

LABOUR RELATIONS CODE  
(Section 84 Appointment)  
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION

UNION

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

EMPLOYER

(Remedy – Grades 4 - 12 Class Size and Composition:  
2006-07 and 2007-08 School Years)

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Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Craig D. Bavis and George Popp
Representing the Employer:	Judith C. Anderson and Brian Chutter
Dates of Hearing	November 25 and 26, 2009
Date of Decision:	January 11, 2010

## Contents

1.	Grievances, Representative Nature of Proceeding and Findings .....	1
2.	Class Size Dispute and Current Stage of Proceedings (1974 – 2009) .....	6
3.	Past Arbitral Remedies - Negotiated Class Size and Composition in B.C. ....	10
4.	<i>School Act</i> Public Policy, Funding and Accountabilities .....	29
5.	Employer Submissions on Prejudice and Case of First Instance .....	33
6.	Union and Employer Submissions on Remedy .....	42
7.	Discussion, Analysis and Decision .....	52

## 1. Grievances, Representative Nature of Proceeding and Findings

[1] This arbitration is about class size and composition in Grades 4 to 12 in public schools in British Columbia for the first two school years there were legislated size and composition standards for these classes. This decision is about an appropriate remedy at grievance-arbitration for the failure of board of education employers to comply with the class size and composition provisions of sections 76.1(2.2) and (2.3) the *School Act* in the organization of individual classes in these grades.

[2] The grievances include an allegation one board of education exceeded an aggregate class size average of twenty-one students for Grades 1 to 3 in each of the two school years. The facts are agreed and the remedy is the subject of a companion decision issued the same date as this decision.

[3] The union submits, in addition to a declaration, based on a formula it proposes, there should be an award of compensation payable to each affected classroom teacher and an additional award of compensation payable to the local union to be used to provide assistance to the school teaching and learning community to redress or respond to the impact in that community of the organization of classes contrary to the *School Act*. The employer submits no remedy beyond a declaration is appropriate in all of the circumstances.

[4] The union grieves that in the 2006-07 and 2007-08 school years some boards of education organized some classes contrary to the requirements of section 76.1 of the *School Act*, R.S.B.C. 1996, c. 412 enacted by the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3, s. 12 and amended by the *Education (Learning Enhancement) Statutes Amendment Act, 2006* S.B.C. 2006, c. 21.

[5] The legislation sets grade level class size and composition standards that boards

of education must not exceed. Some grade level standards are firm and inflexible. Other grade level standards may be exceeded if the board of education meets the requirements for the grade level. Section 76.1 states:

**Class Size**

- (1) A board must ensure that the average size of its classes, in the aggregate, does not exceed
  - (a) for kindergarten, 19 students,
  - (b) for grades 1 to 3, 21 students,
  - (c) for grades 4 to 7, 28 students, and
  - (d) for grades 8 to 12, 30 students.
- (2) Despite subsection (1), a board must ensure that the size of any primary grades class in any school in its school district does not exceed
  - (a) for kindergarten, 22 students, and
  - (b) for grades 1 to 3, 24 students.
- (2.1) Despite subsection (1) but subject to subsection (2.4), a board must ensure that the size of any class for any of grades 4 to 7 in any school in its school district does not exceed 30 students unless
  - (a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
  - (b) the principal of the school has obtained the consent of the teacher of that class.
- (2.2) Despite subsection (1) but subject to subsection (2.4), a board must ensure that the size of any class for any of grades 8 to 12 in any school in its school district does not exceed 30 students unless
  - (a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
  - (b) the principal of the school has consulted with the teacher of that class.
- (2.3) Despite subsections (1) to (2.2) but subject to subsection (2.4), a board must ensure that any class in any school in its school district does not have more than 3 students with an individual education plan unless
  - (a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
  - (b) the principal of the school has consulted with the teacher of that class.
- (2.4) Subsections (2.1) to (2.3) apply to a board, in relation to a school year, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10) for that school year.
- (3) The Lieutenant Governor in Council may, by regulation,

- (a) establish the methods to be used by a board for determining average class size in the aggregate, including, without limitation, methods of providing for students with special needs,
  - (b) exclude any type of class, course, program, school or student from the determination of average class size in the aggregate,
  - (c) set dates by which determinations must be made under this section,
  - (d) define terms used in this section for the purposes of a regulation under this section,
  - (e) require boards to prepare, submit to the minister and make publicly available, in the form and manner specified by the Lieutenant Governor in Council, for each school district and each school within the school district,
    - (i) reports respecting class size, and
    - (ii) plans respecting allocation of resources, services and staff in order to comply with subsection (1),
  - (f) specify matters that must be considered by a board in preparing a plan under paragraph (e) (ii) and the information required to be included in reports or plans under paragraph (e), and
  - (g) require a board to establish, in respect of plans and reports under paragraph (e), a process of consultation with parents of students attending school in the school district.
- (4) The limits and requirements of subsections (1) and (2) do not apply for the purposes of the 2001-2002 school year.
- (5) In this section, "**student with an individual education plan**" means a student for whom an individual education plan must be designed under the Individual Education Plan Order, Ministerial Order 638/95, but does not include a student who has exceptional gifts or talents.

[6] Preliminary objections to the grievances were heard and dismissed in September 2008 (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL)). By agreement after that decision, the two school year grievances were consolidated for hearing and final decision. The classes in dispute were identified through case management discussions, disclosure of particulars and interim decisions described in the August 2009 decision on eighty-one representative classes in seven representative schools in the 2007-08 school year selected by the union and employer.

[7] The representative class process and what was hoped to be achieved in using this approach to manage this grievance-arbitration is described in the August 2009 decision on the merits of the grievance with respect to the representative classes:

The union and employer agree the representative schools and classes, which have a variety of missions and purposes, English as Second Language programs, immigrant settlement patterns, Aboriginal children populations,

curricula, support and remediation programs and special education needs, have been truly a representative cross-section of the Grades 4 to 12 schools and classes across the province. ...

The agreement on this process was predicated on an intention it would produce some clear criteria for addressing recurring differences on the same issues, establish some predictable guidelines for resolution of many differences and avoid divergent outcomes before different arbitrators. One goal is to fashion some structured approach that provides predictability and efficiency in resolving many, if not most, differences over classes that exceed the legislated class size and composition standard. (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL), ¶ 11 - 12)

[8] The grievance was allowed for twenty-one classes in five of the seven representative schools indicated by a check mark in the following table summarizing the findings on the merits of the grievance. The names of the affected teachers are in bold.

	Class	Teacher(s)	No Consult	No Opinion	No Deferral
<b>Merritt Central Elementary – SD No. 58 (Nicola-Similkameen)</b>					
1.	Grades 4/5	L. Dixon / <b>S. Carroll</b>	✓*		
<b>Thornhill Elementary – SD No. 82 (Coast Mountains)</b>					
2.	Grade 4	<b>J. Billey / A. Hill</b>	✓	✓	
3.	Grade 4	<b>L. Yeats / A. Hill</b>	✓	✓	
4.	Grades 4/5	<b>C. Sneddon / A. Hill</b>	✓	✓	
5.	Grade 5	<b>L. MacBean / A. Hill</b>	✓	✓	
6.	Grades 5/6	<b>P. Kolterman / A. Hill</b>	✓	✓	
7.	Grade 6	<b>D. Rivet / C. Lambright</b>		✓	
8.	Grade 6	<b>S. Rusch / C. Lambright</b>		✓	
9.	Grade 6	<b>S. Dhaliwal / C. Lambright</b>		✓	
10.	Grade 7	<b>K. Fraser / C. Lambright</b>		✓	
11.	Grade 7	C. Killoran / <b>C. Lambright</b>		✓	
<b>Hastings Elementary Community – SD No. 39 (Vancouver)</b>					
12.	Grades 4/5	<b>L. Coulter</b>	✓		
13.	Grade 5	<b>S. Patrick</b>	✓		
14.	Grades 5/6	<b>K. Appleton</b>	✓		
15.	Grades 6/7	<b>G. Morrow / J. Chu</b>	✓		
16.	Grades 6/7	<b>S. Brothers</b>	✓		
17.	Grades 6/7	<b>A. Low</b>	✓		
18.	Grades 6/7	<b>T. Hampel</b>	✓		
<b>Qualicum Beach Middle – SD No. 69 (Qualicum)</b>					
19.	Social Studies 7-3	C. Johnsen / <b>B. Worthen</b>	✓		
<b>Claremont Secondary – SD No. 63 (Saanich)</b>					
20.	Chemistry 12E	<b>M. Ewan</b>			✓
21.	Social Studies 9	<b>S. Hooper</b>			✓

[9] In each of the Grades 4 to 7 and the Grade 9 classes, the board of education failed to “ensure that any class in any school in its school district does not have more

than 3 students with an individual education plan” contrary to section 76.1(2.3) of the *School Act*. The failure was either a failure to consult a teacher of the class required by section 76.1(2.3)(b) or a failure to have or form the dual opinions required by section 76.1(2.3)(a). In the Grade 12 class, the board of education failed to “ensure that the size of any class for any of grades 8 to 12 in any school in its school district does not exceed 30 students” contrary to section 76.1(2.2) of the *School Act*. The failure was a failure to form the dual opinions required by section 76.1(2.2)(a). These requirements must be met before a board of education can exceed the applicable grade level class size and composition standard after September 30<sup>th</sup> in a school year.

[10] I must acknowledge and correct one overreaching in my August findings and decision. The focus of the representative hearings and the consultation requirements was on the consultation required within fifteen days after the first day of the school year under section 76.2(a) of the *School Act*. The consultation I found to have been required for Mr. Steve Carroll, the union Staff Representative, at Merritt Elementary School in January 2008 was under section 76.4. It is likely for this reason that, as the employer correctly submits, “this matter was not put in issue by the Union during the arbitration process at any time” (*Outline of Argument of the Employer*, ¶ 148). I ventured where I should not have gone without notice to the union and the employer and an opportunity for each of them to address the issue. I appreciate the candour of counsel in addressing this matter at this stage of the arbitration. I anticipate the benevolence of counsel, the union, the employer, Mr. Carroll and Principal Sandy Fukushima in accepting that what I did on my own I should undo on my own. Consequently, I will not order any remedy with respect to Mr. Carroll.

[11] For the classes at Thornhill Elementary School in School District No. 82 (Coast Mountains), I found:

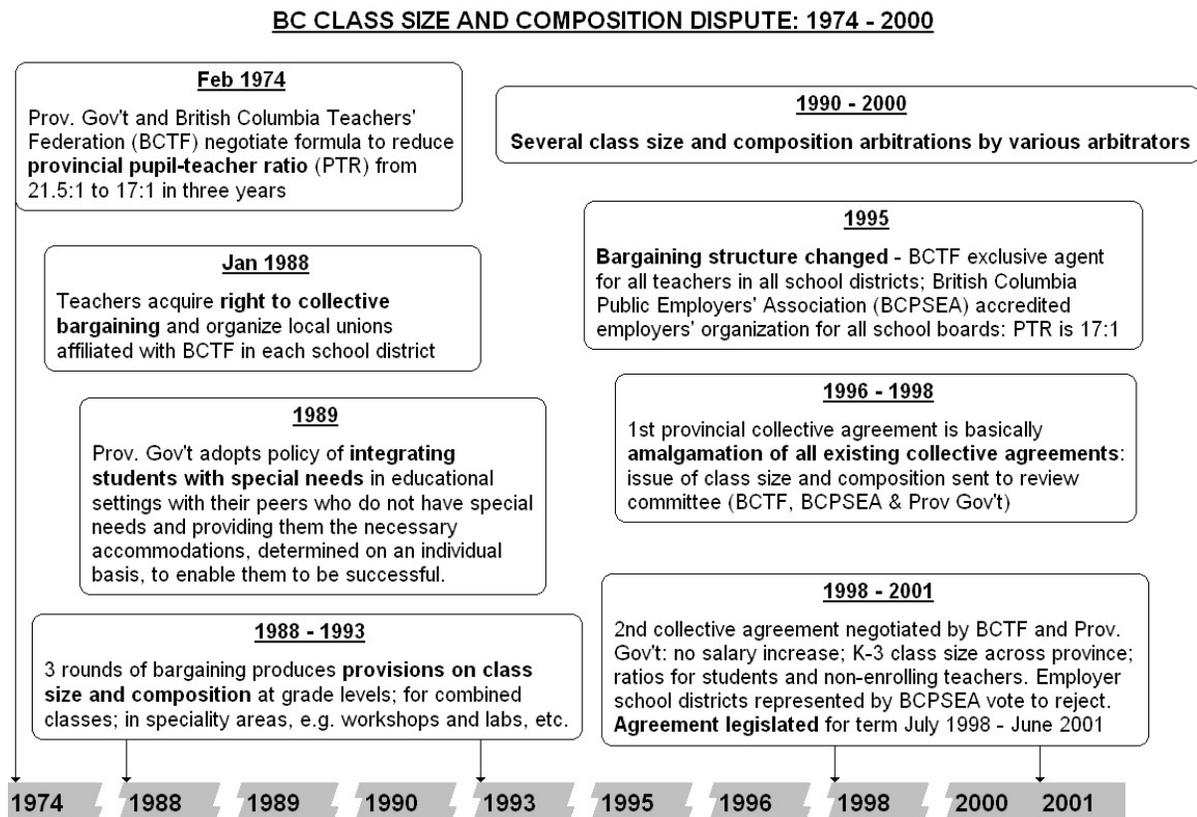
There was no opinion by the Principal that the disputed classes were appropriate for student learning on September 30<sup>th</sup> and a mistaken opinion by the Superintendent. Consequently, the disputed classes were organized in a manner that exceeded the class size and composition standard without the requisite principal and superintendent opinions that is a precondition to the class continuing with this organization after September 30, 2007. (¶ 527)

The name of one of the teachers, Cory Killoran, for one Grade 7 class is not in bold.

Mr. Killoran was school vice-principal and not covered by the collective agreement. The remedy with respect to that class will be restricted to the preparation relief teacher, Cathy Lambright and her assigned replacement.

## 2. Class Size Dispute and Current Stage of Proceedings (1974 – 2009)

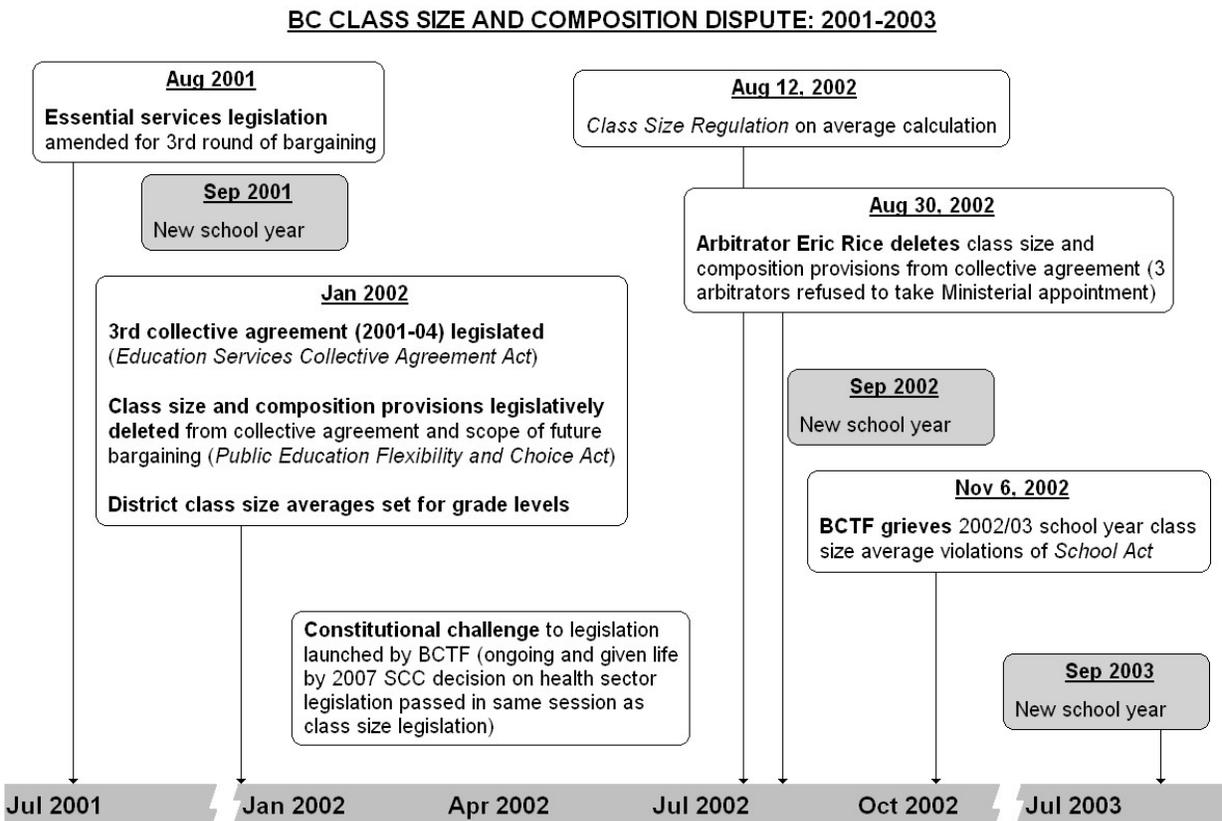
[12] The history of the ongoing class size dispute between the union and employer and between teachers, with support from others, and the British Columbia Teachers' Federation and the provincial government was reviewed in the August 2009 decision. The events from 1974 to the expiration of the second provincial collective agreement in 2001 are summarized in the following timeline graphic.



[13] Legislation deleting class size and composition provisions from the collective agreement and making class size and composition beyond the scope of collective bargaining generated litigation challenging the constitutionality of the legislation that is ongoing as classes for successive school years are organized each September.

[14] The union made successful complaints to the International Labour Organization.

[15] In the 2003-04 school year there was a grievance under the collective agreement that was challenged by the employer.



[16]

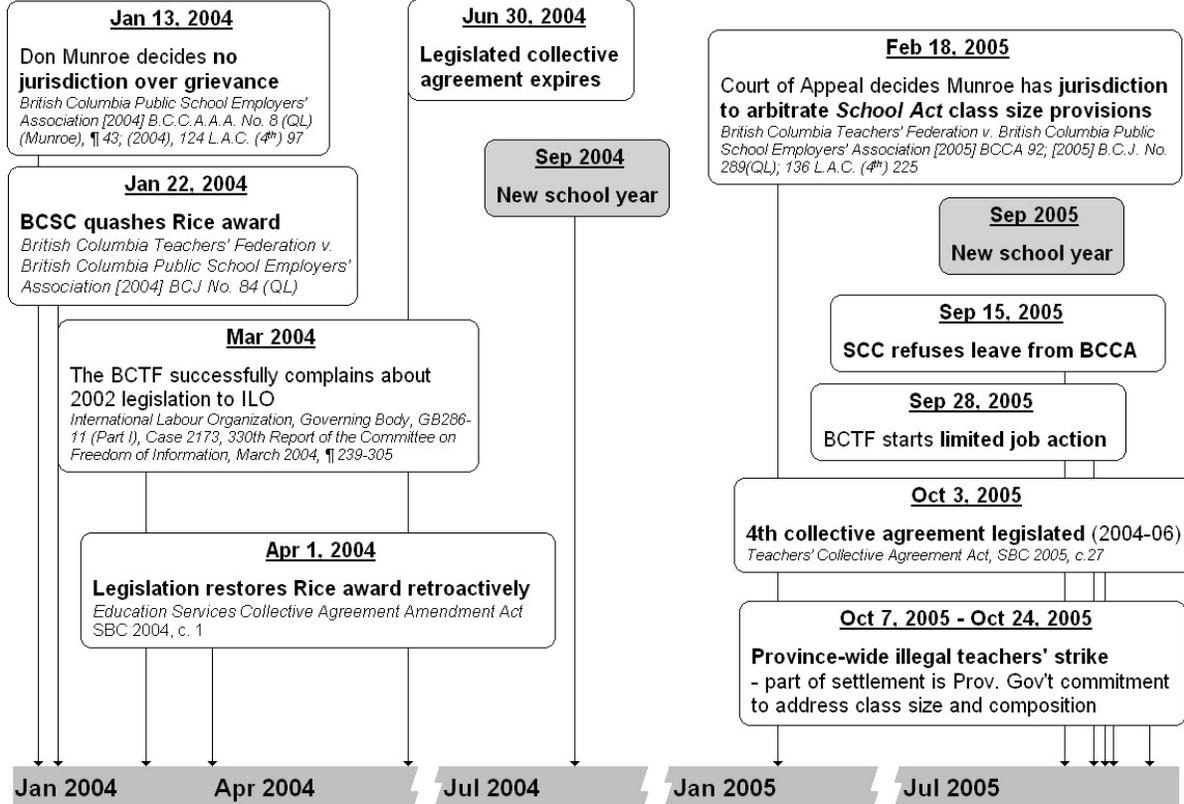
[17] Successful judicial review of the arbitrator's decision deleting collective agreement provisions was overturned by legislation.

[18] An arbitrator's decision that grievances are not arbitrable under the collective agreement was reversed by the Court of Appeal.

[19] Leave to appeal was denied by the Supreme Court of Canada as classes were organized for two more school years.

[20] A work stoppage by teachers in the 2005-06 school year, following a legislated renewal of the collective agreement, led to a settlement that included a provincial government commitment to address class size and composition issues through a forum that included participation by the British Columbia Teachers' Federation.

### BC CLASS SIZE AND COMPOSITION DISPUTE: 2004-2005



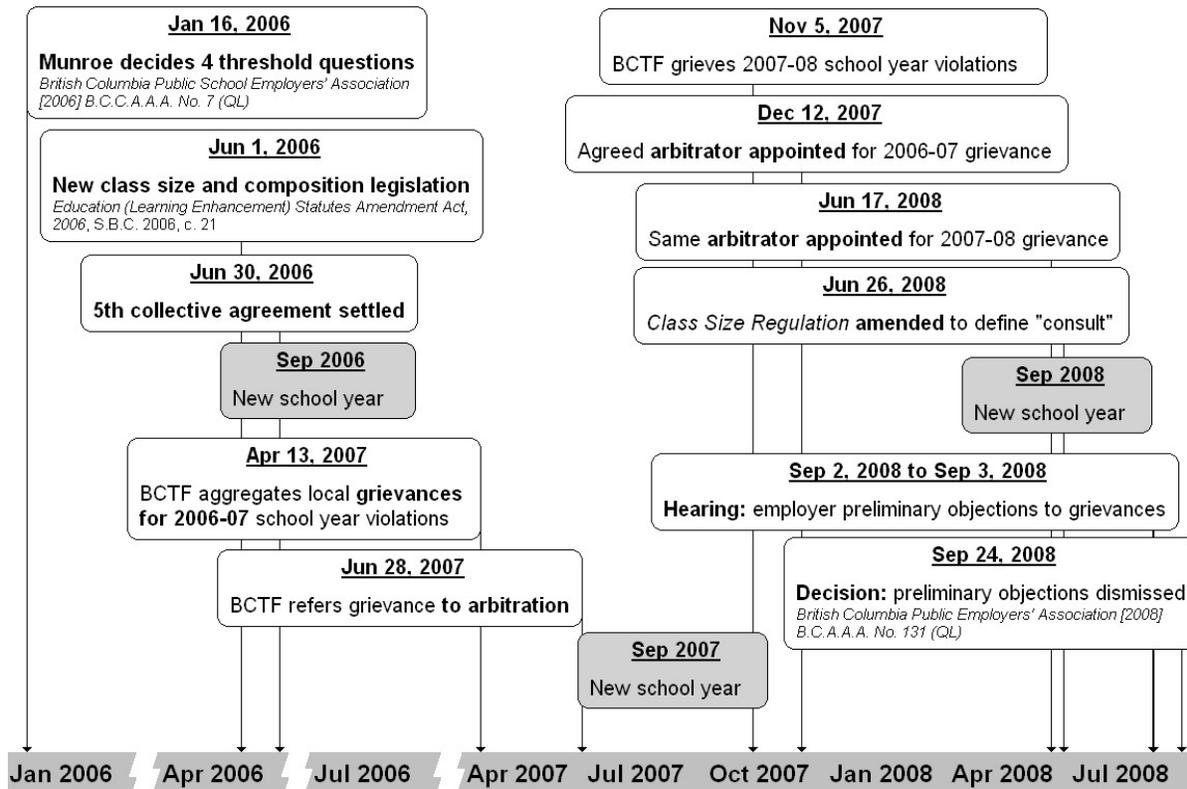
[21] The union and employer achieved agreement to renew the collective agreement in June 2006.

[22] New legislation amending the class size and composition provisions for the 2006-07 school year was enacted.

[23] Alleged contraventions of provisions of this legislation in the 2006-07 and 2007-08 school years were grieved and are the subject of this arbitration.

[24] A decision on employer preliminary objections in September 2008 preceded agreement to consolidate the grievances for the two school years. Through case management and cooperation by the union and employer, particulars were disclosed and an agreement was made to proceed by hearing evidence of representative classes in representative schools.

**BC CLASS SIZE AND COMPOSITION DISPUTE: 2006-2008**



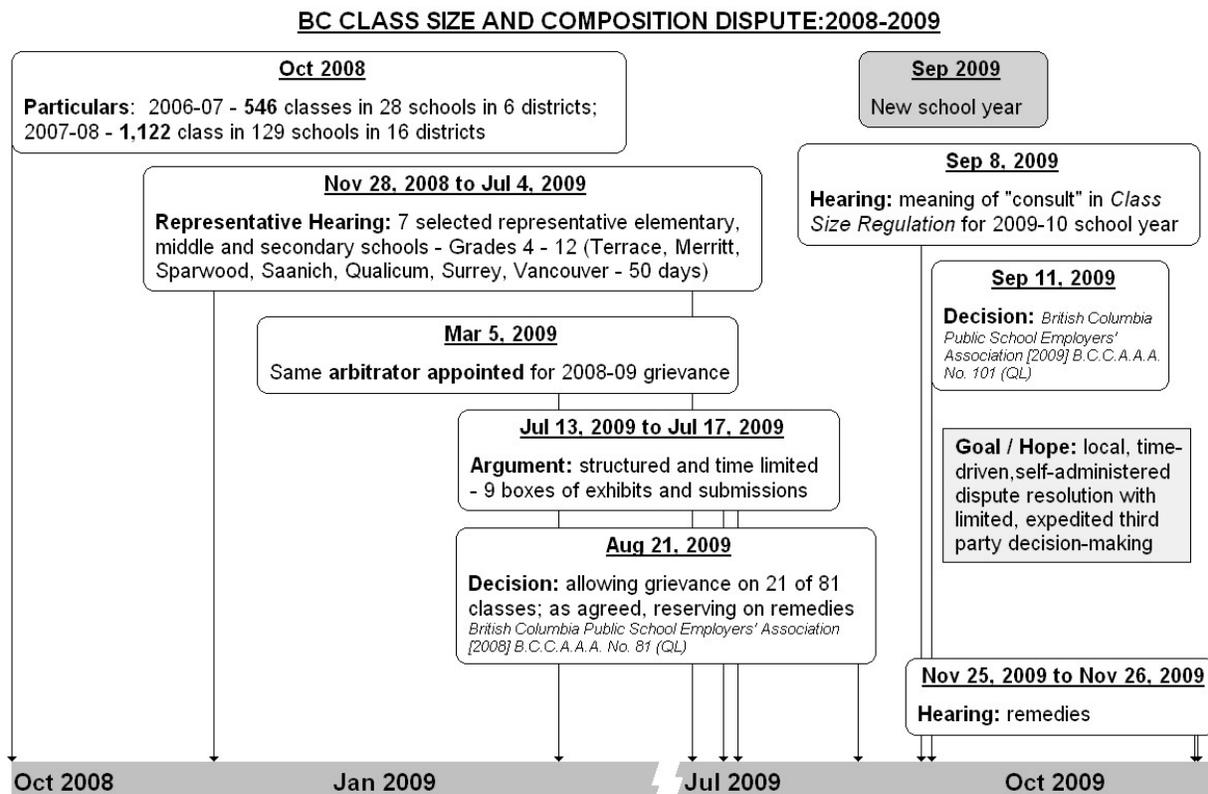
[25] Evidence about Grades 4 to 12 classes in seven representative schools was heard on fifty days in eight communities before counsel made final submissions in July 2009. A decision was issued in August 2009.

[26] There has been no evidence or submissions on Kindergarten to Grade 3 classes. None of the Kindergarten to Grade 3 classes that are included in the two grievances has been addressed in previous decisions and none is addressed in this decision.

[27] Throughout, this arbitration proceeding the goal and hope has been that clarity of interpretation and establishment of dispute resolution outcomes would enable the union and employer to fashion a time-driven, locally administered dispute resolution procedure that could be invoked each fall to expeditiously resolve differences over class size and composition under the *School Act* with limited resources and resort to third party decision-making.

[28] The union and employer have been unable to fashion such a class size and

composition dispute resolution mechanism until they have a decision on the range and nature of remedies and a remedial formula.



### 3. Past Arbitral Remedies - Negotiated Class Size and Composition in B.C.

[29] This is the first instance of fashioning a remedy at grievance-arbitration since *School Act* amendments deleted class size and composition provisions from the collective agreement; made class size and composition an impermissible subject of collective bargaining; and enacted class size and composition standards.

Understandably, the union and employer draw on and distinguish the many remedial decisions by arbitrators when there were contraventions of class size and composition provision of collective agreements.

[30] In the 1980's, class size and composition provisions were negotiated in local school district collective agreements. In an interest arbitration following a nine day strike, the arbitrator reviewed the provisions negotiated across the province and awarded terms that provide "more protection and limitations than the vast majority" of the negotiated collective agreements (*Board of School Trustees, School District No. 75*

(*Mission*) [1989] B.C.C.A.A.A. No. 469 (Ready) (QL), ¶ 22). The terms allowed some class size guidelines to be exceeded by a flexibility or “fudge” factor and for temporary emergency placements that exceeded the guidelines. Maximum class limits were to be in place by September 30<sup>th</sup>.

[31] There were collective bargaining disputes in some school districts over whether the appropriate date was September 30<sup>th</sup> or October 15<sup>th</sup> (E.g., *Board of School Trustees, School District No. 28 (Quesnel)*, unreported, January 14, 1995 (Taylor)). In others, there were disputes over whether the collective agreement set “guidelines”, “limits” or “goals” (E.g., *Board of School Trustees, School District No. 36 (Surrey)* [1995] B.C.C.A.A.A. No. 534 (Laing) (QL); *Board of School Trustees, School District No. 60 (Peace River North)* [1996] B.C.C.A.A.A. No. 45 (Germaine) (QL); *Board of School Trustees, School District No. 40 (New Westminster)* [1993] B.C.L.R.B.D. No. 290 (QL)).

[32] In later disputes, school board employers were seeking relief from the costs associated with class size and composition provisions (E.g., *Board of School Trustees, School District No. 75 (Mission)* [1993] B.C.C.A.A.A. No. 348 (Kelleher) (QL)). One approach was to staff “into the flexibility factor right from the beginning of the year” (*Board of School Trustees, School District No. 62 (Sooke)* [1995] B.C.C.A.A.A. No. 27 (McPhillips) (QL), ¶ 30). Another was to rely on a negotiated provision that the limits could be exceeded when external financial constraints beyond the employer’s control make it impossible to maintain the limits (E.g., *Board of School Trustees, School District No. 44 (North Vancouver)* [1994] B.C.C.A.A.A. No. 304 (Chertkow) (QL)).

[33] Despite some school board employers favouring an approach of negotiating only class size averages, many collective agreements contained limits on the size and composition of individual classes. Some contained joint dispute resolution procedures that had to be invoked before a grievance could be filed (E.g., *Board of School Trustees, School District No. 29 (Lillooet)* [1989] B.C.C.A.A.A. No. 509 (Kelleher) (QL); *Board of School Trustees, School District No. 39 (Vancouver)* [1990] B.C.C.A.A.A. No. 99 (Chertkow) (QL)). Some agreements provided for mediation and non-binding recommendations by a third-party trouble-shooter as in the dispute over a staffing ratio for non-enrolling teachers in *Board of School Trustees, School District No. 88 (Terrace)*

[1989] B.C.C.A.A.A. No. 154 (Kelleher) (QL).

[34] Some collective agreement provisions allowed class size maxima to be exceeded provided the teacher's average class size under the collective agreement was not exceeded (E.g., *Board of School Trustees, School District No. 39 (Vancouver)*

[1990] B.C.C.A.A.A. No. 99 (Chertkow) (QL)).

[35] There were differences over whether the collective agreement language required school districts to make "every effort" or "every reasonable effort" to comply with the limits or guidelines (E.g., *Board of School Trustees, School District No. 40 (New Westminster)* [1994] B.C.C.A.A.A. No. 152 (Hickling) (QL); *Board of School Trustees, School District No. 44 (North Vancouver)* [1994] B.C.C.A.A.A. No. 304 (Chertkow) (QL); *Board of School Trustees, School District No. 40 (New Westminster)* [1994] B.C.C.A.A.A. No. 541 (Thompson) (QL)).

[36] In 1990, an interest arbitrator observed: "Given the history of this dispute it is only logical that this class size agreement be given a sufficient period of time for both sides to appropriately adapt to its implementation" (*Board of School Trustees, School District No. 35 (Langley)* [1990] B.C.C.A.A.A. No. 355 (Ready) (QL), ¶ 32). He described some of the provincial landscape on this issue at that time.

Replicating what the parties would have done in these circumstances is by no means an easy task due to the varied nature and number of class size agreements negotiated between locals of the B.C. Teachers' Federation and other School Boards throughout the Province. For instance, only 29 of 75 collective agreements in the Province contain class size provisions. Of those 29 agreements, only five contain a staffing formula provision for Librarians and only two contain a staffing formula provision for Learning Assistants. None of the collective agreements contain a weighting formula such as that proposed by the Association. In addition, I observe that the collective agreements contain flex factors which allow the negotiated guidelines to be exceeded under certain circumstances. Also, many of the collective agreements make broad references to Board policy. As well, in several School Districts the parties fashioned contract language which provides for the formation of various types of committees to study and deal with class size matters.

I note also that four School Districts agreed to similar, if not identical, language as was negotiated in this Agreement (set out above) which provided for study and implementation committees and the subsequent involvement of a mediator who was empowered, if necessary, to render a final and binding recommendation. Of the four districts, only one other (Penticton) has reached an agreement without outside assistance.

Notwithstanding all of the vagaries and differences in the various collective agreements, it must be remembered that the class size proposals were extremely contentious between these two parties during their last round of negotiations. Indeed, it was one of the central issues which led to a strike - a strike which lasted approximately one week and was settled after extensive negotiations which resulted in the resolution set out at page 53 of the collective agreement (set out above). (*Board of School Trustees, School District No. 35 (Langley)* [1990] B.C.C.A.A.A. No. 355 (Ready) (QL), ¶ 25 – 27)

Issues about the scope of jurisdiction of a referee under the expedited dispute resolution procedure under that agreement were decided in *Board of School Trustees, School District No. 35 (Langley)* [1991] B.C.C.A.A.A. No. 401 (Ready) (QL); *Board of School Trustees, School District No. 35 (Langley)* [1992] B.C.C.A.A.A. No. 386 (Ready) (QL); *Board of School Trustees, School District No. 35 (Langley)* [1992] B.C.C.A.A.A. No. 336 (Giardini) (QL); *Board of School Trustees, School District No. 35 (Langley)* [1992] B.C.C.A.A.A. No. 369 (Giardini) (QL).

[37] Adaptation to dispute resolution implementation was also required in some negotiated expedited dispute resolution processes.

In turning to a resolution of the dispute, I commence by saying that the process was flawed in the sense that it required the parties to address the underlying issues of fact and application in hindsight. The process contemplated in Article 37.6, at least in my view of it, is remedial and contemplates that events will be addressed prospectively rather than retrospectively. In that process it is expected that the parties and the arbitrator they select will expedite the resolution of disputes by addressing them early in the school year when there is scope to mediate or arbitrate solutions. It is intrinsic to the process that class size issues be addressed while they are dynamic and while the full range of options remains.

The process of resolution begins with the parties at the budget stage and carries on through to the fixing of classes at the commencement of the school year. In that process, the parties can be expected to have taken steps to record their positions on any perceived or real anomalies. If and when a matter is advanced to arbitration, it will be in the form of a continuum in which the parties and the arbitrator will have available the full range of options and access to resolve any disputed facts in terms of those options and the positions taken by the parties in developing them.

That potential was lost in this dispute because of the newness of the process and because of the fact that the parties had not reached a consensus on its application. The Employer viewed the class size agreement as permitting it to address anomalies on the basis of what has been described as the "fudge factor" approach. That is, the Employer saw the parties as having agreed that the numbers in Article 37.6(e)(vi) could be exceeded in some circumstances. The Employer agreed that it was required under Article 37.6(c) to budget for the numbers fixed in Article 37.6(e)(vi). That is, its notion of a fudge factor was not seen as relieving it of its budgetary obligation to meet those numbers. But, in its

view, when that obligation had been met and class sizes had increased due to unforeseen circumstances, the Employer considered itself free to go beyond the numbers if that option was seen as reasonable in a consideration of all of the relevant factors, including the financial implications of exercising a particular option.

The submission of the Employer was that the numbers were intended to reflect a goal, with a recognition that anomalies would occur and that numbers could be exceeded where the options available to redress the issue were seen as unreasonable from an educational or financial perspective. The Employer saw that position as reflecting the general approach to class size restrictions in the province and a fair balancing of interests in light of the fact that class sizes in the district were below the provincial average.

The position of the Association was that the factors relied on by the Employer are irrelevant because they expose the rights of teachers to an averaging approach that requires the individual teacher to bear the burden of flexibility without some compensatory balance. In any event, said the Association, the disputed language does not support the Employer's interpretation. The Association rejected the notion that the provision it thought it had negotiated could be diluted by a retrospective application of such factors as the Employer's assessment of provincial trends.

The fact is that the disputed language does not speak clearly in support of the interpretation of either party. (*Board of School Trustees, School District No. 32 (Hope)* [1992] B.C.C.A.A.A. No. 61 (Hope) (QL), ¶ 22 – 27)

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In that context, it is necessary to remember that the dispute resolution process is designed to address anomalies that arise despite the best efforts of the parties in the budgeting and planning process to meet the class size limits set out in the provision. The reality is that school-based decisions represent the best potential for an expedited resolution of those isolated issues that elude the budgeting and planning process. That is not to say that the expedited nature of the process contemplates that individual teachers will be expected to simply accommodate excess class numbers. The expectation of the process is that the Board will respond in good faith to the resolution of excess numbers within the remedial initiatives set out and contemplated in the class size provision. In that same vein, individual teachers and the Association can be expected to seek solutions beyond simply demanding reduction in numbers. If the Board has approached the budgeting process responsibly and has sought to forecast numbers and budget for them realistically on the basis of available data, any anomalies must be addressed in the broad terms contemplated in the dispute resolution process.

It would appear that the expectations of the process were achieved in this school year even though the process provoked a measure of dissatisfaction from the Association in the form of what it saw as a manipulation of the process by the Board. Similarly, the Board questioned the good faith of the Association in raising the pro-rated position in this dispute late in the process and in what the Board perceived as an attempt to exploit the decision in Mission School District. However, the good faith concerns of the parties are not borne out in an examination of the facts. (*Board of School Trustees, School District No. 32 (Hope)* [1992] B.C.C.A.A.A. No. 330 (Hope) (QL), ¶ 45 - 46)

[38] In another school district, a decision resolving a dispute for the current school

year was achieved in September (*Board of School Trustees, School District No. 75 (Mission)* [1992] B.C.C.A.A.A. No. 267 (Hope) (QL) and [1992] B.C.C.A.A.A. No. 366 (Hope) (QL)).

[39] Despite its best efforts, a school district failed to have maximum class size limitations in place for a newly negotiated September 30<sup>th</sup> date. Arbitrator Taylor issued a declaration there had been a violation of the collective agreement, but declined to award compensation because there was no on-going violation; it arose from unforeseen circumstances; the employer recognized and corrected the situation; and it was an interpretive matter of first instance (*Board of School Trustees, School District No. 28 (Quesnel)*, unreported, January 14, 1995 (Taylor)). In a later arbitration of first instance over the meaning of “external budgetary constraints” under the same collective agreement, he did not limit the remedy to a declaration (*Board of School Trustees, School District No. 28 (Quesnel)*, [1995] B.C.C.A.A.A. No. 454 (Taylor) (QL)).

[40] In a situation where a teacher’s combined Grades 1 and 2 class had twenty-three rather than the maximum twenty-two students, the agreed resolution was to give the teacher an additional thirty minutes of non-instructional time from the date of the grievance for the duration of the school year (*Board of School Trustees, School District No. 44 (North Vancouver)* [1992] B.C.C.A.A.A. No. 245 (Chertkow) (QL)).

[41] In the 1992-93 school year, a principal grouped (or platooned) five Grade 5 students with severe learning disabilities to provide them additional support and placed them in a class of twenty-seven students. The union grieved when the principal failed to consult the teacher and school-based team when a sixth student with severe learning disabilities was placed in the same class at the end of November. The arbitrator found in May that there had been a failure to consult both the teacher and school-based team as agreed in the collective agreement.

By way of remedy, the Union asks that I direct the Employer to assign a full-time teacher to Lake's classroom to work specifically with the SLD [Severe Learning Disability] students and to provide Lake with two hours a week preparation time back to the time the grievance was filed.

In considering these proposed remedies, it is important in my view to keep in mind the purpose of an arbitrator's remedial jurisdiction. That purpose is to put the injured party in the same position she would have been if the collective agreement had not been violated. In this case, that purpose would be achieved

by referring the matter of the placement of the sixth SLD student back to Foley [Principal] and directing that she consult with Lake and the school-based team on that matter. Only after such consultations have taken place is it appropriate to assess the reasonableness of Foley's efforts under Article 21.24 of the collective agreement.

It might be argued that such a remedy is largely meaningless in this case because of the lateness in the school year. That may be so, but that is a comment that can be made with respect to any remedy in this case. Hopefully, this decision will clarify the process for future cases. However, the solution to this concern, in my view, is for the parties to develop an expeditious procedure for handling grievances like this one in a timely fashion.

With respect to the Union's proposed remedies, a consideration of their reasonableness is premature at this stage. However, I should say that I have considerable doubt as to my jurisdiction to award the proposed remedies under this collective agreement, even if I was to conclude ultimately that Foley had not made "reasonable efforts" under Article 21.24 of the collective agreement.

In conclusion, I refer the matter of the placement of the sixth SLD student back to Foley and direct her to consult with Lake and the school-based team regarding such placement, taking into consideration the factors set out in Articles 22.22 and 22.23. It is so awarded. (*Board of School Trustees, School District No. 36 (Surrey)* [1993] B.C.C.A.A.A. No. 136 (Kinzie) (QL), ¶ 48 - 52)

[42] In the 1993-94 school year, after upholding a grievance in April that there were classes in contravention of size and composition limits at two schools, Arbitrator Hickling reserved jurisdiction on remedy (*Board of School Trustees, School District No. 40 (New Westminster)* [1994] B.C.C.A.A.A. No. 152 (Hickling) (QL)). No agreement was achieved. The union sought a remedy that spent the amount of money it calculated the employer had saved by engaging two temporary teachers and allocating additional funds for teacher release time. The employer was agreeable to hiring four additional teachers, but objected to release time. Arbitrator Hickling decided his role was "to compensate those who are aggrieved and not to punish" the employer. He awarded that two additional teachers be provided to each of the schools, whose assignments were to be determined by staff committees at the schools; each affected teacher "be entitled to two days compensatory time off between now and the end of the school year"; and employer payment of \$3,600 into the professional development fund of each school for the benefit of the affected teachers (*Board of School Trustees, School District No. 40 (New Westminster)*, unreported, May 8, 1994 (Hickling)).

[43] Paid release time based on a formula driven by the number of students and weeks for which a class was oversized was part of a settlement in another school

district (*Board of School Trustees, School District No. 34 (Abbotsford)* [1995] B.C.C.A.A.A. No. 503 (Munroe) (QL)). The union sought release time based on a similar formula in *Board of School Trustees, School District No. 12 (Grand Forks)* [1995] B.C.C.A.A.A. No. 235 (Korbin) (QL), ¶ 41. Arbitrator Korbin awarded paid leave for professional development with supportable expenses to a maximum of \$75 per day. If professional development opportunities were not locally available, then the teacher could elect to use the time as preparation or release time without the expense payment.

[44] In the 1994-95 school year, a local teachers' union and school board arbitrated two class grievances involving a Grade 6 and Grade 7 class to set guidelines for other class size and composition grievances from the previous and current school years. Arbitrator McPhillips decided the union was correct that the flexibility factor under the collective agreement did not apply to classes with students with special needs. In determining an appropriate remedy, he looked beyond the two representative classes to the broader group of classes in dispute and fashioned a remedial compensatory formula:

Finally, there is the issue of financial compensation. In this case the Union seeks ten (10) days' compensation for each of the teachers affected during the 1993-94 school year. The Labour Relations Board indicated in *Government of British Columbia, supra*, at p. 4, "the grievance procedure should be capable of providing an appropriate remedy where an employee is required to work contrary to terms of the collective agreement". For that reason, this arbitration board is of the view that some financial compensation is appropriate in this case.

However, the Union's request for ten days off for each teacher affected by the breach would be excessive in all the circumstances of this case. That is so for a number of reasons. First, not all classes which were affected were actually in the flexibility factor for the whole year or even for lengthy periods of time. In some cases, the breach was for only a limited period, in some cases for only a week or two. Therefore, the remedy must be tailored to reflect that fact.

Second, the increased work load as described by Mr. Cook and Ms. Morrison was primarily caused by the number of special needs students in the class. However, the breach of Agreement did not occur because there were special needs students in the class. Indeed, the Sooke Teachers' Association had been unable to negotiate a limit in the Agreement on the number or type of special needs students in any class. The breach of the Agreement in this case was caused by the number of students being in excess of the class size limit. Therefore, when a class was over the limit and into the flexibility factor, the breach could have been removed simply by taking regular students out of the class. Therefore, when considering the marginal impact on the workload of the teachers in the Sooke School District in 1993-94, it is the effect of the removal of

regular students which should be considered rather than assuming that it would be the special needs students who would be removed from the class.

Third, it is important here to realize that this is not a case where there was any maliciousness or ill-will on the part of the School Board officials. This board accepts completely that Mr. Chaland and Ms. Hazen honestly believed that what they were doing was within their rights as they interpreted them. It has now been decided that they were mistaken but in my opinion there should be no doubt as to the honesty of their intentions. The School Board acted in good faith throughout all the events in question here.

The final consideration is the actions of some of the teachers themselves. As discussed above, the Union is not estopped from asserting its rights under this Agreement because the Executive and Officials of the Union were unaware of the practice of the School Board in 1992-93. However, individual teachers were or should have been aware of their rights and their failure to inform the Union must be considered in assessing damages. This less than diligent reaction on their part in 1992-93 should be taken into account when assessing damages for them and their colleagues for 1993-94 in order to ensure that no "unfair windfalls" occur.

For all these reasons, this board orders the School Board to compensate the teachers who were affected by this breach of the Collective Agreement either in time off or in pay in lieu thereof in the amount of one-third (1/3) of a day for each four weeks or part thereof in which a class with special needs students was in the flexibility factor during the 1993-94 school year. Therefore, if a class was in violation for a total of less than four weeks, there is to be compensation of one-third (1/3) of a day; if it was from four to eight weeks - a further one-third (1/3) of a day; if it was between eight weeks to twelve weeks, a further one-third (1/3) of a day, etc. At the high school level, this remedy will be applied on a prorated basis. For any full days owing a teacher, the teacher will have the discretion of taking time off or receiving pay in lieu thereof. For portions of a day owing, compensation will be in the form of pay unless both the teacher and the School Board agree otherwise. To provide an example, if a teacher had a class with special needs students in the flexibility factor for a total of 26 weeks, the teacher would be owed 2 1/3 days. That teacher can elect to take two days off or receive two days pay in lieu but for the remaining 1/3 day owing, he/she will receive pay unless both parties agree otherwise. (*Board of School Trustees, School District No. 62 (Sooke)* [1995] B.C.C.A.A. No. 27 (McPhillips) (QL), ¶ 98 - 103)

[45] In May 1995, Arbitrator Fraser found a school board had contravened the class composition provisions of the collective agreement during the current school year and compensation should begin at the commencement of that school year.

On the question of whether any damages have been proved, I have no difficulty in concluding that the class composition provisions in the Collective Agreement amounted to a benefit negotiated by the Union and that, in these circumstances, no actual evidence of loss need be tendered. In my view, it is self-evident that the loss to the Union of its ability to insist on work load limitations is compensable.

Mr. Harris also argued that there was no evidence to confirm that the teachers in whose classes the violations occurred did not agree to teach in those

circumstances. I cannot accept this submission. A teacher does not have the ability in law to make a private agreement with an Employer. To hold otherwise would be to countenance a violation of the Union's exclusive bargaining authority (see *Board of School Trustees, School District No. 35 (Langley) - and- Langley Teachers' Association*, Unreported, Award of C. Bruce, November 24, 1992 at page 23).

The parties and their counsel should have an opportunity to attempt to reach an agreement on the timing of a Cease and Desist-Order and on the issue of compensation. I will retain jurisdiction to deal with these issues and any other matter that may arise from the implementation of this Award. (*Board of School Trustees, School District No. 75 (Mission)* [1995] B.C.C.A.A.A. No. 484 (Fraser) (QL), ¶ 134 - 136)

[46] The next month, in an expedited arbitration under the *Labour Relations Code*, a local teachers' union sought to have four teachers at a new school compensated for oversized classes that had been reduced by the time of the arbitration. The compensation the union proposed was one hour per week for each oversized class plus one hour per week for a teaching load in excess of collective agreement limits. The employer disputed there was a contravention of the collective agreement, but, if there was, the appropriate remedy was classroom assistance from additional teachers or teacher assistants. There was a problem determining the precise numbers in a class at any date.

Because the parties could not agree upon the number of students enrolled in each of the grievor's classes, a significant amount of time was spent at the hearing before me, by both parties, examining and cross-examining witnesses in an attempt to establish the number of students enrolled on the relevant dates. Everyone found this to be a very frustrating experience. (*Board of School Trustees, School District No. 36 (Surrey)* [1995] B.C.C.A.A.A. No. 534 (Laing) (QL), ¶ 45)

Arbitrator Laing requested "...both parties, at the end of the evidentiary stage of the proceedings, that they assist me by suggesting what might be a reasonable remedy, in the circumstance of the evidence" (¶ 74).

[47] The lack of records and recall on the number of students enrolled in each class each day influenced the choice of a remedy, which was not formulistic:

This brings me to the matter of remedy. As I have already observed, the evidence as to the number of students enrolled in each class on any given day is, to put the matter charitably, unreliable. At its best, the evidence can only prove the number of students in a class on one of the days in the week. The grievor's acknowledged that they did not have accurate records of the dates upon which students entered and left their classes. The record keeping arrangements by both the teachers themselves and the administration were inadequate. While the

employer has effectively conceded that the guidelines were exceeded, it has not provided me with any definitive data by which any precise calculations can be made. The teachers involved apparently did not maintain records and the association relies upon the employer records. Therefore, a remedy which requires a calculation of the number of students over the applicable class size limits is not appropriate in this case. The parties have had to make the best of evidence that is incomplete and, in part, unreliable. I am bound by the same constraints.

This is neither the first nor the last time that an arbitrator and the parties to a particular arbitration proceeding are required to make do as best they can with evidence of a factual nature that is incomplete and inaccurate. Part of the appropriate arbitral response is to decide the issue on the basis of who bears the onus. Ultimately, in a case like this, that falls upon the association. However, evidence that may be insufficient for one purpose, such as a precise calculation based on the specific number of students in each class, may be sufficient for another purpose, that is to provide a reasonable arbitral response by way of remedy in the circumstances. Having determined that the collective agreement was breached, I am now required to determine an appropriate remedy in all the circumstances.

What then is the actual injury that was suffered? Both parties, in their arguments to me have recognized that the excess students imposed additional workload responsibilities on the teachers involved. Put in simple terms, the more students the teacher has to cope with, the more work that is entailed, both in teaching and in associated tasks such as marking papers and assignments. I agree with that analysis. A remedy intended to put the grievors in the position they would have been in, but for the breach of the collective agreement, should therefore focus upon this increased workload. The addition of one student increases the workload by one. The fact that the additional student may result in violations of two separate provisions of the collective agreement, class size limits and workload, does not mean the workload is doubled. This must be considered in determining an appropriate remedy.

The employer has submitted that an appropriate remedy for over size classes is to provide a teacher with classroom assistance. While that remedy is available when violations of the class size are continuing and while that may be an appropriate course of action for the parties to take to ameliorate the effect of any ongoing student overages, it is not an appropriate remedy where, as in this case, the alleged violations ceased prior to the commencement of these proceedings.

I have reviewed the cases that were cited to me by both parties with respect to the matter of remedy. While a number of them are helpful on at least some of the broad principles, none of them deal with the kind of circumstances before me. Not surprisingly, in all of these cases either the collective bargaining language or the facts or both are different from those before me.

Accordingly, I have decided that a reasonable and appropriate remedy, in all of the circumstances of this case, is to make an award of one hour of compensation for each of the grievors for each of the weeks, after the end of the first week in October, in which their workload and/or class sizes were in violation of the collective agreement. I find those to be, for Mr. Davies - one week, for Ms. Donn - one week, for Mr. Moseley - two weeks, and for Mr. Powell - seven weeks. This award is to compensate them for the additional time spent in teaching duties, including administrative tasks resulting from the fact that there were more

students than ought to have been present. Finally, it is based upon the fact that the violation of the agreement, while real and not insignificant, ended shortly after the grievance was filed and was not motivated by malice or bad faith on the part of the employer. (*Board of School Trustees, School District No. 36 (Surrey)* [1995] B.C.C.A.A.A. No. 534 (Laing) (QL), ¶ 105 - 110)

[48] Meanwhile, in Mission school district, the union and employer were unable to resolve the matter. At the subsequent hearing, the employer maintained its position there was no proof of damages:

On the issue of compensation, counsel for the Employer repeated his earlier submission that, in the absence of any proven financial loss, compensation was inappropriate. He argued that an award of compensation would be purely speculative, given that the evidence in these proceedings failed to demonstrate that a violation of class composition resulted in any special burden being imposed on the teachers involved and given that the Union had led no evidence that any teacher's program had to be modified as a consequence of the class composition violations. (*Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 4)

Arbitrator Fraser disagreed: "In my view, the weight of the evidence and the circumstances here support a finding that the 'fact of loss is reasonably apparent' in circumstances where the violation of the composition of classes would, on balance, result in an increased work load to the teachers involved" (¶ 9). He observed "As a matter of pure logic, the presence in the classroom of students having special needs forecasts special consideration, work and effort by the responsible teacher" (¶ 10).

In summary, it is against both the weight and implications of the evidence in these proceedings and against logic to assert that violations in class composition do not result in more work for the teachers involved. The provisions of the Collective Agreement which I have interpreted in the Award were quite obviously negotiated to put a limit on the work load of the teacher. (*Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 15)

[49] He considered the impact of the "work now – grieve later" principle and the employer's behaviour in fashioning a compensatory remedy.

Of course, my remedial authority found in the Statute can only properly be exercised where, as here, the arbitrator has concluded that compensation is appropriate because the prospect of loss was reasonably foreseeable and the fact of loss is reasonably apparent. The fact that the teachers continued to work means that mitigation is not an issue in these proceedings.

The remaining issue to be discussed is the extent to which the conduct of the Employer should influence the measure of compensation awarded. At page 54 of the Award in these proceedings I accepted Mr. Harris' submission that damages should be awarded purely on a compensatory basis and not for any

punitive or exemplary reason. As a review of other cases submitted by counsel I will reveal later in this Award, it appears that the conduct of an Employer has been taken into account by an Arbitration Board as a factor in ameliorating an award of compensation against it (see *School District #62 (Sooke) -and- Sooke Teachers' Association*, (*supra*) and *Board of School Trustees of School District No. 36 (Surrey) and the Surrey Teachers' Association of the British Columbia Teachers' Federation*, Unreported, June 15, 1995 (Heather J. Laing). I proceed to assess compensation on the basis that, while the conduct of an employer has on some of the authorities resulted in an amelioration of the compensation awarded against it, an employer's conduct should not (absent a claim for exemplary or punitive damages) be taken into account as a reason for increasing the compensation that would otherwise be ordered. (*Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 18 - 19)

[50] After reviewing Arbitrator' Laing's decision, he concluded:

The facts in the Surrey case were different than the evidence has established here. While the Surrey decision dealt with class size and not class composition, both parties were prepared to concede that a class size violation imposes additional work load responsibilities on the teachers involved. In the Surrey decision, the arbitrator considered a remedy which would take into account the number of students over the applicable class size limits. From my reading of the award, it appears that the only reason the arbitrator did not choose such a formula was because the class enrolment records in that case were entirely unreliable. In this case, the records were comprehensive and, I find, reliable.

In my view, compensation should be awarded in this case on the basis of a formula that reflects not only the extent and duration of the Collective Agreement violations, but also the fact that because the composition violations varied, individual teachers were dealing with different numbers of students and, therefore, different work loads.

In light of all of the evidence and after giving the matter the best consideration I can, I have determined that appropriate compensation for elementary school teachers is that each affected teacher should receive one day's pay for every student in excess of class composition limits for every month, or part thereof, of violation in the 1994/95 school year commencing at the start of the 1994 school year. All affected secondary school teachers will receive compensation on the same basis, pro-rated to the number of blocks in violation.

An exception will be made with respect to Stu Davis, whose band class was in violation. The numbers of students involved and the particular circumstances make the above composition formula inappropriate. A fair measure of compensation for Mr. Davis is that he receive a total of two days pay for every month, or part thereof, that his class was in violation in the 1994/95 school year, beginning at the start of the 1994 school year.

Counsel for the Union has asked for an award of interest. I agree that this is an appropriate case for interest to be awarded and I order that interest in the amount of 5% be paid on the amount due to each of the affected teachers.

The Union is entitled to an Order for compliance. I will retain jurisdiction to make such an Order if it becomes necessary that an Order ultimately be made. (*Board*

*of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 35 - 40)

[51] The remedy for contravention of class size and composition provisions of the collective agreement was the issue at expedited arbitration in the New Westminster school district at the commencement of the 1995-96 school year. The union sought an order, based on a formula related to the number and duration of oversized classes, that the employer was to employ additional teachers for the balance of the school year. The employer agreed there should be an order for additional staffing to a level that would place it in compliance with the collective agreement.

[52] After reviewing the decision in *Tahsis Company Limited* [1982] 3 W.L.A.C. 393 (Bird), Arbitrator Germaine adopted the following statement by Arbitrator Bird:

If I do not award damages in this case, I might as well erase the written promise made that the company would manage its affairs so that contract fallers would not work while company fallers are on layoff. I make an award of damages with the purpose of encouraging the company to be diligent in keeping the promise concerning contract fallers, as well as compensate the fallers for a breach of the company's obligation to them. If it can be seen that a company promise need not be kept, then the confidence of the members of the bargaining unit in their collective agreement as a means of securing their rights will be seriously undermined. If this happens, then there will be a tendency to resort to self-help (such as wild-cat strikes) to resolve grievances. As a matter of labour relations policy, I disregard common law rules and award \$500.00 damages. (p. 409)

Arbitrator Germaine summarized his approach as follows:

In summary, it is my obligation to fashion a remedy for the Employer's violations of the class size and composition limits. The remedy must be an appropriate response to the breach. It must not be punitive but, for the reasons identified by the Labour Relations Board in *Government of British Columbia, supra*, and by arbitrator Bird in *Tahsis, supra*, such a remedy is not punitive simply because the Union is unable to prove any monetary loss. The context and policy imperatives of labour relations may require some remedy, possibly even a monetary remedy, in circumstances which do not include monetary loss. As this case illustrates, the process of labour arbitration will fail its purpose if no remedy is granted. (*Board of School Trustees, School District No. 40 (New Westminster)* [1995] B.C.C.A.A.A. No. 628 (Germaine) (QL), ¶ 51)

[53] The union and employer did not cite any earlier arbitration decisions ordering a remedy for contravention of class size and composition provisions of a collective agreement (¶ 52). They did introduce a settlement in the Vancouver school district that contemplated employing additional non-enrolling staff. Arbitrator Germaine concluded:

The issue is therefore reduced to one of quantification. At one extreme, it is not sufficient to direct the Employer to employ more staff in order to achieve the minimum compliance staffing level. For the reasons I have already expressed, such a direction would not provide any remedy for the violations. At the other extreme, a remedy which imposes substantial financial costs could easily become punitive. It would be irresponsible to impose undue financial burdens in the contemporary climate of level or diminishing funding for education. At what point, then, does additional staffing cease to be remedial and become punitive? In this respect the Vancouver School District #39 settlement affords no assistance. The terms of the settlement do not indicate what portion of the 38 new staff would be hired for purposes of compliance, and what portion for remedy.

I have already described the formula by which the Union calculates that the appropriate remedy would be an order directing the employment of an additional 2.25 FTE teaching staff. The Employer says that request is unreasonable, and unsupported by any evidence of an adverse impact on individual teachers. Thus, for example, there is no evidence of the effect of the violations on teacher preparations for the classes involved, and no evidence of disciplinary or other problems resulting from the violations. The Employer offers a very different formula for calculating the amount of additional teaching staff which should be employed. The total number of students by which the Employer's violations exceeded the applicable limits, the Employer says, is approximately 32. Since almost all of the violations did not last the entire quarter, the cumulative effect of the violations was nearly enough to comprise a separate class for one quarter. The Employer's submission is therefore that one additional FTE in the second quarter would be more than sufficient to provide an appropriate remedy. Of course, as I have said, the Employer submits this should be in addition to the first quarter staffing level.

I have already rejected the Employer's ultimate position, but I find certain of its arguments concerning the scope of the appropriate remedy to be persuasive. It was accepted at the hearing that the average cost to the Employer of one teacher for one school year is approximately \$65,000. As I understand it, the cost of an FTE may be less if it is made up of on-call or other forms of appointments instead of a full-time regular teacher. But the figure gives the Union's request some meaning. The cost to the Employer of 2.25 FTE staff over the remainder of the school year would be well in excess of \$100,000. The remedy must be sufficient, as arbitrator Bird said in the *Tahsis* award, to encourage the Employer to be diligent in performing its obligations. But a financial burden of that order represents an unnecessarily large cost to the Employer; it would almost certainly be regarded as punitive.

I accept the Union's submission that the \$5,760 offered by Employer in the form of professional development funding is not sufficient to adequately remedy the violations. It would not be, to borrow again from arbitrator Bird's analysis, an adequate incentive for the Employer to be diligent about observing the class size and composition limits.

In the end, the judgment of what amount of additional staffing is remedial but not punitive becomes a determination limited only by wide parameters. Having regard to the extent of the violations, and the costs involved to the Employer, I have concluded that the Employer should employ an additional FTE for the remaining three quarters of the school year. To be clear, that is .75 FTE for a full

year. For the elimination of any doubt, I repeat that this is in addition to the staffing level necessary to comply with the class size and composition limits prescribed by Article D1 of the collective agreement. The additional staff may be allocated between the remaining quarters in the manner the Employer considers most effective.

The Employer did not contest the Union's further request for an order directing compliance with the collective agreement for the balance of the school year. The Union cited *Polax Tailoring Ltd.* (1972), 24 L.A.C. 201 (Arthurs) in this respect. I am persuaded that the order should be granted.

#### Summary

First, I dismiss the Employers preliminary objection. The Union was entitled to apply for expedited arbitration under Section 104 of the Labour Relations Code despite the collective agreement provisions for expedited arbitration of class size disputes. Second, I find that the Employer's violations of the class size and composition limits in the collective agreement commenced on Monday, September 18, 1995, the first day of the third week of the school year. Third, I direct the Employer to comply with the class size and composition limits in Article D1 of the collective agreement for the balance of the school year. Fourth, in addition, as a remedy for the violations in the first quarter of the school year, I direct the Employer to increase its staffing in the second to fourth quarters to a level which is .75 FTE above the level necessary to comply with the provisions of the collective agreement. (*Board of School Trustees, School District No. 40 (New Westminster)* [1995] B.C.C.A.A.A. No. 628 (Germaine) (QL), ¶ 55 - 61)

[54] Some collective agreements contained enforceable agreements that required the employer to provide additional school staff when certain class size limits were exceeded (E.g., *Board of School Trustees, School District No. 61 (Greater Victoria)* [1996] B.C.C.A.A.A. No. 257 (Bruce) (QL)).

[55] In the 1997-98 school year, I found an employer organized combined all day Kindergarten and Grade 1 classes contrary to the agreed class size limit. The union did not want to upset the classes in the current school year. It sought compliance in future school years and employer assignment of additional or supernumerary teachers in the next school year.

The union seeks a compensatory remedy which addresses the effect of the collective agreement violation on the working life of the affected teachers, the quality of education for the affected students and the representative role of the union. It proposes that additional teachers be employed throughout the next school year. Their school assignment and grade level would be determined in a manner which reflects the distribution table above.

The FTEs could be enrolling teachers or increases in Learning Assistance, Reading Recovery or other non-enrolling teachers. The students would benefit from the additional instruction and resources. The affected teachers would generally benefit because most will return to their current assignments. The union would benefit from the increase in employment for teachers. School staff

committees would be involved in allocation determination within a school. The Administrative Officers would have the final decision making responsibility.

The union submits that this remedy is not punitive, but responsive to the breach of the collective agreement. It incorporates the collective agreement's admonition to arbitrators that: "In any arbitration convened to consider a class size grievance the arbitrator shall consider the impact of any decision on the quality of education for students in the class and school" (Art. 9.D.2). (*Board of School Trustees, School District No. 39 (Vancouver)* [1998] B.C.C.A.A.A. No. 88 (Dorsey) (QL), ¶ 9 - 11)

The employer advocated a different approach:

Any remedy, it submits, has to be directed to the working conditions of the teachers and not the quality of education of the students. While the teachers and union have a professional interest in quality of education issues, the collective bargaining process and collective agreement are directed to working conditions. It is the employer who has the statutory and common law responsibility for the quality of education.

The employer submits that an arbitrator's remedial authority does not extend to making decisions about the quality of education. Article 9.D.2 is an admonition not to adversely affect the quality of education. It is not a license to do what the arbitrator thinks may enhance the quality of education.

The employer proposes that the appropriate remedy is compensation for the individual teachers whose workload was increased as a consequence of the contravention of the collective agreement.

In assessing the quantum of compensation that should be paid to affected teachers, the factors to be considered are: the contravention relates to class composition not size; the total class size numbers were not exceeded; the practice was long-standing and not clearly onerous or professionally unacceptable for the teachers; and there was a delay in filing and pursuing this grievance which prejudiced the employer.

The proposed maximum compensation should be an amount equivalent to one day's pay for each month for each teacher in a class whose size requirement was contravened. There should be payment rather than time off in lieu to avoid class disruption. (*Board of School Trustees, School District No. 39 (Vancouver)* [1998] B.C.C.A.A.A. No. 88 (Dorsey) (QL), ¶ 13 - 17)

[56] I found there was no delay by the union in pursuing the grievance. The remedy and rationale was as follows:

I have decided that this is not an appropriate case to fashion an order in the nature sought by the union. In making this decision, I am not deciding that such a remedy is speculative, remote, punitive or exemplary. Nor am I deciding that making the remedial order requested by the union is beyond my jurisdiction or inappropriate. Nor am I deciding that class size limitations do not have an intended educational benefit for students by seeking to attain a certain quality of instruction and educational experience for each student.

While there is a harmony and honour to the remedy and rationale proposed by the union, I do not have the factual basis on which I can conclude with a reasonable degree of certainty that the students in the improperly composed

classes suffered a loss and, if they did, the extent of the loss. This is not to deny the general proposition that there is an empirical and principled correlation between class size and the quality of education. Nor is it to deny that there is a sound foundation for elementary school policy in support of any particular class size.

Rather, assuming the predictable caring and professional behaviour of teachers, it is equally probable, in the absence of facts to the contrary, that individual, affected teachers have made extra commitments and devoted more time to their duties which did, or sought to, maintain the quality of education for their students.

On this assumption, the loss is a loss to the teachers and not to the students. In the absence of evidence to the contrary, I have concluded that the presumption should be in favour of the teachers' loss being more demonstrable and, therefore, the appropriate focus for the remedy in this case.

In making this decision, I have considered the impact of my decision under Article 9.D.2. For the most part I have been relieved of the most difficult decision under this article because the union has not insisted on immediate compliance and because there will be compliance with the class size limits in the next school year.

If this were a situation where a staffing alteration were to be made during the school year, prospective supernumerary staffing may be appropriate to compensate for past losses as was ordered in *Board of School Trustees of School District No. 40 (New Westminster)*, unreported, November 30, 1995 (Germaine).

On the evidence before me, the fact of a loss for the individual teachers is reasonably apparent for the period from the date of required compliance under Article 9.D.14 to the end of the 1997-98 school year. They have been assigned and will continue to be assigned a teaching workload, with its associated parent related duties and administrative responsibilities, which is beyond the agreed workload limits for which the teachers receive the agreed salary.

These teachers have suffered a loss for which monetary compensation is a permissible remedy under section 89(a) of the *Labour Relations Code*. As a matter of administrative convenience, the employer proposes a single measure or formula to be applied to all situations. A single formula will produce varying amounts of compensation depending upon an individual teacher's position on the salary scale. Similarly, the compensation amounts will have differing relationships to the extent of the contraventions depending upon the number of students enrolled in the classes. As rough as this may be made to appear, a single formula is an acceptable approach when other variables are not being assessed with exactitude.

What is an appropriate measure of compensation? One day's pay for every student in excess of limits for every month for each teacher was the measure in *Board of School Trustees of School District No. 75 (Mission)*, unreported, January 17, 1996 (Fraser). It was one hour for each week in *The Board of School Trustees of School District No. 36 (Surrey)*, [1995] B.C.C.A.A. No. 534, June 15, 1995 (Laing). And in *Board of School Trustees of School District No. 62 (Sooke)*, unreported, January 23, 1995 (McPhillips) the order was for "time off or compensation in lieu thereof in the amount of one-third (1/3) of a day for each four weeks or part thereof" (p. 43).

As disclosed in the distribution table above, the range of one-half day overage per class is from four to thirteen students. As a matter of equity and for the teachers who are to benefit from the remedy, I find that I should order a measure of compensation which reflects the loss to those slightly above the average of 7.6 students. In doing so, I have considered the question of awarding interest to be paid on the compensation and, as matter of administrative convenience, have decided not to order a separate amount for interest.

I have determined that a fair and appropriate measure of compensation is that each affected teacher receive two day's pay for each month. Portions of months are to [be] prorated on the basis of school days, including non-instructional days, in the month. (*Board of School Trustees, School District No. 39 (Vancouver)* [1998] B.C.C.A.A.A. No. 88 (Dorsey) (QL), ¶ 24 - 34)

[57] In the 1999-00 school year, there was a dispute in secondary schools over the interpretation and application of a mediated settlement of several class size and composition grievances in the previous school year. The settlement provided that an arbitrator's jurisdiction would include "the power to order additional staff and/or compensation as appropriate" (*Board of School Trustees, School District No. 39 (Vancouver)* [1999] B.C.C.A.A.A. No. 467 (Jackson) (QL), ¶ 12). After reviewing remedial principles and Arbitrator Germaine's decision, Arbitrator Jackson concluded:

In awarding compensation where class size or composition violations have been acknowledged or determined, I have considered the reasoning of arbitrator Fraser in *School District No. 75 (Mission), supra*. He applied a formula that reflected the extent and duration of the violation and the differing numbers of students and corresponding workloads for each teacher. When arbitrator Fraser's reasoning is applied to a secondary school situation, it amounts to one day's pay to each affected teacher for every student in excess of class size or composition limits for the school year. However, the parties in the case before me have in previous settlements agreed upon a remedy that is based on the same sort of formula as arbitrator Fraser's but provides two days for every student, one for the teacher and one for the school in the form of an additional teacher for a day. While the parties are not - nor am I - bound by that approach, in my view such a remedy is the more reasonable and appropriate one in all the circumstances of this case. Finally, there are some alleged breaches of the SNMOA [Special Needs Memorandum of Agreement] that are related to class size or composition issues but do not involve excess students. Where such violations are found to have occurred, I have applied a similar remedy with whatever modifications seem appropriate to the particular violation and surrounding circumstances. (*Board of School Trustees, School District No. 39 (Vancouver)* [1999] B.C.C.A.A.A. No. 467 (Jackson) (QL), ¶ 16)

[58] Class size and composition issues became more complex with the interaction of locally negotiated class size provisions and the Memorandum of Agreement K - 3 Primary Class Size (K-3 Memorandum) that was part of the second provincial collective agreement legislated by the *Public Education Collective Agreement Act*, S.B.C. 1998, c.

41. (See the reviews in *British Columbia Public School Employers Association* [2000] B.C.C.A.A.A. No. 43 (Dorsey) (QL) and *Board of School Trustees, School District No. 68 (Nanaimo-Ladysmith)* [2000] B.C.C.A.A.A. No. 175 (Dorsey) (QL))

#### **4. School Act Public Policy, Funding and Accountabilities**

[59] This is the first instance of fashioning a remedy at grievance-arbitration since *School Act* amendments deleted class size and composition provisions from the collective agreement; made class size and composition an impermissible subject of collective bargaining; and enacted class size and composition standards as public policy in the *School Act*.

[60] Grievance-arbitration remedies for contraventions of legislated public policy standards for class size and composition and district aggregate class size averages must now reflect the goals and character of legislated public policy and not simply mimic remedies when limits, guidelines and exceptions were negotiated or legislated into collective agreements.

[61] Elected local boards of education must govern within the mandates, funding and structures of the *School Act*, which assigns specific rights and responsibilities to parents, students, teachers, teachers' assistants, vice-principals, principals, directors of instruction, superintendents, secretary treasurers, school medical officers, school planning councils, parents' advisory councils, district parents' advisory councils, trustees, boards of education, the Ministry of Education and others with an interest and role in public education. Boards of education and those they employ are subject to the governance and accountability requirements of the *Act*.

[62] From time to time, the Legislative Assembly, Lieutenant-Governor in Council and Minister of Education refines the mandate and limits or enlarges the discretion and autonomy of local boards of education through amendments to the *School Act* and its subordinate regulations and orders. When section 27(3) of the *School Act* was amended in 2002 in the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c. 3, s. 12 by adding sub-clauses (d) to (j) and excluding school organization, class size and composition and student and non-enrolling teacher ratios from collective bargaining, teachers and their union lost some of their voice and role in working and learning

conditions and the autonomy and discretion of local boards of education was enlarged. Section 27(3) states:

- (3) There must not be included in a teachers' collective agreement any provision
  - (a) regulating the selection and appointment of teachers under this Act, the courses of study, the program of studies or the professional methods and techniques employed by a teacher,
  - (b) restricting or regulating the assignment by a board of teaching duties to principals, vice principals or directors of instruction,
  - (c) limiting a board's power to employ persons other than teachers to assist teachers in the carrying out of their responsibilities under this Act,
  - (d) restricting or regulating a board's power to establish class size and class composition,
  - (e) establishing or imposing class size limits, requirements respecting average class sizes, or methods for determining class size limits or average class sizes,
  - (f) restricting or regulating a board's power to assign a student to a class, course or program,
  - (g) restricting or regulating a board's power to determine staffing levels or ratios or the number of teachers or other staff employed by the board,
  - (h) establishing minimum numbers of teachers or other staff,
  - (i) restricting or regulating a board's power to determine the number of students assigned to a teacher, or
  - (j) establishing maximum or minimum case loads, staffing loads or teaching loads.

[63] At the same time, by placing class size and composition standards for Kindergarten to Grade 12 beyond the scope of collective bargaining, the Legislative Assembly was denying board of education employers and the union the flexibility to negotiate trade-offs between workload and compensation as had been done in past collective bargaining. One example was the collective agreement legislated in 1998 by the *Public Education Collective Agreement Act* SBC 1998, c. 41, which provided the first uniform provincial maximum class sizes and no salary increase.

[64] In introducing this legislation, the Minister's theme was it gave boards of education flexibility that they had relinquished or lost through collective bargaining and legislatively imposed collective agreements. With increased flexibility for boards of education local autonomy and discretion was supplanted, in part, by standardized and centralized provincial public policy. On first reading, the Minister stated, in part:

Education is the cornerstone of our society, and this bill continues in our commitment, this government's commitment, to put students first. This bill puts

class size into the School Act so that it is clear that it is a matter of provincial public policy. This bill protects special needs students by returning decision-making to teachers, parents and local districts.

This bill returns flexibility to local districts by removing fixed and rigid ratios for non-enrolling teachers, such as counsellors and librarians. (*Hansard*, 37<sup>th</sup> Parliament, Volume 2, Number 28, January 25, 2002, p. 864)

[65] As a matter of provincial public policy, this legislation was to advance the public agenda toward achieving the first of the later articulated five great goals for the next decade – “to make B.C. the best-educated and most literate jurisdiction on the continent” (*Hansard*, 38<sup>th</sup> Parliament, Volume 1, Number 2, September 12, 2005, p. 4).

[66] The current class size and composition standards provide no flexibility in the form of a “flex” factor to exceed the maxima of 22 students per class for Kindergarten and 24 students per class for Grades 1 to 3. The three students lower mandatory maximum school district averages of 19 students per class for Kindergarten and 21 for Grades 1 to 3 require that some classes in the school district have fewer students if any classes have the maxima.

[67] Similarly, in Grades 4 to 7 the mandatory maximum school district average of 28 students per class with an individual class maximum of 30 students requires that some classes in the school district have fewer than 28 students if any classes have the maximum. There is limited local flexibility to exceed the maximum if the teacher of the class consents to have more than 30 students in his or her class.

[68] The most operational flexibility on class size is in Grades 8 to 12 where principal-teacher consultation and dual principal and superintendent opinions can result in classes with more than 30 students. The experience is that the mandatory maximum school district average of 30 students per class for these grades is easily attainable because of the nature of the curriculum in Grades 8 to 12.

[69] Where the *School Act* has not allowed maxima class sizes to be exceeded or district averages to be exceeded, boards of education have had to reorganize classes in September, as happened in the 2007-08 school year at three schools in School District No. 5 (Southeast Kootenay), or exceed the mandatory district average without a consequence under the *School Act*, as happened in two school years in the companion decision to this decision.

[70] The *School Act* does not provide any circumstance allowing the maxima or aggregate district class size averages to be exceeded, as was negotiated in some district collective agreements, when external financial constraints beyond the board of education's control make it impossible to maintain the standards. In situations of financial constraint, boards of education will have to consider reassignment of resources from capital reserves, maintenance, transportation, facilities, administration, support staff and non-enrolling teacher ratios to achieve class size and composition standards and use the flexibility available to them to squeeze resources from class organization in Grades 4 to 12. Boards of education will not be able to resolve the problem locally in negotiation with the union. There will be resulting pressure to maximize class size wherever possible, while remaining at or below mandatory district averages, regardless whether the result is more classes having more than three students entitled to an individual education plan or more classes with more than thirty students. This reality explains, in part, the proportion of classes in these grades included in these grievances.

[71] The formula for presumptive arbitral deference to a principal's opinion that Grades 4 to 12 class are appropriate for student learning supports the exercise of discretion and flexibility at these grade levels. However, it does not contemplate that a plea of underfunding by the provincial government will be a factor in assessing the appropriateness for student learning of a class whose composition does not meet the formula for presumptive deference.

[72] When the Legislative Assembly took away the autonomy of local boards of education and their teachers through collective bargaining to negotiate class size and composition standards, district averages and circumstances when they may be exceeded, it necessarily committed to fund each board of education in a manner and to an extent that will enable each board with its unique topography and student demographic to fulfill its legislated responsibility and duty to ensure it meets every class size and composition standard in the public policy enacted in the *School Act* and to play its role in working to achieve the provincial government's first great goal.

[73] If boards of education are not funded to enable them to fulfill their legislated responsibility and duty, then the funding provincial government must be accountable or

the Legislative Assembly must expressly enact relief from the class size and composition standards and explain to parents and teachers why the standards are no longer desirable or achievable. It is not to be left to arbitrators to diminish remedies for individual teachers or increase deference to the opinions of principals and superintendents because underfunding places boards of education in positions where they must stretch their opinions of what is appropriate for student learning to meet class size and composition standards with inadequate funding.

[74] Similarly, recognizing that class size maxima and mandatory district averages are public policy and not privately negotiable, the legislated class size and composition standards cannot be compromised by boards of education and the union to achieve settlements in local grievance procedures or expedited class size and composition dispute resolution processes. Only when expressly permitted can teachers, their union and board of education employers consent or agree to exceed the standards.

[75] Presuming that this public policy regime of class size and composition standards and processes has been constitutional enacted, an arbitrator's role is to provide expeditious, final private dispute resolution under the collective agreement and, in doing so, to further the public policies of the both the *Labour Relations Code* and the *School Act*.

[76] This is a role distinct from the remedial oversight provisions of the *School Act* that enable the Minister to address systemic failure in a school district through the appointment of a special administrator (ss. 76.5 - 76.7). To date, none has been appointed and none is likely to be appointed to remedy a failure to organize a single class or scattered classes across one or several school districts. The accessible remedial avenue for a teacher is through grievance-arbitration in which the teacher's individual circumstance and class can be addressed in a local dispute resolution process or at arbitration with the rights and protections for access to a fair hearing for all parties.

## **5. Employer Submissions on Prejudice and Case of First Instance**

[77] The employer "relies on prejudice to defeat any remedy other than the granting of a Declaration" for all classes in the five representative schools for which the grievance

was allowed. The employer submits it “has been fundamentally prejudiced by the failures of the Union in the processing of the disputes for the 2006-2007 and the 2007-2008 school years” (*Outline of Argument of the Employer*, ¶ 4). Further, the employer submits a declaration is an appropriate remedy in this case of first instance.

[78] Prejudice to the employer was a consideration in limiting the scope of the union’s November 6, 2002 grievance that class sizes and averages exceeded those permitted by the *School Act*. It listed fifteen school districts with “minimal particulars as to the alleged violations” (*British Columbia Public School Employers’ Association* [2005] B.C.C.A.A.A. No. 223 (Burke) (QL), ¶ 8). The employer requested further particulars. The union removed two school districts from the list, but did not provide further particulars. The employer repeated its request for particulars throughout 2003.

[79] Arbitrator Munroe upheld the employer’s objection to an arbitrator’s jurisdiction to hear the grievance in January 2004 (*British Columbia Public School Employers’ Association* [2004] B.C.C.A.A.A. No. 8 (QL) (Munroe); (2004), 124 L.A.C. (4<sup>th</sup>) 97). The Court of Appeal reviewed and reversed his decision in February 2005 (*British Columbia Teachers’ Federation v. British Columbia Public School Employers’ Association* [2005] BCCA 92; [2005] B.C.J. No. 289(QL), ¶ 21; 136 L.A.C. (4<sup>th</sup>) 225).

[80] In March 2005, the union’s position was that the November 2002 grievance was a continuing one that encompassed the subsequent two school years. The list of school districts included in the grievance was reduced to nine for the 2002-03 school year. The employer continued to request particulars. In May 2005, the union provided particulars for the 2002-03 school year with particulars for the 2003-04 and 2004-05 school years to follow.

The Employer says the schedule to the Union’s letter reveals amongst other things, 13 new districts added to the schedule in respect of which the Employer had no prior notification; additional violations in some of the school districts identified earlier; in one district the nature of the violations are fundamentally changed and only two are described in any similar fashion to the initial November 6 schedule.

On May 24, 2005, the Employer responded advising the grievance related only to the 2002/2003 school year and subsequent school years were not within its scope. On June 20, 2005 the Employer points out the Union submitted a schedule alleging violations in 16 school districts for the 2003/2004 school year, including 34 separate classrooms as well as three separate averaging complaints

and two for school year 2004/2005, 18 different school districts, including 43 separate classrooms and two further averaging complaints.

As a result, the Employer filed this application seeking a preliminary ruling that the scope of the grievance is confined to the nine districts remaining from the Schedule submitted with the November 6, 2002 grievance. It maintains additional districts, classes or complaints identified for the 2002/2003 school year on May 20, 2005 and the alleged violations identified in the letter of June 20, 2005 are beyond the scope of this grievance. (*British Columbia Public School Employers' Association* [2005] B.C.C.A.A.A. No. 223 (Burke) (QL), ¶ 18 - 20)

The union argued any prejudice from an inability to resolve disputes in the grievance procedure was a consequence of the employer's erroneous objection to jurisdiction that delayed proceedings for two school years. (¶ 37)

[81] Arbitrator Burke agreed with the employer:

At the time the Union filed its grievance, it alleged that identified classrooms in originally 15, now 9 specific school districts had more students in those classrooms in the 2002/2003 school year than was permitted by legislation. The Employer says those allegations are discrete allegations relating to the circumstances prevailing in those particular classrooms with those particular school boards in that school year. I agree with the Employer on this point. While as it says the grievance might be considered to be continuing throughout the year, it does so only as long as those circumstances continue to exist. Once the school year ends those matters come to an end. The Union's complaint that there are subsequent violations in different classes in different schools in subsequent years cannot be considered to be a "continuing" complaint resulting from class sizes in the 2002/2003 school year. (*British Columbia Public School Employers' Association* [2005] B.C.C.A.A.A. No. 223 (Burke) (QL), ¶ 45)

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In my view, the scope of the grievance is confined to the original matters raised in the November 2002 Schedule. Although the Union maintains it retained its right to add violations that came to light, the most that could be considered to be part of that grievance would be those that involved that school year. I am of the view that once that school year ended, any matters that arose involving class size and limits would be a new matter to be dealt with separately in another grievance. These matters are not differences in degree, but are differences in kind and change the character of the grievance. They support an independent breach of the collective agreement and would provide an entirely separate basis for relief. While the Union's argument may have an initial attraction in that the principles to be applied may be similar, that argument could be applied broadly in many cases and encompass numerous violations that invoke the same principles but involve different facts. As a result, the Union's argument does not persuasively lead to the conclusion those alleged facts arising in different school years are covered by the scope of the same matter. The allegations here involve different classes in different school districts in different years leading to a difference in kind which would support a separate basis for relief.

Moreover, I am cognizant of the significant prejudice the Employer would be subjected to in this instance should the grievance be expanded to include the

new allegations. One of the fundamental concerns in labour relations is that matters be raised and dealt with in the grievance process. That opportunity would be denied to the Employer in this instance. While the Union maintains that is an empty argument as the Employer would no doubt deny that it breached the legislation, speculation on the Employer's reply is not sufficient to eliminate the concern this argument raises. I note at the commencement of the matter, the Union indicated it would update the Schedule and turn the matter over to counsel. There was, however, no update to the Schedule until the spring of 2005. The Employer could therefore reasonably believe the scope of the grievance was accordingly delineated.

Further, significant prejudice may arise due to difficulties locating documents and witnesses to earlier events that are only now identified in 2005. While the Union argues it maintained its right to add other identified violations, that cannot be considered an open ended right. This is particularly so where the Employer has consistently been requesting particulars of the alleged violations throughout this time. A party is generally entitled to be advised of alleged violations in a timely way. The existence of an objection to jurisdiction, even though ultimately unsuccessful, does not eliminate this obligation. Accordingly, I find the expansion of the matter to encompass two more school years and 13 school districts in 2002/2003, would create significant prejudice. In my view this can not be alleviated by an adjournment and fundamentally changes the character of the grievance.

In view of all the above, the matter is confined to those violations remaining from the November 6, 2002 Schedule submitted with the original grievance and matters previously raised between the parties arising from that Schedule. (*British Columbia Public School Employers' Association* [2005] B.C.C.A.A.A. No. 223 (Burke) (QL), ¶ 50 - 53)

[82] In the 2006-07 school year, grievances were filed locally with boards of education from November 26, 2006 to February 15, 2007 (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 222). They were aggregated and referred to BCPSEA as a grievance of general application on April 13, 2007. The five objections for dismissal of this grievance were dismissed. There was no local sense of urgency and in several school districts some or all differences were resolved. I concluded:

It is artificial to treat the April 13, 2007 grievance from the BCTF as a bolt out of the blue and not view it in the entire context of the bargaining structure and history of disputes over class size provisions. The interpretation, application, operation and alleged violation of the class size provisions were destined for arbitration. There was no surprise for the employer after the several grievances and grievance discussions at the boards of education.

Prompt resolution of grievances has a high value in amicable labour-relations and delay can corrode morale and discredit the mandatory alternate dispute resolution process intended to discourage work stoppage. In this workplace context, delay may discourage consent and corrode consultation under the *School Act* in the current and future school years.

In all of the circumstances, I find that there was not prejudice by denying the employer the benefit of the grievance procedure. It was fully accessible and to varying degrees utilized in local relationships by the boards of education represented by BCPSEA and local unions where, in some cases, specific situations were examined in great particularity. BCPSEA demonstrated no urgency to convene a Step Three meeting.

Granting relief will not prejudice the employer, which will have access to particulars to be provided in this arbitration process and the legislated class organization reports with their rationale for class organization and supporting documentation.

I therefore grant relief under section 89(e) of the *Labour Relations Code* and exercise my agreed jurisdiction under Article A.6.8.d.i of the collective agreement to waive the time requirement for the referral of this general application grievance to Step Three of the grievance procedure. This is not an appropriate case to deny access to arbitration by exercise of the jurisdiction under section 89(f) of the *Labour Relations Code*. This preliminary objection is dismissed. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 225 - 229)

[83] After reviewing Arbitrator Burke's decision on the November 2002 grievance, I concluded:

I find the employer is incorrectly seeking to characterize a difference in degree, on which the union gave notice in the initial grievance and provided additional information in the subsequent settlement discussions, as a difference in kind in order to restrict the grievance to the letter of the initial grievance. Including the additional allegations of violations of class size provisions in the 2006-07 school year in all the school districts identified is not an expansion of the scope or character of the grievance. To find otherwise and restrict the union to the letter of the grievance would not be fulfilling the statutory mandate of grievance arbitration. This preliminary objection is dismissed. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 257)

[84] On the matter of timely disclosure of particulars, I concluded:

This employer objection that it has not been provided with adequate information to investigate and mitigate any violations of the class size provisions permeates each of the previous objections. At times, it presents from the perspective of an employer representative keen to productively use the grievance procedure to resolve and remedy grievances and at other times as the perspective of someone who has to prepare to litigate a case.

Grievance procedures are intended to identify and resolve or clarify issues. Some collective agreements provide for consequences if the steps are not followed in a timely manner or parties are uncooperative and refuse to meet. This collective agreement does not. There is no arbitral principle that the behaviour of a party during the grievance procedure, including not being sufficiently forthcoming, will result in a grievance being either forfeited or allowed.

The absence of standards of disclosure during the grievance procedure and the fact that some parties, through inadvertence, disorganization, miscommunication

or design, fail to make reasonable disclosure during the grievance procedure has led to arbitrators having and exercising jurisdiction to order pre-hearing disclosure of particulars and documents to ensure a fair and efficient hearing.

If the conduct of the union or employer has aggravated a violation or impacted the ability to mitigate a violation, that is a matter that can be considered when fashioning a remedy.

Since my appointment in December 2007, there has been no application for an order for pre-hearing disclosure of particulars or documents. The merits of this grievance are scheduled to be heard commencing November 24, 2008. There is adequate time to hear and decide any application for pre-hearing disclosure of particulars and documents either the employer or union wish to make.

This preliminary objection is dismissed. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 260 - 265)

[85] The following school year, the grievance was filed with BCPSEA on November 5, 2007. As had happened with the 2002-03 school year grievance, the interchange of demand for particulars, preliminary objections and failure to provide particulars until the preliminary objections had been decided was repeated with these grievances. A hearing on the preliminary objections did not happen until the first day of the 2008-09 school year. The four objections for dismissal of the 2007-08 school year grievance were similarly dismissed. On the question of timely and adequate particulars, I concluded:

Without repeating the reasoning with respect to this objection to the 2006-07 school year grievance, the November 5, 2007 grievance stated the framework of the issues, well known to all parties by this seventh year in the operation of the legislated class size provisions. The grievance procedure was the forum in which the specifics were to be discussed and explored. There were discussions. Evidence of some or all of those discussions might be inadmissible. It cannot be presumed specific instances of allegations were not made known or discussed before the delivery of the June 13, 2008 schedule.

The employer's submissions imply there is a sense of urgency in the administration of the grievance procedure under this collective agreement, which is not reflected in the behaviour at the local level in many school districts on the local class size grievances or at the provincial level in the dealings between the union and employer on class size grievances.

Based on the limited evidence adduced in this proceeding, there is no basis to assume a class size grievance would proceed through the grievance procedure and, if not resolved, be arbitrated within the school year in which it arises.

The parties and their collective agreement are engaged in a single education sector and have intense familiarity with its annual school and class organization and all the vagaries and changes that affect that organization. The class size issue is a large one with a complex history punctuated by strategic and tactical positioning, including avoidance and delay.

It is speculative to conclude, as the employer submits, that it will suffer irremediable prejudice. The manner in which the parties will agree to, or be directed to, proceed, based on a representational examination of the issues, as they have in the past, or otherwise, has not been determined. The union and employer chose to forestall addressing that question until the employer's preliminary objections were heard and decided. The employer could have applied for an order for pre-hearing disclosure of particulars. It chose not to although the preliminary hearing was not scheduled until after the last day of the 2007-08 school year and then adjourned on the employer's application. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 277 - 281)

[86] The employer's assertion of prejudice did not prevent the arbitration from proceeding on a representative basis and, in that stage of this arbitration, three claims of prejudice by the employer were dismissed (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL), ¶ 15 - 26).

[87] Following the decision on the employer's preliminary objections, there was rigorous identification of the scope of the grievances and particulars, as recounted in the August decision. At this remedial stage, the preliminary objections have been revisited by the employer in its submissions on the impact of prejudice on remedy.

There is no doubt that the Employer has been prejudiced by the failure of the Union to identify particulars of class violations in time for those classes to be remedied during the year in which they occurred. It is critical that the Employer not only have a list of classes and teachers but also details concerning the alleged violations.

The Union must identify the reasons why a class is alleged to be in violation of the legislation. It is not sufficient to state that the class is over 30 or over 3. The legislation permits classes over 30 and over 3. Instead, the Union must explain why a class is in breach of the legislation. Was there a failure to consult? Was there a failure to provide sufficient information for the consultation? Was there a timing concern for the consultation? Was the consultation inadequate, and if so, why? Was the class organization inappropriate for student learning? If inappropriate for student learning, why was the class inappropriate for student learning? Without this explanation, the Employer is prejudiced and unable to review and make changes if deemed necessary. Only identifying the classes does not allow the Employer to investigate.

The failure to provide the opportunity for local grievance discussions adds to and compounds the prejudice. (*Outline of Argument of the Employer*, ¶ 52 - 54)

[88] The nature of proceeding with representative schools, as quoted above and repeated here, was forward looking.

The agreement on this process was predicated on an intention it would produce some clear criteria for addressing recurring differences on the same issues, establish some predictable guidelines for resolution of many differences and

avoid divergent outcomes before different arbitrators. One goal is to fashion some structured approach that provides predictability and efficiency in resolving many, if not most, differences over classes that exceed the legislated class size and composition standard. (*British Columbia Public School Employers' Association* [2009] B.C.C.A.A.A. No. 81 (Dorsey) (QL), ¶ 12)

[89] In keeping with this approach, the August 2009 decision articulated criteria for teacher participation in consultation and preconditions to efficient and timely dispute resolution (¶ 360 - 384). The employer cites these statements and the nature of the legislation to support its position it has been prejudiced, which should be reflected in any remedy.

It must be noted that the Union did not comply with the requirements set out in para 383 for any of the classes falling within the scope of the 2006-2007 and the 2007-2008 dispute. For the representative classes, the necessary information and particulars were provided for the first time at the hearing. To date, the Employer has received no particulars concerning the non-representative classes nor have any of those disputes followed the requirements set out in para 383.

The prejudice suffered by the Employer is a complete answer to any remedy, in particular monetary remedy, requested by the Union. The flaws in the processing of the disputes have fundamentally deprived the Employer from any action it could have taken with respect to the alleged violations.

The structure of the current legislation is also a significant factor to consider when assessing the prejudice argument. The legislation is not "hard numbers". A breach of the legislation occurs when the arbitrator does not give deference to the opinions of the Principal and Superintendent on "appropriate for student learning". A breach does not occur when a class organization has more than 30 students or more than 3 designated students.

Under the previous collective agreement provisions, with "hard numbers", an employer could easily identify when there was a violation. No particulars were required to put the employer on notice that the collective agreement was breached.

The legislation has no hard numbers. Violations are based on opinions and multiple factors. The scheme of the legislation makes it essential for there to be early and proper identification of the basis for alleging a class is in breach of the legislation. (*Outline of Argument of the Employer*, ¶ 61 - 65)

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The submissions in these proceedings by the Union on the monetary compensation required to satisfy the "remedy" supports the Employer's prejudice argument.

The Union is seeking exorbitant monetary compensation for classes that could have been remedied with little or no compensation had they been particularized and identified early on.

The Union is seeking compensation for events that could have been dealt with had they been identified in a timely fashion.

These are not black and white allegations such as hard numbers. Identification and explanation are essential.

In summary, the prejudice argument of the Employer is a significant argument that must be seriously considered and accepted in these proceedings as a complete answer to any request by the Union for a remedy. The providing of the necessary particulars occurred during the hearings on the representative schools and not at any time before the actual hearings. The hearings occurred several years after the classes were established and at a time when it was no longer possible to investigate, to discuss and to make changes if needed. In order to eliminate prejudice, the Union must change its approach as described earlier and it must comply with the August ruling. Until the Union complies with the August ruling, there should be no monetary remedy. (*Outline of Argument of the Employer*, ¶ 71 - 75)

[90] The employer submits it is necessary for there to be an incentive for teachers and the union to act expeditiously if there are to be monetary remedies.

[91] On the issue of consultation, in the representative schools in which the 2007-08 school year grievance was upheld, the employer submits there were no particulars and no reference to a failure to consult at Hastings Elementary School until the commencement of the hearing at the school; a failure to consult Mr. Carroll in January at Merritt Central Elementary School was not raised during the hearing at the school; a failure to consult Mr. Worthen at Qualicum Beach Middle School was first raised at the commencement of the hearing at the school; and a failure to consult Ms Hill at Thornhill Elementary School was first raised on the second day of the hearing on this school. The employer submits: "It is obvious that the Employer is prejudiced by the late filing and identification of the issues that have been found to be violations at five of the seven schools. The various School Districts had no notification that these classes were alleged by the Union to be in violation until it was too late to discuss or provide any remedy." (*Outline of Argument of the Employer*, ¶ 87 - 88)

[92] The employer submits teacher and union failure to give timely notice of disagreement and grievance of the two classes found not to be appropriate for student learning at Claremont Secondary School denied the principal the opportunity to address the teachers' concerns.

[93] The employer submits because this is a case of first instance in interpreting this legislation, a monetary remedy would be inappropriate, as was decided in *Board of School Trustees, School District No. 28 (Quesnel)*, unreported, January 14, 1995 (Taylor) and *Board of School Trustees, School District No. 32 (Hope)* [1992]

B.C.C.A.A.A. No. 61 (Hope) (QL). Remedies beyond a declaration can be considered in future cases.

The lengthy hearing and subsequent Award on the merits of 89 classes for 7 representative schools has provided considerable guidance for the parties. The interpretation of the legislation by Arbitrator Dorsey guides the parties this school year in the formulation of classes and in the review of classes to be submitted for adjudication.

The August Award resulted in the examination of a representative sample of classes. It is now necessary to end the retrospective process and to apply the principles provided in the August Award in the future.

Any monetary remedy for 2006-2007 and for 2007-2008 would be unequivocally inappropriate and contrary to fundamental principles of labour relations. (*Outline of Argument of the Employer*, ¶ 108 - 110)

[94] The employer submits this is particularly the case with failures to consult preparation relief teachers and one of two job share teachers in a class.

For each of those situations there was a different and legitimate reading of the requirements of the legislation by the Employer. The Employer's interpretation of the legislation was that no consultation was required for the three teachers. The Employer interpreted the phrase "teacher of the class" not to include preparation relief teachers and teachers who shared a class with another teacher.

Based on the interpretations contained in the August Award, preparation relief teachers are now consulted as are teachers who share a class with another teacher. (*Outline of Argument of the Employer*, ¶ 135 - 136)

## 6. Union and Employer Submissions on Remedy

[95] The union submits both a breach of the teacher's right to be consulted and a principal's failure to correctly determine a class is appropriate for student learning "must attract the same substantive remedy" (*Union's Outline of Argument Re Remedy*, ¶ 5).

[96] The union submits a failure to consult as required in the *School Act* cannot be subsequently cured and "the class size and composition limits in Bill 33 cannot be exceeded during that school year for that class" (*Union's Outline of Argument Re Remedy*, ¶ 7).

If a class is inappropriate for student learning, the school board must take immediate steps to reduce the size of the class to within the limits of Bill 33 or address the learning situation in the class room by adding teaching staff and without taking resources from other classrooms or school. Such additional support should be implemented in consultation with the classroom teacher and staff representative. (*Union's Outline of Argument Re Remedy*, ¶ 11)

[97] The union submits the information about the representative classes was known to administrators in September 2007 and compliance with the *School Act* class size and

composition standards could have been achieved. A retroactive remedy “must address the impact of the breach on the learning and teaching community of the school and on the individual teacher of the class” (*Union’s Outline of Argument Re Remedy*, ¶ 13).

The remedy must be based on five “labour relations” principles:

1. recognize the importance of appropriately organized classes;
2. recognize the importance of teacher involvement in the consultation process;
3. provide a meaningful incentive for the employer to comply in the future;
4. recognize grievance arbitration is the only forum for teachers to address class size and composition issues; and
5. provide compensation to the affected parties, including individual class teachers and the learning and teaching community of the school.

[98] The union submits contraventions of *School Act* class size and composition standards impact the teaching and learning conditions in classrooms – “the most important interest served by the public education system” (*Union’s Outline of Argument Re Remedy*, ¶ 16). The contraventions impact the quality of education for students by adversely affecting a student’s instruction and access to individual attention. They place an increased workload burden on teachers (*Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 14 - 15).

[99] The union submits having regard to the nature of the interest affected is important in assigning the value to be attributed to the interest (*Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia* [2007] S.C.J. No. 7 (QL); 2007 SCC 27; *Old Dutch Foods Ltd.* [2009] A.L.R.B.D. No. 56 (QL)). Class size and composition is important to teachers. A remedy should be substantive and reflect the importance of this significant part of the employment relationship.

[100] The union submits the role of the teacher in shaping classes appropriate for student learning and their central role through consultation must be recognized.

The consultation required under Bill 33 is an important dialogue for teachers. To suggest that a failure to meaningfully consult with a teacher is not as significant as a failure to create a class that is appropriate for student learning is to deny the role and voice of teachers within the educational setting. The failure to consult cannot be abstracted from the need to have classes that are appropriate for

student learning as a minor or merely procedural violation of Bill 33. (*Union's Outline of Argument Re Remedy*, ¶ 26)

The right of consultation is an important right that has attracted substantive remedies at arbitration (E.g., *TFL Forest Ltd. (Elk Falls Lumber Mill)* [2007] B.C.C.A.A.A. No. 145 (Dorsey) (QL); *MacMillan Bloedel Ltd. (Alberni Pacific Division)* [1983] B.C.C.A.A.A. No. 408 (Munroe) (QL)). It should continue to be redressed with substantive remedies as a statutory, rather than a collective agreement, right.

[101] The union submits, in order to provide an incentive for future employer compliance, the remedy must be more than a declaration.

An arbitrator must ensure that the remedy is more than a license for employers to continue to violate Bill 33. While the employers may not have intended to violate Bill 33 by creating classes that were inappropriate for student learning, a remedy must ensure that it does not become more economical for employers to breach Bill 33 and then pay a nominal remedy rather than comply with Bill 33 from the outset. If an employer exceeds the Bill 33 limits, the employer is saving money by not having to employ teachers. A remedy must ensure that it does not become more economical for school boards to pay damages at arbitration than hire additional staff. (*Union's Outline of Argument Re Remedy*, ¶ 31)

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An award of damages is intended to not only restore the aggrieved party to the position they were in prior to the breach, but also encourage the offending party to comply in the future. It must not be more economical for employer[s] to breach the provisions of the *School Act* and pay damages following a grievance; the damages awarded to the BCTF should fulfill both purposes of the damage award. (*Union's Outline of Argument Re Remedy*, ¶ 37)

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A meaningful incentive for employers to comply with Bill 33 in the public education sector requires that the consequences of a breach must attract a significant remedy to ensure that compliance with legislative class size provisions is given the same attention and effort as compliance with collective agreement provisions is given. (*Union's Outline of Argument Re Remedy*, ¶ 50)

(See *Burrard Yarrows Corporation, Vancouver Division* (1981), 30 L.A.C. (2d) 331 (Christie); *Eurocan Pulp and Paper Co.* [2000] B.C.C.A.A.A. No. 226 (Hope) (QL); *B.C. Rail Ltd.* [2004] B.C.C.A.A.A. No. 305 (hope) (QL); *BC Rail* [2004] B.C.C.A.A.A. No. 288 (Munroe) (QL); *Jim Pattison Sign Co.* [2006] B.C.C.A.A.A. No. 15 (Dorsey) (QL))

[102] The union submits grievance-arbitration is the only realistic forum for teachers to enforce class size and composition provisions of the *School Act*. Therefore: "In order to provide teachers with confidence in the Bill 33 system, and an assurance that school boards and principals will comply with the full spirit and requirements of Bill 33, the

Arbitrator must require a substantive remedy from the only forum in which they can pursue claims” (*Union’s Outline of Argument Re Remedy*, ¶ 42). Board of education employers must know they must keep the promises made to teachers in the class size and composition provisions of the *School Act* (See *Tahsis Company Limited* [1982] W.L.A.C. 393 (Bird)).

This is more critical when one considers the competing interests that employers must balance. Employer’s make budgetary choices according to prevalent pressures, currents that come from complying with government edicts, the desire to equitably protect the rights of children to education, the need to work within legislative restrictions, observe collective agreement provisions, and respond to parent and community concerns and pressures. These choices are made within the context of a legislative/policy framework. Each choice is necessarily defined by the nature and degree of its consequence. Perhaps this was most evident in the documents introduced in the Grievance respecting School District 82, in which the District outlined the significant competing interests and pressures in setting budgets and District priorities.

When firm class size and composition restrictions were contained in negotiated collective agreements, budgetary choices which impacted student learning by increasing the size and complexity of classes were constrained. Contractual language was adhered to and Employers had to spend the funds necessary to ensure compliance with what the parties had bargained. When class size and composition protections were stripped from collective agreements, there were fewer constraints on class sizes. Consequently class sizes rose and composition issues were exacerbated by the loss of non-enrolling teachers.

The choices that employers make now are framed within the current provincial legislative and policy framework alone. Employers no longer need to comply with contractual language but have other imperatives to consider. For example, under section 79.2 of the *School Act*, each Board of Education in British Columbia must prepare and submit to the Minister of Education, an Achievement Contract with respect to standards for student performance and plans for improving achievement in the District. (*Union’s Outline of Argument Re Remedy*, ¶ 45 - 47)

[103] The union submits the remedy should relate to the entire period of the breach (*Board of School Trustees, School District No. 39 (Vancouver)* [1999] B.C.C.A.A.A. No. 467 (Jackson) (QL)).

[104] The union submits, although the extent or measure of the impact of contraventions of the *School Act* class size and composition provisions on teachers and school communities, some of which are intangible, may be difficult to quantify and assess, a fair assessment of remedial damages must be made. (*Polymer Corp.* [1959] O.L.A.A. No. 1 (Laskin) (QL); 10 L.A.C. 51; *Blouin Drywall Contractors Ltd. v. United Brotherhood of Carpenters and Joiners of America, Local 2486*, [1975] O.J. No. 31

(C.A.) (QL); *Webb & Knapp (Canada) Ltd. v. Edmonton (City)*, [1970] S.C.R. 588; *University of Victoria* [1990] B.C.C.A.A.A. No. 194 (Kelleher) (QL); *TFL Forest Ltd. (Elk Falls Lumber Mill)* [2007] B.C.C.A.A.A. No. 145 (Dorsey) (QL))

[105] With respect to the school learning community, the union submits:

While teaching a class that violates Bill 33 has an impact on teachers, it also has a profound effect on the learning and teaching community at the school. In particular, having high numbers of students with individual education plans and different learning needs in a classroom places greater demands on non-enrolling teachers in the school as well as on other students. From increased demands for behaviour programs, resource teachers, learning assistance centres, testing, and referrals to district programs, the solutions proposed by the school boards to deal with classes exceeding composition limits strain with more use.

The BCTF submits that the most appropriate remedy to the learning and teaching communities in the school where classes were in violation of Bill 33 is to allocate resources which better equip teachers at the school to address the challenges of the student population. The BCTF proposes that for each violation of Bill 33, the school board be required to provide redress to the learning and teaching community through allocating funds to the Local Association for the sole purpose of providing assistance to the teaching and learning community. The Local Association, as the representative of the teaching staff at the school, is in the best position to know what challenges are most pressing at the school and how additional resources can best be used to respond to the impact of oversize or inappropriate classes. (*Union's Outline of Argument Re Remedy*, ¶ 61 - 62)

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Examples of support to the school learning and teaching community that a Local Association might sponsor with remedy funds include:

- professional development for teachers
- reference resources for teachers
- resources for students such as computer equipment or books
- release time for teachers to organize school programs such as homework clubs
- new technology which assists students with individual education plans

Because such a payment is made a remedy for a breach of the School Board's duties under Bill 33, such payment to the Local Association must necessarily be in addition to any funding received by the school and not replace any existing funding. While perhaps a novel approach to remedy, the dual nature of the remedy, to the individual teacher and to the learning and teaching community at the school, ensures a meaningful incentive to comply, is not punitive, and does not provide a windfall to individual teachers. (*Union's Outline of Argument Re Remedy*, ¶ 64 - 65; see also *Durham Catholic District School Board* unreported, November 20, 2006 (Surdykowski))

[106] The union proposes a remedial formula, which it submits will provide guidance for the employer and union and be easily administered by local school district parties.

In fashioning the formula, the union draws on and doubles the remedy in *Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL) for individual teachers. To support the proposed additional compensation to be administered by the local union, the union draws on the remedial approach in *Board of School Trustees, School District No. 39 (Vancouver)* [1999] B.C.C.A.A.A. No. 467 (Jackson) (QL) and *Board of School Trustees, School District No. 40 (New Westminster)*, unreported, May 8, 1994 (Hickling).

[107] The union proposes the following remedy:

- I. Compensation for the teachers of the classes which were in violation of Bill 33 in any manner (Column B on attached chart) in the form of paid release time from teaching in the current year, or at their option the monetary value of paid release time. The amount of release time (Column G) is to be calculated based on the number of students which exceeded the Bill 33 class size or composition limit (Column E) per month and the amount of time during the school year the teacher taught that class (Column F).

AND

- II. Compensation for the learning and teaching community at the school in which the classes were in violation of Bill 33 in the form of the cost of teacher time paid to the Local Association for the district in which the violation occurred, to be used by the Local Association in consultation with the teachers for providing support to the learning and teaching community at the school in which the violation occurred.

The cost of teacher time to be calculation based on the total average compensation cost of a teacher of \$420 per day multiplied by the number of days of release time in number 1. The amount of \$420 per day is based on an average teacher salary of \$66,167 per year, divided by 189 days, with an additional 20% for benefits. (*Union's Outline of Argument Re Remedy*, ¶ 70)

A	B	C	D	E	F	G	H
School	Teacher	# IEP	Total	# above	% of time	release days	payment to local
<b>Failure to Consult</b>							
Merritt Central	Carroll (Dixon)	6	25	3	6	1.8	<b>\$756</b>
Qualicum Beach MS	Worthen (Johnson)	5	30	2	2.5	0.5	<b>\$210</b>
Hastings Elementary	Coluter	4	25	1	100	10	<b>\$4,200</b>
	Partick	4	24	1	100	10	<b>\$4,200</b>
	Appleton	4	28	1	100	10	<b>\$4,200</b>
	Morrow/Chu	4	27	1	100	10	<b>\$4,200</b>
	Brothers	4	28	1	100	10	<b>\$4,200</b>
	Low	4	28	1	100	10	<b>\$4,200</b>
	Hampel	4	28	1	100	10	<b>\$4,200</b>
Thornhill Elementary	Hill (Billey)	5	26	2	6	1.2	<b>\$504</b>
	Hill (Yeats)	6	28	3	6	1.8	<b>\$756</b>
	Hill (Sneddon)	5	23	2	6	1.2	<b>\$504</b>

	Hill (MacBean)	4	25	1	6	0.6	<b>\$252</b>
	Hill (Kolterman)	5	25	2	6	1.2	<b>\$504</b>
<b>Not Appropriate for Student Learning</b>							
Thornhill Elementary	Hill (Billey)	5	26	2	6	1.2	<b>\$504</b>
	Hill (Yeats)	6	28	3	6	1.8	<b>\$756</b>
	Hill (Sneddon)	5	23	2	6	1.2	<b>\$504</b>
	Hill (MacBean)	4	25	1	6	0.6	<b>\$252</b>
	Hill (Kolterman)	5	25	2	6	1.2	<b>\$504</b>
	Lambright (Rivet)	4	24	1	6	0.6	<b>\$252</b>
	Lambright (Rusch)	4	27	1	6	0.6	<b>\$252</b>
	Lambright (Dhaliwal)	4	27	1	6	0.6	<b>\$252</b>
	Lambright (Fraser)	4	26	1	6	0.6	<b>\$252</b>
	Lambright (Killoran)	5	28	2	6	1.2	<b>\$504</b>
	Billey	5	26	2	100	20	<b>\$8,400</b>
	Yeats	6	28	3	100	30	<b>\$12,600</b>
	Sneddon	5	23	2	100	20	<b>\$8,400</b>
	MacBean	4	25	1	100	10	<b>\$4,200</b>
	Kolterman	5	25	2	100	20	<b>\$8,400</b>
	Rivet	4	24	1	100	10	<b>\$4,200</b>
	Rusch	4	27	1	100	10	<b>\$4,200</b>
	Dhaliwal	4	27	1	100	10	<b>\$4,200</b>
	Fraser	4	26	1	100	10	<b>\$4,200</b>
	Killoran	5	28	2	100	20	<b>\$8,400</b>
Claremont Secondary	Hooper	8	29	5	12.5	6.25	<b>\$2,625</b>
	Ewan	0	36	6	12.5	7.5	<b>\$3,150</b>

[108] The union takes 189 days as the divisor of the average salary from Article B.2 of the collective agreement where it is used to calculate the daily rate of pay for a teacher-on-call. The union does not use the minimum number of instructional days in a year (187) or the number of school calendar days (194) (*School Calendar Regulation*, B.C. Reg. 114/02, as amended).

[109] The union submits there was no loss of employer documents or absence of witnesses in the representative phase of this arbitration to support the employer's assertion of prejudice due to delay, which the union says was primarily caused by the employer's obstructive objections. The union acknowledges there some teacher documents were lost because they were destroyed as a matter of annual practice, but the employer successfully defended against the grievance in most classes at most schools and virtually all classes at schools other than Thornhill Elementary and Hastings Community Elementary where there were unique circumstances.

[110] The employer submits there are no class composition limits. There are class

size limits – “hard caps” – for some grade levels, but no composition limit for any grade level. There are requirements for formation of principal and superintendent opinions following consultation that classes with more than three students entitled to an individual education plan are appropriate for student learning. There is no legislative statement or presumption that classes in Grades 8 to 12 with more than thirty students are not appropriate for student learning; that classes with more than three students entitled to an individual education plan are not appropriate for student learning; or that classes with more than thirty students of whom more than three are entitled to an individual education plan are not appropriate for student learning. This is important to bear in mind when fashioning a remedy, which is not for exceeding class composition “limits”, which the employer submits the union inaccurately labels.

There is no logic or basis for the Union in these proceedings to seek compensation for every student over 30 or over 3 in the 21 classes. The finding of contraventions of the legislation for all 21 classes was not based on “over 30” or “over 3”. The pre-2002 awards are all based on compensation for “x” students over the collective agreement inflexible number for the particular class. (*Outline of Argument of the Employer*, ¶ 212)

[111] The employer submits no monetary remedy should be awarded to teachers for classes found not to be appropriate for student learning because the legislation addresses student learning, not teacher workload. Consequently, arbitral awards prior to 2002 are neither applicable nor determinative of an appropriate remedy. “The awards interpreted and applied collective agreement provisions that were devised under a totally different construct” (*Outline of Argument of the Employer*, ¶ 197). In addition:

The Union’s claim for compensation would have serious consequences for the school system in British Columbia if awarded.

For Thornhill Elementary, there are additional reasons why there should be no remedy. If it is determined that teachers are entitled to compensation, the compensation should be limited to the month of October and should be one TOC [teacher-on-call] day for each classroom teacher.

For Claremont Secondary (two classes), there are additional reasons why there should be no remedy. If it is determined there should be a remedy, it should be one TOC day for each of the two teachers. (*Outline of Argument of the Employer*, ¶ 11 - 13)

[112] Similarly, the employer submits a monetary remedy is not appropriate for a class that has not been found to be not appropriate for student learning.

A monetary remedy for a class organization that has been found to be “appropriate for student learning” is not appropriate. If a class organization is

appropriate for student learning, there is no basis for awarding a monetary remedy. There is no basis for making “a teacher whole” as the teacher had a class organization that was appropriate for student learning.

It is the position of the Employer that in addition to the submissions on “prejudice” and “case of first instance” for 19 of the 21 classes for which a monetary remedy is sought by the Union, there should be no monetary remedy as those class organizations were appropriate for student learning. (*Outline of Argument of the Employer*, ¶ 114 - 115)

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The August Award on the merits of the classes at the representative schools supports the Employer’s position. The Award discusses in detail the intent of the legislative provisions in issue.

Bill 28 (*Public Education Flexibility and Choice Act* (January 2002)) was reviewed at paras 113-118. The essence of the Hansard references is captured by the following quote:

[113] In introducing the *Public Education Flexibility and Choice Act*, which was passed without amendment, the Minister said:

Education is the cornerstone of our society, and this bill continues in our commitment, this government’s commitment, to put students first. This bill puts class size into the School Act so that it is clear that it is a matter of provincial public policy. This bill protects special needs students by returning decision-making to teachers, parents and local districts. ...

Further, at para 114:

[114] On second reading, the Minister further explained the purpose of the legislation as follows:

... This bill is intended to put students first by giving the local school boards and the college boards the flexibility they need to effectively manage British Columbia’s K-to-12 education system and our province’s public colleges and institutes. It’s about getting collective bargaining in education away from setting education policy and back to focusing on wages and benefits. But most of all, this bill is about putting students first and about making the tough changes that need to be made to continue putting students first in the face of a difficult fiscal environment. ...

Bill 33 (*Education (Learning Enhancement) Statutes Amendment Act 2006*) was reviewed at paras 134-137. The Hansard references refer constantly to student learning and not to “teacher workload” as an objective of the legislation.

Arbitrator Dorsey provides his views and conclusions with respect to “appropriate for student learning”. At paras 432-433 he states:

[432] “Appropriate for student learning” is a phrase that is not addressed to equitable distribution of workload among affected teachers any more than the class size and composition standard of thirty and three, which can result in inequitable workloads.

[433] This phrase implies the focus of the principals’ decision is to be the goal of successfully providing an education program to the students in

the class. At the same time, while individual student development to its fullest is a goal, it is not a guarantee in the Kindergarten to Grade 12 education system. There are many factors beyond a class and a school that will affect success for each student today, as it was at the time of the Royal Commission. Principals are constrained to act within the mandate of the public education system and direct resources as effectively as possible to achieve competing goals.

Monetary compensation for teachers for contraventions of Bill 33 is inappropriate. There have been no workload violations. The concept of “making a teacher whole” has no application. It is student learning that has been affected or potentially affected by the breaches.

In summary, it is the Employer’s position that any remedy based on increased workload is not appropriate and does not fall within the intent and scope of the legislation. As this is not a workload provision, there is no basis for teachers to receive compensation as redress. (*Outline of Argument of the Employer*, ¶ 123 - 129)

[113] The employer submits there should be no monetary remedy for a teacher for a failure to consult, as was determined in *Board of School Trustees, School District No. 36 (Surrey)* [1993] B.C.C.A.A.A. No. 136 (Kinzie) (QL), and none for the union, as was decided in *Board of School Trustees of School District No. 60 (Peace River North)* [2003] B.C.L.R.B.D. No. 94 (QL), ¶ 28 and 31. (See also *St. Albert Protestant Separate School District #6*, unreported, February 27, 1977 (Stratton))

[114] The employer submits a failure to consult within the time and as required under the *School Act* can be mitigated by later employer action or events that must be considered in any remedy. There is no automatic entitlement to a remedy based on the entire school year, semester or term.

[115] In determining remedy, the employer submits the union must prove loss which must not be remote or speculative; any award of damages is to compensate not punish; damages are not to be awarded for mental or emotional stress; and the conduct of the employer must be considered. In addition to the adoption of these principles in class size arbitration decisions prior to 2002, see also *Ontario Hydro* (1990), 16 L.A.C. (4<sup>th</sup>) 264 (Kates); Brown and Beatty, *Canadian Labour Arbitration* (Fourth Edition), ¶ 2:1410; *Tillicum Haus Society* [2000] B.C.L.R.B.D. No. 278 (QL); *Clark Reefer Lines Ltd.* [1988] B.C.L.R.B.D. No. 223 (QL); *Canada Post Corporation* (1984) 16 L.A.C. (3d) 383 (McKee); and *Buanderie Central de Montreal Inc.* (1989), 6 L.A.C. (4<sup>th</sup>) 403 (Frumkin).

The application of the accepted principles for determining compensation as a remedy do not support the compensation sought by the Union. There is no

evidence presented by the Union in the proceedings to support the compensation sought by the Union. The Union has not met its onus in proving any loss.

There is no evidence of any loss by the teachers who are part of the “failure or group consultations”. In fact, for all of the classes where consultation was an issue there was a determination that the classes were appropriate for student learning. No teachers testified concerning any loss due to the consultation issues.

For the two Claremont classes where there was a finding of “inappropriate for student learning”, there is no evidence from the Union concerning any loss for the teachers.

Damages are to compensate, not to punish. In this case, there is no basis to compensate the teachers. The Union is seeking damages that have the purpose of punishing the Employer.

There is no need to put the teachers in the position they would have been in had there been no breach of the legislation. The class organizations save for two were all appropriate for student learning. (*Outline of Argument of the Employer*, ¶ 192 - 196)

[116] The employer submits there are “no black and white rules for employers to follow” in class organization. Unintended and “Serious consequences will flow for the Employer and for student learning and student learning opportunities if the Union’s claim for compensation is accepted” and “The Employer would need to assess the risk factor associated with the creation of classes over 30 and over 3.” “If there are large monetary remedies awarded to the teachers in the 21 classes, the Employer may elect to reduce the risk of large monetary awards by reducing the number of classes over 30 and over 3 in the future.” (*Outline of Argument of the Employer*, ¶ 239 - 242).

[117] Finally, the employer submits there are several objectionable aspects of the union’s proposed approach: Ms Hill is compensated twice; the total percentage for a class exceeds 100%; the claim for Mr. Carroll is for the full school year; there is no basis to include a percentage for benefits because none was lost; there is no basis to use 189 days; and there is no foundation in law for the claim for a loss to the learning and teaching community, which results in double compensation, and local associations have no legal authority to assume employer authority (*Outline of Argument of the Employer*, ¶ 272 - 281)

## **7. Discussion, Analysis and Decision**

[118] This dispute, arising under a collective agreement, involves the interpretation and application of class size and composition provisions of a statute that, in part, regulates

the employment relationship and terms and conditions of employment of persons bound by the collective agreement. The *Labour Relations Code* vests in an arbitrator “the authority to provide a final and conclusive settlement of a dispute arising under a collective agreement”, including making an order “setting the monetary value of any injury or loss suffered” by an employee “as a result of a contravention of the collective agreement” (s. 89).

[119] A declaration there has been a contravention of a collective agreement obligation or statutory obligation arbitrable under a collective agreement is the minimum remedy that can be expected from grievance-arbitration. The interpretation, the decision there has been a contravention and a remedial declaration will have a vindicating benefit and provide guidance for the future to the parties to the collective agreement relationship.

[120] Often, in order to remedy the action contrary to the collective agreement, it will be necessary to reverse or modify employer imposed discipline or a management decision. In many instances, a monetary award will be the only available, although inadequate, means to attempt to place the aggrieved person in the position he or she would have been had there not been a breach of the collective agreement obligation.

[121] The purpose of a monetary award is compensation for a loss that is not speculative or too remote. It is subject to reduction by an amount for avoidable losses and the duty of the person harmed to mitigate the extent of the harm caused by the contravention. It is not punishment for the person who contravened the collective agreement. The fact of a loss, including loss of opportunity, can be apparent from the context and nature of the right and contravention. If the extent of the actual, not speculative, loss is difficult to quantify, it will have to be estimated.

[122] A monetary remedy is not punitive because there is no strict proof of an actual monetary loss. Reinforcement of the work now – grieve later principle and furthering the purposes of peaceful and orderly settlement of disputes under a collective agreement require a meaningful remedy for employees, even in circumstances where the employer’s contravention was the result of innocent or good faith action or a misunderstanding of its obligation. If there is no meaningful remedy, grievance-arbitration will have failed its purpose.

[123] These principles and this approach are equally applicable when the right arbitrated under the collective agreement and *Labour Relations Code* is created under a provision of a publicly enacted statute rather than a provision of a privately negotiated collective agreement. An arbitrator's authority under section 89 of the *Labour Relations Code* is no less encompassing.

[124] The purposes of remedies and the grievance-arbitration process are not altered because contraventions of provisions of the *School Act* might be remedied in other forums by intervention or decisions of the Minister or trustees of boards of education, by courts in actions brought by parents or students, by administrative tribunals investigating and hearing complaints or by prosecution under the *Offence Act*, R.S.B.C. 1996, c. 338.

[125] Honest, good faith or mistaken employer actions contrary to a collective agreement have been considered by grievance-arbitrators to ameliorate or deny a monetary remedy, in some situations, perhaps in the face of intransigence by the other party to the collective agreement or the actions of employees or a union representative. This is in the context of a private agreement subject to renegotiation, consensual operational refinement with experience and the possibility of settlement of disputes by the collective bargaining parties on terms outside or contrary to the terms of the negotiated agreement.

[126] That is not the context of the class size and composition standards in the *School Act*. Class size and composition is no longer within the permissible scope of collective bargaining. Teachers and the union have had their participation in this aspect of their working conditions taken away from their self-determination ability through collective bargaining. What they could privately negotiate at collective bargaining and compromise with their employers, before or after the fact, is now legislated public policy universally applicable to all classes in the provincial public education program. They are restricted to enforcing a contravention of that policy as it affects them at their expense through private grievance-arbitration.

[127] The extent and manner in which the union and employer in the grievance and settlement process can compromise the statutory rights and obligations of individual

teachers and employers, which they cannot collective bargaining, has not been fully canvassed in this arbitration.

[128] In this context, ameliorating or denying monetary remedies because of honest, good faith or mistaken employer actions in contravention of the *School Act* cannot foster more co-operative or reasonable relationships between the union and employer in resolving workplace issues, adapting to change, negotiating solutions or other goals of the *Labour Relations Code*. The subject of class size and composition cannot be collectively bargaining.

[129] Grievance-arbitration will best advance the public interest in the class size and composition public policy in the *School Act* and *Class Size Regulation* by ensuring boards of education have the scope of flexibility in organizing classes that is intended by the legislation while, at the same time, ensuring boards of education do not fudge away from their responsibility to organize classes in the manner prescribed by the legislation. Effective remedies will serve the goals of the legislated public policy and support confidence in that policy by all interested persons, not just those bound by the collective agreement.

[130] Balancing the legislative purposes of board of education flexibility and board transparency and accountability was a central consideration throughout the reasoning of the August decision, including the following:

Perhaps the reason “appropriate” was chosen was because it does not provide clarity or certainty or carry preordained constraints.

At the same time, “appropriate” is not an unfettered term. It must take its meaning from the context in which it is used. That context is that the first mandate for a board of education is to “ensure” the class size and composition standard is met for each class. Ensuring is not a goal or ideal. It is a clear direction. Exceeding the class size standard is not to be a norm, but a permissible anticipated exception to occur with some frequency in Grades 8-12. There is no easily discernible measure of how frequent it was anticipated the class composition standard of three students with an IEP would be exceeded at any grade level.

The context in which “appropriate” is used includes the consultation requirement, superintendent opinion and reporting requirements that flow from a principal opinion that a class that does not met the class size and composition standard is appropriate for student learning. (*British Columbia Public School Employers’ Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 434 - 436)

[131] In some situations, arbitrators have denied compensatory remedies in disputes of

first instance under new language in a collective agreement. Should the same approach be considered when there has been a contravention of a statute? Perhaps, but this was not the approach of the British Columbia Supreme Court, in a case of first instance, in finding a breach of a duty to meaningfully consult a parent of a child with autism in *Hewko v. British Columbia* [2006] B.C.J. No. 2877 (QL). It ordered the board of education to meet and carry out “both the procedural and the substantive aspects of its consultation obligations”. The court dismissed the negligence/educational malpractice claim, but would have ordered damages had a tortious cause of action been established (¶ 379 - 381).

[132] For a contravention of the time specific consultation requirements of the *School Act*, it is not a meaningful remedy to order consultation after the specified time. As described in the August decision, the consultation in the fifteen days after the first day of school opening is itself after the fact.

The annual cycle of school organization – enrolment projection, district staffing and resource allocation, student course selection, principal organization of classes, teacher assignment, student placement – followed by the requirement to consult within the first fifteen school days of the new school year means the legislated consultation will be about what has been decided, not what is to be decided. The thirty and three standard is exceeded before, not after, consultation.

The timing and context of this consultation requirement is unlike consultation frequently seen in other contexts where persons who are to be impacted by or will implementing a decision are consulted before the decision is made. This process does not support the Minister’s statement: “I think the bill clearly outlines that principals will now be required to talk to their professionals, their teachers, about the class that they’re about to put children and professionals into.”

As was clear from the evidence, the focus of the consultation discussion is how to support the class or make the existing organization work. It is not about changing the size or composition of the class. Teachers are loath to suggest the principal remove one or more students from their class and place them in a colleagues’ class or to deny a student that elective in that semester. Teachers correctly assume the principal has stretched the resources allocated to the school as far as possible and any suggestion that an additional class be organized and staffed is futile. (*British Columbia Public School Employers’ Association* [2008] B.C.C.A.A. No. 131 (Dorsey) (QL), ¶ 332 - 334)

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For all principals, the consultation is an essential feedback loop. The principal will be looking for reinforcement from the teacher that the class formation assigned to the teacher is considered by the teacher to be, in the vernacular of the profession, “educationally sound” or an “effective learning situation” or, in the

language of the *School Act*, “appropriate for student learning” despite exceeding the class size and composition standard in some respect.

That reinforcement will often come from teachers who tell the principal the class size and composition is “O.K.”; is acceptable; is as was previously discussed; is as requested by the teacher; is as decided by the department; or in some other manner communicates acceptance of, or agreement with, the organization of the class. (*British Columbia Public School Employers’ Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 364 - 365)

[133] Principal-teacher consultation is a mandatory pre-condition to a principal forming the opinion that a class exceeding the class size and composition standard is appropriate for student learning. If there is no requisite consultation, the teacher has been denied his or her limited partnership role in the organization of a class assigned to the teacher to teach. There cannot be a validly formed principal’s opinion and the board of education has not met the “unless” (notwithstanding or *non obstante*) conditions permitting it relief from the obligation to “ensure” the class does not exceed thirty students or does not have more than three students entitled to an individual education plan (*School Act*, ss. 76.1(2.2) and (2.3)). There is no mechanism in this legislated public policy for a board of education to do after September 30<sup>th</sup> what it has not done properly before September 30<sup>th</sup>. There is no slip rule. There are only legislative imperatives.

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

[135] The designation of a class as “appropriate for student learning” under the provisions of the *School Act* is reserved for a class that exceeds the standards in accordance with the statutory requirements. In keeping with a new legislative scheme and new terminology in the *School Act*, I have chosen to refer to the class size and composition directives in the *School Act* as statutory “standards”, rather than “limits”, although when the Minister introduced the *Education (Learning Enhancement) Statutes*

*Amendment Act 2006* (Bill 33) her explanation of the Government's purpose was as follows: "I am pleased to introduce Bill 33. This act introduces legislative changes that will address class size and composition in British Columbia schools, and meets our throne speech commitment to ensure that all school districts live within class-size limits established in law." (*Hansard*, 38<sup>th</sup> Parliament, Volume 10, Number 2, April 27, 2006, p. 4120)

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

[137] In this sense, a class "appropriate for student learning" is a class whose size and composition permissibly exceeds the grade level class size and composition standards because the board of education has done what it is required to do to exceed the standards. It is a class that has been organized in accordance with section 76.1(2.1), (2.2) or (2.3) of the *School Act*. It is a construct that does not apply to a class in September or to a class that was not in compliance with the class size and composition standards on the date of the superintendent's report (s.76.1(2.4)). The obligation is "despite" the lower grade level averages in 76.1(1), but subject to the period in any school year after the required superintendent's report (s.76.1(4)).

[138] Consequently, in the case of the representative classes for which there was a finding of no consultation or no timely formation of the requisite dual principal and superintendent opinions that a class was appropriate for student learning, there was no further examination whether the class could have been a class that, if the pre-conditions

had been met, would have been a class for which there would have been arbitral deference to the principal's opinion it was appropriate for student learning. This inquiry was unnecessary because the class could not be one "appropriate for student learning" under the legislative scheme without the board of education having established the mandatory pre-conditions at the mandatory time. The grievance was allowed with respect to those classes because the employer contravened section 76.1(2.3) of the *School Act*.

- (2.3) Despite subsections (1) to (2.2) but subject to subsection (2.4), a board must ensure that any class in any school in its school district does not have more than 3 students with an individual education plan unless
- (a) in the opinions of the superintendent of schools for the school district and the principal of the school, the organization of the class is appropriate for student learning, and
  - (b) the principal of the school has consulted with the teacher of that class.

[139] Under the *School Act*, teachers must bear the burden without redress in September for all classes assigned to them regardless of their size and composition.

This is because:

The date for reporting class size averages under the *School Act* is September 30, the same date at which the school district reports enrolment to the provincial government for funding. [*Class Size Regulation*, B.C. Reg. 245/02 as amended, s. 1.1(1)(a)] It is agreed this is the date at which class size and composition standards must be met or, if exceeded, by which the statutory requirements to exceed must be met. As Arbitrator Munroe determined in 2006, there is no grace period after September 30<sup>th</sup> to achieve compliance as there was in deleted collective agreement provisions that sometimes set the compliance date at October 15<sup>th</sup>. [*British Columbia Public School Employers' Association* [2006] B.C.C.A.A.A. No. 7 (Munroe) (QL)] (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 350)

Consequently, there is no contravention of the legislation and no remedy for classes that exceed grade level class size and composition standards in September.

[140] There is a period between the fifteenth day after the first day of the school year and September 30<sup>th</sup> during which it can be known that a required principal-teacher consultation has not occurred within the legislated time and, therefore, the class cannot become one "appropriate for student learning" after September 30<sup>th</sup>. However, without demeaning the burden for affected teachers during this period of time, the circumstance is one that should be treated as a small matter with which grievance-arbitration should

not be concerned (*de minimis non curat lex*). It is, to use Arbitrator Laing's phrase, part of the "zone of adjustment" in annual class organization before classes are to meet the standards (*Board of School Trustees, School District No. 36 (Surrey)* [1995] B.C.C.A.A.A. No. 534 (Laing) (QL), ¶ 99).

[141] Under the legislated public policy, a teacher has a right to expect to be assigned a class that meets the grade level class size and composition standards and only exceeds them when the employer does what it is required to do to organize a class that exceeds the standard. When a board of education exceeds grade level size and composition standards for a class and does not meet the requirements with respect to the class, the burden of the breach is primarily borne by the teacher(s) of the class, not the principal, superintendent, trustees or even individual students.

[142] If classes exceed the grade level class size and composition standard after September 30<sup>th</sup> and do not one qualify as permissible exceptions to the applicable standard, teachers must continue to teach the classes regardless whether they continue to exceed the standard or later come within the standard through attrition or student transfer. The teachers must work now – grieve later. For each student in the class, they must fulfill their *School Act* obligations, professional responsibilities and personal commitments.

[143] It is within the authority of the board of education employer to mitigate the burden on a teacher by ensuring the class, at some time, does not exceed the applicable standard. When it does for a class, the compensable burden on the teacher(s) ceases.

[144] The responsibility and power of the teachers and the union to ensure timely compliance with the *School Act* is to promptly inform the employer and to file a timely grievance. As I said in the August decision, "... unequivocal communication of disagreement, timely notice to school districts by local unions and timely grievance filing by the union, followed by prompt identification of classes in dispute, are basic for timely resolution of differences that might benefit students as well as teachers." (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 383)

[145] A failure to communicate disagreement and timely notice and grievance with

sufficient information to identify the class might cause a prejudice to the employer being informed of a contravention and taking corrective steps. It might be a reason to lessen the compensation or damages for the contravention of the *School Act*. The circumstances might be so unusual, unclear or novel that compensation is lessened on the basis that the burden was not significant and it is a dispute of first instance.

[146] However, this was not the situation at Thornhill Elementary School in the 2007-08 school year where ten classes were organized contrary to section 76.1(2.3) of the *School Act*.

	<b>Class</b>	<b>Teacher</b>	<b>Size</b>	<b>IEPs</b>
1.	Grade 4	J. Billey / A. Hill (Music)	26	5 (2D, 1G, 2Q)
2.	Grade 4	L. Yeats / A. Hill (Music)	28	6 (2D, 4Q)
3.	Grades 4/5	C. Sneddon / A. Hill (Music)	23	5 (2D, 1G, 2Q)
4.	Grade 5	L. MacBean / A. Hill (Music)	25	4 (1C, 1D, 1K, 1Q)
5.	Grades 5/6	P. Kolterman / A. Hill (Music)	25	5 (1D, 4Q)
6.	Grade 6	D. Rivet / C. Lambright (Library)	24	4 (4Q)
7.	Grade 6	S. Rusch / C. Lambright (Library)	27	4 (1D, 3Q)
8.	Grade 6	S. Dhaliwal / C. Lambright (Library)	27	4 (4Q)
9.	Grade 7	K. Fraser / C. Lambright (Library)	26	4 (2D, 2Q)
10.	Grade 7	C. Killoran / C. Lambright (Library)	28	5 (1C, 4Q)

[147] There was no principal's opinion at September 30<sup>th</sup> that any of the ten was a class "appropriate for student learning" as required under section 76.1(2.3)(a). The principal expressly stated the class were not appropriate for student learning. There was no consultation with Ms Anne Hill for her classes as required under section 76.1(2.3)(b). Contrary to what is implicit in the double compensation the union claims for Ms Hill, failure to meet two, rather than one, of the requirements to exceed the class size and composition standard does not compound or double the loss. The contravention is exceeding the class size and composition standard, not failing to consult Ms Hill. The reason Ms Hill was not consulted is not relevant when there was no requisite principal's opinion by September 30<sup>th</sup> that her class was appropriate for student learning. Therefore, it is unnecessary to consider the employer's submission on prejudice with respect to the principal's failure to consult Ms Hill.

[148] Each teacher, except Vice-Principal Killoran and Ms Hill, who was not consulted, clearly communicated to the principal in their consultations that they disagreed with the

organization of their class. The principal clearly communicated on October 2<sup>nd</sup> it was not his opinion the classes were appropriate for student learning – “The bottom line is that we need help – a lot more help, if we are going to state that the learning situation at Thornhill Elementary is ‘acceptable’ and ‘appropriate.’” There could be no more timely or authoritative communication to the superintendent and board of education. Despite this communication, the board of education was told on October 3<sup>rd</sup> by the superintendent that the organization of all classes was in compliance with the *School Act*.

[149] In this unique situation, to attribute prejudice to the employer because of the timing of the grievance or delayed particulars of the grievance or to treat it as a case of first instance that should not attract a remedy for the affected teachers would be to shift accountability away from the senior management and board of education to the teachers and the union. There was no doubt the principal’s opinion on the organization of these classes was mandatory. There was no acknowledgement by the employer that it had failed to ensure each of the ten classes “does not have more than 3 students with an individual education plan.” The teachers bore the burden for nine months after September 30<sup>th</sup> of teaching classes organized contrary to section 76.1(2.3) of the *School Act*. The teachers could not mitigate the continuing contravention and should be compensated for their burden and loss of not having classes organized as the employer is statutorily required to ensure they are.

[150] Seven classes were organized at Hastings Community Elementary School in the 2007-08 school year contrary to section 76.1(2.3) of the *School Act*.

	<b>Class</b>	<b>Teacher</b>	<b>Size</b>	<b>IEPs</b>
1.	Grades 4/5	L. Coulter	25	4 (1C, 1F, 1H, 1R)
2.	Grade 5	S. Patrick	24	4 (3Q, 1R)
3.	Grades 5/6	K. Appleton	28	4 (1D, 2Q, 1R)
4.	Grades 6/7	G. Morrow / J. Chu	27	4 (1H, 2Q, 1R)
5.	Grades 6/7	S. Brothers	28	4 (1D, 1H, 1Q, 1R)
6.	Grades 6/7	A. Low	28	4 (1Q, 3R)
7.	Grades 6/7	T. Hampel	28	4 (2Q, 2R)

Principal Wrinch failed to hold individual consultations with the teachers of these class as required by section 76.1(2.3)(b) of the *School Act*. Because of the nature of her

reports, the responsible Assistant Superintendent and the Superintendent did not know there had been a group consultation.

[151] The consultation in September 2007 was not a process of first instance for Principal Wrinch, who had clear instructions on how to proceed. The circumstances of the group consultation and the roles of the union representative and teachers in conducting this second annual consultation as a group consultation are described in the August decision.

In reporting the consultations in September 2006, Ms Ross completed forms for each meeting for the local union and Ms Wrinch completed reporting forms for each consultation for the school district. There were similar union and school district forms for 2007.

On September 10<sup>th</sup>, Ms Wrinch received a reminder of the school district's guidelines and administrative requirements to fulfill the consultation and reporting requirements for classes with more than three students with an IEP. The individual teacher consultation forms were to be retained at the school in order to be able to "produce proof of consultation." Submitting the class organization to the Superintendent was affirming the principal's opinion the organization was appropriate for student learning.

Ms Wrinch testified she knew she had to consult with each of the seven teachers in seven of the eight intermediate classes with more than three students with an IEP and inform district Human Resources by September 20<sup>th</sup>.

After September 10<sup>th</sup>, Ms Wrinch spoke to Ms Ross about the upcoming consultations. She told Ms Ross she had been informed by Human Resources that no additional resources were available. There was no hold back. They discussed giving the seven teachers more support by reassigning Resource Teachers, which did not happen, or having more intentional involvement of the Counselling Team to support designated students with behaviour problems.

They discussed and decided it would be more efficacious and ensure delivery of a common message if they dispensed with individual consultation meetings with each teacher and convene a collective meeting. It would be more expeditious and less disruptive in a busy time of the year.

Ms Ross convened and chaired a local union meeting to discuss the consultation process and Ms Ross told the teachers in attendance that she believed a group meeting of the affected teachers with the principal would be appropriate and they could do the union reporting paperwork at that time. She knew the reporting forms would be reviewed as part of the provincial class size and composition grievance process. She testified the teachers were satisfied with a group meeting, but she is not sure they thought it was brilliant. There is no evidence that all affected teachers attended this meeting.

Notice was given of a meeting after school on Tuesday, September 18<sup>th</sup>. The meeting was held at 3:10 p.m. Ms Brothers, Ms Coulter and Mr. Low testified they attended as did Ms Ross and Ms Wrinch. No formal notes were taken. They recall Ms Appleton, Ms Patrick, Ms Morrow and Ms Hempel attended. No

one recalled Ms Chu attending. Ms Ross and two other Resource Teachers attended.

The meeting began at 3:10 p.m. and lasted ten to fifteen minutes. Ms Wrinch and Ms Ross were at the head of the group and each spoke introducing the meeting as a consultation meeting on class size and composition. Ms Brothers asked if the teacher who had come in March was returning. He was not and there were no additional resources available. Ms Wrinch said Resource Teacher schedules might be adjusted. Resource Teacher Kary Taylor expressed the opinion that was not possible because all the classes were over-designated. Ms Wrinch said the Counselling team might be able to provide more intentional intervention and focused assistance with some students. Ms Wrinch left to print out a list of the designated students. Mr. Low left. While Ms Wrinch was gone, the teachers completed the union forms. Ms Wrinch returned and the meeting was concluded.

Ms Brothers, Ms Coulter and other teachers completed their local union reporting forms, which Ms Ross signed. The forms do not require the teacher to state whether she agrees or disagrees with the organization of the class. Adrian Low left before completing his form to get to the gymnasium to coach a student volleyball team. He left the form to be completed by Ms Ross. He testified he did not know whether he had a choice to agree or not agree with the organization of the class.

The union reporting form has no place for a teacher to sign or indicate agreement or disagreement with the organization of the class. Ms Ross faxed the reporting forms to the local union office at the end of October after returning from bereavement leave.

Ms Wrinch was unaware of the prior local union meeting until this arbitration and was proceeding on the basis the group consultation had been decided by her and Ms Ross. She did not know classes in her school had been included in the grievance until this phase of the arbitration. There are none in the union's particulars for the 2006-07 school year.

On September 19<sup>th</sup>, Ms Wrinch completed individual reporting forms for the school district dated that day. They are not identical and do not disclose that there was no individual meeting with each teacher. They list the attendees as the Resource Teacher, the union representative and the individual teacher. The description of the class and some of the comments are specific to each class, although some of the comments are similar.

Ms Wrinch testified the first time she realized she had not held individual consultation meetings with the teachers was during the first day of testimony by Ms Ross.

On September 21<sup>st</sup>, Ms Wrinch completed a report indicating she had held the required consultations with the teachers of the seven classes, including Ms Chu. She testified she was of the view each of the teachers considered the organization of their classes to be appropriate for student learning. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A. No. 131 (Dorsey) (QL), ¶ 894 - 907)

[152] The teachers bore the burden of teaching classes for nine months that had not been organized in compliance with section 76.1(2.3) of the *School Act*. During that

period, Ms Appleton's class fell within the standard with three students entitled to an individual education plan from October to May. Ms Brothers' class fell within the standard with three students entitled to an individual education plan from mid-October to December when she offered to take a student from Mr. Low's class. Her class again fell within the standard with three students entitled to an individual education plan at the end of April. These events after September 30<sup>th</sup> would be relevant in fashioning an appropriate remedy.

[153] I agree with the employer that, in fashioning a remedy to compensate these teachers for their burden and loss in teaching classes organized contrary to section 7.6(2.3) of the *School Act* the following factors should be considered: the group consultation was agreed to, organized and co-chaired by the union staff representative at the school; the teachers agreed to the process; the union did not complain about the process until after the employer selected this school as a representative school; and the principal's reliance on the union representative that the consultations could be conducted in this manner, rather than as they had in the previous school year. In the circumstances, I have concluded there was a prejudice to the employer that must be considered in determining the remedy, which, in addition to a declaration, should be limited to nominal compensation for each teacher, as proposed by the employer.

[154] One class was organized at Qualicum Beach Middle School in the 2007-08 school year contrary to section 76.1(2.3) of the *School Act* when the principal failed to consult Brian Worthen, a Grade 6 homeroom teacher, who taught a Social Studies 7-3 class one of four blocks in a recurring six day cycle. The class had thirty students, five of whom were entitled to an individual education plan (1G, 1H, 2Q, 1R). The principal mistakenly overlooked Mr. Worthen in the consultation process in September 2007. Although Mr. Worthen was engaged in August 2007 in placing students in exploratory classes, neither he nor anyone else drew this to the principal's attention until the hearing in November 2008. In the circumstances and because of Mr. Worthen's limited assignment to the class, I have concluded the remedy should be no more than a declaration.

[155] Two classes were organized at Claremont Secondary School in the 2007-08

school year contrary to section 76.1(2.2) and (2.3) of the *School Act*. A consultation was held for each class.

	<b>Class</b>	<b>Teacher</b>	<b>Size</b>	<b>IEPs</b>
1.	Chemistry 12E	M. Ewan	36	0
2.	Social Studies 9	S. Hooper	29	8 (2G, 1K, 4Q, 1R)

For each class, I decided the principal's opinion under section 76.1(2.2)(a) and (2.3)(a) that the class was appropriate for student learning was not an opinion for which there should be arbitral deference.

[156] In the case of Mr. Ewan's class, which had 35, not 36, students from October 2, 2007 to the end of semester:

The Principal set an agreed limit for the class above the class size standard after discussion with the teacher. That limit was exceeded without the Principal's knowledge. He did not confirm with the teacher that the additional number above the agreed limit had the teacher's agreement. There is no basis for recognizing the Principal's opinion that a class in September was appropriate for student learning when that size class for this course was not acceptable in June. This is not a situation where there ought to be deference to the Principal's changed opinion with no new circumstances to justify the change. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 552)

[157] In addressing a remedy to compensate Mr. Ewan, his other classes and schedule during the semester are not relevant. The public policy focus of the *School Act* is on the class, not the teacher's overall workload as it was in some collective agreement provisions. The supports for the class, such as Science Lab assistance, were considered in the determination whether there should be arbitral deference to the principal's opinion. Without deference, the class does not meet the "appropriate for student learning" construct and cannot be a class that exceeds thirty students. In fairness to the employer, it must be considered that Mr. Ewan, an experienced teacher, agreed to a class organization with as many as thirty-two students and did not clearly communicate his disagreement with the organization of the class during the consultation process. His views on appropriate limits for science classes with labs were known to the principal.

[158] In the case of Ms Hooper's class:

The Principal's opinion about this core academic class, thought to have thirty students at the time of the consultation, was not a reasonably held opinion

demanding deference. The organization of the class in excess of the class size and composition standard was mechanistic and determined by factors unrelated to the students in the class. The Principal knew the [originally] assigned experienced teacher had selected this class to relinquish from the first day of school. Regardless of his confidence in Ms Hooper and her ability to instruct and manage eight students with four special needs category designations and their IEPs, twenty-two other students and a special education assistant, he explored no options to rebalance the Socials 9 classes. He did not inform himself about the nature and character of the composition of this class despite the red flag of its numbers. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 560)

[159] In addressing a remedy to compensate Ms Hooper, as in the case of Mr. Ewan, her other classes and schedule during the semester, whether assigned by the principal or chosen by her, and the supports for this class are not relevant. There were dramatic differences between the stature and tenure of Mr. Ewan and Ms Hooper in the school at the time of the consultations in September 2007. In Ms Hooper's circumstances as a first year teacher, the failure to voice disagreement with the organization of the class is not a factor to diminish the employer's responsibility or her compensation.

[160] While the specific facts of each school, class and situation have been argued and considered in determining remedy, the purpose of this representative process is to achieve an adaptable remedial formula which can be applied, perhaps with modification to suit individual circumstances, to provide a fair monetary value under section 89 of the *Labour Relations Code* of the injury or loss the teachers suffered as a result of contraventions of sections 76.1(2.2) and (2.3) of the *School Act*.

[161] I have determined the formula should not include allocation of funds to be administered by the union through local associations or by school staff committees. Before 2002 when class size and composition was a permissible bargaining subject, the union sought and employers agreed to remedies with such a component to redress collective agreement contraventions. This is highlighted in the excerpt quoted above from *Board of School Trustees, School District No. 39 (Vancouver)* [1998] B.C.C.A.A.A. No. 88 (Dorsey) (QL), ¶ 9 - 11 and ordered in *Board of School Trustees, School District No. 39 (Vancouver)* [1999] B.C.C.A.A.A. No. 467 (Jackson) (QL)..

[162] Since 2002, the collective roles of teachers through their union and its participation in setting class size and composition standards and organizing classes

have been “deleted” and prohibited. No longer, as Arbitrator Fraser concluded, is it self-evident the union suffers a compensable loss for its ability to “insist on work load limitations” it has negotiated (*Board of School Trustees, School District No. 75 (Mission)* [1995] B.C.C.A.A.A. No. 484 (Fraser) (QL), ¶ 134). Except for enforcing teacher rights related to working conditions under the collective agreement, the matter of class size and composition and staffing have been placed beyond the reach of the union and the collective bargaining table.

[163] I have concluded that matters that, as a matter of public policy, cannot be included in a collective agreement because of section 27(3) of the *School Act* should not be placed within union decision-making through the exercise of an arbitrator’s remedial authority. Employer authority that cannot be limited or assigned through collective bargaining should not be assigned to the union by an arbitrator in the judicable process of grievance-arbitration. This does not mean the affected teachers, union and employer cannot agree and resolve a grievance by engaging additional or supernumerary teachers or teachers’ assistants or putting in place other supports for classes.

[164] What is an appropriate arbitral remedial formula? The experience with class size and composition provisions under a collective agreement is instructive of what the employer and union considered an appropriate remedy. Chief among the remedies was compensatory time off, paid release time or teacher-on-call time for affected classroom teachers for personal use or professional development with the time pro-rated according to the proportion of the teaching assignment and duration during which there was a contravention of the agreed class size and composition limits. Release time and percentage and duration of teaching assignment affected are key elements of the union’s proposed remedy. Release time is also an alternate remedy proposed by the employer (*Outline of Argument of the Employer*, ¶ 12 - 13; 252; and 267).

[165] Duration of time during which a Grades 4 to 12 class is organized contrary to the requirement to ensure it does not exceed the standards in sections 76.1(2.2) and (2.3) of the *School Act* is a reasonable, fair and useful measure of the ongoing burden a teacher must bear and the teacher’s loss. The class size and composition standards

may be primarily for the benefit of students, but professional teachers bear the burden of achieving prescribed educational outcomes for all students in their classes whether they meet or exceed the standards. At its essence, this means additional workload for a teacher by devoting more non-instructional time to the class and individual students.

[166] The union proposes using the number of students above thirty or three entitled to an individual education plan in a class as a multiplier of the assignment percentage to determine the total paid release time. Arbitrator Fraser fashioned a similar approach in a grievance dealing with class composition, not size, because “the composition violations varied, individual teachers were dealing with different numbers of students and, therefore, different work loads” (*Board of School Trustees, School District No. 75 (Mission)* [1996] B.C.C.A.A.A. No. 28 (Fraser) (QL), ¶ 36).

[167] The employer is correct that the class size and composition standards in the *School Act* are, at some grade levels, more flexible than in previous collective agreement provisions. Size and composition are less compartmentalized and more intertwined. Consequently, I find a formula driven by the exact number of students above thirty or three entitled to an individual education plan in a class is not reflective of the legislated public policy scheme for class size and composition.

[168] Under this legislated public policy scheme, I have concluded a tiered formula for remedial release time is more responsive and reflective of an employer contravention of sections 76.1(2.2) and (2.3) of the *School Act* and the burden and loss for the teacher of the class.

[169] In fashioning the formula, I have considered the number of instructional days in a school year, the additional work for a classroom teacher associated with preparing to have a teacher-on-call substitute for the classroom teacher, and that board of education employers and teachers might wish to continue a class for the duration of the school year rather than transfer one or more students to other classes to achieve compliance with not exceeding the standard after September 30<sup>th</sup>.

[170] Review and analysis of the particulars of all classes in dispute in both school years has drawn me to a four tier formula with a limit on the total number of paid release days as a reasonable balance among the interests of equitable compensation, an

efficacious formula and potential for settlements that minimize disruption for students.

[171] The first tier is for a class for which the sum of the number of students in the class and the number of students in the class with an individual education plan is thirty three or lower. The tier-one remedy is two-thirds ( $2/3$ ) day paid release time for each month, or part thereof, that an employer has contravened sections 76.1(2.2) and (2.3) of the *School Act*. The maximum for a class for October to June would be six release days.

[172] The second tier is for a class for which the sum of the number of students in the class and the number of students in the class with an individual education plan is thirty-four to thirty-six. The tier-two remedy is one (1.0) day paid release time for each month, or part thereof, that an employer has contravened sections 76.1(2.2) and (2.3) of the *School Act*. The maximum for a class for October to June would be nine days.

[173] The third tier is for a class for which the sum of the number of students in the class and the number of students in the class with an individual education plan is thirty-seven to thirty-nine. The tier-three remedy is one and one-third ( $1 \text{ and } 1/3$ ) days paid release time for each month, or part thereof, that an employer has contravened sections 76.1(2.2) and (2.3) of the *School Act*. The maximum for a class for October to June would be twelve days.

[174] The fourth tier is for a class for which the sum of the number of students in the class and the number of students in the class with an individual education plan is forty or higher. The tier-four remedy is one and two-thirds ( $1 \text{ and } 2/3$ ) days paid release time for each month, or part thereof, that an employer has contravened sections 76.1(2.2) and (2.3) of the *School Act*. The maximum for a class for October to June would be fifteen days.

[175] The enrolling classroom teacher will be awarded the full tier remedy for the FTE teaching assignment for the applicable duration, which can be less than the full nine months if the class did not exceed the standard for the full nine months or the teacher was on leave for a portion of the year. If there is a leave of absence, as was the case for Ms. Lambright at Thornhill Elementary School, then a substitute teacher with the replacing temporary assignment, not teachers-on-call, will be entitled to the applicable

tier remedy for the period of substitution.

[176] The applicable tier remedy will not be limited to the instructional time in the classroom with the students, which might be less than 100% of the FTE assignment because a portion is preparation time or time spent with school or teacher organized reading groups or other activities. In addition, the preparation relief teacher, who teaches the same class music, library, computer skills or another subject, might also be entitled to pro-rated paid release time for the instructional time with the class, but not including a pro-rating of that teacher's preparation time. As a consequence, because of preparation time entitlements under the collective agreement, in some grades and school circumstances, a class will attract a total remedy among affected teachers of the class that is higher than 100% of the applicable tier.

[177] There is an element of inexactitude in this formulistic approach borne from a need for practical and expeditious class size and composition dispute resolution. It is not predicated upon and seeks to avoid highly individualized inquiries into all facets of each class that characterized the representative class hearings.

The evidence to be admitted and considered is evidence of the events and knowledge at the time the class was organized and the events and facts known or that ought to have been known or anticipated in September. In this first impression and learning phase of the arbitration, the evidence went far beyond September. There was extensive evidence of events after the date on which the principals and superintendents formed and communicated their opinions. This is not to be taken as a precedent for the next phase or subsequent arbitrations.

The employer correctly submits information and concerns about a class that the teacher did not share with the principal cannot be relevant to impeach the reasonableness of the principal's opinion unless the information should have been otherwise known to the principal. Equally, changes in class size and composition and other events after September, including student withdrawals or achievement in the class of which there was extensive evidence adduced by the employer, cannot be relevant to the opinions formed and acted on in September.

Kids grow, develop and change. Teachers work hard and collaboratively to teach the classes in front of them. Classes and schools are dynamic. There will seldom be any relevance and probative value to evidence of events after September to assessing the reasonableness of opinions formed weeks or months before the events. In the same vein, the probative value having dedicated and devoted teachers testify at length about the behaviour of special needs and grey students to make the case that the class they taught was not appropriate for student learning is outweighed by the potential tear it leaves in the collaborative and caring culture essential to their school's success. Timely dispute resolution within the school year will help remove the temptation to expand the scope of the evidence beyond what was known and considered by

the principal and superintendent in forming their opinions. (*British Columbia Public School Employers' Association* [2008] B.C.C.A.A.A. No. 131 (Dorsey) (QL), ¶ 443 - 445)

[178] This four tier formulistic remedial approach does not account for a burden teachers must bear in September; precise student numbers; variations in student personalities and abilities; differences in students with different special needs category designations; the mix of designations in a class; school supports for individual students in a class or the entire class; or teacher experience, expertise and coping abilities. Allowing compensation greater than 100% of the applicable tier in some circumstances and including preparation time for the enrolling classroom teacher and not for the preparation relief teacher are inexactitude consequences of having a more easily administered approach.

[179] Evidence of events after September 30<sup>th</sup> that the number of enrolled students in the class, not the number of attending students, declined so that the class fell within the class size and composition standard the employer must ensure under sections 76.1(2.2) and (2.3) or from one remedial tier to a lower one will be considered in calculating the duration of time there was a contravention of sections 76.1(2.2) and (2.3) or that the release time tier remedy applies. Student absences are not a factor because of teachers' ongoing responsibilities to students and their parents during a student's absence; the additional work sometimes required both before and during an absence; the additional work required when the student returns; and related administrative responsibilities.

[180] Paid release time will be at the teacher's current salary, even though the current salary may be higher than in the 2007-08 school year. With no corresponding payment to local unions, there is no reason to calculate an average teacher salary.

[181] Paid release time is to be taken at a time chosen by the teacher for whatever use the teacher decides after giving notice in accordance with the collective agreement provisions or employer's policy or practice for teacher absences.

[182] Normally, the paid release time must be taken within the current school year. Because it is now the middle of the 2009-10 school year, the paid release time ordered in this decision for teachers at Thornhill Elementary School may be taken in the 2010

calendar year. That board of education will know at the end of June any residual liability it has for the 2010-11 school year arising from this decision.

[183] If any teacher is no longer employed by a board of education or on leave during 2010, the teacher will be paid an equivalent amount in salary without an additional percentage for benefits.

[184] At Thornhill Elementary School, each of the ten classes exceeded the class size and composition standard in section 76.1(2.3) of the *School Act* for nine months. Unless I have overlooked some evidence, during the school year none of the classes fell within the standard the employer must not exceed after September 30<sup>th</sup> under section 76.1(2.3). For nine classes, a tier-one remedy is applicable for the nine months for each affected teacher. For the tenth class (Grade 4), a tier-two remedy is applicable for the nine months for each affected teacher.

[185] At Hastings Elementary Community School, for the reasons stated above a nominal remedy of one paid release day is awarded to each of the seven affected teachers.

[186] At Claremont Secondary School, while Mr. Ewan's class would normally attract a tier-two remedy, for the reasons stated above, a tier-one remedy is applicable in calculating the paid release time awarded to Mr. Ewan. Ms Hooper's class attracts a tier-two remedy and it is awarded to her.

[187] In summary, I declare and order as follows:

1. The Board of Education, School District No. 82 (Coast Mountain)
  - (a) contravened section 76.1(2.3) of the *School Act* in the organization of ten classes at Thornhill Elementary School in the 2007-08 school year;
  - (b) is ordered to compensate the affected teachers of nine of the classes with tier-one paid release time to be taken at a time of the teacher's choosing during the current calendar year; and
  - (c) is ordered to compensate the affected teachers of one of the classes with tier-two paid release time to be taken at a time of the teacher's choosing during the current calendar year.
2. The Board of Education, School District No. 39 (Vancouver)
  - (a) contravened section 76.1(2.3) of the *School Act* in the organization of seven classes at Hastings Elementary Community School in the 2007-08 school year; and

- (b) is ordered to compensate each of the affected teachers of the seven classes with one day paid release time to be taken at a time of the teacher's choosing during the current school year.
- 3. The Board of Education, School District No. 69 (Qualicum)
  - (a) contravened section 76.1(2.3) of the *School Act* in the organization of one class at Qualicum Beach Middle School in the 2007-08 school year.
- 4. The Board of Education, School District No. 63 (Saanich)
  - (a) contravened section 76.1(2.3 and (2.3) of the *School Act* in the organization of two classes at Claremont Secondary School in the 2007-08 school year;
  - (b) is ordered to compensate Mark Ewan with tier-one paid release time to be taken at a time of the teacher's choosing during the current school year; and
  - (c) is ordered to compensate Stacey Hooper with tier-two paid release time to be taken at a time of the teacher's choosing during the current school year.

[188] I thank counsel and representatives of the union and employer for their courteous, professional advocacy and relationship throughout this lengthy proceeding. I reserve and retain jurisdiction over the interpretation and implementation of this decision and the grieved classes that have not been part of this representative phase.

JANUARY 11, 2010, NORTH VANCOUVER, BRITISH COLUMBIA.

*James E. Dorsey*

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