

LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION and
SOOKE TEACHERS' ASSOCIATION

UNION

BRITISH COLUMBIA PUBLIC EMPLOYERS' ASSOCIATION and
THE BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 62 (SOOKE)
EMPLOYER

(Kathryn Sihota – DART Assessment – Professional Autonomy and Discipline)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Randall J. Noonan
Representing the Employer:	Judith C. Anderson
Dates of Hearing:	October 20 – 24, 2008; January 26; April 24; June 29 – 30, 2009
Date of Decision:	September 22, 2009

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1. Grievances and Jurisdiction

[1] Shirley Elm, the Principal of Millstream Elementary School, directed Kathryn Sihota twice to administer an assessment of the students in her Grades 2/3 class no later than Friday June 8, 2007. The assessment is called a District Assessment of Reading Team (DART). On June 8th, the local union grieved this direction violated the professional autonomy provision of the collective agreement.

ARTICLE F3 – PROFESSIONAL AUTONOMY

The Board recognizes and respects the professionalism of teachers covered under this collective agreement. Teachers shall, within the bounds of the prescribed curriculum and consistent with recognized effective educational practice, have individual professional autonomy.

[2] Ms Sihota refused to administer the assessment. Following a hearing by the Trustees of the Board of Education on September 25, 2007, the employer gave Ms Sihota a letter of discipline dated September 27, 2007 for insubordination because of “deliberate and overt refusal” to follow the principal’s direction. The union grieved the next day.

[3] The union referred the grievances to arbitration and seeks a declaration the employer had no authority to direct Ms Sihota to administer the DART assessment and an order to rescind the discipline.

[4] I was notified of my appointment as arbitrator on January 17, 2008. The union and employer agree I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* with jurisdiction to finally decide the merits of both grievances.

[5] By agreement the grievances were consolidated for hearing. Although it was agreed the union proceed first to adduce evidence, the usual onus on the employer to establish just and reasonable cause for discipline applies. There was an agreed exclusion of witnesses.

2. Negotiating Teacher Professional Autonomy Clauses (1988 - 2006)

[6] In April 1984, the BCTF established a Bargaining and Professional Rights Task Force to “study how the unique concerns of teachers – in their capacity as professional educators and in their employment relationship – should be addressed in law” (BCTF, *Report of the Task Force on Bargaining and Professional Rights* (November 1984 – 3rd printing – revised February 1986), p. 2). One of the Task Force recommendations was to include a statement of professional recognition and responsibilities in the *School Act*. One of the teacher responsibilities to be recognized was: “Individual professional autonomy in determining the methods of instruction, and the planning and presentation of course materials in the classes of pupils to which they are assigned” (p. 30).

[7] When teachers acquired collective bargaining rights in 1988, local unions were provided reference materials developed by the BCTF to assist them in negotiations with school board employers. One suggested model clauses was:

Teachers shall, within the bounds of the prescribed curriculum and consistent with effective educational practice, have individual professional autonomy in determining the methods of instruction, and the planning, presentation and evaluation of course materials in the classes of pupils to which they are assigned.

[8] The Sooke District Teachers’ Association proposed this language. The employer’s position was that it was contrary to the provisions of the *School Act*, which excluded from the permissible scope of collective bargaining “the program of studies or the professional methods and techniques employed by a teacher” (*School Act*, s. 27(3)(a), which was s. 140(1)(a) in 1988). Employer negotiation committee member Trustee Dick Williams likened the proposal to his academic freedom as a university Education Faculty professor and expressed the opinion the *School Act* did not allow the employer to agree he same for school teachers.

[9] The local union repeatedly returned to the issue in negotiations. As the end

school year date approached, the employer agreed to the more general statement that became Article F3. Assistant Superintendent Jim Cambridge, who was union Vice-President at the time, and Assistant Superintendent Ron Warder, who was teaching at the time, were both members of the union bargaining committee in those negotiations. Mr. Cambridge testified he does not recall the source of the language finally agreed.

[10] This language continued unchanged in subsequent collective agreements. It became part of the provincial collective agreement in 1995 when provincial collective bargaining replaced school district collective bargaining.

[11] In December 1995, seeking a province-wide agreement on teachers' professional autonomy, the BCTF proposed the following clause:

ARTICLE F.6: PROFESSIONAL AUTONOMY

The employee shall have individual professional autonomy for determining the method of teaching, including instruction and evaluation, the planning, selection and presentation of course materials, evaluation and assessment of students, the management and day-to-day discipline of his/her students.

In February 1996, BCPSEA proposed the following:

ARTICLE F.6: PROFESSIONAL AUTONOMY

- 6.1 Teachers shall, within the bounds of legislative provisions, and the provisions of this agreement and consistent with effective educational practice, have the right and responsibility to plan and present course materials, and determine methods of instruction.
- 6.2 Nothing in this Article shall preclude the establishment of Board policy on educational matters which are consistent with effective educational practice.

An agreement was not achieved. Previously agreed local language continued as part of the provincial collective agreement with application in the school district in which it had been negotiated.

[12] Fifty-seven of the sixty local agreement components of the provincial agreement have a professional autonomy clause. In School District No. 20 (Kootenay- Columbia) and School District No. 48 (Howe Sound), the language is the same as in School District No. 62 (Sooke).

[13] In March 2006, the BCTF resolved at its Annual General Meeting to support an increased focus on teaching and learning by having its members:

- a. participate in educational change that will produce a positive outcome for student learning.
- b. increase their active involvement at the school level with parents through parent advisory councils.
- c. express to parents and trustees our educational and professional concerns with FSA testing and standardized tests.
- d. withdraw from participation in the formulation of all accountability contracts and school growth plans.
- e. withdraw from participation on School Planning Councils.

The same AGM resolved that teachers refuse to serve on School Planning Councils.

[14] In collective bargaining in 2006, the BCTF proposed the following professional autonomy clause:

ARTICLE F.5: PROFESSIONAL AUTONOMY

1. Employees shall have individual professional autonomy in:
 - a. establishing the teaching and learning environment for the students assigned to them
 - b. diagnosing learner needs
 - c. planning the delivery of the educational program
 - d. determining and implementing the appropriate means of instruction
 - e. evaluating and selecting learning resources beyond those recommended by the district or province
 - f. determining the appropriate methods of assessment
 - g. evaluating student progress
 - h. communicating student progress only to Ministerial Orders and,
 - i. classroom management
2. The employer shall not impose requirements for reporting student progress beyond those in Ministerial Orders.
3. Employees shall have a working environment that encourages professional autonomy, and shall not be subject to procedures and policies that limit or undermine their professional autonomy.

[15] The intention was to recognize the autonomous exercise of teacher judgment within the confines of the *School Act*, regulations and Ministerial Orders, but not have teacher judgment constrained by directive from school and district administration. The proposal arose from a conclusion that an expanded administrative mandate was eroding teacher autonomy and moving away from a supportive professional relationship between teachers and administrators toward a bureaucratic relationship between managers and employees with more

supervision over learning from outside the classroom through directives to teachers from school and district administrators.

[16] The BCPSEA counter proposed a package that included professional growth, mentorship, evaluation and professional autonomy. The approach was to acknowledge teaching professionals have a scope of professional autonomy, but affirm they are also employees accountable within the current system of public education governance and decision-making. The professional autonomy proposal was as follows:

ARTICLE F.5: PROFESSIONAL AUTONOMY

1. The employer recognizes and respects the professionalism of teachers covered by this collective agreement.
2. Within the bounds of locally and provincially prescribed curricula, and consistent with recognized and effective educational practice, teachers shall have individual professional autonomy in determining methods of instruction, and in planning and presenting course materials.
3. Nothing in this Article is intended to affect the right of the employer to conduct evaluations of teachers under the collective agreement, in accordance with established criteria.

[17] Both proposals were withdrawn before settlement on June 30, 2006.

3. Academic Freedom in Canada and Grades K-12 Teachers

[18] In elementary and secondary schools, with younger, more impressionable students compelled to attend school, there are more constraints on teachers and more employer measures adopted for the efficacy and effectiveness of the educational system than in post-secondary institutions where academic freedom is prominent, valued and aggressively defended.

[19] Throughout the decades, teachers, especially at post-secondary institutions, opposed others directing either the specific content or methodology of their teaching. In some circumstances, tensions arose between the independence of teachers in their classrooms and the obligations and responsibilities imposed on them because they teach and must perform administrative tasks as employees in bureaucratic organizations.

[20] In the United States, while the First Amendment to the Constitution

protecting freedom of speech and freedom of the press does not make reference to teaching, the courts have held the protection of freedom of expression is “inseparably linked to the principle of academic freedom.” As a consequence, teachers in public institutions have a constitutionally protected interest “in choosing a particular pedagogical method for presenting the idea-content of a course, as long as the course is part of the official curriculum of the educational institution and the teaching method serves a demonstrable educational purpose.” The basic belief is that “teachers should be free to engage in the exchange of diverse ideas on controversial topics, both within and outside the classroom, without risking the imposition of sanctions as a result of their ideological expressions.” (*State Board for Community Colleges and Occupational Education*, 687 P.2d 429 (S.C. of Colorado) (1984); *Keyishian v Board of Regents*, 385 U.S. 589 (1967). See Richard S. Vacca and William C. Boshier, Jr., *Law and Education: Contemporary Issues and Decisions* (6th ed., 2003, LexisNexis™))

[21] The American protection within the class does not extend to teachers choosing curriculum or classroom management techniques contrary to school policy or dictates. The institution as the speaker of the educational program being taught can make content-based choices that restrict teachers’ choices. This is the institution’s academic freedom. (*Edwards v. California University of Pennsylvania*, 156 F.3d 488 (U.S. Ct. Appeals Third Circuit) (1998)). Further: “Academic freedom is not a license for activity at variance with job related procedures and requirements, nor does it encompass activities which are internally destructive of the proper function of the University or disruptive of the education process.” (*Charles I. Stastny v. The Board of Trustees of Central Washington University*, 32 Wn. App. 239; 647 P.2d 496; 1982 Wash. App. Lexis 2962 (1982))

[22] A tenured professor unsuccessfully challenged a university employer’s policy of standardized student evaluation of teachers as interfering with her classroom method and violating her academic freedom. The court held teacher evaluation was part of the university’s academic freedom and it did not interfere with her right to academic freedom, which she could not invoke to refuse to perform her duty as an employee. (*Wirsing v. Board of Regents of the University of*

Colorado, (1990) U.S. Dist. Lexis 7861)

[23] In Canada, it has fallen to employment law, rather than constitutional law, to delimit the freedoms, responsibilities and obligations of teachers as employees in the public school system. All duties of teachers are not expressly set out in legislation, regulations or collective agreements. In 1975, the Supreme Court of Canada upheld a decision of the Manitoba Court of Appeal that teachers were under a duty to provide noon-hour supervision at secondary schools under the direction of the principal because it was an implied contractual obligation. While dissenting on the grounds that the dispute should have gone to arbitration rather than the courts, Chief Justice Laskin, with two other Justices concurring, assessed the nature of the employment relationship and expectations under a collective agreement in the context of the school as a “professional enterprise” in which the teacher is a professional with responsibilities extending beyond those addressed in the collective agreement. He wrote:

Almost any contract of service or collective agreement which envisages service, especially in a professional enterprise, can be frustrated by insistence on “work to rule” if it be the case that nothing that has not been expressed can be asked of the employee. Before such a position can be taken, I would expect that an express provision to that effect would be included in the contract or in the collective agreement. Contract relations of the kind in existence here must surely be governed by standards of reasonableness in assessing the degree to which an employer or a supervisor may call for the performance of duties which are not expressly spelled out. They must be related to the enterprise and be seen as fair to the employee and in furtherance of the principal duties to which he is expressly committed.

I dispose of the first point on the simple ground that the parties’ collective relations envisage that directions will be given from time to time by the principals of the schools which may, when issued, become part of the duties to be discharged under the collective agreement. I do not agree with the Association’s contention that any such directions to be valid must be limited to instructional duties during the instructional day. (*Winnipeg School Division No. 1 v. Winnipeg Teachers’ Assn. No. 1*, [1976] 2 S.C.R. 695, pp. 705–6)

[24] Some of the tensions between expectations that flow from professional responsibilities and workload protections addressed in a collective agreement were at issue in a difference over the school day and the instructional day in *Toronto District School Board* [2004] O.L.A.A. No. 423 (Newman) (QL). The board

majority concluded the time during which teachers attend to student learning needs extends beyond the time defined by the bells or the times between the bells specifically designated for instruction and preparation.

Teachers are professionals. The expectations upon them from their employer, from their students, the parents, their peers, their community, and the legislator, is that they provide a complex and diverse collection of functions and services from the moment they arrive at school, throughout a school day, until they leave, and indeed, in some respects, after they leave the premises. The collective agreement does not articulate all of those functions. Preparation time, instructional time and scheduled supervision time are not the only three categories of activity performed in a school day. They are however, three elements of teacher activity that have attracted specific protection in the collective agreement. In our view, the role of the professional is not defined by these three elements, and it is not limited to these three elements. Under which of those three headings would we categorize attendance at a staff meeting? Under which would we categorize the teacher's early morning meeting with a troubled student, or a concerned parent?

The parties themselves negotiated certain protections around certain aspects of teacher activity, but they did so against a foundation of teacher professionalism that mitigates against an interpretation that would articulate and limit a description of their role as simply the sum of those three elements. The teacher's role is more diverse, more autonomous, and one that reflects higher expectations. The contract is interpreted against a fabric of professionalism. (¶ 126–7)

[25] The limits of professional autonomy in curriculum instruction were explored in 1997 in an arbitration in Manitoba in which the union grieved that an unwritten employer policy was a violation of the academic freedom of a Grade 8 lesbian teacher with over twenty years teaching who wished to disclose her sexual orientation to her students as a way to teach tolerance. In deciding it did not have jurisdiction and dismissing the grievance, the board majority wrote:

The second issue is the nature of the Division's determination that Ms. M'Lot may not disclose her sexual orientation in the classroom. Is the position on non-disclosure of sexual orientation a company rule or a discretionary management right?

This is a difficult question to answer. Certainly it is important that teachers be allowed a significant degree of freedom in the teaching of any course. Inevitably, that freedom will include the making of numerous judgments on how to convey the curriculum. Also that freedom will involve an element of providing content to the lesson to "fill out", amplify or interpret the curriculum being taught, and of shaping it to the needs of students.

Moreover, from the testimony and the exhibits filed, it is clear that the Division intends that its teachers be allowed to exercise professional skill and judgment when preparing and delivering the curriculum. That

preparation and delivery will involve amplifying on the curriculum required to be taught and applying of appropriate methodology.

But, having recognized the importance of that freedom, it is necessary to consider whether disclosure of sexual orientation involves an essential part of the curriculum which it is within the Division's discretion to set.

On consideration, the Division's policy of non-disclosure must be viewed as the setting of a core component of the curriculum for students. Advising students of a teacher's sexual orientation involves a significant "teaching" of the students. It imports information of a purely personal nature into the curriculum. One can sympathize with Ms. M'Lot's bona fide desire to use disclosure as a teaching tool. But, ultimately, the disclosure results in the disclosure itself becoming a significant part of the curriculum. It is within the discretion of management to determine the appropriateness of making this disclosure to the students.

A teacher advising of his or her sexual orientation forms a significant part of the lesson or curriculum. It follows that the determination of whether that disclosure should be made is a management right, as opposed to a company rule.

On review of all the authorities submitted by both Counsel, there is no precedent for applying the KVP principle in such circumstances. The authorities do not provide that the test of reasonableness is to be applied to such a right as that of management to exclude material of a personal nature from the core of the curriculum. It follows that the disclosure or non-disclosure of a teacher's sexual orientation to his or her students falls within the category of management rights, and rules pertaining to disclosure are not subject to review as to reasonableness. (*Assiniboine South School Division No. 3* (1997), 64 L.A.C. (4th) 155 (Wood), pp. 175 – 7)

[26] The minority board member decided the teacher's academic freedom in a Canadian constitutional context protected her right to make the disclosure. The majority decision was reversed on judicial review but reinstated by a majority of the Court of Appeal (*Assiniboine South Teachers' Association of the Manitoba Teachers' Society v. Assiniboine South School Division No. 3* (1998), 128 Man. R. (2d) 231 (Q.B.) reversed (2000), 148 Man. R. (2d) 1). The Supreme Court of Canada refused leave to appeal ([2000] S.C.C.A. No. 435).

[27] One commentator identifies the differing roles of teaching and the different circumstances, age and maturity of the students as one basis for distinguishing teacher free speech in elementary and secondary schools from universities that justifies either advocating for a different measure of academic freedom for Grades K-12 teachers or characterizing the freedom differently than academic freedom. While he argues: "Teachers should also have some measure of academic freedom

in their classrooms so they can help prepare our students for their roles in a democracy by teaching them how to think critically”, he concludes: “In practice, the bureaucratic and curricular control that teachers are subject to seems to militate against any meaningful degree of academic freedom” ((Paul Clarke, “Canadian Public School Teachers and Free Speech: Part II – An Employment Law Analysis” (1999) 9 E.L.J. 1 at pp. 45 and 96). For later judicial and arbitral discussion of teachers’ freedom of speech see *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board* [2002] P.E.I.J. No. 36 (CA) (QL); *British Columbia Public School Employers’ Association* [2005] B.C.J. No. 1719 (CA)(QL) leave to appeal refused [2005] S.C.C.A. No. 455 (QL); and *British Columbia Public School Employers’ Association* [2008] B.C.C.A.A.A. No. 51 (Kinzie) (QL).

4. Professional Autonomy and British Columbia Grades K-12 Teachers

[28] Regardless of the extent to which public school teachers may claim academic freedom in Canada, British Columbia is unique in that almost all Grades K-12 teachers have an expressed right to professional autonomy under provisions of a collective agreement.

[29] Despite the continuation of these professional autonomy provisions for two decades, there have been few reported instances when they were invoked and interpreted or applied in arbitration to the interface between the professional roles and responsibilities of enrolling and non-enrolling teachers and their duties as employees in a highly structured and increasingly provincially directed bureaucratic public education system.

[30] In a 1999 arbitration decision involving a two week suspension for comments by a substitute teacher to a Grades 6/7 class:

The issues raised require an examination of the extent to which the conduct of a teacher in a classroom is subject to the direction and control of a school board and the extent to which a board is entitled and required to define rules that govern classroom content. The position of the Employer, in effect, was that teacher behaviour in a classroom is an aspect of professionalism and the actions of the Grievor fell outside the professional pale. The position of the Union was that clear definition is required before a teacher can be disciplined for classroom content. (*Board of School Trustees of School District #5 (Southeast Kootenay)* [1999] B.C.C.A.A.A. No. 193 (Hope) (QL), ¶ 2)

[31] While the union submitted the employer "...failed to define guidelines with respect to classroom content that would justify its actions in this dispute" (¶ 104),

Arbitrator Hope decided:

In terms of the classroom conduct of teachers, where the evidence establishes that the misconduct alleged against the teacher offends against a standard of professionalism that all teachers can be expected to know, the conduct will support discipline without the employer having to establish that the conduct was in breach of some defined policy or standard. However, where the conduct in question does not support a finding that the teacher knew or ought to have known that it was improper, the employer will be required to establish that it was in breach of some defined standard which had been communicated to teachers generally and/or the teacher in question. (¶ 134)

[32] On the facts, he concluded:

... the Grievor, confronting a teaching assignment with which he was thoroughly unfamiliar and for which he was largely unprepared, relied to some extent on techniques of sarcasm, humour and embarrassment to maintain what he perceived to be a necessary level of discipline. Coincidentally, he lapsed into topics that proved to be too mature and too controversial for some members of the class. (¶ 133)

But the evidence does not support the conclusion that the Grievor made the statements in the form alleged. Rather, the reasonable conclusion is that he made statements that were misinterpreted and distorted by the students and were exaggerated in the telling when they spoke with their parents. I accept the evidence of the Grievor that he did not intend the meaning taken by some of the students with respect to any of his remarks. It was clear on all of the evidence that he was both surprised and dismayed by their reactions. The finding I make is that the Employer did not prove on a balance of probabilities that the Grievor made the statements alleged by the students, either as to the words used or the context in which they were used. (¶ 130)

[33] Arbitrator Hope concluded professional autonomy did not apply in the circumstances and teachers are subject to "express direction with respect to how they will approach the task of teaching." He wrote:

The submission relating to the professional development [autonomy] provision fails on the same rationale. That provision cannot be read as vesting in teachers a license to make any statement or address any subject they wish. Further, teachers remain subject to express direction with respect to how they will approach the task of teaching. The authorities invite the view that there are few subjects in public education that are as politically charged as classroom content. Content is a matter of fundamental interest to parents. It is also the subject of public policy initiatives in legislatures and provincial administrations. Finally, it is a significant topic with boards of school trustees. In that environment,

teachers are subject to controls with respect to what they may teach and how they may teach it. (¶ 136)

[34] In 2000, the Ministry of Education implemented the Foundational Skills Assessment (FSA) of student achievement in reading comprehension, writing and numeracy in relation to provincially prescribed curricula supervised by teachers at Grades 4, 7 and 10. In 2002, the BCTF unsuccessfully argued before the Labour Relations Board that professional autonomy provisions of the collective agreement permitted teachers to refuse to do this work. (*British Columbia Public School Employers' Association* [2002] B.C.L.R.B.D. No. 123 (QL); see also [2002] B.C.L.R.B.D. No. 56 (QL); [2002] B.C.L.R.B.D. No. 110 (QL); [2002] B.C.L.R.B.D. No. 125 (QL); [2009] B.C.L.R.B.D. No. 25 (QL); and *British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 51 (Kinzie) (QL))

[35] This arbitration is concerned with an assessment of student learning that is not expressly mandated by the Ministry of Education. The DART assessment was not sent to the school district by the Minister to be administered in accordance with the *Student Learning Assessment Order* (Ministerial Order 60/94), which compels the administration of international studies, such as TIMMS (Trends in International Mathematics and Social Study) in which British Columbia is treated as a separate jurisdiction, and provincial assessments, such as FSA.

[36] The DART assessment that Ms Sihota was directed and refused to administer was chosen by School District No. 62 (Sooke) and many other school districts as a measurable performance indicator, to set targets and to report as part the accountability requirements under the *School Act*. In this way, the DART assessment is administered by the district, and teachers are directed to administer it, to fulfil part of the district's legislated accountability framework responsibilities.

5. Legislated Accountability Framework Starting 2002/03 School Year

[37] Under amendments to the *School Act* enacted in 2002, boards of education are required to prepare, submit and publish accountability contracts "with respect to improving student achievement in the school district and any other matters ordered by the minister" (s. 79.2). In 2007, the name of the contracts was changed and additional matters required under the *School (Student Achievement*

Enabling) Amendment Act, 2007. Section 79.2 now states:

- (1) A board must prepare an achievement contract with respect to
 - (a) standards for student performance,
 - (b) plans for improving student achievement in the school district,
 - (c) literacy,
 - (d) early learning programs, and
 - (e) any other matters ordered by the minister.
- (1.1) Achievement contracts under subsection (1) may contain different terms and conditions for different boards.
- (2) On or before July 15 of each year, a board must submit its achievement contract for the school year to the minister and must make its achievement contract available to residents of the school district and to parents of students attending schools in the district.

[38] Boards of education are “responsible for the improvement of student achievement in the school district” (*School Act*, s. 65 (1.1)) and superintendents must submit reports to boards of education on student achievement (s. 22(1)(b.1)). The Ministry has published an Accountability Framework Policy reflecting the formalized responsibility of boards and their schools for student achievement and the three components of the framework – achievement contracts, district review teams and school planning councils. The policy states, in part:

Each school and school board will develop plans for improvement. Schools, Boards of Education and the Ministry will monitor progress towards improving student performance and will report these results to parents and the community. Implementation may differ from school district to school district.

Accountability [achievement] contracts detail the specific goals individual Boards of Education have set to enhance student achievement. Student achievement includes intellectual, human and social development, and career development. These contracts reflect the unique characteristics, priorities and needs in each district.

District Review Teams will focus on improving student achievement through school and district planning. Up to 20 district reviews will occur annually as part of the accountability framework. Teams will include parents, teachers, other school district staff (including principals and other administrators) and Ministry of Education staff.

School Planning Councils, consisting of the principal, a teacher, three parents, and one student from Grade 10, 11 or 12 where applicable, will examine how well their students are performing and develop an annual plan for their school that includes goals and outcomes for improvement. (www.bced.gov.bc.ca/policy/policies/accountability_framework.htm).

The Ministry policy states that it: “Promotes evidence-based, data-driven decision making with a focus on assessment for learning.”

[39] For the 2002/03 school year, School District No. 62 (Sooke) set four goals. One was improving achievement in literacy. The district had no standard tools, identified expectations or benchmarks. There was no performance objective or surrogate method for measuring success in achieving this goal at all grade levels. Some schools were investing in levelled texts to match reading materials with student abilities and encourage development. The district had purchased a commercial product, Developmental Reading Assessment® (DRA®), for each school to help build a common language.

[40] The intention going forward was to use provincial, district and school level data to set SMART goals – **S**pecific, **M**easurable, **A**chievable, **R**elevant and **T**imely. This required the district to find or create measurable performance indicators of achievement that would provide the data.

[41] The district Accountability Contract for the 2003/04 school year was established after aligning school plans and district goals and establishing an Accountability Steering Committee. Teacher participants on the Accountability Contract Steering Committee were appointed by the local union in accordance with Article A5 of the collective agreement. Teachers also participated on four working teams aligned with the goals – numeracy, writing, reading and transitions.

[42] One district goal for the 2003/04 school year was to improve achievement in reading. One objective for this goal was to have 90% of all students reading at grade level by June 2005 using DRA® or an equivalent assessment and FSA and graduation program examination results. All students in Kindergarten to Grade 8 were to be assessed in reading “using the DRA or equivalent” by December 2004. Among the strategies to achieve the goal were: “To develop district-wide criteria for assessment at each grade level, including common reporting language”; and “To use common assessment practices based on common tools. Practices must include assessment that informs instruction, team and single teacher assessment, and group and individual student assessment.” The British Columbia performance standards for reading provided the common language (Ministry of Education, *BC Performance Standards: Reading*, revised edition, 2002 – Grade 3 Quick Scale is at p. 87).

6. Assessing and Reporting Non-fiction Reading Comprehension

[43] The Accountability Contract Steering Committee included the President of the Sooke Teachers' Association. Ms Sihota was President for the 2003/04 school year, but does not recall attending or participating in the Committee's work. She does not recall if the union Vice-President attended and participated in her place. No Committee minutes were adduced into evidence. Mr. Cambridge, Director of Instruction at the time, testified most of the agenda for the meetings consisted of reports by the four team leaders and budget resource allocations.

[44] In the prior school year, Pam Richmond had been on the Literacy Team reporting to the Accountability Contract Steering Committee. For the 2003/04 school year, the Literacy Team was replaced by Reading and Writing Teams. Ms Richmond became chair of the Reading Team which reported in September 2003 that there was no standard expectation about reading abilities at grade levels, but the previously purchased DRA® would be used to assist in establishing standards.

[45] The Reading Team began implementing district-wide use of DRA® in K-8; developing or adopting existing reading benchmarks for K-12 instruction; organizing in-services for Picture Word Induction Model (PWIM) and reading Strategies in Action; and undertaking a survey of current usage of DRA® that Ms Richmond organized. The survey found DRA® was regarded as a powerful tool, but demanded an extensive amount of time. It was not widely used, well understood or found useful by teachers. As a consequence, it was determined not to be appropriate for assessment of all students.

[46] Ms Richmond was the district representative on the Island Literacy Network that shared resources and discussed common concerns and best practices to help children progress. One common concern being discussed was children's lack of reading comprehension.

[47] The Campbell River school district had developed a tool called District Reading Assessment (DRA). Anne Boyd testified the superintendent of the Campbell River district had challenged her in 1994 to develop an assessment because teachers wanted a common basis for determining how well students were

doing at the end of primary and at other transition points. She testified that in 1994 the Campbell River district was using a series of "Reading and Responding" books written by Faye Brownlie, a British Columbia literacy expert, who Ms Boyd contracted to write additional passages for year-end assessment. This became the DRA, which some other districts purchased and used because, Ms Boyd testified, the Campbell River district was gather useful information at Grades 3, 6 and 9 that helped it take steps to improve learning through reading intervention programs. The DRA was administered in accordance with a district protocol and data was distributed to schools. The Campbell River district had baseline data from 2000/01 and the DRA as a performance indicator when district accountability contracts were required. Ms Boyd testified that, to avoid overburdening the system, the Campbell River district does not use DRA in grades where there is another required data source such as FSA or provincial examinations.

[48] The Victoria school district was developing a tool called Oral Reading Comprehension Assessment (ORCA) using concepts from DRA for whole-class assessment. Other school districts were developing other tools, such as RAD in the Surrey district. DRA® was designed for individual student, not whole-class, assessment.

[49] As discussion at the Literacy Network evolved, there emerged some consensus about a philosophy and methodology that could be used across districts. In 2003, ten of the districts at the Network engaged Ms Brownlie to discuss how to do a whole-class assessment at Grades 3-9 for more in-depth comprehension of non-fiction reading material. By early 2004, DART was being field tested in eighteen Island, Fraser Valley and Interior school districts.

[50] DART built on DRA and used existing DRA® reading materials with permission from Pearson Canada for Grades 5-9. A fall assessment component was added. Ms Brownlie wrote new passages for Grades 3 and 4. The Grade 3 spring assessment passage, *Our Mighty Fraser River*, was field tested in several district and revised before being included in DART.

[51] Ms Boyd testified DART is not a standardized test and its administration

protocol does not require all teachers to do the same things. She testified it takes approximately fifteen minutes to set the atmosphere in the classroom after choosing a good day and time to integrate the assessment as a normal, perhaps new, but not upsetting, classroom activity. She testified she has administered DART hundreds of times and has not encountered a child who was visibly unhappy with it.

[52] DART can be administered in an hour; its criteria referenced using the BC Performance Standard Quick Scale; provides a running record on each student; and identifies students who are not yet meeting expectations with whom there could be further assessment, instruction and work, perhaps using the DRA®. The consortium of school districts wrote a DART strategy booklet containing lessons to help teachers deal with issues identified with students through DART. The booklet is revised annually.

[53] The Sooke school district decided to use the DART assessment in place of DRA®. It held a DART in-service in March 2004 for its planned district-wide implementation in May.

[54] In April 2004, a District Review Team appointed under the accountability framework visited the Sooke school district and reported to the Minister. It found the district and its schools were “at the beginning stage of developing district, school and classroom assessments” (*District Review Report, Scholl District No. 62 (Sooke)*, p. 4). Among other things, the District Review Team recommended the district promote literacy assessment and support development of district-wide assessments and consistent use of performance standards.

[55] The Accountability Contract Steering Committee reviewed the recommendations. and proposed establishing a 1.0 FTE Literacy Curriculum Advisor position for the 2004/05 school year to take steps to meet the recommendations, including administering the DART assessment for Grades 3-9. The Trustees of the Board of Education adopted, approved and implemented the recommendation.

[56] In Ministry *Guidelines for 2004-2005 District Accountability Contracts*, the

opening statement is: “Improving student achievement is the top priority for the Ministry of Education.” The intent of the accountability contracts “is to focus district attention and resources on improving student achievement.” One avenue is setting goals supported by specific objectives with measurable performance indicators to track progress towards attainment of objectives and goals.

Measurable performance indicators allow districts to set short and long-term performance targets or expected results. Districts must make decisions and choices in selecting strategies and providing supporting structures with resource allocations to achieve the goals and objectives they set.

[57] DART is regarded as an assessment tool developed by teachers that provides information closer to and mirroring the classroom context. The focus is non-fictional material or information text. Children’s reading skills for non-fictional material is generally less developed than their skills for reading fictional material. It is important students develop skills to read non-fictional materials because by secondary school most courses are based on non-fictional materials.

[58] In the 2003/04 school year, Vivian Collyer was a teacher at Spencer Middle School and member of its school-based literacy team. She testified she had used the DRA®, which required from twenty to sixty minutes per child, and found it was inefficient. She volunteered for the district Reading Team, which she recalls met four or five times in the 2003/04 school year. She successfully applied for the Literacy Curriculum Advisor position. In the 2004/05 school year she held workshops, gave demonstration lessons, helped administer and code DART assessments, co-ordinated conferences and spoke to staff and personnel in the district.

[59] Ms Collyer testified DART is a criterion-referenced assessment using performance standards that focuses on thought processes not on factual details as in a test. It looks for strengths and weaknesses and helps teachers determine where a student is now against the criteria and it can be used by teachers to plan to move forward. It is one of many ongoing assessment tools teachers can use.

[60] A DART assessment in the fall provides data to classroom teachers about

student strengths and weaknesses that can be used to drive classroom instruction and to structure school learning assistance programs or create guided reading groups. For students identified as not meeting grade level expectations, an individual reading inventory tool, such as DRA®, will have to be used to assess how far the student is behind grade level. A second DART assessment in the spring, when the students will be familiar with the format, will gather snapshot assessment data of what was learned. It may be useful for the students' teachers the following school year.

[61] DART has detailed grade level assessment procedure protocols that evolved with teacher feedback. They are intended to set the students up for success. For Grade 3 there are more oral parts acknowledging because not all students at this grade level are comfortable with writing. The assessment is for fluency and comprehension, not spelling, punctuation and grammar. The questions focus on note taking and details in the text; reading text features like graphics, pictures, headings and maps; reading between the lines or drawing inferences; reading beyond the lines, making personal connections and reasoning; and identifying difficulties with the text and strategies for handling the challenge. Coding, not score ranking, is used to identify comprehension and fluency.

[62] The 2004/05 Accountability Contract for the Sooke school district tightened its focus on certain objectives related to district goals. It continued the goal of improving achievement in literacy with one objective to establish baseline data for DART assessment at Grades 3, 6 and 9. DART was to be administered at all Grades 3-9, but reported at the three transition grades – the last years of primary and elementary and before provincial examinations. The district wanted complete data for all schools and all students to evaluate the effectiveness of literacy interventions.

[63] Ms Collyer testified DART was used in the fall of 2004 by those who had piloted it earlier in the year and some others, but it was not extensively used across the district. She did not attend the Island Literacy Network meetings, but did attend meetings of other teachers in other Island districts working like her in literacy support. For her, these meetings were the best source of information

about all aspects of DART. In subsequent years, based on shared experiences, the DART protocols and instructional materials in the strategy booklet and the materials for each grade became more extensive and detailed.

[64] Ms Brownlie prepared materials for in-service training that Ms Collyer used for an in-service on October 22, 2004. Another in-service, held by the Campbell River school district in April 2005, was attended by one teacher from each of Grades 3-9 in the Sooke school district.

[65] The Sooke district adopted the same rules for eligibility and exemption for DART assessment as applied to the FSA. The intention was to have the assessment as inclusive as possible and to have individual student results available for teachers in the students' subsequent school years. An ESL exemption would be decided by the school-based team. Among the school districts that use DART, there are differences in whether its administration is mandatory or not and how exemptions are addressed.

[66] Mr. Cambridge testified there was no discussion about the possible interaction between the approach the district adopted and the provisions of the collective agreement, other than possibly release time for group coding of results.

[67] Consistent coding is important if the results are to be used as a reliable performance indicator. After a call for volunteers, the spring coding in 2005 was done in May by seven coding teams of ten teachers each trained by Ms Collyer using anchor papers which were student samples from the pilots. The training and coding was done on paid release time. The process of training, initial marking review and partner coding was as rigorous as could be achieved in a single day. Each participant had the benefits of seeing hundreds of papers and results and the opportunity to review the coding for their classes and to provide feedback to improve the DART assessment. The coded papers were returned to the schools by the end of May or early June for review and use by the schools and classroom teachers. Some teachers used them to make anecdotal report card comments.

[68] In June 2005, Ms Collyer was able to report that the DART assessment had been administered in each of the Grades 3-9 and 600 to 700 papers per grade had

been coded. This provided a baseline of data for non-fiction reading that would be compiled and available in the fall.

[69] The 2005/06 Accountability Contract, which set targets for that school year, reported baseline reading comprehension and fluency data from DART for the percentage for students at or above what is expected at grade level. The decision to report the data in this manner and use it to set targets was made by the Accountability Contract Steering Committee and, ultimately, by Mr. Cambridge.

[70] Ms Collyer testified she was surprised that the percentages of students at or above what is expected at grade level were high in fluency, but not in comprehension. It was a shock to learn the high percentage of students who were not yet meeting expectations across all grades for comprehension of informational text. She testified she might have expected up to 10% would not comprehend as expected for the grade level. She did not think it would be over 50%.

[71] This was the first time the district had this data. It brought home that students who do not do well in reading comprehension of non-fictional material are unlikely to meet the expectations in higher grade courses based on comprehension of informational text. The conclusion was that, beginning in primary, a greater emphasis had to be placed on reading non-fictional material.

[72] Ms Collyer's work in the fall of 2005 was interrupted by the provincial job action. She received a telephone call from Ms Sihota advising she could no longer work on the DART assessment and meetings with teacher had to be cancelled. If teachers had concerns about this they were contact Ms Sihota. Ms Collyer testified this communicated a negative connotation to DART to teachers unfamiliar with DART. She eventually overcome this, but it was December before grade level network meetings were held and the fall DART assessment was adversely affected.

[73] In the spring of 2006, the DART assessment was done and again coded by volunteer teams, as in the previous year. The data was not available for publication in the 2006/07 Accountability Contract because a new data base that was being developed had not been completed. Ms Collyer left her position to

become district Vice-Principal Staff Development in charge of French programs. Laura Lancaster was appointed Literacy Curriculum Consultant.

[74] The use of DART spread across the province. By December 2006, twenty-nine school districts were meeting and collaborating with Ms Brownlie on DART improvements. Among these school districts, there are different approaches to whether administration of the DART assessment in the fall and spring are mandatory; who does the coding; and what students can be exempted.

[75] In the Sooke school district, there was a significant change in the DART assessment in the 2006-07 school year. The local union advised teachers not to volunteer for coding teams. As a consequence, each teacher coded the assessment for his or her class.

[76] Ms Collyer testified the consensus among district literacy consultants involved in the Island network was there is greater consistency in criterion reference coding with a team engaged in professional dialogue, applying common standards and seeing a large number of papers. She particularly regretted the loss of the professional dialogue and development that was an intrinsic part of the group training and coding.

[77] Mr. Cambridge testified the school district does not have a report card data base. There are no initiatives to link or compare the snapshot DART assessments with other tools or with teacher assessments in yearend reports to parents.

[78] The comprehension results were significantly higher in the spring of 2007 than in the previous two years. It may have been the student cohorts, the success of intervention strategies or the change in coding. To assure integrity, the school district had the accumulated data for all three years externally reviewed.

[79] Mr. Cambridge testified the percentages increased in both comprehension and fluency, particularly in middle schools. Nonetheless, there was still a high percentage of students who did not comprehend at or above the expected grade level. The percentages of students understanding at or above what is usually expected at grade level as reported were:

Grade	2004/05	2005/06	2006/07
3	23%	41%	55%
6	18%	20%	45%
9	36%	23%	60%

[80] Assessments at the same grade level do not assess or report a cohort of students as they move from grade to grade. Grade level assessments assess and report a new cohort of students each year, but the assessments over time will reflect system performance. Ms Collyer testified the district does some analysis of results for the same cohort of students moving from grade to grade.

[81] Each school in the district has access over the internet to a data warehouse from which it can compare year-over-year results and school-district results. The district also produces more user friendly result reports for internal use. Lists of students who do not meet expectations are given to school-based teams. The hope is the results and lists will be used for school planning.

[82] Mr. Cambridge testified the district employed a statistician to assist in interpreting and determining the significance of the data. In the 2008/09 Achievement Contract, the district moved to more segregated data reporting. It reported the DART results for Grade 4 male students, which confirmed FSA results that they were below the provincial average. The DART results were used to identify the extent of the gap between the Grade 9 all-student percentage with reading comprehension at or above expected grade level and the aboriginal student percentage.

Grade 9	2005/06	2006/07	2007/08
All students	25%	59%	45%
Aboriginal students	18%	46%	18%

7. Ms Sihota Refuses to Administer DART Assessment (May 2007)

[83] Ms Sihota has taught since 1980. She has taught in the Sooke school district since 1990. Throughout her career, principals' reports have praised her empathy and rapport with her students and her professionalism as a teacher in preparation, instruction and student motivation. Colleagues, parents and administrators voice their praise for her and her leadership. Ms Elm's evaluation of Ms Sihota, signed off in June 2007, states:

Kathryn Sihota continues to offer satisfactory service to the district with special mention given to her superior communication skills and her ability to represent herself, the school and other teachers within the school community in a knowledgeable, understanding and extremely professional manner. Ms Sihota never misses an opportunity to offer encouragement, knowledgeable advice or any information that could be important. Many times she is the person to ask the best question. Kathryn's compassion, empathy and high energy serve her well within her teaching and professional work. Her expertise and collaborative skills make her an extremely valuable member of the staff. She is regularly sought out by new teachers, guests, staff and parents because of her friendly and straightforward approach to all that she does within the school. Her strong focus on student learning is consistently obvious in her excellent teaching. She reacts to all instances of student difficulty, whether they are academic, social, emotional or physical in nature. The families of her students trust and appreciate her ability to develop deep and lasting relationships with individual students so that she can discuss their strengths and challenges in clear and honest ways. Ms. Sihota is not daunted by tasks that are difficult or complex because she believes so fully in the importance of our work. While her tenacity is commendable, one of her best qualities is her capacity for humour and her willingness to promote a joyful atmosphere whenever possible.

[84] Ms Sihota does assessment for, as and of learning with her students throughout the school year and does summative evaluations for parents throughout and at the end of the year. She testified she had looked at the DART assessment for the first time in the fall of 2005, but was not comfortable with it. She decided to wait until the spring.

[85] District policy did not allow students without an individual education plan to be exempted. Ms Sihota testified she had asked and been told by Mr. Cambridge that she could not exempt the three students she wanted to exempt. He does not recall this conversation.

[86] Ms Sihota administered the DART assessment to the approximately twelve Grade 3 students in her class in the spring of 2006 and came away from the process upset. Ms Sihota testified one boy was struggling with reading and cried during the assessment. He did not complete the assessment. One more capable girl became upset and cried. She stayed in the class during recess to complete her assessment and did well. Ms Sihota felt guilty about making the children sad and cry. She went to the office, spoke to the Principal at the time and telephoned Mr. Cambridge.

[87] Mr. Cambridge recalls a telephone conversation he had with Ms Sihota in which she said the DART assessment impacted one student who became quite anxious and that she did not believe it was an accurate assessment tool. He recalls discussing the purpose of DART and why he thought it was useful – to identify where system resources and attention had to be focused to improve learning achievement. Ms Sihota's view was he could simply ask teachers. His response was the governance structure of the school district and the accountability contract requirements necessitated data gathering to justify resource allocation. He testified DART results identified previously unidentified areas, such as middle school boys, to which resources and programs were directed. Asking teachers would not provide reliable, measurable data. There were no data available for Grade 3 prior to DART assessments.

[88] For Mr. Cambridge the conversation was a professional difference with an honest, trustworthy, empathetic, problem-solving and valuable member of staff who is an outstanding teacher and in whom he had confidence any student stress could be minimized. He had not received similar reports of upset students from other teachers and administrators and a single report was not a basis to change what had been thoughtfully put in place. At the same time, he was hearing union protests about assessments and knew about Ms Sihota's active involvement with the union. They simply had differing perspectives and views.

[89] Ms Sihota testified she had been concerns the passage selected for reading – *Our Might Fraser River* – was not connected to the children's lives, the questions were vague and the process did not allow the children to discuss and share ideas. Her practice is to introduce children to grade level material gradually to lessen and avoid frustrations for some. She was upset again when she received the coding results for her class. One child who was coded poorly she assessed at a grade level higher than Grade 3.

[90] Ms Sihota was full-time local union President for five years and Co-President for two years. She was a BCTF Executive Committee Member-at-Large for two years (2003/04 and 2004/05). She was full-time local union President for the 2003/04 school year. She was not involved in district school planning councils

or in the preparation or content of accountability contracts. She was in the classroom when DART was introduced into the district, but unaware of its development, piloting and introduction in the district.

[91] Ms Sihota taught Grades 1/2 in 2004/05. DART was not administered in these grades. She recalls hearing about DART in the school. She taught Grades 2/3 in 2005/06 when she received detailed and clear written information and instruction on administering the DART assessment. She decided it was not necessary to attend a DART in-service. She taught Grades 2/3 in 2006/07 and 2007/08 and was on part-time release as local union Co-President.

[92] Ms Sihota regarded the DART assessment as a standardized test because it was delivered to a large group with a fixed delivery method, expectations and marking system. She agrees DART allows for open-ended answers, teacher variation in administration and is not time limited.

[93] The 2006/07 school year was Ms Elm's first year at Millstream Elementary School. She was summonsed to testify by the union and called as its first witness. She knew Ms Sihota and respected her as a teacher who does an excellent job of engaging her students and setting the tone and order of her class, is thoroughly prepared, highly organized and patient. Ms Sihota keeps abreast of current thoughts and development in the profession, is not resistant to new ideas and is a positive role model for other teachers. Ms Elm had worked with Ms Sihota in the past in an administrator and union representative relationship and described Ms Sihota's approach as compromising and problem-solving, rather than confrontational.

[94] Ms Elm testified that among the administrators in the district there were differing opinions about the merits of administering the DART assessment and the validity of its results, but no one could offer a better instrument to get a broad overview of reading comprehension and fluency across the district. She regarded DART as a tool to assist in planning. Experienced administrators were curious about the results that would come from their schools. She does not recall any discussion among administrators about any collective agreement restraints on

having teachers administer DART and she did not anticipate a problem at Millstream Elementary School. After resolving some problems with obtaining the DART materials, Ms Elm arranged for the Literacy Curriculum Advisor to speak to the teachers at the school.

[95] Because she was on part-time union release for the 2006/07 school year, Ms Sihota was teaching Monday to Thursday mornings with a focus on the humanities, which included reading. Her team teacher taught the afternoons and all day Friday. There were different team teachers with Ms Sihota for the first and second half of the school year. Ms Sihota did not consider voluntarily administering the DART in the fall of 2006 to prepare her students and lessen any potential anxiety or stress with the mandatory assessment scheduled for the following spring.

[96] At a general membership meeting on October 25, 2006, the local union resolved to recommend teachers not volunteer to participate in district group marking of the DART assessment. Ms Sihota supported the resolution and wrote to Mr. Cambridge on October 26th as follows:

This letter is to inform you of motions passed at the Sooke Teachers' General Meeting on October 25, 2006.

The first motion is that Sooke Teachers will not provide any data from the Fall DART assessment to school based or district administration. As you are aware, the BCTF and STA annual general meetings passed motions that teachers would not participate in anything that connects directly or indirectly with school plans or the district accountability contract. Along that same line, the second motion is that Sooke Teachers will not volunteer to participate in the district group marking of the DART in the fall or in the spring.

As you are also aware, B.C. teachers' professional autonomy is being attacked by various district and provincial assessments that do not provide an accurate picture of student achievement. In fact, the term "achievement" has taken on a whole new meaning in this province – a meaning with which teachers do not wish to be associated.

Classroom teachers assess their students regularly and efficiently. They collect their own data and share their thoughts and ideas with their colleagues. They also provide their evaluation of those data to parents and to administrators on a regular basis.

Let it be clear that Sooke Teachers' Association is not suggesting to its members that they refrain from using DART as an assessment tool if they see fit. In fact, we encourage teachers to use whatever tools they find appropriate in order to best determine their own students' achievement.

We simply believe that neither district nor provincial standardized tests are appropriate or accurate reflections of student achievement in our classrooms.

[97] In April 2007, when Ms Elm received a reminder that the period for administering the DART assessment was approaching, she reminded teachers at a staff meeting that the DART assessment was to be administered. The DART materials were stored in Ms Elm's office where they could be borrowed by the teachers.

[98] On April 9, 2007, Mr. Warder wrote Grades 3-9 teachers that the spring DART reading assessment was to be administered during the period from April 16th to 27th and the teachers would be responsible to mark the assessment of their students. The local union requested release time for each teacher to mark. In response, Mr. Warder wrote Ms Sihota as follows:

Thank you for your letter where you inquire as to the District's plans for providing teacher-on-call relief for teachers marking the spring DART. If I understand your request correctly, you are expecting the District to provide relief time for all teachers marking the DART. I reiterate that as in previous years, the District continues to be prepared to provide teachers release for District teams to mark the DART.

The following districts utilize the DART assessment tool:

Quesnel #28	Howe Sound #48
Fraser-Cascade #78	Bulkley Valley #54
Nicola-Similkameen #58	Cowichan Valley #79
Prince George #57	Abbotsford #34
Vancouver Island North #85	Nechako Lakes #91
Mission #75	Vancouver Island West #84
Maple Ridge-Pitt Meadow #42	Comox Valley #71
Richmond #38	West Vancouver #45
Chilliwack #39	Cariboo-Chilcotin #27
Campbell River #72	Prince Rupert #52
Langley #35	Gulf Islands #64
Qualicum #69	Nanaimo-Ladysmith #68
Sooke #62	Alberni #70
Saanich #63	Nisga'a #92
Sunshine Coast #46	

These districts use a variety of approaches to mark the DART and many of them do what we've done for the past two years. I am not aware of any of these districts providing individual release time as you propose.

The District continues to offer the opportunity to provide release time for the marking teams so as to avoid all teachers administering the DART to also have to mark it.

At the decision of the Co-Presidents, the local union grieved. This grievance and two others relating to the DART reading assessment have been referred to arbitration.

[99] As the period for administering the DART assessment was passing, Ms Elm was checking with teachers whether they had accessed the materials for their grade and whether they had done the assessment. She recalls mentioning it to Ms Sihota in passing, who said she was not sure she would be doing the assessment. Ms Elm was surprised and left the subject. Either before or after that time, they had exchanged comments that they each did not think it was “a great test.” At the time, Ms Elm, who had heard conflicting comments about the assessment from teachers, regarded it as a difficult test for students.

[100] After the first exchange, Ms Sihota specifically spoke to Ms Elm to alert her that she was considering not administering the DART assessment. Ms Sihota’s view was it was not a good indicator of how her students were doing and it was stressful for them. Ms Elm was unsure how to react and said she would have to speak to district administrators to learn their expectation of her as principal. This was a respectful conversation between colleagues.

[101] Ms Elm inquired and was told by Mr. Warder that she would have to direct Ms Sihota to do the assessment. She did not think of, and they did not discuss, the option of having the team teacher do the assessment.

[102] Ms Elm spoke to Ms Sihota privately in May, after the period during which the DART assessment was to have been done, and told she had been told to direct her to do the DART assessment and this was her direction to Ms Sihota to administer the DART assessment. Ms Sihota refused.

[103] Ms Sihota testified she refused because assessments of the children should be done in a fair manner and be indicative of what they can do. In her opinion, DART is not such an assessment for the children in her class. Further, she had unsuccessfully sought to exclude certain students, but was unable to convince Mr. Cambridge to vary the policy.

8. Events Following Ms Sihota's Refusal

[104] Ms Elm informed Mr. Warder of Ms Sihota's refusal and offered to do the assessment herself. He suggested speaking to the team teacher. Ms Elm directed that teacher to do the assessment and she did. While she did, Ms Elm helped by taking the Grade 2 students out of the room. There is not evidence the team teacher objected and the union did not grieve. The following year, in the spring of 2008, Ms Elm did the DART assessment for Ms Sihota's class and did not ask or direct her to administer it.

[105] On June 5, 2007, Mr. Warder sent an email to all principals and vice-principals instructing how to handle a refusal, although no one other than Ms Sihota had refused to administer or code the DART assessment. He forwarded the email to Ms Sihota and Ian Johnson, local union Co-Presidents.

Subject: DART direction - URGENT

Before we deal with any aspect of insubordination, I want to be clear about the verbal direction that should have been given to any teacher who has not administered and/or marked the DART for their class.

In such cases you should have said to the teacher something along the lines of "I am directing you to administer (and/or mark as the case may be) the DART for your class by (insert the due date for your school)." If you have not clearly done so, then you are to do this by noon today. If you have clearly done so, and the teacher has not complied, you are to contact me by phone by noon today.

It may be that these teachers are relying on a follow-up letter of direction, however that will not be forthcoming. A failure to follow verbal direction is on its own merits is sufficient to follow through with discipline. If you are faced with this, it may well be worth your while to consult with your staff rep who may want to review matters with the teacher.

We are heading into very serious territory, so I would like you to ensure it that you review this e-mail carefully before taking any actions and to consult with me if you have any questions.

Given the serious nature of this e-mail I am copying the STA so that implications of not following verbal direction is clear to all parties.

[106] The school district set June 8th, the date of the grievance of the direction, as the deadline for Ms Sihota to administer the DART.

[107] On June 13, 2007, the local union issued a special edition *Presidents' Update* written by Mr. Johnson. It states, in part:

On May 18, 2007, Kathryn Sihota, a grade three teacher at Millstream Elementary School is verbally directed by her principal to administer the

DART. Kathryn decides to disregard the direction, knowing full well that she will likely receive a letter of discipline on her file for this action. (This is normally the first step of discipline for someone who has a record free of former discipline.) However, Kathryn decides to take a principled stand to avoid administering a test that she feels is not a good use of her students' time, that has validity issues when used to generate and evaluate "data", and that is used by the District for data that feeds the Accountability (now Achievement) Contract. (Not to mention that it makes 8 year olds cry!)

District: Launches an investigation. The result is a recommendation from senior management to the School Board that Kathryn should be suspended without pay for 2-3 days.

STA: Begins to publicize what it deems to be unfair treatment.

Kathryn has taken this stand on behalf of many teachers throughout the district. Many, many teachers are upset by the constant need for data in regard to student "achievement." This year, if a teacher is teaching a grade 3/4 class, she/he will be administering the DART, the District Numeracy Assessment and the FSA. We have grave concerns about this inappropriate fixation on what we see to be data that provides very little real information about the students we teach every day.

We thank you for your support.

At the time, there was no recommendation for a disciplinary suspension – only speculation. On cross-examination, Ms Sihota agreed this *Update* accurately described her position at the time.

[108] On June 15th, Mr. Warder interviewed Ms Sihota who was accompanied by Mr. Johnson. As is his practice, Mr. Warder had arranged the time and place through the local union and had given Ms Sihota a copy of the questions to be asked. The interview was brief. Ms Sihota acknowledged she had received a verbal direction with clear expectations that she understood and knowingly chose to disregard. There was no elaboration.

[109] Mr. Warder completed an investigation report finding there had been an insubordinate refusal to follow direction by Ms Sihota. He sent a copy to her on June 20th. A Board of Education discipline hearing scheduled for August 28th was postponed to September 25th. The BCTF organized a rally outside the board offices on September 25th at which Ms Sihota spoke.

[110] The Board of Education found there was a deliberate and overt refusal to follow the principal's direction and issued a disciplinary letter. The Superintendent was required to inform the College of Teachers. In January 2008, the Preliminary Investigation Sub-Committee of the College decided no further action was

warranted.

[111] Disciplining Ms Sihota generated various news reports and comments adduced into evidence, including the view of four teachers explaining their differing experiences with the DART assessment which was published in September 2008 in the BCTF's newsmagazine *Teacher*. This article concludes:

Lastly, the DART is an assessment that is congruent with our values regarding what reading is. The DART aims to assess thoughtful and deep reading, asking students to represent their thinking and reading in a variety of ways. We want our students to be these kind of readers. (Vol. 21, No. 1, p. 3)

9. Union and Employer Submissions

[112] The union submits whether DART is a good or bad assessment tool is irrelevant. The central issue is whether the imposition of its use and administration is contrary to teachers' rights of professional autonomy. The employer violated Ms Sihota's rights contrary to Article F3 and did not have just and reasonable cause for any discipline.

[113] The union submits the administration of the DART assessment is not a provincially mandated activity. It is not a "board policy on educational matters", a limitation on professional autonomy the BCPSEA unsuccessfully sought to negotiate in 1996 and, thereby, recognized did not exist previously and still does not exist. It is a district activity directed by the Accountability Contract Steering Committee and, ultimately, by Mr. Cambridge, a senior district administrator.

[114] The union submits the language of Article F3 is clear and specific. "Teachers shall, within the bounds of the prescribed curriculum and consistent with recognized effective educational practice, have individual professional autonomy." This gives teachers a guaranteed right under the collective agreement. The direction to Ms Sihota offended this right because the employer rule on which the direction was based is not consistent with the collective agreement. The employer cannot make such rules, give directions to follow them and then discipline for failure to follow them. (*KVP Co.* (1965), 16 L.A.C. 73 (Robinson); *St. Michael's Extended Care Centre* (1994), 40 L.A.C. (4th) 105 (Smith))

[115] The union submits the issue is not to be determined by a decision on the

validity, reasonableness or utility of the school district's decision to make administration of the DART assessment mandatory, but by whether the direction to Ms Sihota to administer it was a legitimate exercise of management obligations under the collective agreement (*Metropolitan Toronto (Municipality)* (1988), 3 L.A.C. (4th) 97 (Solomatenko); *Hamilton-Wentworth (Regional Municipality) Police Services Board* (1992), 30 L.A.C. (4th) 198 (McLaren)).

[116] The union submits Ms Sihota exercised her individual professional autonomy in a professional manner to refuse to administer what she considered to be an inappropriate assessment for her class. This refusal resulted in "little or no interference with the effective and efficient operation of the school or the school district" (*Outline of Argument*, ¶ 36). In balancing her rights and the school district's interests, an infringement of her professional autonomy rights was not justified. It was not justified when her team teacher could administer the assessment as happened after her refusal.

[117] The union submits boards of education operate under a highly regulated statutory regime, including the *Canadian Charter of Rights and Freedoms*, on which it expressly does not rely. Under this statutory regime, the management rights of school district employers are more circumscribed than in a private enterprise.

[118] The union submits the direction to Ms Sihota offended the statutory regime establishing the responsibilities of teachers, which are set out in Section 17 of the *School Act* and include performing "duties set out in the regulations", which must be consistent with *Act*. "Teachers are responsible for assessing educational programs and instructing, assessing and evaluating individual students and groups of students" (*Outline of Argument*, ¶ 38). The Minister may make orders "preparing a process for the assessment of the effectiveness of educational programs" and requiring boards to cause their schools to participate and orders for measuring individual student performance (s. 168(2)(d) and (d.1)). No such order has been made with respect to DART.

[119] Similarly, the union submits fulfilling the teachers' responsibility under the

statutory scheme to assess, evaluate and report on students' learning does not require participation in a "privately developed assessment tool such as DART" (*Outline of Argument*, ¶ 43), which was not developed by either the Ministry or the Sooke Board of Education.

[120] The union submits responsibility to assess and evaluate students in accordance with the *School Act*, regulations and policies (Ministry of Education, *Reporting Student Progress: Policy and Practice*) is assigned to teachers not to school district bureaucrats. Teachers must discharge this responsibility and can be held accountable. Others cannot usurp it.

[121] The union submits Ms Sihota determined the DART assessment was not appropriate for her students and she was ordered to breach her duties and responsibilities by being directed to perform what she did not consider a useful tool for her class. She was wrongfully disciplined for refusing to follow a direction that the employer had no authority to give. (*Wilson Erectors Ltd.* [1972] O.L.A.A. No. 49 (O'Shae) (QL))

[122] The union submits Ms Sihota was not obliged to obey an unlawful order and grieve later because adequate redress could not be secured through the grievance-arbitration process. The harm she would suffer is more compelling than the interest in maintaining the employer's managerial authority (Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed., March 2009), ¶ 7:3610; *British Columbia Telephone Co.* [1976] B.C.C.A.A.A. No. 7 (MacIntyre) (QL); *British Columbia Telephone Co.* [1977] B.C.C.A.A.A. No. 14 (Larson) (QL); *Auto Haulaway Ltd.* [1994] C.L.A.D. No. 1233 (Rayner)(QL); *Thrifty (Canada) Ltd.* [2002] B.C.C.A.A.A. No. 120 (Larson) (QL); *Canadian Blending & Processing Inc.* [2002] O.L.A.A. No. 594 (Lynk) (QL); *Weyerhaeuser Co.* [2006] A.G.A.A. No. 48 (Sims) (QL)).

[123] The union submits the employer contrived to put Ms Sihota in an untenable situation when it had an available alternative and the discipline was without just and reasonable cause.

In the spring of 2007, she tried to continue to do the job she has done so effectively for the students of School District No. 62. She understood from

her previous experience, that DART was not appropriate for all of her students. Her professional judgment was that it was not an assessment tool that she, in good conscience, could use and that it could be harmful in that it placed undue stress and affected the self-esteem of some students. She continued to be, of course, willing to use effective assessment techniques that she had developed over the years. (*Outline of Argument*, ¶ 57)

Ms Sihota was placed in an untenable position of obeying the direction or doing what she thought was best for her students. The employer did not seek to ease her moral dilemma by allowing her to exempt students or asking another teacher who did not share Ms Sihota's concerns to administer DART.

[124] The union concludes:

DART may be a great test and assessment tool for some teachers and for some students. It's possible that some educators could convince the Ministry of Education that it should be a required common assessment tool. If that happened, then at least it would open up a debate as to the wisdom or otherwise of requiring teachers to use the test whether they wanted to or not. That has not happened.

The Union does not doubt the good intentions or the enthusiasm of those teachers and administrators who have taken part in developing DART and other learning and assessment tools over the years. No doubt they have contributed greatly to the educational system in BC and to the ideas individual teachers have regarding teaching, evaluation and assessment. Nevertheless, that does not take away from the duties of individual teachers to design and choose the learning and assessment techniques they deem to be appropriate given their own particular skills and the individual needs of their students. It does not detract from the importance of allowing and requiring teachers to use their professional autonomy and judgment in using techniques and tools appropriate for their own students.

The School District and the Union have entered, in good faith, into a contractual arrangement under which teachers are allowed to exercise their professional autonomy subject only to:

- a. using it within the bounds of prescribed curriculum; and
- b. ensuring that it is used in a manner consistent with effective educational practice.

In this case, the Employer is trying to add a third limiting factor: the whim (albeit based on good intentions and consultations with others favourable to DART) of the Director of Instruction or other supervisors. In short, what the Employer is effectively saying in this case is that the collective agreement means that teachers have individual professional autonomy except whenever they feel like telling them otherwise. Unfortunately for the School Board's case, that is not what the collective agreement says or means.

The Union submits that the discipline of Ms. Sihota should be rescinded, that any record of the discipline be removed from her personnel file and that a declaration be made that the Employer, in these circumstances, had

no authority to order the Grievor to administer the DART test against her own best professional judgment. (*Outline of Argument*, ¶ 62 – 64)

[125] The union submits teacher professional autonomy is a very important part of the educational system. If an administrator or board of education can direct a teacher to do an assessment or use particular readings or evaluation techniques that find favour, regardless of the teacher's professional judgement about the teacher's own skills and the need of the students, it diminishes both the professionalism and autonomy of teaching recognized and agreed in the collective agreement.

[126] The employer submits the education system and Article F3 of the collective agreement are not intended to protect the idiosyncratic judgments of individual teachers, regardless how exemplary their teaching career has been. To do so would be to foster chaos and defeat consistent assessment practices.

[127] The employer submits in April 2004 a District Review Team acting under the legislated accountability framework recommended the school district continue to promote literacy assessment. To this end, the district adopted DART, which it had participated in developing, for the 2004/05 school year. It adopted the FSA exemption policy. The employer submits the real matter at issue is the union's opposition to the government's accountability contract and not Ms Sihota's professional autonomy (*Argument of the Employer*, ¶ 90).

[128] The employer submits Ms Sihota failed to follow a lawful directive of her principal and deliberately chose not to obey and then grieve, a principle with which she was very familiar from her elected union roles. (Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed., March 2009), ¶ 7:3610; *Lake Ontario Steel Co.* [1968] O.L.A.A. No. 2 (Weiler) (QL); *Pacific Press* [1997] B.C.C.A.A.A. No. 830 (Bruce) (QL); *Douglas Aircraft Co. of Canada* (1972), 2 L.A.C. (2d) 56 (Weiler); *British Columbia Telephone Co.* [1976] B.C.C.A.A.A. No. 7 (MacIntyre) (QL); *Southern Railway of British Columbia* [1996] B.C.C.A.A.A. No. 600 (Moore); *British Columbia Hydro and Power Authority* [2002] B.C.C.A.A.A. No. 415 (McPhillips) (QL); *Atco Lumber Ltd.* [2005] B.C.C.A.A.A. No. 282 (McPhillips) (QL)) This on its own justifies the discipline imposed.

[129] The employer submits the legislative scheme does not exclude persons other than teachers from directing assessment of students. This is evident from the *School Regulation*, B.C. Reg. 265/98, s. 4(1)(a) and (g):

The duties of a teacher include ... (a) providing teaching and other educational services, including advice and instructional assistance, to the students assigned to the teacher, as required or assigned by the board or minister; ... (g) evaluating educational programs for students as required by the minister or the board. (Emphasis added; see also ss. 5(6) and (7))

The requirement from the Board of Education was made when it approved the successive accountability contracts and recommendations of the Accountability Contract Steering Committee.

[130] The employer submits the legislative scheme and specifically section 27(3)(a) of the *School Act* precludes inclusion of any provision in a collective agreement regulating the “professional methods and techniques employed by a teacher.” This captures Article F3. This article does not fall within the exception as articulated in *British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association* 2004 BCSC 86, which was later addressed by amendment to section 28 of the *School Act*. Further, the scope of Article F3 as advanced by the union is in direct conflict with the *School Act* and the Act prevails (*Board of School Trustees of School District No. 70 (Alberni)* [1992] 230 (Blasina) (QL)). “The better approach is to harmonize the collective agreement and legislation with the result that Article F3 applies to choices made by a teacher that are in addition to and not in conflict with the requirements of the Employer under section 17 of the *Act* and the duties of teachers regulation.” (*Argument of the Employer*, ¶ 146)

[131] The employer submits the union has agreed management has the exclusive right to assign duties to teachers “except as otherwise provided in this agreement” (Article A7). The decision to implement a district-wide DART assessment was to fulfill the requirements of the accountability framework and the decision to have teachers administer it was fair and reasonable with no elements of discrimination, arbitrariness or bad faith. (Donald J.M. Brown and David M. Beatty, *Canadian Labour Arbitration* (4th ed., March 2009), ¶ 4:2322; *Simon Fraser University* [1983]

B.C.L.R.B.,D. No. 169 (QL); *Shaughnessy Hosp. Society* [1988] B.C.C.A.A.A. No. 64 (McPhillips) (QL); *British Columbia School District No. 82 (Coast Mountains)* [1998] B.C.C.A.A.A. No. 388 (Bluman) (QL); *Abbotsford School District No. 34* [1992] B.C.C.A.A.A. No. 71 (Williams) (QL); *British Columbia Public School Employers' Association* [2007] B.C.C.A.A.A. No. 4 (Munroe) (QL))

The assessment tool provided valuable information for the District for its allocation of resources and for its professional development activities. The information obtained from DART enabled the District to identify students in need of resources and to direct its programs to address problem areas identified through the DART assessments. (*Argument of the Employer*, ¶ 162)

[132] The employer submits:

There is no support for the assertion that teachers in the public school setting are free to determine assessment methods and tools in direct opposition to directions of the employer that are duly sanctioned and authorized by the legislation.

Further, in this case, the wording of Article F3 is limited and does not cover assessment of students.

Article F3 is a general recognition clause with no substance nor specifics included in the wording.

The wording of Article F3 must be contrasted with other professional autonomy clauses that include specifics. In some of the clauses contained in local agreements there are even specific references to "student evaluation assessment".

The concept of "professional autonomy" is limited in Article F3 by

- (a) prescribed curriculum and
- (b) recognized effective educational practice. (*Argument of the Employer*, ¶ 192 - 197)

DART is an effective, performance based assessment tool that can be used to fulfill the requirements of the Primary Program. It complements and is in harmony with other tools teachers use.

[133] Finally, the employer submits, in collective bargaining in 2006:

... the BCTF sought and did not achieve a professional autonomy clause that limits methods of assessment used by districts. It cannot now argue it has those same rights in existing clauses such as F3 in Sooke.

The BCTF was not successful in its attempt to extend locally negotiated professional autonomy clauses to include "determining the appropriate methods of assessment". It sought unsuccessfully to have such language in the contract. It cannot now assert that the professional autonomy provisions such as F3 are sufficiently broad to cover student assessment. Arbitral jurisprudence supports the Employer's position that the failure to

achieve something in bargaining can be used to show the lack of such protection in the current language. (*Argument of the Employer*, ¶ 246- 247)

10. Discussion, Analyses and Decision

[134] Caution must be exercised in approaching the comprehensive submissions ably argued by counsel and the broader clash of positions that could not be reconciled at the collective bargaining table in 2006. Because of unforeseen and unarticulated implications, it would be inappropriate to venture beyond a discussion and analyses of what is necessary to decide the merits of these two grievances, which are merely one skirmish on the broader provincial stage.

[135] It is clear that Ms Sihota is an excellent teacher who repeatedly received accolades for her contributions to her students, school and colleagues. It is equally clear she decided to take a principled stand based on her right of individual professional autonomy against data gathering that feeds achievement contracts and to risk discipline for doing so.

[136] There is no evidence that what happened in her class when she administered the DART assessment in the spring of 2006 happened in other classes; was likely to be repeated in the spring of 2007 with the group of students in her class that year; and could not have been avoided by preparing these students, who had never taken the assessment, to take the assessment as a normal classroom activity.

[137] There is no evidence Ms Sihota spoke to Ms Elm, the previous principal, Ms Collyer, Ms Lancaster, Mr. Cambridge or anyone else about her concerns that *Our Might Fraser River* was not connected to her students and is an inappropriate passage for Grade 3 students in the Sooke school district or that the protocol developed for the DART assessment required refinement to avoid a repeat of her experience. She did pursue with Mr. Cambridge, in a general way, the option of teachers exempting students, but she did not identify any students she thought should be exempted in May 2007 or speak to Ms Elm about any arrangement to have them exempted. She did not tell Ms Elm her refusal was a matter of conscience for her or suggest an alternative approach to help her avoid administering the DART assessment.

[138] Essentially, Ms Sihota's refusal was broadcasting a personal statement about the course taken in public education policy in British Columbia. The union has not argued her refusal is protected by any constitutionally guaranteed right in the *Canadian Charter of Rights and Freedoms*. It relies on her contractual right to individual professional autonomy.

[139] It is equally clear the employer joined in the test of jurisdiction and wills. It had an alternative route to obtaining the data from this class of students and, in the end, used that route to obtain the data, but pressed Ms Sihota to the point of refusal. It did not repeat this approach in May 2008.

[140] An essential element of individual professional autonomy is teachers having the assurance they are free to exercise professional judgment in teaching students assigned to them. This professional judgment is a critical element in the quality of public education.

[141] Some other professions are self-regulating within a regulatory regime and maintain and reinforce their professional autonomy through an effective system of self-regulation that imposes and enforces standards, ethics, quality service, professional development and cost-containment for the public being served. Teachers do not have this.

[142] Teachers are employees subject to direction and discipline by employers. They must negotiate the scope of their right of individual professional autonomy to provide services independent of supervision within the highly structured regulatory regime in which they work. The highly regulated structure of public education limits the extent to which teachers can negotiate and be contractually guaranteed freedom from control and direction by their employer and others.

[143] Legislation, regulation and Ministry and board of Education policies circumscribe teachers' professional autonomy. Teachers must teach the curriculum defined in educational programs and assess students on prescribed learning outcomes. They have autonomy to decide the instructional and assessment strategies to do that. Article F3 recognizes their autonomy must be exercised "within the bounds of the prescribed curriculum and consistent with

recognized effective educational practice.”

[144] Beyond these boundaries or limitations, teachers do not have unfettered discretion to comply with or refuse to comply with employer policies or directions on all matters that relate to teachers’ duties and responsibilities. Teachers work and are employed in a bureaucratic professional educational enterprise. The nature and extent of their contractually guaranteed right of individual professional autonomy must be interpreted within this context. It must be interpreted in a manner consistent with the fulfilment of responsibilities by others who are assigned roles and duties within the highly regulated structure of public education. It must be interpreted in a manner that is harmonious with those statutorily and regulatory assigned responsibilities and duties and not in a manner that trumps or frustrates them. In some situations, when the conflict arises between two independent exercises of discretion and judgment, this might mean balancing competing rights and responsibilities.

[145] In this situation, teachers were directed by the employer to conduct a reading assessment using DART. The employer had good reason to use DART to fulfill its statutory accountability responsibilities. It had confidence DART was the most appropriate available assessment to use for this purpose. The Board of Education endorsed and approved the decision of senior administrators and the superintendent to include DART data in the successive accountability/achievement contracts when the Board resolved to approve and submit them to the Minister in furtherance of its statutory obligations. It was not the decision of a principal, senior administrator, colleagues or others that led to the direction that teachers were to administer the DART assessment. It was the Board’s decision.

[146] As the union correctly acknowledges, the issue in this arbitration is not the validity, reliability or usefulness of the DART assessment. The evidence is that the DART assessment has been designed and refined to achieve a valid and reliable whole-class and larger-scale assessment. Its use revealed previously unidentified important information about student learning, for example the disparity between fluency and comprehension. It aided the district in targeting remedial programs and activities and making resource allocations. In time, it might be that limitations

or flaws with DART and the data it generates will be identified. It might be that its use will fade out of fashion. But on the evidence, there are sound educational and organizational reasons for the Board's decision to use it.

[147] There is also a larger policy issue behind this dispute that is not to be decided. That is whether the learning needs of students can be better met through greater teacher and school autonomy or through an alignment of goals and resources from the class to the Ministry directed by accountability contracts and resources allocation to support the activities chosen to achieve their goals and objectives.

[148] In adopting the accountability framework with its prescriptive demands on school districts, it is unclear whether the provincial government is making a comment on its assessment of the competence of local boards of education and schools; is embracing the education standards movement to increase standards, measure student achievement and hold teachers accountable; or is pursuing something else. It is unclear whether the provincial government understood or expected prescriptive administrative demands it makes on school districts that implicitly direct school district priorities and resource allocation will also result in school districts making prescriptive administrative demands on classroom time.

[149] One of the current emphases in public education policy is measuring and reporting student achievement using methods and language common in organizational strategic formulation, implementation, and measurement. Data is collected to evaluate the current situation; decide the direction to go; and monitor progress in getting there. This school district uses the DART assessment to provide information on how well it is doing developing the core learning skill of non-fiction reading comprehension and fluency. In this context and performance measurement language, the Grade 3 results are a leading indicator and the Grade 9 results might be regarded as a trailing indicator.

[150] Assessment for teacher is more immediate and continuous. Teachers assess to immediately gather information about what a child knows, understands and is able to do in order to identify learning needs and support and promote

learning. Assessment, evaluating and reporting achievement are integral to student learning and achievement. The cycle is continuous and repetitive – plan, instruct, assess and evaluate. Teachers are required to do this. In primary, the greater the constraints and the more decontextualized the setting for an assessment, the more stressful it might be for children. (See generally Ministry of Education, *The Primary Program: A Framework for Teaching* (2000), chp. 8)

[151] These differences in assessment – information, evidence or data gathering – and the purposes for which they are intended to be used must be kept separate, despite the fact the DART assessment is designed to be a dual purpose tool to assist school district organizations with larger-scale assessment and data gathering and to assist classroom teachers with individual student assessment.

[152] The collective agreement interpretation issue in this dispute is the extent of independent judgment agreed in Article F3 and whether this Board’s decision to implement district-wide DART assessment and the direction that flowed from it is an assignment of duties that cannot be made by the employer because it is “otherwise provided in this agreement” that each classroom teacher has the individual right to exercise professional autonomy on matters of assessment. This is not a situation involving a non-enrolling teacher or a matter of student evaluation.

[153] The employer’s directive to administer the DART assessment does not direct the teacher to use it to fulfil the teacher’s responsibility to report student progress to parents, even if it can be used for that purpose. The direction to administer DART is a bureaucratic directive for organizational purposes that consumes a teacher’s time in the classroom, which the teacher might otherwise choose to use for another purpose or to do a different assessment. A teacher might think it is unnecessary and not helpful in teaching the class of students. However, it is consistent with the requirements on the employer under the *School Act* and a long-standing employer policy, pre-dating the collective agreement that teachers “shall administer school-based, district-wide and provincial assessment instruments as necessary” (Administrative Regulation B-330, *Learning Assessment*, April 12, 1983, A.3).

[154] For some teachers, it is likely frustrating that there can be a greater emphasis and importance placed on the broader, large-scale assessments than on the daily classroom assessments they do to support individual children to develop, learn and grow toward become contributing citizens. For them assessment is a tool to support learning not simply take snap-shot measurements.

[155] However, the Board of Education has a statutory mandate that requires it to set goals, target and report. As in other organizations, establishing what is to be measured and doing it will likely detract from other use of the time and resources. And the data is subject to misinterpretation and misuse. However, snap-shot measurements are a means to support learning through needs and success identification and resource allocation.

[156] The employer direction and assignment of the duty to administer the DART assessment can be viewed as a clash of professional and bureaucratic cultures. The professional teacher looks at the students in the class and continuously assesses them in a thoughtful, sensitive and supportive manner. The administration looks for an integrated longitudinal view of performance of students across the district to identify needs, measure success and allocate resources. Teachers are directed to do the DART assessment as an addition to their duties and responsibilities.

[157] A direction to administer the DART assessment does not direct how a teacher is to act or what a teacher is to do “within the bounds of the prescribed curriculum.” It does not tell teachers not to use a practice because it is not a “recognized effective educational practice.” It does not diminish the art and profession of teaching by telling teachers what they cannot do. It does not tell teachers they must use or rely on the DART assessment in their teaching, although they may choose to.

[158] The direction to administer a DART assessment, in the context of the statutory scheme regulating public education and the Board of Education’s responsibilities and obligations under the accountability framework, is an assignment of duties the employer has the exclusive authority to make. It is not an

infringement of the individual professional autonomy guaranteed in Article F3 of the collective agreement.

[159] DART is designed to mirror and is to be administered as a normal classroom activity. If a student cannot do it on the day selected, the student can do it another day. Given the entire protocol for DART and the flexible window of time within which it can be administered, the assignment of this administrative duty to teachers was neither unfair nor unreasonable. There is no evidence of a circumstance that made it unfair or unreasonable for Ms Sihota to be directed to administer it in May and June 2007. The direction was clear and understood. It was an assessment within the area of the curriculum she was responsible to teach in her team teaching arrangement.

[160] Whether or how the teacher chooses to use the DART assessment activity and its results in discharging the teacher's responsibility is a matter within the teacher's individual professional autonomy. The teacher can choose to embrace and integrate DART assessment into the planning, instructing, assessing and evaluating cycle or can choose to simply treat it as an additional administrative and bureaucratic burden.

[161] I find the employer had the right, through the principal, to direct Ms Sihota to administer the DART assessment. The first grievance is dismissed.

[162] Ms Sihota did not have the right to refuse the lawful direction to perform an administrative task as an exercise of her individual professional autonomy. This is not a situation that meets an exception to the principle obey now and grieve later. The employer had just and reasonable cause for discipline. The discipline imposed was not excessive in all of the circumstances. The second grievance is dismissed.

SEPTEMBER 22, 2009, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey