

LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION /
NANAIMO DISTRICT TEACHERS' ASSOCIATION

UNION

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

EMPLOYER

(Re: Superintendent's Class Organization Report – *School Act*, s.76.3(3))

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Carmella Allevato, Craig D. Bavis and Amanda Merritt
Representing the Employer:	Judith C. Anderson
Dates of Hearing:	September 17 and 18, 2011
Date of Decision:	September 25, 2011

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1. Union Seeks Review of Superintendents' Class Organization Reports

[1] This dispute is another chapter in what some characterize as a litigation quagmire for public education class size and composition organization in British Columbia. The government acted to take this issue away from the collective bargaining table and out of grievance-arbitration and the courts. It enacted legislation to make class organization a matter of public policy expressed in legislation implemented through school district management discretion rather than a collective agreement matter. One set of consequences was an illegal strike, a successful constitutional challenge to the initial 2002 legislation, Court of Appeal decisions directing disputes to grievance-arbitration and several grievance arbitrations.

[2] It is understandable and predictable, against the history of the class size and composition issue in British Columbia public education, that the union regards itself as an agent to ensure vigilant adherence to all aspects of the legislative scheme. Its preferred enforcement forum is grievance-arbitration, but the scope of matters under the legislation within the exclusive jurisdiction of grievance-arbitration is not yet fully defined.

[3] The union has been seeking to use grievance-arbitration to assert and enforce its interpretation of the statutory obligation on superintendents of schools to prepare an annual class organization report to be submitted to boards of education on or before October 1st. The employer's steadfast position has been that the union has no right or place to insert itself into the reporting to boards of education by their appointed superintendents of schools and grievance arbitrators have no jurisdiction over this subject matter.

[4] The union maintains the legislatively mandated class organization report is unlike any other report superintendents of schools must make under the *School Act* or at the direction of boards of education because this report deals with class organization and is a component of the statutory scheme regulating class size and composition enacted in 2006 (*Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21 (Bill 33)).

[5] Section 76.3 of the *School Act*, of which section 76.3(3) is the specific focus of the union's concern and attention in this dispute, states:

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.** (emphasis added)
- (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).

[6] The union and employer have referred to arbitration the issue whether a grievance asserting a superintendent failed to comply with section 76.3(3) can be arbitrated under their collective agreement and the *Labour Relations Code*. Only if I determine I have jurisdiction am I to address the merits of the union's asserted interpretation of the obligations imposed on a superintendent under section 76.3(3).

[7] The union and employer agree I have jurisdiction under their collective agreement and the *Labour Relations Code* to decide whether this is a matter within the jurisdiction of grievance-arbitration.

2. General Organizational Overview of Boards of Education

[8] The preamble to the *School Act*, RSBC 1996, c.412 states its purpose:

WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become literate, personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society;
AND WHEREAS the purpose of the British Columbia school system is to enable all learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy;

[9] Part 4 of the *School Act* (ss. 30 – 54) deals with the establishment of boards of education, trustee qualifications, elections, electors, election proceedings and office holding. Part 5 (ss. 55 – 64) deals with trustee conflicts of interest. Part 6 (ss. 65 – 95) addresses the role, authority and powers of boards of education under four divisions:

1. Corporate Status and Meetings (ss. 65 – 72)
2. Powers and Duties (ss. 73 – 87)
3. Health and Other Services (ss. 87.1 – 92)

4. Limitation of Actions and Indemnification (ss. 93 – 95)

[10] The senior management employee in a school district is the superintendent of schools appointed by the board of education. The superintendent of schools (directeur général of a francophone education authority), under the “general direction” of the board of elected trustees, is statutorily responsible for the delivery of educational programs. Section 22 of the *School Act* states:

Superintendent of schools

- 22 (1) A board must appoint a superintendent of schools for the school district who, under the general direction of the board,
- (a) has general supervision and direction over the educational staff employed by the board of that school district,
 - (b) is responsible
 - (i) to the board, for improvement of student achievement in that school district,
 - (ii) for the general organization, administration, supervision and evaluation of all educational programs provided by the board, and
 - (iii) for the operation of schools in the school district,
 - (b.1) must, on or before December 15 of a school year, prepare and submit to the board a report on student achievement in that district for the previous school year, and
 - (c) must perform other duties set out in the regulations.
- (2) A board may appoint one or more assistant superintendents of schools to perform those duties assigned by the superintendent of schools for that school district.
- (3) A superintendent of schools must promptly provide to a superintendent of achievement for the school district any information or report requested by the superintendent of achievement.

[11] In 2002, existing class size provisions in the collective agreement were declared void and deleted from the collective agreement. Under a new section 76.1 of the *School Act* enacted in the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3 (Bill 28), superintendents were given discretion to organize classes, subject to grade level district class size averages and Kindergarten and Grades 1 to 3 class size limits. Average calculation methods, reporting requirements and other matters could be directed by regulation, not Ministerial Order or direction. Consultation with teachers or their union was not specifically identified as a part of the annual school and class organization process.

[12] The amendments to section 76.1 and additions to the class size provisions enacted in 2006 were after the British Columbia Court of Appeal decided in 2005 that the union could arbitrate a grievance that a board of education had not complied with

section 76.1; denial of leave to appeal from that decision by the Supreme Court of Canada; and the teachers' illegal strike in 2005. (*Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21 (Bill 33))

[13] These 2006 provisions enacted in Division 2 (Powers and Duties) of Part 6 of the *School Act* (ss. 66 – 87) and dealing with the annual organizing of classes are the most specific and directive provisions in the *School Act* on the discharge of superintendent responsibilities and how boards of education are to exercise their oversight and general direction of superintendents in the discharge of these responsibilities.

3. Nanaimo-Ladysmith District Class Organization Reporting (2006 – 2009)

[14] This dispute arises from class organization reporting by the superintendent in the Nanaimo-Ladysmith school district. Michael J. Munro, previously employed in various positions in the school district, was appointed superintendent in March 2006. The new class size and other provisions were given Royal Assent on May 18, 2006, effective for the coming school year. The entire provisions state:

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.

Authority of vice principal under sections 76.1 to 76.6

76.8 If authorized by the principal of a school, the vice principal of the school may perform any duties of the principal under sections 76.1 to 76.6.

[15] On second reading on May 4, 2006, the Minister of Education spoke about the purposes of the legislation. She said: “The changes to the School Act we are introducing will provide for smaller classes, increased accountability and more consultation for parents and teachers.” (*Hansard*, 38th Parliament, Second Session, May 4, 2006, p. 4397)

[16] The Minister characterized the content of the amendments as: “New class size limits for grades four through seven and for students with special needs, as well as new requirements for consulting and reporting, and a mechanism to ensure that boards comply with legislation.” She described the compliance mechanism as follows:

The school board must then review the superintendent's report at a public meeting on or before October 15 each year and then send a copy of that report to the Minister of Education. The school board will be able to decide whether to accept the report, or they may instruct the superintendent to revise the report. In that case, the report must be returned to the board within 15 days.

If a school board fails to comply with the class size and composition requirements, the province will appoint a special administrator, and if a school board fails to follow the direction of a special administrator, the board may be dissolved and an official trustee appointed to conduct the affairs of the school district. (p. 4398)

[17] During section review of Bill 33 in the Committee of the Whole House, the Minister stated:

The other thing we agreed on at the Learning Roundtable was the issue of accountability. This bill actually builds in a system of accountability.

Principals will be required to talk to teachers. Now, one would think we wouldn't need legislation to make sure that happens, but apparently we do. So principals will talk to teachers, and eventually they'll include parents in that discussion through school planning councils, the board and the district parent advisory council.

Ultimately the superintendent is responsible to take the school organization plan to the board of trustees. Principals and superintendents will work together to make those decisions at the school level, but the superintendent is ultimately responsible to the board. The board is ultimately accountable to its community, who chose it, and to the government to be able to demonstrate that that plan is acceptable and appropriate for the children in that district. (*Hansard*, 38th Parliament, Second Session, May 10, 2006, p. 4660)

[18] With respect to the balance sought to be struck in the legislation among differing perspectives, the Minister said:

With respect to class size and composition, this legislation addresses many of the concerns we heard at the Learning Roundtable; in our meetings with student and parent groups; and, most recently, during numerous visits to schools, to school districts and, in fact, to dozens of classrooms across the province. All of our education partners have provided valuable input, and it is obvious that each one of them wants what's best for British Columbia's students.

It's also clear that our partners – whether it's parents, teachers, superintendents, principals, vice-principals, school trustees.... There is not necessarily agreement on the best way to improve learning conditions in our classrooms through class size and composition. For example, principals were concerned about fixed class-size limits in legislation, although they recognize that large classes in grades four to seven, and pressure points are experienced there.... That is an issue for them.

Parents expressed concern that fixed numbers in secondary schools limit student elective choices, though they had some concern about the pressure points once again, and somewhat larger classes in grades four to seven. Teachers, of course, made it clear that they support firm class-size limits in grades four through 12.

This legislation balances many of the concerns that we've heard. There was a common view that classes in grades four to seven have pressure points when it comes to class size. This legislation places firm limits on class sizes in grades four to seven.

All members of the round table agreed that there should be an enforcement mechanism for school boards that are not in compliance with class-size legislation. This legislation includes an enforcement mechanism for that class-size legislation. Roundtable members also agreed that parents and teachers need to be engaged in meaningful and genuine consultations about class size and composition. This legislation provides teachers with a stronger role in class-size organization.

Teachers must consent to class size numbers in grades four to seven that exceed 30 students. Teachers must also be consulted on any class in grades eight to 12 that is proposed to exceed 30 students. Teachers must also be consulted on any class that is proposed to have any more than three students with special needs in the class.

This legislation gives parents more say about class size and composition. Principals must consult with the school planning council on class organization within 15 days of the start of the school year. After the start of the school year, if a class exceeds 30 students, principals must advise the school planning council and provide a rationale for the organization of that class.

Parents, educators and school boards all have a vital role to play in school planning that is centered on increasing student achievement. These legislative changes will result in smaller classes, which in turn will lead to improved student achievement. (p. 4398)

[19] The Ministry of Education struck a team to assist superintendents and boards of education to plan and implement this new regime for the 2006-07 school year. The boards had to become aware of the implications on budgetary strategies and planning. The legislation contains mandatory timelines.

[20] The *Class Size Regulation*, B.C. Reg. 245/02 was amended on September 7, 2006, effective September 8, 2006, to change board data reporting to the Minister. Section 6, which has not been amended since 2006, states:

- (1) Subject to subsection (2), on or before October 30 of each year, a board must prepare and submit to the minister a class size data report in the form and manner and containing the information required by the minister.
- (2) A board may include the class size data report with the report on organization of classes required under section 76.3 (10) of the Act, unless the board has instructed the superintendent to revise the report under section 76.3 (7) (b).

[21] In the Nanaimo-Ladysmith school district, the experience prior to 2006 had been that 13.4% of Grades 8 to 12 classes had more than 30 students. In May 2006, the superintendent advised the board that there would likely be larger classes for band and other classes where larger numbers are desirable and some classes slightly larger than 30 students where it would “allow the school to offer smaller classes in specialty area to fill out the educational program.”

[22] The Ministry informed superintendents it would be collecting board approved class organization plans between October 16th and 31st. This report is the initial or revised report submitted by the superintendent to the board under Section 76.3. The Ministry had published statistical reports for the 2005-06 school year on individual school, district and provincial class sizes and class averages. The web-based forms for uploading and collecting the data that were used in the reports were to be revised for

the 2006-07 school year to include new fields. The Ministry advised superintendents and boards:

You should use your own local information privacy policy and practice guidelines to ensure that any information related to an identifiable student is kept confidential and out of the public record. You might do this through the clustering of classes to make rationale statements, or through the way you word the rationales to convey the message without identifying students or sensitive issues.

The Ministry is not collecting the rationales as part of the electronic data collection, so they will not be made public through the release of the statistical reports. The rationales will be collected in paper form, but there is no intention for the Ministry to release these documents to the public due to their sensitive nature.

[23] Superintendent Munro submitted his report with a background, statutory and operational explanation. He listed schools, their number of classes and the number of classes in the school with more than 30 students. He clustered classes under rationale statements. The rationales were reported as follows:

Of the 166.5 Intermediate divisions (Grades 4-7), none exceed 30 students.

Of the 7 schools that report band classes in excess of 30 students, these classes have been organized 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 numbers 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.

Of the 995 instructional blocks (Grades 8-12), 50 instructional blocks exceed 30 students.

Of the classes with more than 30 students, 31 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, 19 have been organized on a rationale of "program support" where a larger grouping of students supports the needs of the program.

The board's public meeting on September 27th was attended by Carol McNamee, President of the Nanaimo District Teachers' Association who asked several questions about the report. He is reported to have been disappointed the board did not receive sufficient information to ensure all students were in a good learning environment. The report was unanimously approved by the trustees and forwarded to the Minister by the superintendent by letter dated September 28th.

[24] The superintendent provided further the board with further reports on class and school organization in October and throughout the school year. Data as of September 30th was uploaded to the Ministry when its web form was available on October 31st. The Ministry was coordinating the collection with the annual form 1701 verification reports

and not using the reports forwarded by the superintendents. The data uploaded included distribution of students with special needs and English as a Second Language.

[25] The superintendent presented a second semester class organization report to the board in February. This data was not collected and reported by the Ministry.

[26] In February 2007, the Ministry published the September 30th individual school, district and provincial class sizes and class averages.

[27] The school district identified discrepancies between the Ministry's public report and the superintendent's class organization report. The different reporting dates, September 27th and 30th, accounted for a difference of three classes with more than 30 students.

[28] For the 2007-08 school year, the Ministry made enhancements to its web-based reporting. The Ministry informed superintendents:

There is a bit of a sleeper in the class size reporting web form. It now provides a field to enter the rationale for each class over 30 and requires that an entry be made. This change is made so that you do not need to report this information in a separate report when the Board approves the Superintendent's report and sends it on to the Minister in October.

The effect of this change will be to make the rationale stated more accessible and transparent. This will meet the Minister's requirement to report this information publicly but has the consequence of requiring more care in framing the rationale. It was expected that the rationale reflect thoughtful professional judgment. Last year some rationale did not meet this standard. Examples included, "Too many kids", "not enough divisions", "no other options" and the prize winner "I wish I could do more." Please caution your principals that their statements will be readily accessible to anyone who wishes to review the nature of their professional judgements.

[29] By email dated September 25, 2007, the Ministry addressed the statutory requirement for the filing in accordance with section 76.3(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)." The Ministry advised superintendents in an email:

Heads up - class size reports

I have had several calls on the class size reporting requirement as we near month end. There are a few differences from last year but fairly minor. Consider these:

- * Last year you were required to report actual class size and composition as of September 30 and submit a report by an early October deadline. Then at somewhat later you were required to submit the superintendent's report as approved by the Board with a declaration that your district was in compliance with the School Act and rationale for classes that were over 30. This meant that we received a data report on

September 30 and an approved report sometime in October. Frequently the two reports differed.

- * So this year, we want only one electronic report of the size of each class after it has been approved by the Board. That electronic report will also include the rationale for each class over 30. No other report of class sizes needs to be sent to the Ministry following the Board's approval. All we need is the declaration (see below).
- * Remember, in order to protect privacy, the rationale for classes that have more than three students with special needs is not reported.
- * The Superintendent's class size report, must be provided to the Board and DPAC by October 1. The Board has until October 15 to approve or change the report and must download the approved report through BCSIS or enter the report on the webform immediately thereafter.
- * As the rationale are part of the data report, these statements are accessible publicly.
- * The Board report to the Ministry is that which the Board has submitted to the webform and the approved report of the superintendent. The report of the superintendent is a declaration that can use language parallel to that found in section 76(5) of the School Act. It is the Superintendent's signature that should be on this report but it needs to be accompanied by a letter or minutes of a Board meeting attesting to its approval.

The main difference this year is that you should not be submitting any further class size report following Board approval of the superintendent's report. You will only be submitting the declaration following Board approval.

Rick Davis

Superintendent, Student Achievement

Ministry of Education

[30] Superintendent Munro's class organization report to the board as of September 30, 2007 was similar to the one in 2006. He informed the board a more detailed class-by-class profile data report would be filed with the Ministry for its publication. His speaking notes include detailed school reports with the rationale for the number organized with more than 30 students in each school – "school organization" (mostly "activity based classes" and "not predominantly associated with academic programs") or "program support." The trustees unanimously approved the report. In accordance with the Ministry instruction, a copy of this report was not sent to the Ministry.

[31] The Ministry report made available to the public in December 2007 listed classes by school and division, classes with more than 30 students at September 30th, the number of students in each class and the rationale for each class. The rationales for the classes were more specific than "school organization" or "program support."

[32] Throughout the school year, Superintendent Munro provided the board with update reports on class organization. The number of classes with more than 30 students declined from 78 (September) to 59 (October) to 47 (February) to 32 (April).

[33] The process was repeated for the 2008-09 school year and Superintendent Munro gave a similar class organization report as of September 30th to the board. He forwarded his class organization report to the Minister with a letter from the board chair.

Dear Minister Bond:

RE: Superintendent's Report on Class Size and Composition

At the Open Board Meeting held on October 15, 2008 the Superintendent of Schools presented his report on Organization of Classes in School District No. 68 (Nanaimo-Ladysmith) as of September 30, 2008. While the Board of Education did unanimously approve the report as presented, it did pass the following motion:

That the Board of Education write a letter to be sent with the document Organization of Classes in School District 68 (Nanaimo-Ladysmith) final report from the Superintendent of Schools for the 2008-09 school year to indicate that while the District is in compliance with Bill 33, many of the class sizes and class compositions will not be conducive to creating the conditions for "best practice", and farther, that this is due to the lack of funding for Bill 33.

While classes have been established this September within the guidelines of the Bill after the necessary consultation with teachers and in some cases with the consent of teachers, many have compositions that are challenging in that they exceed the guidelines of the legislation. Also, many secondary classes exceed the class size guidelines of the legislation. The issue here is one of a lack of adequate funding to enable the District to comply with the Bill 33 guidelines and at the same time provide learning conditions that allow for "best practice" to take place.

When the legislation was first implemented we had to increase our teacher staffing at the elementary level by twelve FTE teachers and each year since we have had to add slightly to that in order to meet the District averages required under the legislation. It is particularly difficult for us to maintain the district average at the primary level. This September we had to add three additional teachers in order to do that. Due to lack of funding and increasing costs we had to increase class sizes at the secondary level this year as one of the budget strategies we adopted to balance our budget. This has led to an increase in the number of classes that exceed the Bill guidelines and has created challenges for principals in being able to offer certain courses.

When it comes to class composition the District again is experiencing the reality of not having enough funding to allow for "best practice" to take place. Over 10% of our student population have designations and individual education plans and many of them do not generate supplemental funding. Despite an overall declining enrolment trend in the district, the number of designated students has remained constant or slightly increased over the past few years, resulting in a higher percentage as a group of our overall student population. This places additional stress on the consultation process that occurs between our principals and teachers.

The District has closed six elementary schools and one alternate school in the past four years, which cumulatively results in net annual operating budget savings commencing this year of approximately \$1.6 million. Despite this strategic action on our part, we have been unable to significantly improve the learning conditions for all students in the district because most, if not all, of these savings have had to be directed to complying with the guidelines of Bill 33. The political nature of the decision to implement the Bill should not penalize districts who have recognized the need to rationalize their operations in the face of declining enrolment. Funding should have been provided to support the legislation

which would have allowed districts, such as ours, to truly improve the learning conditions for all students by allowing us to advance our "best practices" in an effective manner. I implore you, on behalf of all students, to adequately fund this legislation so we can move ahead with improving learning instead of merely balancing budgets.

Sincerely,
 Jamie Brennan
 Board Chair

[34] In October the board received detailed class size data by school with the number of classes in class size bands (<20; 21 – 25; 26 – 30; 30; 31; 32; 33; 34; 35 and 35+) and grade level averages for the past three years. As in 2007, the Ministry report made available to the public in December 2008 listed classes by school and division, classes with more than 30 students at September 30th, the number of students in each class and the rationale for each class.

[35] Several new trustees were elected and took office in December 2008. Superintendent Munro gave the board an updated class organization report in March 2009. His report was referred to the Education Committee, which recommended the board direct staff to prepare a report on Grades 11 and 12 “availability of classes and programs at secondary.” The report was prepared and presented.

[36] Operational changes were made in September 2009 to improve principal reporting for the 2009-10 school year. The Superintendent of Achievement asked that each school district:

Complete the class size report directly onto the web form (instructions provided earlier) or through BCeSIS download to the web form. This electronic report is the only report that should be submitted to the ministry. No other paper based reports are necessary or required. In fact, other reports can create confusion as they may not be identical to the electronic report which is the official report on class size that is released by the minister as required by section 76.3(11).

[37] With additional information to educate the new trustees on the process and reporting requirements, Superintendent Munro gave the board a class organization report as of September 30th similar to the one he had given to the board in the three previous years. This board referred the report to the Education Committee for further discussion the same evening. When the report came back to the board later that evening, it was approved with newly elected Trustee McNamee opposing. Superintendent Munro forwarded his report to the Minister with a letter from the new board chair that is substantially the same as the 2008 board chair’s letter.

[38] In response to trustee questions, Superintendent Munro gave the board an oral report on the number of teachers who agreed and disagreed with the organization of their assigned classes.

[39] The Ministry report made available to the public in December 2009 listed classes by school and division, classes with more than 30 students at September 30th, the number of students in each class and the rationale for each class.

4. Nanaimo District Teachers' Association 2009 Grievance Was Not Arbitrable

[40] Since 2002, the union has challenged the *Public Education Flexibility and Choice Act* (Bill 28), including grieving the correctness of the employer's application of the legislation. The first grievance was initially held not to be arbitrable at grievance-arbitration. This decision was found to be legally incorrect by the British Columbia Court of Appeal. I described these events in 2008:

The union grieved November 6, 2002 to BCPSEA at Step 3 of the grievance procedure that certain school boards had violated the class size provisions of the *School Act* and *Class Size Regulation* in organizing certain classes for the 2002-03 school year. The grievance included a list of alleged potential class size violations in fifteen school districts. The list was reduced to thirteen on December 11th.

BCPSEA replied November 18th requesting detailed identification of the alleged violations. The union responded by letter dated December 10th, but not delivered to the employer until February, that it would provide additional details of the violations in each school district as the grievance proceeded and that BCPSEA had access to the class size reports school boards must submit to the minister on or before October 30th each year under the *Class Size Regulation*.

The union asserted it could enforce the legislated class size requirements through the grievance procedure under the collective agreement and its grievance was intended to subsume any grievance filed by a local of the union. The union wrote:

Our intention is to move this grievance to arbitration with all due speed, as we are under no illusion that any amount of detail or clarification will persuade BCPSEA to concede it. Accordingly, we will appoint counsel and urge you to do the same so that we may proceed with selection of an arbitrator.

Following further discussions and correspondence, on February 18th the union wrote that it had "an open mind about the possibility of addressing any jurisdictional issue in advance of more specific factual and legal issues."

The union and employer instructed counsel and on February 27, 2003, employer counsel proposed a jurisdictional question to be submitted for preliminary decision by an agreed arbitrator. By November 2003, it was agreed Don Munroe would hear and decide the jurisdictional question and he and Emily Burke would decide the merits of the grievance if the jurisdictional objection was dismissed.

In 2003, the Supreme Court of Canada rendered its judgment in *Parry Sound (District) Social Services Administration Board v. OPSEU Local 324* [2003] S.C.R. 157. This was another in a line of cases on the jurisdictional assignment of disputes to the courts and

grievance arbitration that include *Weber v. Ontario Hydro* [1995] 2 S.C.R. 929; *New Brunswick v. O'Leary* [1995] 2 S.C.R. 967; *Regina Police Association v. Regina Board of Police Commissioners* [2000] 1 S.C.R. 360; and *Allen v. Alberta* [2003] 1 S.C.R. 128.

The comprehensive legislative scheme for grievance arbitration under a collective agreement forecloses access to the courts for resolution of disputes whose essential character expressly or inferentially arises under a collective agreement. There is to be a broad or liberal, not insular, interpretation of the statutory scheme and the subject matter of disputes that arise explicitly or inferentially under a collective agreement. The legislative scheme includes authority in a grievance arbitrator to interpret and apply legislation intended to regulate employment even if the legislation conflicts with the terms of the collective agreement. While the collective agreement is the foundation of an arbitrator's jurisdiction, the substantive rights of that conflicting legislated provision are, in effect, imported into, implicit in or incorporated into the collective agreement.

On December 23, 2003, Arbitrator Munroe heard the employer's jurisdictional objection that the grievance was not arbitrable under a collective agreement from which all provisions on class size and composition had been stripped. He agreed with the employer and dismissed the grievance on January 13, 2004. He concluded, in light of the history and restriction on the scope of future collective bargaining, that enforcement through grievance arbitration of the class size provisions of the *School Act* and *Class Size Regulations* is not within the ambit of the collective agreement and, by this device, collective agreement class size provisions could not be re-created. Despite the merits or demerits of the legislative intrusion into free collective bargaining:

An arbitral finding that the legislative provisions on class size are implicit in teachers' collective agreements, thus implying back into those collective 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. (*British Columbia Public School Employers' Association* [2004] B.C.C.A.A.A. No. 8 (QL) (Munroe), ¶ 43; (2004), 124 L.A.C. (4th) 97)

In February 2005, the Court of Appeal held this was an incorrect conclusion. The Court observed the Legislature had not addressed whether a dispute alleging a violation of a statutory class size provision was to be resolved by grievance arbitration or proceeding in the British Columbia Supreme Court by individual teachers for breach of the statute. It had not prohibited resort to either arbitration or the courts. The Court of Appeal took a "flexible and contextual approach which seeks to avoid formalistic classification and must look to the essential nature of the dispute" (*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association* [2005] BCCA 92; [2005] B.C.J. No. 289(QL), ¶ 21; 136 L.A.C. (4th) 225).

The Court of Appeal held applying and interpreting an external employment statute at grievance arbitration does not incorporate that statute or its provisions into the collective agreement when there is statutory authority for an arbitrator to interpret and apply an external statute, as there is under section 89(g) of the *Labour Relations Code*. Class size is a significant part of the employment relationship. To violate the statutory requirement "would surely constitute an improper application of the management rights clauses in the collective agreement" and affect other terms of the collective agreement. "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." (¶ 37)

I would decide that a grievance arbitrator under the collective agreement has 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. (¶ 41)

(*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey), ¶ 25 – 33)

[41] The Supreme Court of Canada dismissed the employer's application for leave to appeal (*British Columbia Public School Employers' Association v. British Columbia Teachers' Federation* S.C.C. Case No. 30883, per McLachlin, C.J. Binnie and Charron, JJ, September 15, 2005).

[42] Certain questions were submitted to Arbitrator Munroe for determination. Among the answers he gave in 2006 was that: "With reference to the 2002-03 school year, I find and declare that the school boards were required to ensure compliance by September 30 with the maxima established by Section 76.1(1) and (2) of the Act, and to maintain compliance thereafter." (*British Columbia Public School Employers' Association* [2006] B.C.C.A.A.A. No. 7 (QL) (Munroe), ¶ 24) Section 76.1 of the *School Act* was amended later in 2006 and sections 76.2 to 76.8 were added (*Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21 (Bill 33)).

[43] Grievances over the organization of classes for the 2006-07 and 2007-08 school years were referred to me for arbitration. In August 2009, I made a decision on a representative selection of the classes and schools in dispute. (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (QL) (Dorsey)) The focus was the organization of classes in schools by principals with concurrence in the class organization by superintendents. There was no issue for decision about principal consultation with school planning councils (s.76.2(b)) or superintendent reporting of class organization to elected trustees on boards of education or to district parents' advisory councils in districts where they are established (s.76.3(6)).

[44] In that decision, I made a statement that the union later relied upon in advocating for its position with respect to superintendents' class organization reports. The first was in the context of outcomes from individual principal-teacher consultation about a class assigned to the teacher and a hierarchy of importance in knowing whether a teacher agrees or disagrees with the organization of the class for which there is mandatory consultation.

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 decisions. (§ 351)

[45] The next statements relate to arbitral review of the principal's opinion that a class that exceeds the statutory grade level class size and composition standard is nonetheless appropriate for student learning and, therefore, permissibly organized as an exception to the standard.

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.

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. (§ 441 – 442)

[46] The final statements relate to arbitral review of the superintendent's opinion that a class that exceeds the statutory grade level class size and composition standard is nonetheless appropriate for student learning and, therefore, permissibly organized as an exception to the standard. The union relied upon the third of the following three paragraphs.

The superintendent does not stand in the principal's shoes, does not attend the consultation and cannot be expected to have an opinion about individual classes that approximates the knowledge a principal can be expected to have. In large school districts, highly bureaucratized processes struggle to avoid objectifying children as numbers or categories. However, superintendents do not know, and cannot be expected to know, students' names as teachers and principals do. They cannot be expected to have the level of knowledge of the students and classes the teachers and principals do. They are not required to consult the teacher. Their perspective is necessarily and intended to be broader, but not aloof.

The approach to reviewing superintendent opinions is not a rights dispute matrix predicated on future advocacy and litigation. It must be based on an understanding that the requirement for the superintendent opinion is predicated on their organizational leadership accountability within a governance structure. Their role requires them to exercise due diligence that can be executed through structured processes and delegated

responsibility. There is a second opinion dependent on the existence and reasonableness of the principal's opinion.

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 of that class 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.

If the principal's opinion is reasonably held, the superintendent's opinion cannot undermine the principal's opinion. If the principal's opinion is not reasonable held or is formed without the required consultation, the superintendent's opinion cannot resuscitate the failed process at the school. (¶ 448 – 451)

[47] Against this background, the Nanaimo District Teachers' Association grieved that Superintendent Munro's 2009 class organization report to the board did not fulfil the requirements of the legislation. The grievance, quoting portions of paragraphs 381 and all of paragraph 450 from my decision, states:

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.

[48] The board met with the union and later responded that the grievance was not about a matter that could be the subject matter of a grievance-arbitration.

[49] The previous school year, the union had grieved that the Vancouver board had failed to adhere to its own bylaws at a meeting on October 15, 2007 at which the board approved the 2007-08 school year class organization report from its superintendent. The union advanced the grievance to arbitration at which the employer successfully objected to the jurisdiction of a grievance-arbitration under a collective agreement to hear and decide the matter. (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 172 (QL) (Gordon))

[50] The union advanced the 2009 grievance to arbitration at which the employer again successfully objected the subject matter was not a matter within the jurisdiction of grievance-arbitration. (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A.A. No. 186 (QL) (Diebolt))

[51] Arbitrator Diebolt quoted sections 76.1 to 76.7 to contextualize the disputed section 76.3 within the statutory class size and composition scheme. He reviewed the history of public school teacher collective bargaining and the issue of class size and composition. He summarized the union's position:

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. (¶ 26)

[52] The employer advanced several arguments in support of its objection that the grievance was not arbitrable. In opposing the employer's objection, the union relied on the excerpt from my decision quoted above and the Court of Appeal's 2005 judgment.

[53] Arbitrator Diebolt determined it is a general principle that having arbitral jurisdiction with respect to the interpretation and application of some provisions of a statutory scheme does not mean there is jurisdiction over all aspects of the scheme.

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.

[54] Arbitrator Diebolt reasoned the test to determine which provisions in the statutory scheme are subject to arbitral jurisdiction and which are not is a two-step questioning approach:

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? (¶ 41)

He concluded sections 76.3(3) and 76.3(7) do not meet the test.

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. (¶ 43 – 47)

[55] Apart from this, Arbitrator Diebolt noted a superintendent's class organization report is not the last word. The Minister can appoint a special administrator if tin he Minister's opinion statutory requirements, such as a superintendent not including a rationale required in section 76.3(3), have not been met. He concluded: "In short, the statute provides an extensive review and remediative scheme that extends well beyond a board's acceptance under s. 76.3(7)." (¶ 49) He went on to conclude it was not the Legislature's intention that a superintendent's class organization report or a board's decision to accept a report be the subject of a grievance-arbitration; he 2009 decision by Arbitrator Gordon involved distinctly different facts in Vancouver so that the circumstances were not applicable; and my statements on which the union relied were "at best non-binding *obiter* and of limited utility." (¶ 53)

[56] Arbitrator Diebolt's conclusion was:

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. (¶ 56 – 57)

[57] The union did not seek judicial review of this decision.

5. Union Seeks Judicial Review of Superintendent's 2010 Report

[58] The board oversaw the planning and Superintendent Munro led the organization of schools and classes in the Nanaimo-Ladysmith school district for the 2010-11 school year. There was no change in the process the Ministry required for reporting classes and Superintendent Munro used the same reporting format and content as he had in previous years.

[59] Principals completed aggregate teacher consultation and class organization reports for their schools listing the grade, division, subject, teacher, number of students and students entitled to an individual education plan and the rationale for the organization of classes with more than 30 students. The reports were to be submitted to an assistant superintendent's office by noon on September 29th.

[60] On September 20, 2010, Nanaimo District Teachers' Association President Derek DeGear wrote the chair of the board.

Re: Superintendent's report on the organization of classes pursuant to section 76.3 of the *School Act*

I am writing to bring to your attention the provisions of the School Act that deal with the responsibilities of the board of trustees with respect to the organization of classes for this school year.

In particular, the NDTA wants to ensure that the class size report that the board will be considering at a public meeting of the board on or before October 15 is in compliance with the requirements of s.76.3 (3) of the School Act. That section reads:

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.

A report in compliance with the legislation must meet two basic requirements. It must identify each class that is over the statutory limit and It must provide a rationale for that specific class. In my view, the board would not be fulfilling its obligation under s.75.3 (7) of the *School Act* if it were to accept a report that falls short of these basic requirements.

Earlier this year an arbitrator ruled that he had no jurisdiction to deal with a grievance concerning acceptance by a board of tire report of the superintendent regarding class size. The result is that the jurisdiction on this matter remains with the courts.

With the stripping of class size provisions from our collective agreement, the accountability and transparency measures that were part of the labour relations process have been weakened. Consequently, teachers will be looking closely to ensure that, where classes exceed the statutory limits, they do so only in strict compliance with the requirements of the *School Act*.

We look forward to receiving a copy of the superintendent's report and participating in the public process.

[61] This letter was received at the board's September 29th meeting at which Superintendent Munro advised the board he intended to follow the reporting format and content he had used in past years. Current board chair Sharon Welch has deposed that: "No trustees expressed any need or desire to receive the information requested by the NDTA in the Superintendent's Report. The Superintendent has always provided trustees with whatever information on class size and composition they requested." (§ 24) And further: "There is no need for trustees to be provided with individual class by class information available in October that may not be accurate and may conflict with the Ministry Report available later in the school year." (§ 25)

[62] Superintendent Munro distributed his class organization report to trustees on October 1st with notice that late student admissions and withdrawals would be reviewed and he would be distributing an updated report on October 8th. A special board meeting was scheduled for October 13, 2010. Chair Welch deposes:

At the October 13, 2010 Board of Education meeting, Superintendent Munro presented his final Report dated September 30, 2010 and reviewed its contents with trustees. Trustees asked numerous questions pertaining to the Report and Superintendent Munro or his senior staff answered all questions that trustees asked. Questions asked by trustees and answered by the Superintendent and his staff included:

- Band classes at elementary schools
- Numbers of students who are retained in a course
- Number of students at secondary schools
- 12% of classes at secondary over 30 students in September 2009 and 10% in September 2010
- Numbers of classes under 25 at secondary
- Numbers and location of grade 3 classes
- Possibility of having large classes for lectures and smaller classes for seminar groups
- Were schools that had greater than projected enrolments in September given more staff
- Numbers of classes at 20 - 22
- Secondary school class size averages
- Is it the administration, staff committees or department heads who decide on offering a full array of courses that results in core courses over 30
- The largest class in the District (choral music)
- The largest core academic class (2 PE at 34)
- Majority of classes over 30 are 31 or 32
- Possible late enrolment classes

- Fewer students enrolling than projected
- No reports of late shifts in population
- Strategy for students who move in after September 30 and enrol at schools where classes are at 30 at grades 4 to 7
- Ways to facilitate registrations in before June 15
- Families who move within the District and neglect/fail to register at a new school prior to June 15
- BCeSIS issues for complying information for the Superintendent's Report
- Distribution of the 1701 echo report that lists the head count of students at each school
- Request that the superintendent advise trustees when and if any class is not appropriate for student learning
- What is the "bar" for a class to be appropriate for student learning
- Process of reallocating resources throughout the school year when a class ceases to be appropriate for student learning.

The Board of Education discussed the organizational problems by late student registrations and transfers and asked the Education Committee to look at ways to encourage more parents to register students early.

At the October 13, 2010 Board meeting, the Board approved the final Report prepared pursuant to section 76.3 of the *School Act*. (¶ 28 – 30)

[63] The union grieved that all classes organized with more than 30 students and more than three students entitled to an individual education plan have been organized in contravention of the class size and composition provisions of the *School Act*.

[64] The British Columbia Teachers' Federation, the Nanaimo District Teachers' Association and Kip Wood, teacher and Nanaimo District Teachers' Association Vice-President, petitioned the Supreme Court of British Columbia for judicial review of Superintendent Munro's 2010 class organization report. The board and Superintendent Munro were named as respondents. Mr. Wood deposes he attended the October 13th board meeting, "which lasted less than one hour" (¶ 15) and during which the superintendent did not "provide rationale for the organization of any specific class." (¶ 19) He deposes: "Because class size and composition issues are important working and learning conditions for teachers, the NDTA has an interest in ensuring that the School Board strictly complies with requirements of section 76.1 of the School Act in organizing and reporting classes which exceed the statutory limits." (¶ 10)

6. Judicial Review Adjourned and Back to Grievance-Arbitration

[65] The board objected to Mr. Wood and both unions' having standing to seek judicial review of the superintendent's and board's compliance with the reporting requirements. The judicial review petition was scheduled for hearing on July 20 to 22, 2011. On July 4th, the union filed a supplemental argument in which it submitted a recent British Columbia Court of Appeal decision called into question the Supreme Court's jurisdiction. The employer filed a supplementary reply argument disagreeing with this interpretation.

[66] On July 20th, the parties agreed to adjourn the judicial review to no fixed date and to refer the issue to an arbitrator under the provisions of their collective agreement and the *Labour Relations Code*. Dates for hearing were set to enable circulation of this decision before superintendents make their reports in the current school year. It is agreed the merits of the grievance will only be addressed in this decision if the matter is found to be arbitrable.

7. Court of Appeal 2011 Decision in Alberni School District Grievance

[67] The March 30, 2011 Court of Appeal decision allowed the union's application for review of an arbitration decision I made in February 2010 on a class size and composition dispute that arose in the Port Alberni school district.

[68] A Grade 5 class with 29 students of whom 4 were students entitled to an individual education plan was assigned to be taught by Kathleen Battand. The union and employer agreed that at September 30, 2008 Ms Battand's class was organized in accordance with the requirements of the *School Act*. It was the only one of twelve classes in the school with more than three students entitled to an individual education plan. It had 4 of the 16 designated special needs students in the school.

One of the four students in Ms Battand's class entitled to an individual education plan was deaf or hard of hearing with mild to moderate hearing loss in each ear. This student had a regular adapted program and required assistance with some tasks in addition to ensuring all instruction was understood. One student had a mild intellectual disability and a modified program in all curricular areas. The student designated in September was in the moderate behaviour support category. One student was diagnosed with Asperger's Disorder. (*British Columbia Public School Employers' Association* [2010] B.C.C.A.A. No. 14 (QL) (Dorsey), ¶ 11)

[69] Part of the organization of the class was the assignment of an education assistant to support Ms Battand. There was no discussion in the principal-teacher consultation about what would happen in the event the education assistant was absent for one or more days.

[70] The union grieved in May 2009 that the employer had failed to provide an educational assistant to Ms Battand's classroom on five days (April 14 to 17 and 21, 2009) as, it alleged, was promised in the consultation meeting on September 23, 2009.

The union's grievance was based on the following:

It is our position that Bill 33 consultation meetings are designed to determine whether or not a learning environment is appropriate for student learning. In this case, the Principal of Maquinna Elementary School believed that the provision of an Education Assistant would result in an appropriate learning environment. Therefore, this particular Educational Assistant must be replaced when absent. As a result, School District 70 is in violation of Bill 33 Class Size and Composition Legislation.

[71] The employer's operational policies and practice was not to replace an education assistant for the first three days of an absence.

While not prohibited by the *School Act*, the collective agreement between the employer and the Canadian Union of Public Employees local representing the Education Assistants does not include provisions requiring temporary replacement of Education Assistants.

For purposes of replacement during temporary absences, the employer has a long-standing, unwritten practice of designating Education Assistants critical or non-critical to operations. Personal Attendants are critical and are replaced for all days absent. Behaviour Assistants, assigned to schools for generalized support for students with moderate and severe behaviour challenges, are designated non-critical and not replaced for all days absent. Integration Support Assistants, primarily assigned to schools for generalized academic support, are not generally designated critical and not replaced for all days absent.

Education Assistant staffing is done in the spring with budget approval and June vacancy postings based on the projected population of students designated with special needs. Ratios and formulae for allocations to schools are not tied to the organization of classes or the number of classes with more than three students entitled to an individual education plan.

Often Education Assistant duties are combined to meet school needs and extend limited resources. For example, a Personal Attendant for a student may also provide general Integration Support for other students in the class. At Maquinna, two of the Personal Attendants were also Integration Support Assistants. Ms Clark [the absent education assistant] was an Integration Support/Behaviour Assistant.

The practice is to replace Integration Support/Behaviour Assistants after three days absence. Ms Stoutley [the principal] testified she has had a non-critical Education Assistant replaced earlier than the fourth day, but the cost came from her limited, discretionary school budget. Otherwise, all she can do is make a request for a replacement and hope for the best. However, replacement of Integration

Support/Behaviour Assistants for the intermediate grades is often thought to be less urgent than for primary grades. (¶ 59 – 63)

[72] This practice was generally known to Ms Battand and followed prior to April for absences of the education assistant assigned to her class. Because the education assistant was in paid attendance at a professional development day on April 20th, strictly speaking, the only day among the five grieved that fell outside this known practice for replacing education assistants was April 17th. For this date, Ms Battand spoke to the principal:

... who requested a replacement to come on the fourth day, April 17th. None was available. Ms Battand was exasperated. There was nothing she could do, but rearranged her lesson plans for the following days. [The principal] helped by taking students from her class for longer periods of guided reading group. (¶ 56)

Across the school district on April 17, 2009 “there were not sufficient available casual employees to meet demand that day.” “... eighteen Education Assistants, including Ms Clark and one other at Maquinna Elementary, were absent. Five were replaced. Two Personal Attendants were not.” (¶ 73)

[73] I characterized the issue in dispute as follows:

Organization of classes in accordance with the legislated standards and the requirements for exceeding those standards under sections 76.1 and 76.2 must be fulfilled by September 30th. That is the date at which decisions about class size and composition are made by principals and superintendents. That is the date at which compliance with the legislated class size and composition standards affecting employment relations is to be determined. Until that date, during the September adjustment period, there is a "temporal attenuation" of the class size and composition standards (*British Columbia Public School Employers' Association* [2006] B.C.C.A.A. No. 7 (Munroe) (QL), ¶ 19).

Subsequent administrative, reporting and other accountability requirements imposed by the *School Act* or adopted by boards of education are not arbitrable aspects of the substantive aspects of the employment relationship. They are not, in the language of the *Labour Relations Code* "intended to regulate the employment relationship of the persons bound by the collective agreement" (s. 89(g)). This was the conclusion of Arbitrators Gordon and Diebolt dealing with the October 15, 2007 public meeting of the Vancouver Board of Education required by section 76.3(7) of the *School Act* and the contents of a superintendent's report required by section 76.3(3) of the *School Act*.

There might be class reorganization after September 30th or organization of new classes in schools on a semester or trimester schedules. In those circumstances, under section 76.4 of the *School Act*, the legislated grade level size and composition standards continue throughout the school year and the requirements to exceed those standards apply. The applicable date will be different than September 30th and January 15th and May 15th reporting dates apply (*Class Size Regulation*, B.C. Reg. 245/02, s. 1.1(1)(b)).

The issue of arbitrability raised by this grievance does not relate to steps after September 30th in the legislative reporting and accountability scheme or circumstances after

September 30th that trigger the application of section 76.4 of the *School Act*. The issue is whether there is jurisdiction in an arbitrator to review events after September 30th relating to a class that was organized at September 30th in compliance with section 76.1 of the *School Act*. More specifically, not relating to a class that was organized to meet the grade level class size and composition standard, but a class that permissibly exceeds the grade level class size and composition standard by the employer having fulfilled the legislated requirements to exceed the standard. (§§ 101 – 104)

[74] The union did not argue the class was not organized in a manner appropriate for student learning. “The union submitted the issue in dispute is not whether the class was appropriate for student learning at September 30, 2008, but whether there was a commitment that was not fulfilled.” (§§ 24) From the commencement of the arbitration, it was clear common ground that there was no issue of whether the class was appropriate for student learning.

With the benefit of the extensive opening statements and submissions on this procedural issue of the admissibility of evidence of events after September 30, 2008, I am able to find that the appropriateness for student learning of this class under the provisions of the *School Act* is not an issue in dispute. That was not the issue grieved, referred to BCPSEA or to arbitration. (§§ 16)

[75] The importance of this common ground is that the concept “appropriate for student learning” is a legislative construct with a narrow and time-limited application. It is a phrase employed by legislative drafters not by educational professionals. It is a phrase focused on the organization and assignment of classes that exceed grade level class size and composition standards. It is not a phrase that speaks to whether a class is “educationally sound.” Many professionals and the union would disagree that all classes organized within the *School Act* grade level class size and composition standards and, therefore, incontestable under the *School Act* are educationally sound. Similarly for some classes, the view of some educators would be that certain classes (e.g. band or choral) must be organized to exceed the class size standard in order to be educationally sound.

[76] The concepts “educationally sound” and “appropriate for student learning” cannot be equated. The existence of the difference was addressed in my 2010 remedy decision, excerpts from which I quoted in the Port Alberni decision.

Principal-teacher consultation is a mandatory pre-condition to a principal forming the opinion that a class exceeding the class size and composition standard is appropriate for student learning. If there is no requisite consultation, the teacher has been denied his or her limited partnership role in the organization of a class assigned to the teacher to teach. There cannot be a validly formed principal’s opinion and the board of education has not

met the “unless” (notwithstanding or *non obstante*) conditions permitting it relief from the obligation to “ensure” the class does not exceed thirty students or does not have more than three students entitled to an individual education plan (*School Act*, ss. 76.1(2.2) and (2.3)). There is no mechanism in this legislated public policy for a board of education to do after September 30th what it has not done properly before September 30th. There is no slip rule. There are only legislative imperatives.

Classes organized within the class size and composition standards that boards of education must ensure are met, are permissible or presumptively classes appropriately organized to achieve the public policy goals of public education. A class “appropriate for student learning” is an exceptional legislative construct that has application only to classes exceeding the grade level class size and composition standard that boards of education must ensure are met each school year and maintained after September 30th.

The designation of a class as “appropriate for student learning” under the provisions of the *School Act* is reserved for a class that exceeds the standards in accordance with the statutory requirements. In keeping with a new legislative scheme and new terminology in the *School Act*, I have chosen to refer to the class size and composition directives in the *School Act* as statutory “standards”, rather than “limits”, although when the Minister introduced the *Education (Learning Enhancement) Statutes Amendment Act 2006* (Bill 33) her explanation of the Government’s purpose was as follows: “I am pleased to introduce Bill 33. This act introduces legislative changes that will address class size and composition in British Columbia schools, and meets our throne speech commitment to ensure that all school districts live within class-size limits established in law.” (*Hansard*, 38th Parliament, Volume 10, Number 2, April 27, 2006, p. 4120)

The status of a class “appropriate for student learning” is only achieved by the school principal holding the requisite consultation and the principal and superintendent forming the requisite dual opinions. This unfamiliar phrase, which was not part of education vernacular before the *School Act* amendments in 2006, draws its meaning from fulfilling the requirements of the legislative scheme. A class for which principal-teacher consultation is required and has not been held cannot be a class “appropriate for student learning.” Similarly, a class for which there is not the requisite dual principal and superintendent opinions at the requisite time cannot be a class “appropriate for student learning.” Perhaps, it is a class whose size and composition is “educationally sound”, but under the scheme and provisions of the *School Act* it is not a class “appropriate for student learning.”

In this sense, a class “appropriate for student learning” is a class whose size and composition permissibly exceeds the grade level class size and composition standards because the board of education has done what it is required to do to exceed the standards. It is a class that has been organized in accordance with section 76.1(2.1), (2.2) or (2.3) of the *School Act*. It is a construct that does not apply to a class in September or to a class that was not in compliance with the class size and composition standards on the date of the superintendent’s report (s.76.1(2.4)). The obligation is “despite” the lower grade level averages in 76.1(1), but subject to the period in any school year after the required superintendent’s report (s.76.1(4)). (*British Columbia Public School Employers’ Association* [2010] B.C.C.A.A. No. 1 (Dorsey) (QL), ¶ 132 – 135)

[77] The union’s submission was that the employer’s failing was anchored in the fact there had been a consultation and commitment and therefore the grievance could be arbitrated:

The union submits the grievance is an employer failure to fulfil a commitment or promise it made to provide the support of Ms Battand's class, which was organized to include four students entitled to an individual education plan. The commitment was made in the context of organizing a class exceeding the class composition standard. "There is no question in this case that there is an implicit connection between the commitment (including its breach) and the collective agreement. The commitment relates to a condition of employment." (Union's Submissions, para 47) There is an implicit connection between class size provisions previously in the collective agreement and teacher workload provisions.

The union submits the essential character of the dispute is assignment of work to Ms Battand that depended on a promise of support that allowed the assignment to be in compliance with the *School Act*. Failure to fulfill that promise is intimately connected to the organization of the class and the legislative provision that allowed it to be organized as it was.

The union submits it cannot be an intended consequence that employers can organize and assign classes that exceed legislated standards on the basis of promised supports, then after September 30th take away those supports without the teacher having recourse to review through grievance-arbitration. (¶¶ 110 – 112)

[78] Attempting to express the central question in a realistic perspective of the institutional and workplace context, I wrote:

What significance does the *School Act* place on classes that exceed the class size and composition standards when 20% or so of all classes organized in September exceed the standards? Is it intended that the enrolling teachers of these classes will have enforceable workplace rights and entitlements to resources that derive from the process of organizing these classes that the enrolling teachers of other classes and non-enrolling teachers in a school or with district assignments will not have? In terms of Ms Battand's Grade 5 classes in 2007-08 and 2008-09, does the employer have a greater or different obligation to her and the students in her 2008-09 school year class of 29 students of whom 4 were entitled to an individual education plan than it has to her and the students in her 2007-08 school year class of 30 students of whom 3 were entitled to an individual education plan?

Do legislated class size and composition standards and requirements for principal-teacher consultation and dual principal and superintendent opinions before exceeding the standard in classes vest the teachers of those classes with more workplace rights than the other members of the teaching team in the school regardless of the challenges the other teachers have with their single or combined grades classes at their grade levels and curricular subject areas and with their mixture of individual students, who might be grey area, gifted, English as a Second Language and all the other variables that students bring from their homes, neighbourhoods and communities to the classroom requiring more time and attention for themselves and with their parents? Does the legislative scheme, indirectly, create an enforceable entitlement or priority claim to support or resources for the students of classes permissibly organized to exceed the class size and composition standards that might not be available to the students of classes organized at or within the standards?

This broader workplace and institutional context must be considered in determining whether there is a real contextual connection between the collective agreement and the derivative consequences of organizing a class in accordance with the legislation that exceeds the grade level size and composition standards.

The essential nature of the dispute is the union's claim that teachers who are consulted and assigned classes that are permissibly organized in accordance with the *School Act* in excess of the grade level size and composition standards after September 30th acquire individual terms and conditions of employment that are enforceable under the collective agreement. The grievance alleges that Ms Battand acquired such a term or condition of employment and the employer breached that term or condition.

Such an individual term or condition of employment is not a term or condition of the collective agreement. Its subject matter, the Education Assistant staffing level assigned to her class, cannot be a provision of the collective agreement under section 27(3)(g) of the *School Act*.

There is no evidence of any history of individual, rather than collective, terms and conditions of employment having been included in the collective agreement. Teaching assignments and the bases on which they are to be made have been the subject of collective agreement provisions. However, the matter grieved is the non-teacher supports for an enrolling teaching assignment and there is no evidence that the extent, continuity and consistency of supports were commonly negotiated. In fact, the evidence and educational sector experience is that the organization, allocation and assignment of class supports varies widely and is subject to constant change and adaptation to meet the dynamic daily needs in schools, which can vary widely among schools and throughout the school year.

The asserted individual terms and conditions of employment the grievance seeks to enforce do not arise from union and employer negotiations. They arise from communications between a teacher and principal in a consultation process whose timing and protocol are mandated by the *School Act* and *Class Size Regulation*. The manner in which that process is to be conducted was examined in *British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL).

Regardless how liberal an approach is taken to an arbitrator's exclusive jurisdiction, in the words of the majority of the Supreme Court of Canada in *Bisaillon v. Concordia University* [2006] S.C.J. No. 19 (QL), para 33, I have concluded the issues relating to any individual terms and conditions of employment that result from the consultation process do not have "an express or implicit connection to the collective agreement" whose scope and content is circumscribed by section 27(3) of the *School Act*.

Nor do any teacher's individual terms and conditions of employment have any connection to the *School Act* class size and composition provisions. They may arise in the required legislated consultation process, but they are not enforceable under any subsection of sections 76.1, 76.2 or 76.4. As quoted above, the circumstance in September is that consultations are based on current circumstances, limited current knowledge and assumptions about the future. Principals form opinions that can turn out to be incorrect. Circumstances with all classes, whether organized within the class size and composition standards or permissibly in excess of the standards, and within a school can change. As time passes, as more is known and as needs within classes and a school change and are reassessed, principals and teachers respond. Class organization at September 30th is not intended to freeze the allocation of some resource supports or to limit the flexibility of principals and school teams to respond to changed circumstances.

The consultation process is not intended to either expressly or implicitly provide individual teachers with guarantees that are enforceable as a necessary derivative appendage to the process of being assigned a class that exceeds legislated grade level class size and composition standards. Under the legislative scheme, consequences only flow if there is a failure to fulfil the obligation to consult and form dual principal and superintendent

opinions the class exceeding the grade level size and composition standard is a class appropriate for student learning.

In part, this is because the class size and composition standards of 30 students and 3 students entitled to an individual education plan are unrefined parameters that encompass a wide range of grade level, age related student behaviour, parental engagement and demands and individual students needs and challenges that can be variously affected, as all classes can, by changes, including support and resources changes, throughout the school year. The standards do not encompass refinements to account for curriculum. Any refinements are left to the discretion of boards of education, superintendents and principals. (¶ 125 – 135)

[79] I found the grievance was not arbitrable, but if it were:

... I would dismiss the grievance. I would find Ms Battand did not agree to the organization of her class. I would find there is insufficient mutuality of understanding and agreement between her and the employer to have created an enforceable commitment to always replace a non-critical Education Assistant on the fourth day of absence, namely April 17, 2009. It is less tenable that there was an enforceable commitment that the employer would ensure there would never be a shortage of available casuals when required to replace Ms Clark, even when it could not replace other more critical Education Assistants. (¶ 138)

[80] The union successfully sought review of the decision in a unanimous decision of the Court of Appeal. The Court held I erred in finding the grievance arbitrable and that I “did not make sufficient findings of fact to uphold or dismiss that grievance.” (*British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association*, 2011 BCCA 148, [2011] B.C.J. No. 525, ¶ 3)

[81] The Court of Appeal began its judgment by identifying the provisions of the *School Act* relevant for the appeal - sections 76.1, 76.1(2.3), 76.1(2.4), 76.2 (a) and (c), 76.3(1), (2), (5), (6), (7) and (10). Conspicuously absent from its list is section 73(3).

[82] The Court of Appeal summarized the factual background and described what was at issue:

On September 23, 2008, the principal had a consultation meeting with Ms. Battand. Ms. Battand had concerns about the proposal, particularly in respect of her preparation time for classes. These were discussed at the consultation meeting. The principal proposed certain measures to accommodate Ms. Battand’s needs, including the assignment of an ISEA to work primarily with Ms. Battand’s class.

Following the consultation meeting, the principal was of the opinion that the organization of the class was appropriate for student learning. The school superintendent was also of that opinion. The report required by s. 76.3(5) was signed on September 30, 2008. It is common ground that at that juncture, the requirements of s. 76.1 of the *School Act* had been satisfied, and that the school was in compliance with the class size provisions. (¶ 7 – 8)

On this appeal, the union contends that the arbitrator erred in finding that changed classroom conditions that impact the learning environment of a class during the school year cannot give rise to an arbitrable grievance based on the class size provisions of the *School Act*.

The union also seeks to argue that terms and conditions agreed between an individual teacher and a school board (under s. 27(1)(c) of the *School Act*) can be taken to arbitration. In my view, the Court need not address this second issue, as it can have no effect on the rights of the parties in respect of the grievance. The arbitrator, after considering the evidence, found that no individual agreement between Ms. Battand and her employer was established. Neither party challenges that finding on appeal. The Court generally refrains from dealing with purely hypothetical issues in the absence of very good reason for doing so. I am not persuaded that we should depart from that practice in this case. (¶ 14 – 15)

[83] The Court of Appeal affirmed its jurisdiction and the applicability of its 2005 decision. It recognized that the greatly expanded class size and composition provisions enacted in 2006 are “complex.” (¶ 24) The Court stated the class size provisions of the *School Act*: “... are designed, generally, to ensure that the total number of students and the number of students with special needs in any given class are not so large as to interfere with the teaching environment. While the provisions contemplate a flexible approach to class size, they impose certain requirements when classes reach a certain size.” (¶ 24) The Court does not identify if this is a general overview of what it gleaned from all the legislative provisions or if this is the purpose of the relevant class size provisions it quoted earlier in its judgment.

[84] The Court then wrote the following statements on which the union now relies to submit compliance by superintendents with section 76.3(3) of the *School Act* is arbitrable under its collective agreement and the *Labour Relations Code*. The Court allowed the review, found the grievance was arbitrable and remitted the matter back to arbitration.

The provisions in issue in the current case impose at least three separate requirements before a class may have more than three students with IEPs. First, the principal of the school and the superintendent of the school district must be of the opinion that the organization of the class is appropriate for student learning (s. 76.1(2.3)(a)). Second, the principal must consult with the teacher involved within 15 days of the start of the school year (ss. 76.1(2.3)(b) and 76.2(a)). Third, the principal, superintendent, and school board must complete certain reporting requirements (ss. 76.2(c) and 76.3). The timing of the various aspects of this third requirement is set out in the statute, but the report must generally be prepared by October 1 in each school year.

The arbitrator appears to have concluded that because the consultation and reporting requirements had to be completed by late September or early October in each year, the requirement that the principal and superintendent be of the opinion that the class

organization be appropriate for student learning was also to be completed in that time-frame. In the result, he found that compliance with s. 76.1(2.3) was to be determined at the end of September of the school year. He considered that subsequent events that might affect the appropriateness of the class for student learning were irrelevant to the question of whether the requirements of s. 76.1(2.3) were met.

The arbitrator described the issue of arbitrability in this case as follows:

[104] The issue of arbitrability raised by this grievance does not relate to steps after September 30th in the legislative reporting and accountability scheme or circumstances after September 30th that trigger the application of section 76.4 of the *School Act*. The issue is whether there is jurisdiction in an arbitrator to review events after September 30th relating to a class that was organized at September 30th in compliance with section 76.1 of the *School Act*. More specifically, not relating to a class that was organized to meet the grade level class size and composition standard, but a class that permissibly exceeds the grade level class size and composition standard by the employer having fulfilled the legislated requirements to exceed the standard.

I do not agree with the arbitrator's interpretation of s. 76.1(2.3) of the *School Act*.

Sections 76.3 and 76.4 of the *School Act* provide a mechanism by which the organization of classes at the beginning of each school year is reported to and accepted by the school board. It also provides a mechanism for submitting a report to the Minister of Education. These provisions are important checks to ensure that the class size provisions are properly considered at the commencement of each school year. They also ensure that where normal class size limits are exceeded, the rationale for doing so is set out in a publicly available document. Nothing in s. 76.3, however, suggests that once the superintendent's report has been submitted to the Minister, all obligations under s. 76.1(2.3) are over for the year.

While the consultation and reporting requirements in the class size provisions of the *School Act* are fulfilled by particular events that occur in September and October of each school year, I read the requirement that the principal and superintendent be of the opinion that the class organization is appropriate for student learning as an ongoing one. The ongoing nature of the obligation is underlined by s. 76.1(2.4), which provides that s. 76.1(2.3) applies *after* the date on which the superintendent's report is signed.

In the case before us, the union alleges that events which unfolded in March and April 2009 affected the appropriateness of the organization of Ms. Battand's grade five class. In particular, it alleges that the frequent absence of the ISEA rendered the provision of education much more difficult, particularly during the prolonged absence in April 2009.

As I interpret s. 76.1(2.3), the principal and superintendent were required, when the situation came to their attention, to consider whether the organization of Ms. Battand's class continued to be appropriate for student learning. If they were of the opinion that it did not continue to be so, the school board had a responsibility to make whatever changes were necessary to bring the class back into compliance with s. 76.1(2.3) – either by making accommodations to ensure that the organization of the class became appropriate, or by transferring a student with an IEP to another class.

As a result of the arbitrator's misinterpretation of s. 76.1(2.3), he did not determine whether Ms. Battand's class was organized, in the *bona fide* opinions of the principal and superintendent, in an appropriate manner in April 2009. Instead, he wrongly found that issue to be unarbitrable.

In the result, I would remit the matter to arbitration for consideration of whether the provisions of s. 76.1(2.3) were respected by the Port Alberni School Board in respect of Ms. Battand's grade five class in April 2009. (¶ 25 – 30)

[85] The Court makes mixed statements about the position the union was advocating before it. Early in the decision, the Court speaks of the union's focus being "changed classroom conditions that impact the learning environment of a class during the school year." Later it states the union alleged events in March and April 2009 "...affected the appropriateness of the organization of Ms. Battand's grade five class. In particular, it alleges that the frequent absence of the ISEA rendered the provision of education much more difficult, particularly during the prolonged absence in April 2009." (¶ 31)

[86] The use of the word "appropriateness" cannot be read as a reference to the initial organization of the class as one "appropriate for student learning" in September because it was common ground between the union and employer before the Court that at September 30th "... the requirements of s. 76.1 of the *School Act* had been satisfied, and that the school was in compliance with the class size provisions." (¶ 8)

[87] It is clear the Court of Appeal considers the legislation imposes a continuing obligation on both principals and superintendents of schools to become engaged in all and any situations affecting classes that might affect the continued appropriateness of a class for student learning. If the situations can include the temporary absence of an education assistant, the range of situations is probably broad.

[88] Similarly, it appears the Court of Appeal is of the opinion that the principal and superintendent must take temporary or permanent steps to "bring the class back into compliance." These might be a minor or easily attainable "accommodation" or more drastic action, such as "transferring a student with an IEP to another class." Apart from determining when it would be in the best interests of the educational and social needs of a Grade 5 student to be moved to another class with another group of students and a new teacher, as suggested by the Court, the challenge would be selecting one student with special needs among the four to be transferred and the process that be involved to include the enrolling teacher, the student's parents and the receiving classroom teacher in a timely manner.

[89] If the principal and superintendent did not respond to the situation affecting the appropriateness for student learning, which might be something within or outside the

class, or did not respond in a timely manner or responded in an inappropriate manner, the teacher would have recourse through grievance-arbitration. Presumably, the students entitled to an individual education plan, or each student in the class, and their parents would have recourse to a judicial remedy. But this is limited to classes first organized in accordance with the statutory requirements to exceed the applicable statutory grade level class size and composition standard.

[90] After the Court's remission, continuation of the arbitration was scheduled for September 12 and 13, 2011. Before those dates, the union and employer resolved the grievance.

[91] The Court of Appeal's statement that "The provisions in issue in the current case impose at least three separate requirements before a class may have more than three students with IEPs" was the catalyst that caused the dispute over Superintendent Munro's 2010 class organization report to be rerouted from the Supreme Court to this arbitration.

8. Employer and Union Submissions on Arbitrability

[92] The employer submits that Arbitrator Diebolt's decision is determinative of the issue. As he concluded, there is no "real contextual connection between particular sections of the statute and the collective agreement" (*Employer's Submission on Arbitrability*, ¶ 45). The form and content of a superintendent's report, including the adequacy of the rationale for classes organized in excess of 30 students, which a board is not required to accept, is a matter for the board and the superintendent. The organization and dual principal and superintendent opinions about the appropriateness for student learning of each of the classes can be grieved. The appeal avenue for matters relating to the class organization report is to the Minister under sections 76.5 and 76.7 of the *School Act*.

[93] The employer submits Arbitrator Diebolt's decision is determinative of this same issue between the same parties under the same collective agreement and should be adopted and followed in a manner consistent with the approach described by Arbitrator Taylor in the following passages from a 2004 decision.

Unless the Jackson decision was wrongly decided, then it is binding upon the parties in the sense contemplated in *Prince George*. It will not do to decide a question one way

and, on a different occasion, decide the same question in the opposite way. If two cases involve the same point, the parties expect the same decision. For the sake of uniformity, consistency and certainty, we must apply the rules and principles of previous decisions to cases which raise the same questions: *School District No. 51 - Boundary and BCTF*, April 2003 (Taylor). Indeed, that was the thrust of the employer's submission in Jackson where it urged the arbitrator to follow Laing, *supra*, p. 25.

I have carefully considered the reasoning of Arbitrator Jackson which I respectfully find to be thorough and complete in the sense of stating and analyzing the submissions of the parties and the relevant language of the collective agreement and applying thereto the proper interpretive principles.

The Employer challenges the conclusions reached by Arbitrator Jackson. It is said that she should have reached different conclusions. I accept that the language could be read differently and that another arbitrator could reach different conclusions. But that is not sufficient to defeat the binding force of the Jackson award. The Employer has not established that the decision of Arbitrator Jackson contains any error in principle contemplated by the authorities. The decision is one that the language can reasonably bear. It is a reasoned decision which fully considers the submissions of the parties, the relevant language of the collective agreement and applies the proper interpretive principles.

I am unable to conclude that the Jackson award is clearly wrong (the "clear conviction" standard). When it is read with the deference contemplated by the authorities, it is capable of supporting the conclusions reached and falls well within the arbitral discretion contemplated in *Prince George*. (58 -60) (*British Columbia Public School Employers' Association* [2004] B.C.C.A.A.A. No. 56 (Taylor), ¶ 50; 58 – 60); see also (*Board of School Trustees No. 57, Prince George* [1976] B.C.L.R.B.D. No. 79; *Government of Province of British Columbia* (1988), 35 L.A.C. (3d) 186 (Hope))

[94] In addition, the employer makes submissions under the following headings that it made to Arbitrator Diebolt that a grievance arbitrator has no jurisdiction to determine a union grievance on the content of a superintendent's class organization report made under section 76.3(3) of the *School Act*.

1. No collective agreement provision has been violated. There is no collective agreement provision alleged to have been violated;
2. No employment-related statute. The *School Act* is not intrinsically an employment-related statute and section 76.3(3) is not a substantive employment provision. It is a process provision.
3. The essential nature of the dispute or union claim is the content of the superintendent's class organization report and its acceptance by the board. This is not an employment matter and never has been the subject of collective agreement.
4. Attack on internal board processes. The essence of the union's claim is an attack on how management decisions are reached within the board's

organization by attacking the sufficiency of the information provided to the board. Such decisions are not subject to review at grievance-arbitration.

5. There is no contextual connection between the relevant section of the *School Act* and the collective agreement. The legislated superintendent reporting mechanism and the adequacy of information provided to the board have no connection to any provision of the collective agreement and, therefore, are not matters on which a nexus through management rights can be said to exist.
6. By extension, if this matter is grievable then all reports to the board are grievable and the union thereby becomes involved in all board decision-making, such as spring staffing and budget decision-making because they concern class size and composition.
7. The legislative scheme contemplates that boards and the Minister, not unions, review and cause revision of superintendent class organization reports.
8. The purpose and intent of section 76.3(3) is to support public accountability for administration and implementation of the class size and composition scheme. It is not to establish terms and conditions of employment.
9. The 2005 British Columbia Court of Appeal decision on the 2002 *School Act* amendments has not direct relevance to this issue arising under provisions enacted in 2006.
10. The class organization reporting provisions are analogous to procedural and process provisions in human rights legislation that are not incorporated into collective agreement and subject to grievance-arbitration.
11. Comments in my decision in 2009 about the superintendent's report and the accountability component of the legislative scheme are neither relevant nor determinative of the Arbitrability of claims of failure to comply with section 76.3(3).
12. There is no role for the legislated or intended role for the union in Section 76.3.
13. If the union is correct in its assertion of a role and a role for grievance-arbitration in the superintendent's class organization report to the board, then the logical extension and absurd result is that it has a role in all aspects of the statutory scheme, including those dealing with a special administrator.

[95] The employer submits the Court of Appeal's recent decision neither comments on the reporting requirement in issue nor calls into question the Supreme Court's jurisdiction over the subject matter on which the union petitioned for judicial review.

This jurisdictional issue was not before the Court of Appeal; there was no reference to

this subject matter in the union's factum submission to the Court; and the content of a superintendent's class organization report was not raised before the Court as a pre-condition to exceeding class size standards.

In the Employer's submission, the court's cursory description of the requirements of class size provisions in paragraph 25 cannot be elevated to an analysis of whether the reporting requirements in s.76.3 are a necessary pre-condition to a class exceeding the statutory limits or whether they create a substantive right which is arbitrable.

If the content and significance of the report was not in issue and was not made known to the arbitrator or to the court, and yet the parties, the arbitrator and the Court concluded that the, legislative requirements of 76.1 to exceed the statutory limits for the class had been satisfied, it is difficult to see how the Union can now rely on the Court's decision to support its present grievance that a specific format for the report is a critical pre-condition to a class exceeding the statutory limits. (*Employer's Submission on Arbitrability*, ¶ 190; 195)

[96] The employer submits the class before the Court of Appeal was a Grade 5 class with four students entitled to an individual education plan (a matter of class composition) that cannot exceed 30 students without teacher consent. It was not a Grades 8 to 12 class for which a rationale must be reported because the class exceeds 30 students. Consequently, the employer submits the Court of Appeal decision has no relevance to the issue in dispute in this arbitration.

[97] The union submits a superintendent's class organization report under sections 76.3(2) and (3) must list classes organized with more than 30 students and must state a rationale for each. These sections state:

- (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.

Superintendent Munro's 2010 class organization report failed "to identify or provide rationales for the specific classes that beached the class size limits." (*Written Argument of the Union*, ¶ 2)

The Class Organization Report did not list the specific classes or the subject of class for classes which exceeded 30 students, did not provide a rationale for the organization of each specific class and did not make any reference to the teacher of the class's views on the class, their agreement or refusal to teach it, or any other concerns that a teacher may have expressed. (*Written Argument of the Union*, ¶ 41)

[98] The union submits it follows that the board breached section 76.3(7) by accepting the report. This sections states:

- (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.

[99] The union submits it is not seeking to enlarge or enhance its role or involvement in class and school organization or in the board's jurisdiction and area of responsibility. It is simply seeking, in the interest of teachers', to have superintendents comply with their statutory obligations. This is an especially important role for the union because the entire class size and composition legislative scheme was enacted following the unconstitutional removal of class size and composition provisions from its collective agreement and a prohibition against engaging in collective bargaining about class size and composition. (*British Columbia Teachers' Federation v. British Columbia* 2011 BCSC 469. [2001] B.C.J. No. 675)

[100] The union does acknowledge that if there is a legislated form and content for superintendents' class organization reports and there is a substantive failure to comply by a superintendent in the current school year then the union might raise future arguments about the impact the failure has on the organization of any class with more than 30 students in that school district. This is, in part, the reason this matter has been scheduled and is to be decided before superintendents make their class organization reports for the current school year.

[101] The union states that in light of Arbitrator Diebolt's decision and before the recent Court of Appeal decision:

... the BCTF took the position that while the arbitration process under the *Labour Relations Code*, RSBC 1996, ch. 244, provided an imperfect avenue for individual teachers to challenge the decisions made by administrators to organize classes in excess of the class size and class composition limits, breaches of the accountability requirements of the *School Act* necessarily had to be enforced by the B.C. Supreme Court as a superior court of inherent jurisdiction. (*Written Argument of the Union*, ¶ 18)

[102] The union submits Arbitrator Diebolt's decision cannot be determinative of the jurisdictional issue because the dispute is about the interpretation of a statute, not a negotiated provision of a collective agreement which one party can seek to renegotiate if it does not like an interpretive outcome at arbitration. Arbitrators must be correct in their interpretation of statutes and there cannot be deference to an incorrect interpretation of a statute. As in judicial review of arbitration decisions, "... the standard

of correctness must be maintained in respect of jurisdictional and some other questions of law” when one arbitrator is asked to defer to another because administrative bodies must be “correct in their determinations of true questions of jurisdiction or vires.” (*Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190, 2008 SCC 9, ¶ 50 and 59) This was recognized by the British Columbia Court of Appeal in its recent decision: “The interpretation of the *School Act*, and particularly of the class size provisions, is not within the specialized jurisdiction of a labour arbitrator.” (¶ 20)

[103] The union submits a superintendent’s class organization report contains a substantive term and condition of employment for teachers and is therefore within the jurisdiction of grievance-arbitration.

[104] The union agrees this issue was not before the Court of Appeal, where the issue was events after September 30th. However, the Court of Appeal’s decision “questions the correctness” of Arbitrator Diebolt’s decision. (*Written Argument of the Union*, ¶ 20) The Court found that the right to teach a class that continues to be appropriate for student learning after September 30th is a substantive employment right. This directs adoption of a different approach to the legislative framework than was taken by Arbitrator Diebolt and acceptance of the Court’s overall direction.

[105] The union submits the Court of Appeal did not differentiate among the consultation, opinion forming and reporting requirements of the statute. It treated each equally and all three must be met before an individual class can be organized in excess of the grade level class size and composition standard.

The Court did not differentiate among the three requirements. All three must be met for a class to *exceed* the statutory limits. The fundamental issue is whether a particular class that exceeds the limits does so in compliance with the requirements of the *School Act*. If any one of the requirements is not met, that class is in violation of the *School Act* and the assignment of a teacher to teach that class is a violation of the collective agreement. Clearly the BC Court of Appeal interprets the class size provisions as substantive rights and the acceptance of the report by the board as the “last stage” of the three requirements to be met “before” a class may exceed the limits:

Sections 76.3 and 76.4 of the *School Act* provide a mechanism by which the organization of classes at the beginning of each school year is reported to and accepted by the school board. It also provides a mechanism for submitting a report to the Minister of Education. These provisions are important checks to ensure that the class size provisions are properly considered at the commencement of each school year. They also ensure that where normal class size limits are exceeded, the rationale for doing so is set out in a publicly available document. Nothing in s. 76.3, however, suggests that once the

superintendent's report has been submitted to the Minister, all obligations under s. 76.1(2.3) are over for the year.

BCCA Battand, supra at para 29

Further, the Court of Appeal discussed the consultation and opinion requirements as ongoing requirements:

While the consultation and reporting requirements in the class size provisions of the *School Act* are fulfilled by particular events that occur in September and October of each school year, I read the requirement that the principal and superintendent be of the opinion that the class organization is appropriate for student learning as an ongoing one. The ongoing nature of the obligation is underlined by s. 76.1(2.4), which provides that s.76.1(2.3) applies *after* the date on which the superintendent's report is signed.

BCCA Battand, supra at para 30

Given the BC Court of Appeal's finding that the accountability requirements are a prerequisite for exceeding the statutory limits, there is no basis to find that issues regarding the accountability requirements should not be arbitrable.

The BC Court of Appeal's findings in *BCCA Battand* raises doubt of the correctness of the *Diebolt Award*, which was predicated on a finding that accountability requirements did not create a substantive right. Because the Court of Appeal has determined that the acceptance of the Class Organization Report under s. 76.3 creates a substantive right, this issue is within the jurisdiction of an arbitrator, consistent with other decisions from the Court of Appeal. (*Written Argument of the Union, ¶ 57 – 60*)

[106] Despite agreement at arbitration and in the Court of Appeal that Ms Battand's class was properly organized at September 30th, the union submits:

A failure to conform with all three requirements that are necessary to establish classes above the limits means that teachers are assigned to teach classes that are in violation of the *School Act*. Just like Ms. Battand was. In *BCCA Battand*, the Court of Appeal accepted BCTF's characterization that the collective agreement nexus with the *School Act* giving the arbitrator jurisdiction to inquire into the continuing appropriateness for student learning of a class was the assignment of the teacher to teach a particular class. (*Written Argument of the Union, ¶ 61*)

[107] The union submits Arbitrator Diebolt reached the wrong conclusion:

The ability of teachers to challenge the organization of classes made pursuant to the Collective Agreement and under the *School Act* through the grievance procedure flows from the recognition that classroom conditions are terms and conditions of employment. The *Diebolt Award* is incorrect and should not be followed because its analysis fails to recognize that teachers have a substantive right to teach classes that have met all the requirements of the *School Act*, including the accountability requirements. (*Written Argument of the Union, ¶ 68*)

[108] The union submits that, just as principal-teacher consultation about a class is not merely procedural and is a process with substantial elements, "the reporting requirements of the *School Act* are important accountability requirements which create the same substantive rights." (*Written Argument of the Union, ¶ 75*) The accountability

mechanisms integral to the legislative scheme of class organization are substantive conditions of employment in that they are statutorily stipulated conditions for a teacher to be assigned a class organized in excess of the legislated class size and composition standards. The superintendent's class organization report is a crucial component of the accountability mechanism.

Once a class is deemed appropriate for student learning by the principal and superintendent, based on a consultation with the teacher of the class and discussion of necessary supports and resources, and the class organization is reviewed by the Board as required by the *School Act*, the teacher is responsible for delivering the educational program and the requirements of IEPs as set out by the *School Act* and Regulations.

The *Diebolt Award*, which precludes arbitral challenge to classes which do not meet the accountability requirements of the *School Act*, is contrary to the purpose of intent of the *School Act* and contrary to labour relations policy and jurisprudence. (*Written Argument of the Union*, ¶ 78 - 79)

9. Discussion, Analysis and Decision

[109] The class size, composition and organization provisions of the *School Act* are complex. The statutory scheme seeks to employ multiple means to support the attainment of the goal of improved student achievement.

[110] In 2009, Arbitrator Gordon declined to “determine the Union’s submission that all parts of section 76.3 of the *School Act* must be reviewable by a grievance arbitrator for compliance.” (*British Columbia Public School Employers’ Association* [2009] B.C.C.A.A.A. No. 172 (QL) (Gordon), ¶ 51)

[111] Similarly, the issue of arbitrability in this dispute was not before me in past class size and composition arbitrations. Generalized descriptions and comments in those decisions about the operation and importance of the statutory scheme of reporting and the mechanisms for accountability were not directed to determine questions of arbitrability. They were to look at the overall context because contextualism is the modern approach to statutory analysis.

As has been the analytical standard and approach for some time in grievance-arbitration, arbitrators took a contextual and purposeful approach to the scheme and language of collective agreements in interpreting provisions on class size and composition as benefits for both teachers and students to preserve a positive learning environment. (E.g., *Board of School Trustees, School District No. 39 (Vancouver)* [1997] B.C.C.A.A.A. No. 119 (Dorsey) (QL); *British Columbia Public Employers’ Association* [1999] B.C.C.A.A.A. No. 370 (Taylor)(QL))

Similarly, judicial interpretation of constitutions, statutes and contracts has evolved from a literal to a purposive, contextual analysis and interpretation. It has been a movement from

text to context. The scope of surrounding circumstances will vary when courts interpret the words of a constitution, statute or contract. And the scope of [ten] differs from the accepted scope of surrounding circumstances considered by an arbitrator interpreting a collective agreement.

My review and discussion of policy and other surrounding circumstances in the first representative decision, including funding, were to discern, understand and state the context in which the language and scheme of the class size provisions of the *School Act* were enacted and are to be interpreted. (*British Columbia Employers' Association* [2011] B.C.C.A.A.A. No. 58 (Dorsey), ¶ 112 – 114)

[112] The courts have been clear that a liberal approach is to be taken to deciding subject matters relating to conditions of employment are within the exclusive jurisdiction of grievance arbitrators, as restated by the Supreme Court of Canada.

This Court has considered the subject-matter jurisdiction of grievance arbitrators on several occasions, and it has clearly adopted a liberal position according to which grievance arbitrators have a broad exclusive jurisdiction over issues relating to conditions of employment, provided that those conditions can be shown to have an express or implicit connection to the collective agreement: *Regina Police; New Brunswick v O'Leary*, [1995] 2 SCR 967; *Parry Sound (District) Social Services Administration Board v OPSEU, Local 324*, [2003] 2 SCR 157, 2003 SCC 42; *St. Anne Nackawic Pulp & Paper Co v Canadian Paper Workers Union, Local 219*, [1986] 1 SCR 704; *Allen v Alberta*, [2003] 1 SCR 128, 2003 SCC 13. (*Bisaillon v Concordia University*, 2006 SCC 19, [2006] 1 SCR 666, ¶ 33)

[113] In that decision the Supreme Court of Canada Justices were split four to three over the application of the liberal approach to the pension plan issue in dispute. Four Justices decided it was within the exclusive jurisdiction of grievance-arbitration, as had the trial judge, but not the Quebec Court of Appeal, which had decided the pension issue had nothing to do with the collective agreement.

[114] Three dissenting Justices, taking a “nuanced and contextual analysis animated by the relevant factual matrix”, concluded the pension plan transcended any single collective agreement or employment contract and is outside the exclusive jurisdiction of a grievance arbitrator. (¶ 67) In addition, there ought to be jurisdiction in the courts to avoid multiplicity of proceedings and the risk of conflicting decisions in different forums.

[115] I accept as implicit in the British Columbia Court of Appeal’s 2005 decision a direction that legislative intention cannot trump jurisdiction when there is an issue relating to terms and conditions of employment that have an express or implicit connection to the collective agreement. Arbitrators must take a nuanced and contextual approach to determining jurisdiction, regardless of the legislative intention. As in the Supreme Court of Canada’s decision, the answer is not always clear.

[116] Both past collective agreement and current legislated class organization provisions were fashioned in or grafted to the organizational and operational context of legislated roles for trustees, secretary-treasurers, superintendents, principals, teachers and the Minister. The institutional and personnel roles and the annual school organization cycle provide the frame within which collective agreement provisions were negotiated and legislated provisions were enacted.

[117] The expansion in 2006 of the 2002 class size provisions to address all grade levels, to include class composition and to enact an accountability mechanism were overlaid on the well-established annual cycle of planning, funding, organization and delivery of educational programs. In this respect, the legislation followed the approach of the deleted collective agreement provisions which had been negotiated in the operational context of the school calendar and the September to June cycle of school years and the organizational context of principals, superintendents and trustees.

[118] It is not esoteric or overly nuanced when making decisions that will reverberate throughout the public education system to refer to this larger context to understand the interaction of the many components of this complex system and the many interests it encompasses and attempts to balance. A singular focus on one component or interest to the exclusion of others can have unintended consequences distorting the balance.

[119] Superintendent class organization reporting to boards of education is fundamentally an organizational and governance process. Elected trustees employ superintendents to deliver on the mission of providing an educational program to students. It is not reasonable to assume the Legislature believed boards would not receive superintendents' reports each fall on the implementation and outcomes of class and school organization following the budget approval, planning and decision-making about resource allocation they engage in each spring. Similarly, it is not reasonable to assume the Legislature believed boards would not hold secretary-treasurers accountable for their enrolment projections and superintendents accountable for their resource allocation decisions leading up to and in September class and school organization. It must be assumed boards will do their duty ask: Were our assumptions and estimates about grade level enrolment and student demographic correct and on

mark? Did the plan work? Were there unforeseen circumstances? What can we learn to improve the entire process next year?

[120] The Legislature must be taken to have known that boards reported student enrolment and designated special needs student populations, key drivers for per student and special needs funding from the provincial government to boards. Secretary treasurers and boards have honed the estimating, counting and reporting to a fine art with September 30th as the critical snap shot date. In the first six months of the calendar year, there are preliminary projections, tentative budgetary allocations to schools, preliminary school organization plans, teacher expressions of preferred assignments for the following school year, support employee staffing and wrestling between the provincial government and boards over per student, special needs and dedicated purpose funding.

[121] When schools open and principals see the “whites of students’ eyes”, there are adjustments and student population reports followed by echo reports in October to ensure each board receives all and not more than the funding to which it is entitled. There are negotiations over adjustments, exceptions and needs.

[122] One innovation and addition in the 2006 amendment to the *School Act* was that the Minister would publish reports about class organization for all classes in the provincial system in addition to the class size average and Kindergarten and primary grade class reports it was publishing in accordance with the 2002 legislation. The reporting focus was on classes organized in September, not on second semester classes in Grades 8 to 12 which will have as many classes organized in excess of 30 students. Second semester class organization is addressed in *British Columbia Public School Employers’ Association* [2010] B.C.C.A.A.A. No. 147 (Dorsey).

[123] The Legislature prescribed a process and reporting time line within the existing structures and process to guarantee the public that each and every board of elected trustees, regardless of the experience and predilections of its trustees and its governance policies and practices, would focus on and be accountable for class size organization. The Legislature did not do the same for class composition with its risk of publicizing private matters about designated special need students entitled to an individual education plan.

[124] Through this mechanism, reports from each board would be collected and consolidated into evolving report formats published by the Minister for classes covered by the *Class Size Regulation*.

[125] In this context, whether using the roles and responsibilities and governance approach of the employer or the judicial substantial connection or essential nature test, I find that the superintendent class organization report required under sections 76.3(2) and (3) of the *School Act*, while significant for several reasons and of keen interest to the union and teachers, is not a condition of employment for teachers and is not a condition of employment that has an implicit or express connection to the collective agreement. Therefore, I agree with the conclusion reached by Arbitrator Diebolt and find the subject matter of Superintendent Munro's 2010 class organization report compliance with section 76.3(3) is not in the jurisdiction of grievance arbitration.

[126] The union's submission that Arbitrator Diebolt was incorrect is premised on the accountability reporting requirements in sections 76.3(2) and (3) being a substantive employment right with a real contextual connection to the collective agreement. It is correct that class size and composition organization is a "significant part of the employment relationship" as decided by the Court of Appeal in 2005. (*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association* [2005] BCCA 92; [2005] B.C.J. No. 289(QL), ¶ 21; 136 L.A.C. (4th) 225, ¶ 37) But, in my opinion, Arbitrator Diebolt correctly concluded section 76.3 "is a process and public accountability provision" reporting past decisions made in accordance with section 76.1, not a finalizing step in making those decisions. It is not, as the union submitted, the "last stage" in the organization of individual classes. It is more properly characterized as a first reporting stage in the accountability mechanism under the statutory scheme.

[127] The recent Court of Appeal decision concerning Ms Battand's Grade 5 class of 29 students with four entitled to an individual education plan in the 2008-09 school year decides that a grievance arbitrator has jurisdiction over grievances alleging that changed circumstances have adversely impacted the continued appropriateness of a class for student learning after September 30th for a temporary period or throughout the school year.

[128] The Court did not decide that an organizational or governance event after September 30th, such as a superintendent's failure to make a class organization report or to sign and submit a report to the board or district parents' advisory council or to make a timely report or to make a report in any format or without specific content, made any classes organized in September in excess of the class size and composition standards either classes organized contrary to the *School Act* or classes that ceased to be appropriate for student learning.

[129] The Court of Appeal did not have section 76.3(3) before it in 2011. In its generalized contextual statements about the *School Act*, the Court conflated requirements for organization of individual classes assigned to teachers, which are clearly terms and conditions of employment for teachers, and requirements for reporting district class organization outcomes. The two share the common character of being about class organization. However, they do not have a shared connection to individual classes assigned to teachers, which are terms and conditions of their employment and can be grieved and arbitrated.

[130] To extend the analysis into the overall school and class organization context, it could not have been the Court's intention that individual classes lawfully organized in September in excess of 30 students in accordance with section 76.1 of the *School Act* would be declared to be unlawfully organized because of the time or manner in which the superintendent reported or failed to report the organization of district classes.

[131] If that were intended, what would be the outcome for students, teachers and all school and district personnel assigned to support classes? Are the classes with more than 30 students, but perhaps not the classes with more than 3 students entitled to an individual education plan, to be reorganized in October because of a reporting failure? Or is each teacher of the classes to continue the assignment and be awarded a remedy for the duration of the semester or school year? These are predictable options that will be advanced by persons with an interest in the public education system who are unhappy with the organization of a class and cannot be attributed to have been within the Court's contemplation when it made the generalized statements on which the union relies.

[132] In conclusion, I find the sufficiency of Superintendent Munro's class organization report under sections 76.3(2) and (3) for 2010 school year is not a subject matter within the exclusive jurisdiction of grievance-arbitration.

SEPTEMBER 25, 2011, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey