance specifically excludes grievances concerning alleged violations of s. 76.3(3) because the BCTF has taken the position that grievances respecting superintendents' reports will be separate grievances.

Focusing on *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, supra, the Employer submitted that it recognized two principles respecting the arbitrability of a statutory provision; namely, it must create substantive rights and obligations, and there must be a real contextual connection between the provision and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement. Factually distinguishing the Court of Appeal decision, it was submitted that these principles are not satisfied in this case because there is no history of collective bargaining respecting the matters addressed in s. 76.3

The Employer further submitted that 76.3 does not satisfy the above tests of arbitrability because it is a process and accountability provision, not one that creates substantive rights and obligations. In making this submission, the Employer also relied on *British Columbia Public School Employers' Association/Board of Education of School District No. 39 (Vancouver)* and *British Columbia Teachers' Federation/Vancouver Teachers' Federation*, unreported, April 9, 2009 (Gordon).

IV. Analysis and Decision

The issue to be determined in this Award is a preliminary question. Do I have jurisdiction to hear and determine the matters raised in the October 20, 2009 grievance? I begin with statements of general principle respecting the arbitrability of statutory provisions.

It is settled law that the collective agreement between the parties is the foundation of an arbitrator's jurisdiction: *Dayco (Canada) v. CAW-Canada*, [1993] 2 S.C.R. 230; *Parry Sound v. Ontario Public Service Employees Union*, [2003] 2. S.C.R. 157. That principle, however, does not mean that an arbitrator's jurisdiction is always confined to the express provisions of the collective agreement. In some circumstances an arbitrator has jurisdiction to address and determine whether statutory violations have occurred.

The circumstances in which alleged statutory violations will permit arbitral scrutiny have been variously described in Supreme Court of Canada decisions. For example, in *Parry Sound*, supra, Iacobucci J. (for the majority) observed that an arbitrator has jurisdiction to consider the "substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement" (Reasons, para. 1). Later, he expressed himself more narrowly, stating that arbitrability will depend on whether the substantive rights and obligations are "implicit in" or "incorporated into" the collective agreement (Reasons, paras. 19 and 20).

In *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, supra, Lambert J.A. formulated an arbitrability test which did not depend on "incorporation" of the statutory provision. But he did not appear to doubt the requirement that there be "substantive rights and obligations". In this connection, in Part VI of the Reasons he said:

[34] It is also important to note that it is not the *Human Rights Code* itself that is said, in the first sentence of paragraph 23, to be "incorporated" in the collective agreement, but "the substantive rights and obligations of the *Human Rights Code*".

I take this passage and others later in the Reasons to mean that jurisdiction over some provisions of a statute does not of itself confer jurisdiction over all of its provisions. Only those provisions containing substantive rights and obligations will be arbitrable.

Turning to Lambert J.A.'s reasons for a finding of arbitral jurisdiction under s. 76.1 of the *School Act* and its related regulation, for convenience I will again quote the following paragraphs:

[37] It seems to me that it is significant that the subject of class sizes was negotiated in collective bargaining between teachers and school boards before the 2002 legislation and was clearly, in the past, regarded by the parties as a term or condition of employment. The fact that the subject of class sizes can no longer be negotiated nor have any place in the collective agreement of the parties does not make that subject any less a term or condition that affects the employment relationship. The legislation simply transfers those terms or conditions from negotiated determination to statutory determination. So I regard class sizes and aggregate class sizes as a significant part of the employment relationship. If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of s. 76.1 of the *School Act* and the *Class Size Regulation*. But it would also affect other terms of the collective agreement such as a decrease in the number of teaching staff leading to dismissals or lay offs, and such as health issues arising from stress. These are only examples. The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.

[38] Bearing in mind the precepts that I have drawn from the Supreme Court of Canada decisions and which I have set out in Part VI of these reasons, I believe that a flexible and contextual approach to the position that should be adopted by an arbitrator on the application of a statutory provision to the interpretation, operation, and application of a collective agreement, and to an alleged violation, does not depend on an "incorporation" of the statutory provision in the collective agreement but rather on whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement, often, but not exclusively, a violation of the right expressed or implied in the collective agreement to set principles for management of the workforce in accordance with the laws of the Province. In short, the collective agreement must be interpreted in the light of the statutory breach.

As I read the foregoing two paragraphs, the essential test is set out in paragraph 38 but the factors identified in paragraph 37 are relevant to the application of that test. Accordingly, is the statutory provision a significant part of the employment relationship? Second, applying a flexible and contextual approach, is there a real and contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement?

I wish to say at the outset that the Union's position exhibits some initial appeal insofar as s. 76.3(3) and s. 76.3(7) are elements of a statutory scheme, portions of which are clearly

arbitrable. Upon reflection, however, I have concluded that these provisions do not meet the requirements for arbitrability laid down by the Supreme Court of Canada and the British Columbia Court of Appeal. My reasons follow.

First, on the material presented at the hearing, there is no prior history of collective bargaining with respect to the matters addressed in s. 76.3. A prior history of collective bargaining respecting matters addressed in a statutory provision is a significant consideration because it tends to show that the parties regarded the matter as a term or condition of employment. However, although the Court of Appeal considered it to be a significant consideration, I do consider the absence of bargaining history to be determinative of the jurisdictional question. To select an obvious example, substantive provisions in human rights legislation that have never been the subject of collective bargaining can nonetheless be within arbitral jurisdiction.

More fundamentally, I am unable to conclude that the statutory provisions in issue create substantive rights and obligations. Substantive rights and obligations are found in s. 76.1, s. 76.2 and s. 76.4. In contrast, in my view, s. 76.3 is a process and public accountability provision, as submitted by the Employer. As I interpret the provision, it is a reporting scheme respecting class size and composition decisions previously made under earlier statutory provisions. Accordingly, I am unable to accept the Union's characterization of a board's acceptance of a report as the "last stage" in the determination of class size and composition.

In this connection, it is notable that s. 76.2(c) provides that a principal will provide a superintendent with "a proposed" organization of classes. In contrast, under the statutory language, a superintendent does not "propose" an organization to a board of education; that word is absent. A superintendent prepares and submits a report on the organization of classes, not a report on a proposed organization. Then a board will determine whether to "accept" the

report under s. 76.3(7)(a). In short, as I read the legislation, the substantive decisions respecting class organizations are made before the matter reaches a board of education.

Parenthetically, I note that the language of the statute is different when a board of education considers a revised report. In that case, somewhat curiously, the statute does not speak of a board accepting the revised report; the board is instructed to “review” it:

(10) The board must submit the report to the minister immediately after accepting the report under subsection (7) (a) or after reviewing the revised report under subsection (8) (c). (emphasis added)

Reading the scheme as a whole, to me, the task of a board is intentionally distinct from the tasks of a principal and superintendent. It cannot have been intended that a board would repeat the core functions the statute entrusts to principals and superintendents. Moreover, such an overlapping of function would be impracticable.

It should perhaps be added that the language of the Dorsey award itself provides some support, albeit at most *obiter*, for the proposition that s. 76.3 is an accountability provision. Paragraph 381 of the award, quoted in full earlier, states in part:

[381] ...It may be information that school planning councils, district parent advisory councils and boards of education consider relevant in the accountability scheme for class size and composition standards....

Apart from the foregoing, and in any event, the position taken by a board under s. 76.3(7) is not necessarily the last word on class size and composition. Under s. 76.5 the minister must appoint a special administrator with statutory powers if in the minister’s opinion there has not been statutory compliance with class size provisions. Additionally, under s. 76.6 the minister may appoint a special administrator if the minister is of the opinion that certain requirements have not been met. In particular, an appointment may be made where the minister holds the opinion that a superintendent has contravened subsections 76.3(3) or (5), or

a board has contravened s. 76.3(7). In short, the statute provides an extensive review and remediative scheme that extends well beyond a board's acceptance under s. 76.3(7).

In light of s. 76.5 and s. 76.6, I have considered whether it could have been the intent of the Legislature that a superintendent's report and a board's decision to accept the report are arbitrable. The minister's actions and those of a special administrator would necessarily be beyond the scope of arbitral review because these persons are not parties to the collective agreement. In addition, under s. 76.3(4) the minister can require additional information to be included in a superintendent's report and may specify the form of the report. Again, ministerial actions under s. 76.3(4) would not be arbitrable. In the context of these considerations, even adopting a modern view of statutory interpretation, it is unlikely that there was a legislative intent that the provisions grieved would be arbitrable.

With respect to the Union's reliance on the Dorsey award, Arbitrator Dorsey did write about the inclusion of teacher's positions in the information placed before a board. The fact is, however, he expressed himself in different ways. Speaking of teacher disagreement, he stated in part:

[381] It may be information that school planning councils, district parent advisory councils and boards of education consider relevant in the accountability scheme for class size and composition standards. (emphasis added)

Later, he expressed himself in more forceful terms, stating in part:

[450] Principals, superintendents, boards of education and, perhaps, parents need to know if teachers do not believe their classes are appropriate for student learning. (emphasis added)

Having made the foregoing observations, however, Arbitrator Dorsey also said this:

[438] A grievance over the organization of a class will come before an arbitrator after the legislated review process within a board of education has been completed and the board of education has submitted a report to the minister that is made public and includes the organization of classes that exceed the class size and composition standard. The report will include the rationale or any class with more than thirty students in which some school districts make extensive statements, including when teachers have agreed to the organization of the class. Others, usually larger school districts, more narrowly construe

the requirement to report a "rationale for the organization" as what caused the class to have more than thirty students. (emphasis added)

Two observations can be made about the above quoted paragraph. First, on its face, it suggests that the proper stage to grieve class size and composition is after a board of education has submitted a report to the minister and it has been made public. Second, the final sentence appears to recognize that at least some larger school districts do not report teacher positions in reports to boards of education. In this connection, in reply, the Employer stated that in at least five school districts addressed in the Dorsey award, the superintendents did not know the teachers' positions and accordingly did not report on them. Yet, said the Employer, Dorsey accepted the superintendents' opinions in those cases.

I have endeavored to read the Dorsey award with care. While I admire and respect the work he performed, and though he considered the wisdom of supplying boards of education with teachers' positions, the fact is that the arbitrability of the statutory positions in dispute in this grievance were not in issue, not argued and not explicitly commented upon in his award. In these circumstances, his remarks are at best non-binding *obiter* and of limited utility.

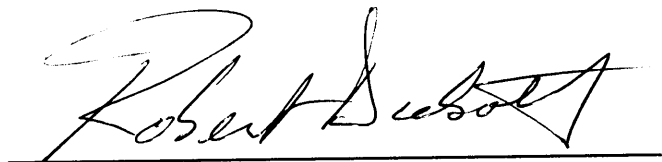
I also consider *British Columbia Public School Employers' Association/Board of Education of School District No. 39 (Vancouver)* and *British Columbia Teachers' Federation/Vancouver Teachers' Federation*, supra, to be of limited utility. In that case, the union alleged that a board of education violated s. 76.3(7) of the *School Act* when it accepted a superintendent's report. Specifically, the union asserted that the board chair misinterpreted and misapplied language in the rules of order governing the board's meeting procedures established under a by-law made under the authority of ss. 67 and 68 of the statute. After reviewing a number of authorities, including the decision of the Court of Appeal in *British Columbia Public School Employers' Association and British Columbia Teachers' Association*, supra, Arbitrator Gordon ruled the grievance inarbitrable. In her view there was no real connection between the

statute, the collective agreement and the dispute between the parties. In arriving at her conclusion, she noted that board meeting procedures had never been a matter of collective bargaining. In her view they were "internal" matters.

Arbitrator Gordon's award is valuable for its review of the authorities and its statements of principle. However, the factual matrix before her was considerably different from this case. Ultimately, therefore, apart from statements of principle respecting arbitrability, I do not consider it directly applicable.

In summary, I am unable to conclude that the statutory provisions in issue create substantive rights and obligations or that they are a significant part of the employment relationship. Nor am I able to conclude that there is a real and contextual connection between the statutory provisions in issue and the collective agreement such that a violation of them gives rise, in the context, to a violation of the provisions of the Collective Agreement. I find myself in agreement with the Employer's position that the superintendent's report and the Board's acceptance of it are internal processes designed to further accountability respecting class size and composition. As stated earlier herein, in my view, the substantive rights and obligations are enshrined in s. 76.1, 76.2 and 76.4. Those provisions, as noted, are being arbitrated on a province-wide basis in respect of the 2009-10 school year.

Because I have concluded that the provisions in issue in s. 76.3 are inarbitrable, I must conclude and declare that I lack jurisdiction to hear and determine the merits of the grievance. Accordingly, the grievance is dismissed. IT IS SO AWARDED.



Robert Diebolt, Q.C.
Single Arbitrator