

## Class Size Arbitration Update

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### **BCTF Appeal: Arbitrator Dorsey's Second Representative Class Size Award**

On May 19, 2011, Arbitrator Dorsey issued his second representative class size award on the issue of "appropriate for student learning." This award was described in [@issue No. 2011-12](#).

During these proceedings, the BCTF requested that Arbitrator Dorsey revisit/reconsider his original findings from his August 2009 award with respect to the standard of review for an arbitrator when assessing the opinions of the principal and superintendent. For example, should the standard of review be reasonableness, an arbitrator's own view based on the balance of probabilities, or should "deference" be provided by the arbitrator to the opinion of the principal and superintendent based on their expert professional experience as educators. In his August 2009 award, Arbitrator Dorsey ruled that, while absolute deference without limit would not be provided, principals and superintendents must be given broad deference by an arbitrator when assessing their opinions.

For evidentiary purposes only, Arbitrator Dorsey then made a distinction between "presumptive deference" and "deference with an explanation." This is now referred to by the employer as the "rule of 33." Arbitrator Dorsey provided "presumptive deference" to classes with a combined total of 33 or less (head count of students plus number of students with IEPs) and "deference with an explanation" for classes with a combined total of 34 or more (head count of students plus number of students with IEPs). For example, if a class had a total of 28 students and 4 of these 28 students had an IEP, for evidentiary purposes only, it would be counted as 32 (28 + 4 = 32).

This rule does not mean that classes of a combined total of 33 or less are automatically appropriate for student learning, nor does it mean that classes of a combined total of 34 or above are inappropriate. Each class must still be looked at on its own merits. For both situations, the onus remains with the union to prove that there has been a contravention of the legislation; however, for classes with a combined total of 34 or greater, there will be an evidentiary burden on the employer to adduce evidence to explain to the arbitrator why the principal and superintendent came to that opinion.

In his second representative class size award dated May 19, 2011, Arbitrator Dorsey reconfirmed the “rule of 33” and onus on the union to prove a contravention of the legislation.

As a result, a total of 108 classes have now been arbitrated on the issue of “appropriate for student learning” by Arbitrator Dorsey. Of these classes, 103 were found to be appropriate for student learning (deference provided to the opinions of the principal and superintendent) and five classes inappropriate for student learning (deference not provided to the opinions of the principal and superintendent). A further breakdown of these numbers indicates that of the 108 classes arbitrated, 55 had a total of 33 or below (none found to be in violation) and 53 had a total of 34 or above (five found to be in violation).

Although nearly two years have passed since Dorsey’s first award (which was not appealed), the BCTF has now filed with the courts an appeal of his second representative class size award dated May 19, 2011.

### **2010-2011 Arbitrations: Adjournment until Receipt of the BC Court of Appeal Decision**

The BCTF has presently referred eight class size grievances to arbitration for the 2010-2011 school year and has informed BCPSEA that additional referrals will be forthcoming. At present, these eight grievances consist of approximately 1,700 classes in eight school districts (SD Nos. 35, 36, 43, 57, 67, 70, 72 and 79).

As described in [@issue No. 2011-08](#) dated March 18, 2011, the BCTF had abandoned following the representative approach model and were instead seeking to arbitrate these matters with a variety of arbitrators. However, in light of the recent BCTF appeal, the BCTF has now requested — and BCPSEA has agreed — to adjourn all pending or future class size/composition referrals for the 2010–2011 school year until the Court of Appeal decision is rendered. BCPSEA has requested that respective counsel for the BCTF and BCPSEA discuss ways that this matter might be expedited. For now, an estimate for receipt of a decision from the Court of Appeal would likely be in spring 2012.

Please note that although these matters have been adjourned for the time being, it is important that districts continue to collect and maintain their records and evidence for any classes grieved in the district.

### **2006-07 and 2007-08: Case Management Meeting Scheduled for July 5, 2011**

Approximately 900 classes remain in dispute. The parties will be meeting with Arbitrator Dorsey in a case management meeting scheduled for July 5, 2011 to discuss exactly what issues remain outstanding and, given the appeal by the BCTF, discuss whether there are any matters/issues that can proceed to arbitration at this time.

### **2008-2010 Class Size Grievances: Resolution Process Agreement**

This week it is hoped that the provincial parties can sign off an agreement on the final list of classes under grievance for these two school years, which is estimated to be in the range of 9,000 classes.

Once this list is signed off, the local parties will then be in a position to implement the "Grievance Resolution Process Agreement" for class size grievances in the 2008-2009 and 2009-2010 school years. Instructions and a copy of this agreement were provided to districts in an e-mail dated April 8, 2011. Once the final list is signed off, further instructions will be sent to districts. In the meantime, should your local union contact your districts to commence this process, please contact Brian Chutter at BCPSEA for clarification and direction.

### **Class Size Manual and Training**

The BCPSEA manual, "Guidelines for Implementing Class Size and Composition Provisions," will be updated to incorporate what we have learned from the class size awards received in the 2010-2011 school year. Although the BCTF has appealed the May 19, 2011 decision of Arbitrator Dorsey on the issue of "appropriate for student learning," this case law will continue to apply subject to any subsequent rulings from the BC Court of Appeal.

On August 25, 2011, BCPSEA will again be providing a class size and composition training session for districts. Unless space permits, this session will be limited to two participants per district. The session will entail a review of the manual, including the processes and procedures for districts to follow in the implementation of the class size legislation for the 2011-12 school year. The grievance resolution process for the 2008-2010 grievances will also be discussed at this session. Registration forms and details for this training session will be sent to districts in the coming week.

### **Questions**

Should you have any questions or would like to discuss further, please contact Brian Chutter or your BCPSEA labour relations liaison.