

## **Class Size Arbitration Update**

### **Arbitrator Dorsey – Representative Classes Award No. 2 Appropriate for Student Learning**

#### **Background**

As there were thousands of classes under grievance and this legislation had never been interpreted before, starting in 2008, the BCTF and BCPSEA agreed to appoint Arbitrator Dorsey to take jurisdiction of all class size grievances stemming from the 2006–2010 school years. The parties agreed to identify and arbitrate representative classes and common interpretive issues in order to provide the parties with guiding principles and procedural interpretations that could be applied throughout the province.

After approximately one hundred days of hearings and fourteen awards by Arbitrator Dorsey, to a great extent this objective has been accomplished. While the rules and case law were fairly clear in the areas of class size processes, procedures and consultation requirements, further direction in the area of “appropriate for student learning” was required. These gaps included grade and subject levels not covered by the original award as well as the determination of more classes at the higher end of the spectrum (sum of students plus students with IEPs in the 34 – 40 range).

In response to filling in these gaps, the parties agreed to arbitrate an additional 44 representative classes, solely on the issue of “appropriate for student learning”. These forty-four classes involved five schools (one elementary, one middle and three secondary) in two school districts (SD Nos. 5 (Southeast Kootenay) and 39 (Vancouver)) with 32 of the 44 classes being a sum of students plus IEP’s ranging from 34 to 40.

The following is a brief summary of Arbitrator Dorsey’s award received today on the issue of “appropriate for student learning” for the 44 representative classes. The complete decision will be posted on our website under “What’s New”.

## Summary of Arbitration Decision

Of the 44 representative classes, Arbitrator Dorsey confirmed 2 classes were within the 30 and 3 legislative standards; 2 classes were with teacher agreement; 9 classes were given presumptive deference to the principal's opinion (rule of 33 or below); 28 classes were given deference to the principal's opinion (rule of 34 or above); and for 3 classes, deference was not provided to the principal. As a result, it has been determined that 41 of the 44 classes arbitrated under these proceedings were "appropriate for student learning".

It is important to remember that when determining whether or not a class is appropriate for student learning, consideration of more than just the assigned number of students and IEPs is required. Although two classes may be the same size and have the same IEP composition, they are not necessarily either appropriate or inappropriate based on these numbers alone. Other factors may include the type of IEPs present and their relevance to the class, type and grade level of the course, additional resources provided (inside and outside of the class) to support the teacher and students, etc.

BCPSEA will be undertaking a full analysis of these 44 representative classes in conjunction with the 71 representative classes previously ruled upon by Arbitrator Dorsey in August of 2009. It is hoped that with this further guidance on the issue of "appropriate for student learning" the parties will now be in a position to utilize these guiding principles to resolve the remaining classes that are still in dispute.

### Rule of 33 – "Presumptive Deference" and "Deference with an Explanation"

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.

Further, in his August 2009 award, for evidentiary purposes only, Arbitrator Dorsey made a distinction between "presumptive deference" and "deference with an explanation to the arbitrator of their opinion". This is now referred to 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).

This rule does not mean that classes of a combined total of 33 or less are appropriate for student learning, nor does it mean that classes of a combined total of 34 or above are inappropriate. Each class must 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 greater than 33, there will be an evidentiary burden on the

employer to adduce evidence to explain why the principal and superintendent came to that opinion.

In these proceedings, the BCTF took the position that the correct test is not “deference” as described above and ruled upon previously by Arbitrator Dorsey. The BCTF’s position was that no “deference” should be provided to the opinion of the principal.

After hearing arguments, on pages 46 – 47 of this award, Arbitrator Dorsey ruled the following:

“The union submits I erred in not taking a more literal approach to the statutory language and scheme and by “reading into the legislation policy considerations which are not reflected in the clear words of the statute,” especially any consideration of funding (Outline of BCTF’s Submission, March 29, 2011).

I disagree. The context is complex. There are multiple goals, values, purposes and objectives including those within the *School Act* preamble. I am not persuaded the interpretation of the class size provisions of the *School Act* in the first representative decision is incorrect. I am not persuaded impermissible contextual factors were considered.

Nor am I persuaded the presumptive deference approach to administration of grievance-arbitration over alleged violations of the class size provisions is an improper exercise of an arbitrator’s jurisdiction; is inconsistent with the accountability and transparency scheme of the statute; limits, obstructs or denies access to arbitration of grieved classes; or preordains a rare likelihood of success in establishing a contravention of the statutes at arbitration.

As explained, it is a procedural approach to balancing competing legislative purposes and establishing a grievance-arbitration process that respects the goals of the *Labour Relations Code*, including promoting “conditions favourable to the orderly, constructive and expeditious settlement of disputes” (s. 2(e)). It is consistent with arbitral deference to employer exercise of its management rights to organize operations based on reasonably held opinions, just as there must be deference to teacher consent or withholding of consent in circumstances when it is a prerequisite to exceeding a class size standard.”

Continuing on page 49, Arbitrator Dorsey further states,

“The pivotal decision under the legislation to exceed a class size of 30 students in grades 8-12 or to include more than 3 students entitled to an individual education plan in a class at any grade is the principal’s decision supported by dual principal and superintendent opinions the class is appropriate for student learning. The maxima class size limits in Kindergarten and Grades 1-3 and the requirement for teacher consent to exceed 30 students in a class at Grades 4-7 does not detract for the authority of the principal or place primacy on the teacher’s opinion in the organization of classes in excess of the legislated class size standard of 30 students at Grades 8-12 or the class composition standard of 3 students entitled to an individual education plan.

Consequently, I decline the union’s invitation to revisit the interpretations and approaches in the first representative class decision. This decision will approach this second group of representative classes as a continuation intended to apply, extend and

refine the principles in the first decision to assist in the resolution of disputes about outstanding classes encompassed by the grievances.

### **Kindergarten to Grade 3**

When Arbitrator Dorsey devised the “rule of 33” with respect to the evidentiary burden in his August 2009 award, there were no K – 3 classes in dispute, i.e., the rule applied to classes from grade 4 to 12 which had a class size standard of 30 in the legislation.

As the class size limits for kindergarten is 22 and 24 for grades 1 – 3, the question became what corresponding rule applies to these classes?

On page 124 of his award, Arbitrator Dorsey determined the following for Grades 1-3:

“For the same reasons as stated in this and the first representative classes decision, I find there should be an easily administered formula based on class size and composition for Grades 1-3 to identify classes for which there is presumptive arbitral deference to the dual principal and superintendent opinions. For Grades 1-3, I have concluded the formula to determine the disputed classes for which there should be presumptive deference to the principal and superintendent opinions on the organization of the class are those for which on September 30<sup>th</sup> the sum of the number of students in the class and the number of students in the class with an individual education plan equals or is less than twenty-seven. (students + students with IEP equal to or less than 27)”

### **Next Steps**

1. BCPSEA will be undertaking a full analysis of these 44 representative classes in conjunction with the 71 representative classes previously ruled upon by Arbitrator Dorsey in August of 2009.
2. BCPSEA will update what factors/variables have been established in these representative awards to help guide principals when reaching his/her opinion on whether a class is appropriate for student learning. The “Guidelines for Implementing Class Size and Composition Provisions” manual will be updated accordingly to incorporate what has been learned from this award.
3. 2006-07 & 2007-08 Outstanding Grievances: Although approximately 900 classes have been resolved for these grievances, approximately 700 classes remain outstanding. It is hoped that now that the parties have received further guidance on the issue of “appropriate for student learning” they will be in a position to resolve the remainder of the classes that are outstanding.
4. 2008-09 & 2009-10 Outstanding Grievances: There are approximately 9,000 classes under grievance. The provincial parties have signed a class size grievance resolution process agreement to attempt to resolve these outstanding grievances. Last week the BCTF provided BCPSEA with their final list of classes under grievance for these years. BCPSEA is in the process of confirming this list. Once this list is confirmed, this list and further instructions will be sent to districts on the implementation of the grievance resolution

process. Further, as the Dorsey award has now been rendered, the provincial parties may wish to consider/discuss possible amendments to this resolution process.

5. 2010-11 Grievances: Unlike the previous four years, instead of filing a provincial grievance, the BCTF advised their union locals to file grievances locally. The BCTF has currently referred 6 local grievances to arbitration (SD Nos. 35, 43, 57, 67, 70 and 72). The grievance from SD No. 67 is scheduled to proceed to arbitration in front of Arbitrator Steeves in July with the remainder of the arbitrations presently being scheduled with 5 different arbitrators during the next school year. Although the BCTF has previously informed BCPSEA that they intend to argue that Arbitrator Dorsey's awards should not be followed by other arbitrators seized of the 2010-11 grievances (please refer to [@issue 2011-08](#) dated March 18, 2011), it is hoped that BCTF will reconsider its position and attempt to settle all outstanding and future grievances based on the guiding principles that have been established in the Dorsey awards. Very significant time and resources have been invested in the Dorsey representative arbitration process that the parties agreed to pursue.

## Questions

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