

IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

(the "Employer")

-and-

BRITISH COLUMBIA TEACHERS' FEDERATION

(the "Union")

(Provincial Policy Grievance - Codes of Conduct, Ministerial Order 276/07)

ARBITRATOR:	John B. Hall
APPEARANCES:	Judith C. Anderson, for the Employer Carmella Allevato, for the Union
DATES OF HEARING:	May 6-7, and June 28, 2010
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF AWARD:	February 25, 2011

PRELIMINARY AWARD

I. INTRODUCTION

This award arises from a preliminary objection by the Employer to the arbitrability of the Union's grievance. The underlying dispute alleges that various school boards in British Columbia have failed to comply with the Provincial Standards for Codes of Conduct Order, Ministerial Order 276/07 (the "Ministerial Order"). The Union is particularly concerned about an alleged failure to comply with Section 6(a) of the Ministerial Order which provides, in part, that school boards must ensure their codes of conduct include "one or more statements that address the prohibited grounds of discrimination set out in the *BC Human Rights Code*".

The Employer argues that the matter in dispute is not grievable and lies beyond the jurisdiction of an arbitrator. Its primary position is that the grievance does not arise out of the interpretation, application, operation or alleged violation of the collective agreement.

In response, the Union eschews a formalistic classification of the grievance. It submits that a flexible and contextual approach necessarily leads to the conclusion that the essential nature of the dispute is the extent to which school boards are exercising their management rights reasonably and satisfying their obligation to provide teachers with a workplace that is free from harassment and discrimination under the *Human Rights Code*.

II. BACKGROUND AND EVIDENCE

The Employer initially took the position that much of the evidence the Union proposed to lead went to the merits of the grievance, as opposed to the immediate question of arbitrability. However, after counsel reached an agreement on how the

evidence will be dealt with should the grievance proceed beyond the preliminary issue, the Employer did not object to the evidence being heard at this stage. Otherwise, much of the background was provided through documents entered by agreement.

(a) Prior Codes of Conduct

The Employer relies on the legislative history of student codes of conduct to support its interpretation of the current legislative regime and the Ministerial Order. In that regard, Section 88(b) of the *School Act*, R.S.B.C. 1979 c. 375, provided that “each school district shall ... determine local policy for the effective and efficient operation of schools in the school district”. Section 114 was headed “Rules of School” and provided:

114. Every pupil shall observe the rules of the school as sanctioned by the board of the school district having jurisdiction in respect of that school and shall carry out the learning activities his teachers require within this Act or the regulations, or within the terms of reference of the curriculum prescribed under this Act.

The School Act Regulation which accompanied the 1979 statute required students (referred to as “pupils” at the time) to follow the code of conduct established for their school:

36. [114] Every pupil shall be subject to the code of conduct established for the school while on the school premises, in going to and returning from school, and at all games and functions whenever and wherever held.

A new *School Act* became effective on September 1, 1989 (B.C. Reg. 264/89). It required students to comply with school rules authorized by their principal, and to comply with the code of conduct and other rules of the school board:

Duties of students

6. (1) A student shall comply

- (a) with the school rules authorized by the principal of the school or Provincial school, as the case may be, attended by the student, and
- (b) with the code of conduct and other rules and policies of the board or the Provincial school, as the case may be.

The 1989 statute provided school boards with the following powers and capacities:

Power and capacity

103. (1) For the purposes of carrying out its powers, functions and duties under this Act and the regulations, a board has the power and capacity of a natural person of full capacity.

(2) Without restricting the generality of subsection (1) a board may, subject to this Act and the regulations, do all or any of the following:

- (a) determine local policy for the effective and efficient operation of schools in the school district;

* * *

(c) make rules

- (i) establishing a code of conduct for students attending educational programs operated by or on behalf of the board, ...

The Employer notes that the foregoing provision was found in Part 6 of the 1989 statute dealing with the responsibilities of school boards, and was not part of the terms and conditions of employment for teachers.

(b) The MLA Task Force

An MLA Task Force was established by the Ministry of Education in October of 2000 "to help improve school safety". According to the accompanying news release, it was envisaged that the Task Force would "... consult with students, parents and educators on best practices, available resources and consistent approaches to increase student safety". The resulting Report dated June 11, 2003 was headed "Bullying,

Harassment and Intimidation in BC Schools”. The Task Force developed the following recommendations to make the Province’s schools “safer places for students”:

- School boards should develop a strategy to share successful anti-bullying programs among schools - in particular, from elementary through to secondary school.
- School planning councils should distribute and promote the BC Confederation of Parent Advisory Councils' workbook *Call it Safe*. The workbook outlines the steps students and parents should follow if they are victims of bullying.
- School boards and school planning councils should review and update anti-bullying policies.
- School boards and the Ministry of Education should encourage schools and communities to work co-operatively to prevent bullying.
- The government should establish safe zones around schools to shield students from criminal activities.
- School planning councils and the community should consider establishing school dress codes.
- School boards and [School Planning Councils] should develop and circulate procedures for reporting and investigating bullying incidents to students and parents.

Based upon these recommendations, the Ministry of Education introduced new provincial standards for school codes of conduct in September of 2003. Then Minister Christie Clark stated at the time that the standards were intended to “... make schools *safe, caring and orderly*, and measure the performance of schools and school districts”: (News Release dated September 4, 2003; emphasis added). The Ministry’s Standards Department issued a comprehensive document in March of 2004 called “*Safe, Caring and Orderly Schools: A Guide*”. Among other things, the document provided provincial standards for codes of conduct, and identified attributes of “safe, caring and orderly schools”.

(c) The 2007 Legislation

In early 2007, the Provincial Government introduced Bill 22, the *Education Statutes Amendment Act*. Once the Bill became effective, it repealed Section 85(2)(c)(i) of the *School Act* (previously Section 103(2)(c)(i) as reproduced above), and enacted a new Section 85(1.1):

Power and capacity

85 (1) For the purposes of carrying out its powers, functions and duties under this Act, a board has the power and capacity of a natural person of full capacity.

(1.1) Without limiting subsection (1), a board must, subject to this Act and the regulations, and in accordance with Provincial standards established by the minister, establish a code of conduct for students enrolled in educational programs provided by the board.

The new subsection (1.1) obviously provided the legislative authority for the Ministerial Order that came later in the same year (the complete Ministerial Order is attached as an Appendix to this award). The Ministry subsequently produced materials to assist school boards in establishing codes of conduct. One of those materials was a document entitled “Developing and Reviewing Codes of Conduct” which is a “Companion” to the Ministerial Order and an update of the Safe, Caring and Orderly Schools Guide. The Companion offers this background:

This Facilitators' Companion has been created to assist boards of education in meeting their obligation to ensure that codes of conduct in their districts meet the provincial standards and comply with the *School Act* and the *Provincial Standards for Codes of Conduct Order*. It offers information to assist boards to meet their responsibilities under the law and work to make the schools of our province as safe, caring and orderly as possible.

In 2004, the Ministry of Education, in consultation with education partner groups, published the handbook *Safe, Caring and Orderly Schools: A Guide* and provided it to all BC schools. This helpful guide included expectations for codes of conduct and suggestions for how schools can

create learning environments that are safe and welcoming for all students and staff. The Guide can be found at: www.bced.gov.bc.ca/sco/.

In 2007, the *School Act* was amended to make it mandatory for boards to have codes of conduct. In addition, a Ministerial Order entitled *Provincial Standards for Codes of Conduct Order* was enacted in the summer of 2007 that sets the standards for codes of conduct. (p. 2)

The next page of the Companion makes express reference to the *Human Rights Code* (bold in original):

Boards of education must consider the BC Human Rights Code when developing codes of conduct in their school districts.

The *BC Human Rights Code* deals with various forms of discrimination. The section dealing with discrimination in services lists grounds that might apply for the purposes of codes of conduct for schools.

Most relevant for the purposes of developing codes of conduct, it prohibits discrimination on the basis of an individual's or a group's race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, or sexual orientation.

How does the BC Human Rights Code apply to codes of conduct?

The *BC Human Rights Code* states that two of its purposes are to

- "foster a society in British Columbia in which there are no impediments to full and free participation in economic social political and cultural life of British Columbia" and
- "promote a climate of understanding and mutual respect where all are equal in dignity and rights."

Students' feelings of safety and belonging, including freedom from discrimination, can seriously affect their ability to learn in school. As the *Safe Caring and Orderly Schools: A Guide* states, schools should be places where students are free from harm, where clear expectations of acceptable behaviour are held and met, and where all members feel they belong. . . .

(d) Hansard

The Employer relies as well on portions of the Debates of the Legislative Assembly (Hansard) related to Bill 22. The Union does not dispute that such legislative history is admissible for the purposes described in various judicial authorities: see, *inter alia*, *R. v. Morgentaler*, [1993] 3 S.C.R. 463, and cases cited therein. The Employer relies more specifically on what was said by then Education Minister Shirley Bond when Bill 22 was introduced:

I'm pleased today to introduce Bill 22, Education Statutes Amendment Act, 2007. This act supports our government's commitment to school safety and to an education system that is transparent and accountable to parents, students and communities throughout British Columbia.

Under this legislation, school boards must establish codes of conduct for their districts to help prevent bullying and harassment at their schools. (B.C. Legislative Assembly, Hansard, Volume 17, Number 7, 29 March 2007 at 1345)

On Second Reading, the Minister expanded upon "the mischief" (to use the terminology in the case law) which Bill 22 was intended to address:

In March of 2004 the government introduced the safe schools strategy, which provided school boards with the new provincial standards for school codes of conduct. Schools were asked to review their codes of conduct to ensure that they meet the new standards. However, a recent survey of British Columbia's school districts shows that codes of conduct in hundreds of schools do not meet provincial standards. The survey showed that while all 60 districts have safe school policies in place, one-third of British Columbia schools, or more than 500 schools, say they do not have codes of conduct that meet provincial standards. That is simply unacceptable.

Safe school policies that do not meet standards or are not enforced are policies that do not meet the needs of our students. Under this legislation it is mandatory for school boards to establish codes of conduct for their districts to help prevent bullying and harassment at their schools. Just as importantly, the codes of conduct must meet provincial standards, as set out in the safe schools strategy introduced in March of 2004.

We all know that students learn better when they feel safe at school, yet many B.C. students may be afraid to go to school and even more afraid

to tell anyone that they're being bullied or harassed by their peers. Parents also need to know that their children will be treated well and protected while they're at school and under the care of their teachers and administrators. *This legislation will help ensure that school boards create standards for appropriate school behaviour throughout British Columbia so that schools will be safer places for students to learn and grow.* (B.C. Legislative Assembly, Hansard, Volume 19, Number 6, 1 May 2007 at 1705; emphasis added)

During the course of the Legislative debates regarding Bill 22, two amendments proposed by the Opposition were defeated. One of the unsuccessful amendments stated that “a [school] board’s code of conduct must be consistent with the principles of the B.C. *Human Rights Code*” (B.C. Legislative Assembly, Hansard, Volume 21, Number 2, 15 May 2007 at 1640).

(e) The Ministerial Order

The Ministerial Order was issued effective October 17, 2007 (M267/07). Its full title is “Provincial Standards for Codes of Conduct Order”. Although the entire text is attached as an Appendix to this award, I will liberally reproduce excerpts relevant to the parties’ submissions:

2. Boards must, in accordance with this order, establish one or more codes of conduct for the schools within their school district and ensure that the schools within their school district implement the codes.

3. When establishing codes of conduct, boards must consider the results of the consultations undertaken by schools within its school district at the school level with individuals or groups the school consider are representative of

- (a) employees of the board,
- (b) parents, and
- (c) students

* * *

5. Boards must ensure that schools within their school district review the codes of conduct annually with individuals or groups the schools consider are representatives of

- (a) employees of the board,
- (b) parents, and
- (c) students

to assess the effectiveness of the codes of conduct in addressing current school safety issues.

6. Boards must ensure that the following elements are included in their codes of conduct:

- (a) one or more statements that address the prohibited grounds of discrimination set out in the *BC Human Rights Code* in respect of discriminatory publication and discrimination in accommodation, service and facility in the school environment;
 - (b) a statement of purpose that provides a rationale for the code of conduct, with a focus on safe, caring and orderly school environments;
 - (c) one or more statements about what is
 - i. acceptable behaviour, and
 - ii. unacceptable behaviour, including aggressive behaviours such as bullying behaviours while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school environment;
 - (d) one or more statements about the consequences of unacceptable behaviour, which must take account of the student's age, maturity and special needs, if any;
 - (e) an explanation that the board will take all reasonable steps to prevent retaliation by a person against a student who has made a complaint of a breach of a code of conduct.
- (f) The Evidence of Lise Tetrault

Some of the most personal and compelling testimony I have heard during 25 years as an adjudicator was given in this proceeding by Ms. Tetrault. She is a middle school teacher, and was the subject of a homophobic incident at her school in June of 2009 involving two female students who had fabricated two letters to another female student. The content of both letters was to the effect that the writer wanted to perform sexually

explicit acts on the recipient. One letter purported to be from the school principal while the second letter had Ms. Tetrault's forged signature.

Ms. Tetrault testified at some length about the incident, including the very disturbing nature of the letters; how uncomfortable she was regarding how the incident was handled initially; the recommendations she put forward to address the situation at the principal's request; and how her recommendations were (or, in some instances, were not) taken up by her school's administration.

Ms. Tetrault's objectives throughout were two fold: she did not want the response to be punitive, and she hoped the resolution would be "a positive educational learning piece for everyone" (i.e. the students involved, their parents, staff at the school, and administration). The Union led this and other evidence through Ms. Tetrault to demonstrate how the failure of school boards to comply with the Ministerial Order has a direct impact on the teaching and working conditions of its members. The Union submits further that a compliant code of conduct would have addressed the incident and the school environment described by Ms. Tetrault.

I have chosen to not recite Ms. Tetrault's testimony regarding the June 2009 incident and other subjects more fully, because the details go beyond what is necessary to determine the immediate jurisdictional difference between the parties. But the concerns she brought forward were obviously real and deserving of attention. For instance, Ms. Tetrault was asked at the end of her direct examination why she did not file a grievance after several of the recommendations she made were not acted upon. She explained with considerable emotion:

The reason I did not file a grievance is because I'm afraid. I did not come out to myself until I was 30 years old because of fear; I did not come out to my peers in the workplace until I was 49 years old because of fear; and I am not out to my students because of fear. When I was asked to speak here I came close to [requesting] to be released because of fear. Homophobia is internalized in all of us, and the reality is that gays and lesbians do not feel safe in their workplaces -- very few do [feel safe]. I

think of kids, and I know some who are struggling with who they are and their sexual identity. If we can't create a workplace that is safe for everyone, we will never be able to deal with this fear. So I am here because I know I need to deal with my fear and I hope it will lead to changes in our workplaces that will make it safer [for everyone] to deal with their questions and fears.

At several points in her testimony, Ms. Tetrault stressed her need, as well as the need of others, to "feel safe" in the workplace. One of the recommendations that she made (and had not been acted upon by the time of arbitration) was for the student planner to include a clearly articulated school rule and expectation for anti-homophobic behaviour, and that the rule be communicated directly to students. Ms. Tetrault testified that, on any given day, one can hear students use expressions such as "That's so gay". However, other adults who also hear the comments do nothing. As the sole lesbian teacher on staff, Ms. Tetrault does not want to be the only one calling students on such behaviour, and believes all adults should take responsibility.

Finally, at the conclusion of Ms. Tetrault's testimony, I asked whether she wished to have her identity anonymized in this award given the highly personal nature of what she had recounted in support of the Union's position. Ms. Tetrault noted several factors which would make that preferable, before stating: "On the other hand, if I'm truly an educator and believe behaviours can shift, then why not step forward and be visible?" She accordingly chose to "attach my name to this to hopefully make a change".

(g) The Evidence of Glen Hansman

Mr. Hansman was the Union's second vice-president at the time of the arbitration hearing. He gave evidence about the process that led to the Ministerial Order, based on his prior involvement as a Union representative on the Vancouver School Board Pride Advisory Committee and later as one of the Antihomophobia and Diversity Consultants with the Vancouver School Board.

The Safe Schools Task Force described earlier in this award was comprised of three members of the Provincial Legislature, and was chaired by MLA Lorne Mayencourt. The resulting Report noted that “[c]oncerns about racism and homophobia figured prominently in submissions made to the [Task Force]. The seven recommendations in the Report were preceded by these passages:

The members of the Safe Schools Task Force believe that there must be a standard baseline policy in place in every school district across the province that establishes clear expectations for all members of the school community regarding bullying, harassment and intimidation.

These policies ought to be based upon a common framework and incorporate all of the categories of rights and responsibilities identified in the *Human Rights Code* and the *Charter of Rights and Freedoms*. We feel strongly that policies should encourage appropriate action and provide a basis for sanctions in response to inappropriate action. (p. 30)

As also described above the 2004 Safe, Caring and Orderly Schools Guide by the Ministry of Education flowed from the recommendations. Mr. Hansman was a member of the VSB’s Pride Committee and, as a result of its work, the district adopted an action plan that involved continuing mandatory training of school counselors and administrators on LGBTQ issues. Mr. Hansman was a presenter at conferences arranged pursuant to the action plan. On one of these occasions, he met Nell Ross who was with the Safe Schools department in the Ministry of Education. Their meeting resulted in ongoing communication between Mr. Hansman and Ms. Ross, as well as others in the Ministry, around LGBTQ issues. Mr. Hansman was also invited, along with other educators, to help determine the content of the Social Justice 12 course.

Mr. Hansman described in evidence his “frustration” with the recommendations of the Safe Schools Task Force when they were released. He stated the Report referred throughout to homophobic bullying being a problem in nearly every school district, yet the recommendations were written in terms of generic bullying. He sent correspondence to Premier Gordon Campbell, then Minister of Education Tom Christensen and MLA Jenny Kwan (the Opposition education critic) complaining about the failure of the Task

Force to “include any reference to homophobic discrimination anywhere in its recommendations”.

In early 2005, MLA Mayencourt announced his intention to introduce a private member’s bill called the “Safe Schools Act”. He stated in a newspaper article that the bill would address the need for a universal code of conduct for students in school; further, it would address a deficiency within provincial education policy that did not require school boards to develop a code of conduct consistent with the B.C. *Human Rights Code*. Mr. Mayencourt’s initiative was not successful, and Mr. Hansman sent an email encouraging the MLA to re-introduce the bill when the Legislature resumed. This occurred in April of 2006, and the Chair of the Vancouver School Board wrote to the Premier’s office “offering our support for the Safe School Act”. Mr. Hansman testified that the District wrote the letter at the request of his Local. The letter described the District as “a leader provincially and nationwide in its social responsibility, anti-racism, and anti-homophobic initiatives”. The bill again died on the order papers, and Mr. Mayencourt promised to re-introduce it during the Spring 2007 session. However, as events transpired, a private member’s bill was no longer required after the Government added Section 85(1.1) to the *School Act* and later promulgated the Ministerial Order.

Before promulgation of the Ministerial Order, Mr. Hansman was invited to a meeting during July of 2007 in his capacity as the VSB Antihomophobia and Diversity Consultant. Also in attendance were Mr. Mayencourt, representatives from the Ministry of Education, and other educators; then Minister Bond was not present. The purpose of the meeting was to give input into the development of the Ministerial Order. Mr. Hansman again expressed his view that generic language was not sufficient; rather, the *Human Rights Code* and protected grounds needed to be included in the standards. He also advocated for the specific inclusion of gender identity. Mr. Hansman recalled this meeting lasting about one hour. Although there was no commitment, he believed the Ministry was heading “in the right direction” and was thanked for the leadership role he had taken on the issue.

The Ministerial Order was apparently released in October of 2007 without much, if any, general notice. Mr. Hansman stated that he “stumbled across it” one day in November while on the Ministry website. He was pleased because it was an Order (unlike the Guide), and used mandatory language: “Boards *must* ensure ...” (emphasis added). Based on the language requiring codes of conduct to include “the prohibited grounds of discrimination set out in the BC *Human Rights Code*”, Mr. Hansman believed his concerns were covered.

In the spring of 2008, Mr. Hansman made a formal Freedom of Information request to all school districts in the Province. He requested “documents demonstrating your Board’s compliance with point 6(a) of Ministerial Order 276/07”. According to Mr. Hansman, some districts expressed confusion and were not aware of the Order. He compiled the information he had received by September and was concerned by what he found. In his view, only a handful of school districts were complying with the provincial standards. He took his findings to a *Vancouver Sun* reporter and to the Union.

(h) Collective Bargaining

Mr. Hansman gave evidence as well regarding his involvement in local collective bargaining during 2006 between the Vancouver Teachers Federation and the Vancouver School Board. The local tabled language to improve the harassment and discrimination language in Article 7.J.2 Non-Discrimination. Mr. Hansman stated the proposal was tabled to include gender identity as a protected ground, and to address issues arising from the *Jubran* case (i.e. intention to discriminate and whether an individual must be part of a protected group in the *Human Rights Code*). A counter-proposal tabled by the employer was ultimately agreed to because, according to Mr. Hasman, it addressed the local’s concerns.

Other documents related to negotiation history were entered by agreement. During the first round of collective bargaining following the enactment of the *Public Education Labour Relations Act* in 1994, the Union developed proposals regarding

violence prevention and protection. One proposal would have required school boards to establish, implement and maintain an effective program of violence prevention and protection that would provide, among other things, for “training programs that provide students with the skills and motivation to resolve differences in a non-violent manner”. The Employer initially proposed a joint education partners’ forum on violence prevention and protection that would be “hosted” by the WCB. The eventual resolution in the Transitional Collective Agreement was a commitment by the parties “to jointly sponsor a forum on violence in the school environment” subject to funding being received from the WCB and/or the Ministry of Education, Skills and Training.

The Union extracts two points from the foregoing exchange: first, the Employer did not assert the subject was not a matter for collective bargaining; and second, the final settlement was an obligation on both parties to jointly sponsor the forum (subject to funding). The Union’s submissions advise, however, that the forum was never held.

In subsequent negotiations, the parties have agreed on issues that will be the subject of provincial collective bargaining, and those that will be left for local bargaining. Violence Prevention in schools and, more specifically, Acts of Violence Against Teachers, is a matter for provincial bargaining (Provincial Collective Agreement, Letter of Understanding and No. 1 at Section E.11.3.47). That said, the matter apparently remains unresolved at the provincial level. In the absence of such agreement, pre-existing provisions in local collective agreements protecting teachers from violence continue in effect; some of those provision refer specifically to student violence against teachers. Additionally, most locals in the Province have negotiated “No Discrimination” clauses in their collective agreements. Under those provisions, the employer’s obligation to provide teachers with a workplace that is free from harassment includes the conduct of students.

The Union places particular significance on an extract from the Teacher Collective Agreement Administration Manual prepared by the Employer. The extract deals with Article E.1 - Non-Sexist Environment, and provides in part:

E.1.3 3. The employer and the local shall promote a non-sexist environment through the development, integration, and implementation of non-sexist educational programs, activities, and learning resources for both staff and students.

Clause E.1.3 establishes the obligation of the district to promote the issue with both students and staff. The focus on students reflects the reality that a non-sexist environment cannot be created and maintained if it only involves district employees. Students are a significant part of a teacher's working environment. The inclusion of the issue in educational programs helps to more readily attain and maintain the goal of this article.

The Union maintains the foregoing constitutes an admission by the Employer that student conduct is the subject of collective bargaining between the parties.

(i) Sample Codes of Conduct

The Union produced a binder containing numerous district and school codes of conduct it had received in response to a request made to its locals around the Province. The Union had assessed these codes using criteria from the Vancouver School Board and the Ministry of Education to determine whether they complied with the Ministerial Order. More particularly, it looked to see whether the codes contained a reference to the *Human Rights Code*, and whether the prohibited grounds of discrimination in the statute were specifically addressed. The results of this exercise were tendered in the form of a multi-page spreadsheet containing details for each school district (Exhibit 2, Tab 3).

In the Union's view, those codes of conduct which list the prohibited grounds are "in compliance". For example, the Union regards the District Code of Conduct for Students from School District 43 (Coquitlam) to be in compliance with the Ministerial Order. It contains the following provision:

4. The Board believes that schools must not be places where discrimination is practiced or tolerated. To that end, each school code of conduct shall contain the following statement:

“Students shall not discriminate against others on the basis of the race, religion, sex or sexual orientation, or disability, or for any other reason set out in the Human Rights Code of British Columbia, nor shall a student publish or display anything that would indicate an intention to discriminate against another, or expose them to contempt or ridicule, on the basis of any such grounds.”

On the other hand, the Union regards Policy No. 4100 from School District 63 (Saanich) as “not in compliance”. The name of this Policy is “Supporting Responsible Student Behaviours” and it contains no reference to the *Human Rights Code*. However, it does direct that school personnel should ensure “codes of conduct/citizenship are written in accordance with the Ministry of Education guidelines detailed in the *Safe, Caring and Orderly Schools* document”. Policy No. 1350 in the same district is named “Human Rights and Discrimination”, and provides as follows:

Preamble

The Board supports and endorses the values and objectives contained in the Canadian Multiculturalism Act, the BC Multiculturalism Act, the Charter of Rights and Freedoms and the BC Human Rights Code. In recognizing the importance of these values, the school district shall prohibit discriminatory conduct which violates the BC Human Rights Code.

Policy Statement

The Board affirms its commitment to the principles and values contained in the BC Human Rights Code. The Board believes that safe school environments are necessary for students to learn and achieve. Discrimination is not part of such an environment and the Board does not, and will not, tolerate any conduct of discrimination toward any individual or group. The Board is committed to creating and maintaining an environment free from all forms of discrimination.

Statutory Reference: Human Rights Code

The Union regards this Policy as “confusing, not in code” according to its spreadsheet.

As the Employer observes, the various policies and codes of conduct from around the Province reveal a wide diversity of approaches. Where protected categories are included, the identification of those categories may vary. Further, some districts such as School District 61 (Victoria) have included grounds not found in the *Human Rights Code* (e.g. socio-economic status).

(j) The Grievance

The Union's grievance was filed as a Provincial Policy matter dated December 12, 2008 (revised January 12, 2009) in these terms:

The B.C. Teachers' Federation ("BCTF" or "the Union"), on its own behalf and on behalf of its affected Locals and members, initiates a grievance of general application at Step 3 of the grievance procedure as per Article A.6.5.b of the collective agreement. The BCTF alleges that Boards of Education throughout the Province ("the Employer") have violated and continue to violate collective agreement provisions by failing to comply with Ministerial Order 276/07.

BACKGROUND:

The above-referenced order requires that Boards of Education develop and distribute student codes of conduct in each school within their jurisdiction which follow specific criteria, including adherence to the BC Human Rights Code. Following investigation we cannot find that any Board has complied with the Order in that:

- i.* Codes of Conduct have not been developed
- ii.* Where Codes of Conduct have been developed, they do not comply with the provisions of the Order
- iii.* Codes of Conduct, if developed, have not been distributed.
- iv.* Employee groups, including teachers, have not been given the opportunity to review Codes of Conduct as set out in the Order.

Consequently, the BCTF says that Boards are in violation of the provisions of the Collective Agreement and the Order and have initiated this grievance.

BCTF seeks as remedies:

1. declarations that the Boards have violated and continue to violate the provisions of the Collective Agreement and the Order;
2. orders that Boards fully comply with the Order forthwith;
3. orders that the Boards consult with employee groups to develop a schedule for review of the Codes in each School District; and
4. any other appropriate remedies within the jurisdiction of an arbitrator.

As the Employer observes, there were initially four elements to the grievance (i.e. points (i) through (iv) of the above letter) and an equal number of remedies were sought; further, while the grievance alleged school boards were “in violation of the provisions of the Collective Agreement”, no specific articles were identified. The Employer took the position that the grievance was “not an employment issue between the district and its teacher employees”, and thus advised the Union that it would be “raising a preliminary objection that the matter is neither grievable nor arbitrable” should the matter proceed to arbitration (April 27, 2009 email sent to Superintendents and Human Resources Contacts). The Union agreed on a without prejudice basis to hold the grievance in abeyance until June 30, 2009 to give time for school boards to comply with the Ministerial Order. The Union later determined to advance the grievance to arbitration based on its assessment that there was no significant evidence of compliance from a majority of boards.

The grievance as ultimately presented at arbitration is more limited but relies on specific articles in the collective agreement -- most notably, Article E.1 which is headed “Non-Sexist Environment”. The Union has now limited its grievance to an allegation that school boards are in breach of the collective agreement where they have not adopted codes of conduct whose content complies with Sections 2, 6(a) and 6(c)(ii) of the Ministerial Order. Further, as should be apparent by this juncture, the Union’s current focus is whether codes of conduct refer to prohibited grounds of discrimination in the *Human Rights Code* and, more particularly, sexual orientation.

III. SUMMARY OF SUBMISSIONS

I am indebted to counsel for their considered and thorough written submissions. Taken together, their Outlines of Argument run to more than 65 pages. The following summaries do little more than provide a sense of the parties' primary positions in admittedly broad strokes. The intricacies of those positions will be explored through my analysis in the next part of this award.

The Employer's opposition to arbitrability of the grievance is helpfully summarized at pages 31-33 of its written argument:

- a. There is no collective agreement provision that is alleged to have been breached.
- b. The provisions in the *School Act* and Ministerial Order concerning student codes of conduct are not "employment related statutes" as was the case in *Parry Sound*.
- c. The British Columbia Court of Appeal decision on class size is distinguishable in that the Court of Appeal concluded arbitrators have jurisdiction over class size legislation provided the following occurs:
 1. there is a substantial contextual connection between the legislation and the collective agreement in that the legislation previously formed part of the collective agreement and without question represents a substantial part of the employment relationship; and
 2. a violation of the class size legislation could result in a violation of other provisions of the collective agreement (e.g. layoff).

In this case, student codes of conduct have never formed part of the collective agreement nor will violations of the code of conduct legislation result in a violation of other provision(s) of the collective agreement.

- d. The essential nature of the dispute is compliance or non-compliance by Boards of Education with the student codes of conduct legislation and Ministerial Order, in particular the alleged failure to include "sexual orientation" as a protected human rights category in the codes of conduct. The essential nature of the dispute has never been the subject

of collective bargaining nor has it ever been viewed as a term or condition of employment for teachers or an aspect of management rights under the collective agreement.

- e. The essential nature of the dispute does not establish a substantial contextual connection with the collective agreement. There are no substantive rights of teachers affected by the student codes of conduct. Codes of conduct govern student behaviour and create consequences for students for non-compliance.
- f. The four collective agreement provisions relied on by the Union as the contextual connection to student codes of conduct are not the essence of the dispute and do not provide such contextual connection.
- g. The Union's position in these proceedings, if successful, would provide teachers with a role contrary to the role assigned by the legislation. Teachers would then have the right to determine content of the codes of conduct. This role is contrary to and undermines the consultation process.
- h. The Union's position results in a role for the Arbitrator which is contrary to the legislation and which extends an arbitrator's role from determination of terms and conditions of employment to determination of student issues of conduct and consequences for the conduct.
- i. The acceptance of the Union's position would place the Arbitrator in the role assigned by legislation to the Minister of Education and would result in the usurping of the Minister's authority by the Arbitrator.
- j. The purpose and intent of student codes of conduct is to govern student conduct and to create consequences for students. The purpose and intent of student codes of conduct is not to establish terms and conditions of employment for teachers.
- k. The Union's argument, if successful, would not limit the Arbitrator's role to one of interpreting section 6(a) of the Ministerial Order. If jurisdiction is found for an arbitrator, the jurisdiction would extend to the interpretation and enforcement of the content of student codes of conduct. Arbitrators would become decision makers on student discipline matters, a role now performed by administrators, Boards of Education and Ministerial processes.
- l. The Union's position creates absurd results if successful.
- m. The floodgates would be opened for arbitrators to adjudicate a wide variety of educational matters that directly or indirectly affect teachers

but which do not create terms or conditions of employment if the Union is successful in these proceedings.

The Employer additionally argues that there are alternate forums or processes for teachers to use if student conduct affects their employment, and points to WorkSafeBC, the Human Rights Tribunal and the enforcement of existing collective agreement provisions. In the alternative, even if a connection to the collective agreement can be established, the Employer submits I should decline jurisdiction in favour of those alternate forums.

The Union relies on recent judgments from our Court of Appeal and the Supreme Court of Canada. It submits the courts have adopted a liberal position which accords grievance arbitrators a broad, exclusive jurisdiction over issues relating to conditions of employment, provided those conditions have an express or implicit connection to the collective agreement. Further, in considering jurisdiction in a case affecting employment governed by a collective agreement, one must take a flexible and contextual approach which seeks to avoid formulaic classification and looks to the essential nature of the dispute. This distillation of the recent authorities leads the Union to submit:

74. A formalistic classification of the nature of this dispute would say that the dispute is about whether the districts have fulfilled their legal obligation under s. 85(1) of the School Act and the Ministerial Order.

75. However, a flexible and contextual approach which adopts a liberal position to the arbitrator's jurisdiction necessarily leads to the conclusion that the essential nature of this dispute is about the extent to which employers are exercising their management rights reasonably; the extent to which they are complying, or not, with their obligation to provide teachers with a workplace that is free of harassment and intimidation under the collective agreement, from discrimination under the *Human Rights Code*; and their obligation to provide teachers with a non-sexist environment.

The Union relies as well on Section 27(1)(a) of the *School Act* which provides in part that “the terms and conditions of a contract of employment between a board and a teacher are ... the provisions of this act and the regulations”. By virtue of this provision,

says the Union, Section 85(1) of the *School Act* and the Ministerial Order are within the jurisdiction of an arbitrator insofar as they affect a teacher's conditions of employment. Further, it is clear from the evidence that student behaviour is part of a teacher's working environment, and that the regulation of student conduct has been the subject of collective bargaining. Thus, failure to comply with the Ministerial Order violates the management rights provisions in the collective agreement and gives rise to an arbitrable dispute.

IV. ANALYSIS

Despite the parties' divergent positions, there is much common ground regarding the applicable legal framework. That is undoubtably because the parties have previously joined issue over similar jurisdictional questions. One of those occasions can be found in *British Columbia Public School Employers' Association/Board of Education of School District No. 39 (Vancouver) -and- British Columbia Teachers' Federation/Vancouver Teachers' Federation (Arbitrability Objection Re: Violation of School Act Grievance)* (April 9, 2009), unreported (Gordon). That award contains a very helpful distillation of the governing principles:

Historically, it has been accepted that the primary source of an arbitration board's jurisdiction is the parties' collective agreement. Under the *Code*, the legislative *quid pro quo* for a prohibition against mid-contract work stoppages is the requirement that arbitration will constitute the mechanism for the final and conclusive settlement of all disputes regarding the interpretation, application, operation or alleged violation of collective agreements. See sections 82 and 84(2). Article 12 of the parties' collective agreement mirrors this statutory mandate. The party advancing a grievance to arbitration is therefore obliged to establish that the alleged conduct constitutes a violation of the collective agreement or the claim seeks compliance with the provision(s) of the parties' collective agreement.

More recently, the courts have identified other means by which the scope of arbitral jurisdiction may extend beyond the scope of the express provisions of a collective agreement.

In *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, the Supreme Court of Canada found that arbitral jurisdiction extends to subject matters inferentially arising out of the collective agreement. And, in *Parry Sound*, the Supreme Court of Canada held that arbitral jurisdiction extends to the authority to enforce the substantive rights and obligations in human rights and other employment-related statutes where it can be said that such rights and obligations are deemed to be incorporated into the collective agreement.

In *BCTF v. BCPSEA*, the British Columbia Court of Appeal conducted a detailed analysis of these and other sources of arbitral authority, and in particular the incorporation of human rights and employment-related statutes into collective agreements. Referring to the Supreme Court of Canada's decision in *McLeod v. Egan*, [1975] 1 S.C.R. 517, as the "fountainhead for resolution of issues about the boundary between the jurisdiction of an arbitrator and the courts" in matters affecting employment governed by a collective agreement, the Court of Appeal noted that in *McLeod v. Egan*, the court did not decide that any of the provisions of the *Employment Standards Act* were incorporated into the collective agreement: the court instead determined that the *Employment Standards Act* "applied to govern the application of the management rights clause in the collective agreement" (paragraph 22). The Court of Appeal also noted that *McLeod v. Egan* was followed in *Parry Sound* where it was held that a grievance arbitrator has the authority to enforce the substantive rights and obligations of human rights and other employment-related statutes as if they were part of the collective agreement, and that the broad rights of any employer to manage the enterprise and direct the workforce under a collective agreement are subject to both the express provisions of the collective agreement and the statutory provisions of human rights and other employment-related statutes.

As noted earlier, at issue in the case before the Court of Appeal in *BCTF v. BCPSEA* was Arbitrator Munroe's decision that he lacked the jurisdiction to hear and determine a grievance alleging that certain school boards had violated their statutory obligation to determine class sizes under section 76.1 of the *School Act*. Central to Arbitrator Munroe's reasoning was the fact that the 2002 amendments to the *School Act* expressly removed the subject of class size from the collective bargaining process and teachers' collective agreements. However, as the subject of class size had been negotiated for many years in the terms and conditions of employment in collective agreements between teachers and school boards, the Court of Appeal viewed this subject as a significant term, condition and aspect of the employment relationship. In these circumstances, the Court of Appeal held that if an employer violated the new statutory determination of class size under Section 76.1 of the *School*

Act, it would constitute an improper application of the management's rights clause in the collective agreement thereby breaching section 76.1 and the Class Size Regulations. The Court of Appeal further held that such conduct would directly affect other terms and conditions of employment in the collective agreement. (pp. 14-15)

Arbitrator Gordon then quoted the key passages from the Court of Appeal's reasoning in the *BCTF v. BCPSEA* judgment:

[37] It seems to me that it is significant that the subject of class sizes was negotiated in collective bargaining between teachers and school boards before the 2002 legislation and was clearly, in the past, regarded by the parties as a term or condition of employment. The fact that the subject of class sizes can no longer be negotiated nor have any place in the collective agreement of the parties does not make that subject any less a term or condition that affects the employment relationship. The legislation simply transfers those terms or conditions from negotiated determination to statutory determination. *So I regard class sizes and aggregate class sizes as a significant part of the employment relationship.* If the statutory determination of class sizes is violated that would surely constitute an improper application of the management rights clauses in the collective agreement, in breach of s. 76.1 of the *School Act* and the *Class Size Regulation*. But it would also affect other terms of the collective agreement such as a decrease in the number of teaching staff leading to dismissals or lay offs, and such as health issues arising from stress. These are only examples. *The point is that such a violation is closely connected in a contextual way to the interpretation, operation, and application of the collective agreement and directly affects it.*

[38] Bearing in mind the precepts that I have drawn from the Supreme Court of Canada decisions and which I have set out in Part VI of these reasons, I believe that a flexible and contextual approach to the position that should be adopted by an arbitrator on the application of a statutory provision to the interpretation, operation, and application of a collective agreement, and to an alleged violation, does not depend on an "incorporation" of the statutory provision in the collective agreement but rather on *whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement, often, but not exclusively, a violation of the right expressed or implied in the collective agreement to set principles for management of the workforce in accordance with the laws of the Province.* In short, the collective agreement must be interpreted in the light of the statutory breach. (emphasis added)

The dispute before Arbitrator Gordon concerned a vote by the Vancouver School Board on the superintendent's report regarding class size and composition. The grievance alleged a failure to uphold Section 76.3(7) of the *School Act* and the VSB by-laws. It was argued by the employer that Arbitrator Gordon did not have jurisdiction over the subject matter of the grievance because it did not arise out of the interpretation, operation, application or alleged violation of a collective agreement; further, the grievance did not arise in connection with the alleged violation of a statute related to employment or employee relations that is implicitly incorporated into a collective agreement under the principles in *Parry Sound (District) Social Services Administrative Board*, 2003 SCC 42, [2003] 2 S.C.R. 157. Following her analysis of the past authorities as quoted above, Arbitrator Gordon turned to consider the essence of the union's claim when viewed in its factual context:

I conclude that the essential nature of this dispute is the Union's claim that the Chair's point of practice ruling under By-Law No. 1 at the October 15th Board meeting was incorrect. In my view, the dispute relates to the Union's allegation that during its voting process, the Chair of the Board mis-interpreted and mis-applied By-Law No. 1, Section III - Rules of Order 5(d), 6, and/or 7 to a motion. The dispute more specifically appears to relate to the proper interpretation and application of the terms "equality of votes" and "prevailing side" as expressed in the Rules of Order.

In the Grievance the Union alleges a failure to comply with Section 76.3(7). It is the case that the Chair's allegedly erroneous point of practice ruling occurred in the context of the Board's vote on a motion to approve the Report; and, it is the case that in voting on the Report the Board was intending to comply with section 76.3(7). However, when viewed in its factual context, I find the essence of the dispute is not that the Board failed to accept the Report at the public meeting on or before October of the school year as required under Section 76.3(7). Rather, the substance of the Union's claim is that in the course of accepting the Report, the Chair rendered an incorrect interpretation of the language in the provisions of the Board's meeting procedures. Hence, the allegation of non-compliance relates to the exercise of power under the provisions of the Board's procedural by-law, not section 76.3(7) of the *School Act*. (p. 17)

The next question considered by Arbitrator Gordon was whether she had jurisdiction to hear and determine the dispute:

This dispute does not appear at first consideration to fall within the ambit of the parties' collective agreement. Neither party provided this board with a copy of the collective agreement, and the Grievance does not allege a breach of any specific collective agreement provision. However, as summarized above, the courts have identified other means by which the scope of arbitral jurisdiction may extend beyond the scope of the express provisions of a collective agreement.

Applying the courts' reasoning to the dispute before me, I find that when viewed in its factual context, there is no real connection between the statute, the collective agreement and the dispute between the parties. The essential nature of the Grievance is a claim that the Chair mis-interpreted and mis-applied certain language in the Rules of Order governing the Board's meeting procedures under By-law No. 1. It has not been shown that the matter of Board meeting procedures has ever been the subject of collective bargaining, included in the parties' collective agreement provisions, or viewed as a term or condition of employment or an aspect of management's rights under the collective agreement. The only connection to the *School Act* is the fact that the Board was exercising its meeting procedure powers, which had been established in compliance with section 67(5) of the *School Act*, when the Chair's allegedly erroneous interpretation was made, and/or that the alleged procedural error occurred during a meeting where the Board was intending to comply with the requirements of section 76.3(7). It appears to be happenstance that the alleged mis-interpretation of the by-laws occurred in the context of a vote on the Report relating to the organization of classes, and I find this association with the subject of class size cannot be relied on to essentially bootstrap arbitral jurisdiction. In my view, when the Board is interpreting and applying the language of its meeting procedures under By-Law No. 1, Section III - Rules of Order, it is acting as a corporate entity exercising its authority in a manner consistent with those procedures. See sections 65(4) and 67(5) of the *School Act*. In the circumstances at hand, I cannot find this dispute, which arises from such conduct, falls within the ambit of the collective agreement as that concept has been extended by the courts. (pp. 17-18)

Another occasion where the parties have joined issue over a similar preliminary objection is *British Columbia Public School Employers' Association/The Board of Education of School District No. 68 (Nanaimo-Ladysmith) -and- British Columbia Teachers' Federation/Nanaimo District Teachers' Association (Superintendent Report*

Grievance) (January 4, 2010), unreported (Diebolt). The grievance there concerned the content of the superintendent's report on class size and composition under Section 76.3 of the *School Act*. Arbitrator Diebolt concluded that Sections 76.1, 76.2 and 76.4 of the statute create substantive rights and obligations; in contrast, he viewed Section 76.3 as a process and public accountability provision (p. 23). He also found that there was no prior history of collective bargaining regarding matters addressed in the latter provision, although he did not consider the absence of collective bargaining history to be determinative of the jurisdictional question. Arbitrator Diebolt ultimately concluded he lacked jurisdiction to hear the merits of the grievance, for reasons summarized as follows:

... I am unable to conclude that the statutory provisions in issue create substantive rights and obligations or that they are a significant part of the employment relationship. Nor am I able to conclude that there is a real and contextual connection between the statutory provisions in issue and the collective agreement such that a violation of them gives rise, in the context, to a violation of the provisions of the Collective Agreement. I find myself in agreement with the Employer's position that the superintendent's report and the Board's acceptance of it are internal processes designed to further accountability respecting class size and composition. ... (p. 27)

The Union submits my analysis of the present jurisdictional question should be guided additionally by the subsequent judgment of the Supreme Court of Canada in *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666. In that proceeding, the university had established a pension plan for its employees, the vast majority of whom were covered by collective agreements with one of nine certified trade unions. Mr. Bisaillon was a unionized employee, and applied to the Quebec Superior Court for authorization to institute a class action against the university in order to contest a number of decisions respecting the administration and use of the pension fund. One of the trade unions had, following negotiations, agreed to the measures contested by Mr. Bisaillon and sought to have the motion dismissed on jurisdictional grounds. The other eight trade unions supported the attempt to institute the class action. A majority of the Supreme Court (LeBel, Deschamps, Abella and Charron JJ.) held the class action procedure could not have the effect of conferring jurisdiction on the Superior Court over

a group of cases that would otherwise fall within the subject matter of another court or tribunal. In the circumstances, Mr. Bisailon's class action was incompatible with the exclusive jurisdiction of grievance arbitrators and the representative function of the certified unions.

The Union quotes the following statement by the majority in *Bisailon* for the proposition that grievance arbitrators have "a broad exclusive jurisdiction" over matters concerning conditions of employment:

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

In my view, it is important to recognize that each of the collective agreements in *Bisailon* referred in one way or another to the pension plan (para. 5). Thus, according to the majority, the pension plan had been incorporated into the collective agreements and became a condition of employment in respect of which the employees lost their right to act on an individual basis, independent of union representation (para. 56). While the situation was "certainly complex", the various disputes fell within the exclusive jurisdiction of grievance arbitrators appointed under the applicable collective agreements (paras. 45 and 47). The majority was not dissuaded by the potential of multiple proceedings and potential conflicts between separate arbitration awards in respect of the different bargaining units.

The minority (McLachlin C.J., and Bastarache and Binnie JJ.) agreed that pension plans form part of employees' conditions of employment and are often vigorously negotiated as part of the bargaining process (para. 66). However, the plan in issue

transcended any single collective agreement or employment contract and, accordingly, fell outside the exclusive jurisdiction of a labour arbitrator. The dissenting perspective was given by Mr. Justice Bastarache:

Because the [pension plan] cannot be reduced to a single collective agreement, it should be expected that problems will result if a labour arbitrator is given exclusive jurisdiction by virtue of one such agreement. ... I believe the risk of inconsistent decisions is symptomatic of a misapplication of *Weber*. I cannot agree that *Weber* allows for the same party to be bound by inconsistent directions from different courts and arbitrators, all claiming -- rightfully, according to my colleague -- to have jurisdiction over the essential character of the dispute. The fact that this possibility exists here confirms that the essential character of this appeal arises out of something other than the collective agreement: the [pension plan] itself. (para. 69)

I digress somewhat to recall the long-accepted view in British Columbia that a dispute between an employer and more than one trade union representing its employees falls within the jurisdiction of the Labour Relations Board. That is because the award of a labour arbitrator appointed under one of the collective agreements is not binding on the second trade union, and will not provide a final and binding resolution to the dispute. It perhaps remains to be seen whether this principle will be revisited in light of *Bisaillon*; however, that question does not arise here. The key point to note at this juncture is that both the majority and the minority in *Bisaillon* accepted that the pension plan formed part of the employees' conditions of employment, and had been incorporated into their collective agreements. It remains to be determined whether the essential character of the present dispute arises explicitly, or by implication, from the interpretation, application, administration or violation of the collective agreement between these parties.

The Union seeks to have the foregoing question determined in its favour by referring to several collective agreement provisions and the negotiating history described earlier. The list of contractual terms includes Articles E.1.3 and E.2.1a of the Provincial

... whether there is a real contextual connection between the statute and the collective agreement such that a violation of the statute gives rise, in the context, to a violation of the provisions of the collective agreement, often, but not exclusively, a violation of the right expressed or implied in the collective agreement to set principles for management of the workforce in accordance with the laws of the Province.

100. In our submission such a real contextual connection exists in this case. Mr. Hansman's evidence establishes that the amendment to the *School Act* and the ensuing Ministerial Order, while motivated by the desire to create a safe school for students, sought to create a safe school environment through establishing mandatory requirements for the regulation of student behaviour.

101. Given the impact of student behaviour on the working conditions of teachers, and given that the regulation of student behaviour has been the subject of collective bargaining, a violation of s. 85(1) and of the ministerial order, is a violation of the management rights provisions in the collective agreement.

In response to these and other submissions, the Employer contends there are no collective agreement provisions containing a reference to student codes of conduct; nor, it says, do any of the provisions have any connection to student codes of conduct.

But these and other submissions by the parties tend to overlook the initial question under the *Weber* analysis, and I turn now to the first issue for determination: When viewed in its factual context, what is the essence of the Union's claim? In my view, and despite the Union's numerous efforts suggest otherwise, the dispute inevitably reduces to an allegation that school districts have failed to comply with the Ministerial Order.

The core of the Union's complaint (i.e. the essential nature of this dispute) has been abundantly plain from the outset. As stated in the grievance letter: "The BCTF alleges that Boards of Education throughout the Province ("the Employer") have violated and continue to violate collective agreement provisions by failing to comply with Ministerial Order 276/07". This perspective is reinforced by the Union's binder containing numerous codes of conduct from school districts around the Province (Exhibit

3), and its spreadsheet assessing whether each of these codes “complies” or is “not in compliance” (Exh. 2, Tab 3). Moreover, this characterization of the dispute is implicit in numerous Union submissions. For instance, the Union concedes that codes of conduct regulate student behaviour. But it also maintains that creating a safe environment for students results in a safe and orderly environment for teachers. It says there is an obligation on school boards to adopt a code of conduct that contains certain terms and, for present purposes, the most significant term of the Ministerial Order is Section 6(a) dealing with the *Human Rights Code*. As the Union’s counsel stated in her opening remarks: “The core of the grievance is to ensure codes of conduct comply with the substantive parts of the Ministerial Order, and for the Union it is the articulation of prohibited grounds of discrimination”. I find that this accurately describes the essential character of the immediate dispute, when it is viewed through the lens of the surrounding facts.

The next element under the *Weber* approach concerns the ambit of the collective agreement: Does the dispute arise either expressly or inferentially out of its terms? Additionally, labour arbitrators have jurisdiction to enforce the substantive rights and obligations of employment-related statutes as if they were part of the collective agreement, and to address statutory violations that are closely connected in a contextual way to the interpretation, operation and application of the collective agreement: *Parry Sound*; and *BCTF v. BCPSEA*.

None of the prior jurisdictional differences between these parties provides an obvious answer. Unlike the subject matters before Arbitrators Gordon and Diebolt, the Ministerial Order cannot be regarded as mere process or procedure. Further, there is an obvious similarity between the Ministerial Order and matters pursued in collective bargaining by the Union -- most notably, a harassment free workplace and a non-sexist environment. On the other hand, student codes of conduct have never been negotiated between the parties, and it is difficult to equate them to “a significant part of the employment relationship” such as class size: c.f. *BCTF v. BCPSEA*.

It is helpful in these circumstances to recall the rationale underlying the exclusive jurisdiction model confirmed by *Weber* and subsequent decisions from the Supreme Court of Canada. One of those pronouncements is *Regina Police Assn. Inc. v. Regina (City) Board of Police Commissioners*, 2000 SCC 14, [2000] 1 S.C.R. 360. In that proceeding, a police officer had resigned rather than face disciplinary action. The chief of police refused to accept the officer's later attempt to withdraw his resignation. The officer's union filed a grievance under the collective agreement and eventually requested arbitration. The arbitrator held that she did not have jurisdiction because matters of police discipline and dismissal were governed by the Saskatchewan *Police Act* and Regulations, and came within the exclusive jurisdiction of the adjudicative bodies created under that legislation. The question on appeal, therefore, was whether the legislature intended the dispute to be governed by the collective agreement or by *The Police Act* and Regulations (para. 31). In answering this question, the Supreme Court applied the exclusive jurisdiction model articulated in *Weber*. As summarized by Bastarache J. in *Regina Police*, the underlying rationale of the *Weber* decision:

... is to ensure that jurisdictional issues are decided in a manner that is consistent with the statutory schemes governing the parties. The analysis applies whether the choice of forums is between the courts and a statutorily created adjudicative body, or between two statutorily created bodies. The key question in each case is whether the essential character of a dispute, in its factual context, arises either expressly or inferentially from a statutory scheme. In determining this question, *a liberal interpretation of the legislation is required to ensure that a scheme is not offended by the conferral of jurisdiction on a forum not intended by the legislature.* (para. 39; emphasis added)

In *Regina Police*, the Supreme Court found the legislature had shown an intention to have all matters relating to police discipline governed by *The Police Act* and Regulations, and had attempted to provide a comprehensive scheme for both the investigation and adjudication of such disputes. Thus, the question that must be considered here is whether the Legislature would have intended for issues regarding compliance with the Ministerial Order to fall within the exclusive jurisdiction of a labour arbitrator?

It will be recalled that the Union's grievance was originally much broader than its case at arbitration. The grievance initially asserted that the Ministerial Order requires school boards to "develop and distribute student codes of conduct in each school within their jurisdiction which follow specific criteria, *including* adherence to the BC Human Rights Code" (emphasis added). The remedies sought included:

1. declarations that the Boards have violated and continue to violate the provisions of the Collective Agreement and the Order;
2. orders that Boards fully comply with the Order forthwith;
3. orders that the Boards consult with employee groups to develop a schedule for review of the Codes in each School District; and

I acknowledge that some provisions of the *School Act* fall within the jurisdiction of an arbitrator while others do not, as exemplified by the authorities canvassed above. Under *BCTF v. BCPSEA*, the distinction turns on whether there is "a real contextual connection between the statute and the collective agreement", such that a violation of the former gives rise to a violation of a right expressed or implied in the latter. The dividing line was drawn in Arbitrator Diebolt's award between statutory provisions that created substantive rights and obligations, and others that were procedural. In this proceeding, one is inclined to suspect that the Union's grievance was narrowed at arbitration due to certain untenable implications of its original claim. In support of this comment, it is only necessary to consider Section 6(a), (c) and (d) of the Ministerial Order:

6. Boards must ensure that the following elements are included in their codes of conduct:

- (a) one or more statements that address the prohibited grounds of discrimination set out in the BC *Human Rights Code* in respect of discriminatory publication and discrimination in accommodation, service and facility in the school environment;

* * *

(c) one or more statements about what is

- i. acceptable behaviour, and
- ii. unacceptable behaviour, including aggressive behaviours such as bullying behaviours while at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school environment;

- (d) one or more statements about the consequences of unacceptable behaviour, which must take account of the student's age, maturity and special needs, if any;

The Union submits that all the elements in Section 6 of the Ministerial Order are “substantive” (which is undoubtably accurate), and states it will be “satisfied” with a ruling on Section 6(a); it is also concerned with Section 6(c)(ii) and what constitutes “unacceptable behaviour”. When pressed to explain how Section 6(d) would fall within the jurisdiction of an arbitrator, counsel conceded that it likely is not subject to arbitration because it deals with consequences for students. I concur, and readily find there is no “real contextual connection” between Section 6(d) of the Ministerial Order and the parties’ collective agreement. The immediate consequence of this conclusion, if the Union’s position is upheld, is that an arbitrator will not have exclusive jurisdiction to hear a dispute over whether a particular code of conduct complies with the Ministerial Order -- jurisdiction will depend on the nature of alleged deficiency. Thus, a dispute alleging deficiencies under both Section 6(a) and (d) would conceivably need to be adjudicated in more than one forum. Yet, on the Union’s theory of its case (i.e. student behaviours affect the working conditions of teachers) there is no valid reason to distinguish between Section 6(a) and (d) in terms of an arbitrator’s jurisdiction.

There are further difficulties with the Union’s position when it is examined in light of the exclusive jurisdiction model. It currently seems that the only remedy being sought by the Union should the grievance be heard on the merits is a declaration that certain school boards have failed to comply with Section 6(a). This will necessarily involve ascribing some meaning to Section 6(a), and then determining what constitutes sufficient compliance with its requirements. However, it is plain from the scheme of the Ministerial Order that teachers are only one of the employee groups who must be

consulted within the school district, along with parents and students (see Sections 2 and 5). In this regard, I am not persuaded by the Union's submission that *Bisaillon* provides a complete answer to the prospect of third parties being affected. Once again, the pension plan in that proceeding was a condition of employment under the various collective agreements between the university and its trade unions, and the jurisdictional issue raised here by the Employer's preliminary objection was not before the court. Rather, I find considerable merit to the Employer's contention that resort to the grievance process would undermine the multi-party consultation process envisaged by the Ministerial Order, and would effectively grant teachers a role superior to other stakeholders in the process for establishing and reviewing codes of conduct.

I nonetheless accept the Union's point that student behaviour can have an impact on teachers. And, as its counsel states, "students' *learning* conditions are teachers' *working* conditions". Thus, a code of conduct regulating student behaviour has implications for the workplace. There may also be, as the Union submits, an overlap between matters that have previously been the subject of collective bargaining and the elements that must be included in a code of conduct, particularly in the area of non-discrimination clauses and other human rights principles. I additionally acknowledge Mr. Hansman's role in advocating for inclusion of the prohibited grounds in the Ministerial Order, as well as the Union's belief that a compliant code of conduct would have addressed the incident and school environment described by Ms. Tetrault. But I am not satisfied that even a combination of these factors brings the Ministerial Order into the realm where a dispute over its requirements falls within the exclusive jurisdiction of a grievance arbitrator. Nor am I persuaded by the Union's submission that actions taken (or not taken) by a school board under the power and capacity provided by Section 85(1.1) of the *School Act* constitute an exercise of management rights for purposes of engaging the collective agreement regime.

Stated in the obverse, the "real contextual connection" in the present case does not lie between the statute and the collective agreement. Rather, it is found in the evolution over the years of provisions for school rules and student codes of conduct under the

School Act. Until Bill 22, the legislative provisions were permissive. Publications such as “Safe, Caring and Orderly Schools: A Guide” were designed to assist schools and school districts to address student safety in schools and, more specifically, the “genuine concern about issues of bullying, harassment, intimidation and youth violence” that had been expressed to the Safe Schools Task Force (Purpose, at p. 5). Further, it is vital to recall that Bill 22 repealed the *School Act* provision which allowed school boards to make rules “establishing a code of conduct for students attending educational programs operated by or on behalf of the board”, and enacted Section 85(1.1):

85. (1.1) Without limiting subsection (1), a board must, subject to this Act and the regulations, and in accordance with Provincial standards established by the minister, establish a code of conduct for students enrolled in educational programs provided by the board.

In other words, the Ministerial Order was promulgated pursuant to a statutory provision allowing the Minister to “establish a code of conduct *for students*” (emphasis added). As explained in the Legislature by Minister Bond, one-third of British Columbia schools did not have codes of conduct that met provincial standards. The Ministerial Order was intended to remedy that situation “so that schools will be safer places *for students* to learn and grow” (emphasis added). Further, student codes of conduct *per se* have never been negotiated at either the local level or the provincial level. All of these considerations demonstrate that the Ministerial Order is not “employment related” legislation (*Parry Sound*), and is not “a significant part of the employment relationship” between teachers and their school boards (*BCTF v. BCPSEA*). It necessarily follows that the essential nature of the Union’s grievance does not arise expressly or inferentially from the ambit of the collective agreement.

This brings me to the Union’s reliance on Section 27 of the *School Act* which sets out the terms and conditions of teachers’ employment:

27 (1) Despite any agreement to the contrary, the terms and conditions of a contract of employment between a board and a teacher are
(a) the provisions of this Act and the regulations,

- (b) the terms and conditions, not inconsistent with this Act and the regulations, of a teachers' collective agreement, and
- (c) the terms and conditions, not inconsistent with paragraphs (a) and (b), agreed between the board and the teacher.

By virtue of Section 27(1)(a), the Union submits Section 85(1.1) of the *School Act* and the Ministerial Order, insofar as they affect a teacher's conditions of employment, are within the jurisdiction of an arbitrator.

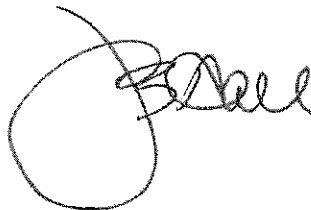
An analogous argument was advanced by the Union in *British Columbia Teachers' Federation and Alberni District Teachers' Union -and- British Columbia Public School Employers' Association on behalf of The Board of Education of School District No. 70 (Alberni) (Re: Kathleen Battand - Replacing Education Assistant during Absence)* (February 2, 2010), unreported (Dorsey). The essential nature of the dispute there was the Union's claim that teachers who are consulted and assigned classes that are permissibly organized in accordance with the *School Act* acquire individual terms and conditions of employment that are enforceable under the collective agreement. The grievance alleged that Ms. Battand had acquired such a term or condition of employment, and that it had been breached by the employer. Arbitrator Dorsey found such an individual term or condition of employment is not a term or condition of the collective agreement, in part because the subject matter cannot be a provision of the collective agreement under Section 27(3)(9) of the *School Act* (para. 129). He also held there was no evidence of individual terms and conditions having been included in the collective agreement, and that the asserted individual terms and conditions of employment did not arise from collective bargaining (paras. 130 and 131). While allowing it was "conceivable" that a consultation process could result in an agreed individual term or condition of employment for a teacher under Section 27(1)(c) of the Act, he concluded that "... such an individual term does not have the necessary connection to the collective agreement to give grievance arbitrators exclusive jurisdiction to enforce them under the collective agreement" (para. 49).

In my view, Section 27(1) ostensibly makes the Ministerial Order a term or condition of a teacher's contract of employment. I also acknowledge that one of the duties of teachers under Section 4(1)(c) of the School Regulation is "ensuring that students understand and comply with codes of conduct governing their behaviour". However, Section 27(1) does not make the Ministerial Order a term or condition of the "teachers' collective agreement" referred to in Section 27(1)(b); nor, for reasons expressed in this award, does the Ministerial Order have the necessary express or implicit connection to the collective agreement for grievance arbitrators to have exclusive jurisdiction. Finally, as made clear by the awards of Arbitrators Gordon and Diebolt, not all provisions of the *School Act* can be arbitrated, despite their inclusion under Section 27(1)(a) in a teacher's contract of employment.

V. DECISION

The Employer's preliminary objection is sustained. I do not have jurisdiction to arbitrate the merits of the Union's grievance alleging a failure by school boards to comply with the Ministerial Order.

Dated at Vancouver, British Columbia on February 25, 2011.

A handwritten signature in black ink, appearing to read "John B. Hall", written over a large, circular scribble.

JOHN B. HALL
Arbitrator

APPENDIX "A"

PROVINCIAL STANDARDS FOR CODES OF CONDUCT ORDER

Authority: *School Act*, sections 85(1.1) 168 (2) (s. 1)

Ministerial Order 276/07 (M276/07)..... Effective October 17, 2007
Orders of the Minister of Education

1. In this order "**board**" includes a francophone education authority as defined in the *School Act*.
2. Boards must, in accordance with this order, establish one or more codes of conduct for the schools within their school district and ensure that the schools within their school district implement the codes.
3. When establishing codes of conduct, boards must consider the results of the consultations undertaken by schools within its school district at the school level with individuals or groups the school consider are representative of
 - (a) employees of the board,
 - (b) parents, and
 - (c) students
4. Boards must ensure that schools within their school district
 - (a) make codes of conduct available to the public;
 - (b) distribute the codes of conduct at the beginning of the school year to
 - (i) employees of the board at the school, parents of students attending the school, and
 - (ii) students attending the school
 - (c) provide codes of conduct to employees of the board who are assigned to a school during the school year when they are so assigned;
 - (d) provide the codes of conduct to students who start attending a school during the school year and their parents when the students start attending the school;
 - (e) display the codes of conduct in a prominent area in the school.
5. Boards must ensure that schools within their school district review the codes of conduct annually with individuals or groups the schools consider are representatives of
 - (a) employees of the board,
 - (b) parents, and
 - (c) studentsto assess the effectiveness of the codes of conduct in addressing current school safety issues.

PROVINCIAL STANDARDS FOR CODES OF CONDUCT ORDER

6. Boards must ensure that the following elements are included in their codes of conduct:

- (a) one or more statements that address the prohibited grounds of discrimination set out in the *BC Human Rights Code* in respect of discriminatory publication and discrimination in accommodation, service and facility in the school environment;
- (b) a statement of purpose that provides a rationale for the code of conduct, with a focus on safe, caring and orderly school environments;
- (c) one or more statements about what is
 - i. acceptable behaviour, and
 - ii. unacceptable behaviour, including aggressive behaviours such as bullying behaviourswhile at school, at a school-related activity or in other circumstances where engaging in the activity will have an impact on the school environment;
- (d) one or more statements about the consequences of unacceptable behaviour, which must take account of the student's age, maturity and special needs, if any;
- (e) an explanation that the board will take all reasonable steps to prevent retaliation by a person against a student who has made a complaint of a breach of a code of conduct.

7. Further to section 6(c), boards must do the following in the statements about consequences of unacceptable behaviour:

- (a) whenever possible and appropriate, focus on consequences that are restorative in nature rather than punitive, and
- (b) include an explanation that special considerations may apply to students with special needs if these students are unable to comply with a code of conduct due to having a disability of an intellectual, physical, sensory, emotional or behavioural nature.