

Arbitration Award: Bill 33 — Class Size and Composition, 2006-07 and 2007-08 School Years

Following 54 days of arbitration, on August 21, 2009, the BC Public School Employers' Association (BCPSEA) and the BC Teachers' Federation (BCTF) received Arbitrator Dorsey's 354 page award concerning class size and composition grievances for the 2006-2007 and 2007-2008 school years.

Background

Since the passage of Bill 28, the *Public Education Flexibility and Choice Act* in 2002 and Bill 33, the *Education (Learning Enhancement) Statutes Amendment Act* (Bill 33) in 2006, the BCTF has launched a series of grievances concerning class size and school organization matters. With the codification of school organization matters in public policy and outside the scope of collective bargaining, the arbitral landscape has shifted concerning what can be the subject of arbitration and how disputes grounded in statutes can be litigated. The nature of these disputes is punctuated by what has emerged as a philosophical divide between those who believe that class size and related matters must be the subject of collective bargaining and those who believe they should be the subject of public policy outside of the scope of bargaining.

Further background is available on the BCPSEA website at:

<http://www.bcpsea.bc.ca/access/media/backgrounder/backgrounder09-Jan20classsize.pdf> and
<http://www.bcpsea.bc.ca/access/publications/aissue/aissue.html>

The Award

Of the 157 schools identified in the BCTF grievances, representing 1,622 classes, the parties agreed to arbitrate 81 classes that were grieved in seven representative schools in school districts 5 (Southeast Kootenay), 36 (Surrey), 39 (Vancouver), 58 (Nicola-Similkameen), 63 (Saanich), 69 (Qualicum) and 82 (Coast Mountains).

The goal of using these seven representative schools was 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.”

Issues

Under Section 76.1 of Bill 33, the following two conditions must be met when a grade 8-12 class exceeds 30 students and/or a K-12 class has in excess of three students with an individual education plan (IEP):

1. 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
2. The principal of the school has consulted with the teacher of that class.

The question that Arbitrator Dorsey addressed was whether the two conditions had been met.

Legislation

Section 76.1 of Bill 33 states:

- (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.

Decision

Arbitrator Dorsey found that 69 of the 81 classes that had been grieved had met the requirement of the principal and the superintendent holding the opinion that the classes were appropriate for student learning and that 67 of the 81 classes that had been grieved had met the consultation requirement under Bill 33.

Twenty-one* classes were found to be in violation of Bill 33 for the following reasons:

- **Preparation Relief Teachers (six classes)**
The arbitrator ruled that although the consultation with the assigned teacher of the class met the requirements of the legislation, there was also a requirement to consult with the preparation relief teacher of the class, which had not occurred.
- **Job Share and Related Teachers (one class)**
The arbitrator ruled that although the consultation with the teacher who taught the class five days of a six-day cycle met the requirements of the legislation, there was also a requirement to consult with the teacher who taught this class for one day in a six-day cycle, which had not occurred.
- **Group Consultation (seven classes)**
The arbitrator ruled that although there was agreement with the union to conduct a group consultation, the consultation requirements of Bill 33 had not been met for these classes, as the group consultation centered around the resource issues of the school rather than that of the individual classes.

- **Date by Which Classes Must be Deemed “Appropriate for Student Learning” (10 classes)**
The arbitrator ruled that although the principal arrived at his opinion that the classes were appropriate for student learning later in the fall, there had been a violation of Bill 33 as the principal had not reached this opinion by September 30.
- **Classes Deemed by Arbitrator as “Not Appropriate for Student Learning” (2 classes)**
Although the principal and superintendent were of the opinion that these classes were appropriate for student learning, the arbitrator found that these were not situations where there was a reasonably held opinion of the principal demanding deference from the arbitrator.

*The total is 21 not 26 classes as a result of the arbitrator ruling that five of the classes were found to be in violation of both conditions.

Remedy

By agreement, no evidence was adduced or submissions made on remedy at the hearing. Any remedy issues will be addressed after the union and employer have discussed the application of this decision to the other classes grieved in the 2006-07 and 2007-08 school years.

With respect to the seven classes where it was found that the group consultation had not met the requirements under Bill 33, Arbitrator Dorsey specifically commented that :

“... any issues about the manner in which union staff representatives participated with the principal in the organization of the consultation process or identification of teachers required to be consulted mitigating a principal’s failure to consult as required by the *School Act* are matters to be addressed when remedy is decided.”

With respect to the 10 classes where it was found that the opinion of the principal after September 30 had not met the requirements under Bill 33, Arbitrator Dorsey commented that:

“Events after September 30th might be relevant to issues of remedy, but they are not relevant to determining compliance with the class size and composition standard as of September 30th”

Executive Summary

Following is an executive summary of the award. Because of the length and complexity of the award, the summary does not provide all the detailed quotes from the award as might normally be the case. Instead, we have structured the summary to provide the conclusions found by Arbitrator Dorsey with a reference to the main paragraphs in the award where his discussion and rulings can be found. We encourage all to read the award in its entirety. A copy of the full award can be accessed on the BCPSEA website at:

<http://www.bcpsea.bc.ca/access/publications/aissue/2009/DorseyAward09.pdf>

For your convenience, we are also preparing a 39 page document containing the relevant quotes from the award on the various topics/issues, which will be available later today on the BCPSEA website at:

<http://www.bcpsea.bc.ca/access/publications/aissue/aissue.html>

Instructions and guidelines for the upcoming 2009-2010 school year will be provided in a separate document to be distributed later in this week following the regional conference calls that will take place on Wednesday, August 26, 2009.

Analysis, Factors Considered, and Principles Established

Record Retention [para 17 – 21]

- There is an obligation on the employer to retain copies of class lists used in the Bill 33 process on and before September 30.

Integration of Students with Special Needs [para 166 – 174]

- The integration of special needs students is a requirement of British Columbia government policy.
- “The legislated class size and composition standards in the *School Act* must operate in conjunction with British Columbia’s policy to include students with special needs in the public education system as fully participating members of a student community. Under the policy [all students are entitled to equitable access to learning, achievement and the pursuit of excellence in all aspects of their education].”
- “Boards of education must provide students with special needs with an educational program [in a classroom where that student is integrated with other students who do not have special needs, unless the educational needs of the student with special needs or other students indicate that the education program for the student with special needs should be provided elsewhere].”

Broadening of Special Needs Designations [para 183]

- “The accumulative effect of the evolution and changes in categories since 1985 is a broadening of the students for inclusion in the behaviour, learning disorders and autism spectrum disorder categories. As a consequence, no direct comparisons can be made between the former class composition provision deleted from the collective agreement and those in the current *School Act*.”

Class Building [para 210 – 247]

- Class building is a nine month process (January – September) which may also continue throughout the school year when necessary.
- It is also a very collaborative process, with a very high degree of teacher involvement, especially in the elementary and middle school settings.
- Class building is also driven by “district policies and formulas for the allocation of resources to district administration and programs, schools and other programs.”

Workload is not a Factor Addressed by the Legislation [para 248 – 254]

- “None of the teacher workload or student learning issues with combined grades classes are addressed in the class size and composition standards in the *School Act*, as they were in many deleted collective agreement provisions.”

Definition of Class for the Purposes of Bill 33 [para 275 – 278]

- “The class size regulation defines [classes] as [a group of students regularly scheduled to be together in a classroom for the purposes of instruction in an education program].”
- “By employing this definition of class, each class that is included in the determination of the district average class size in the aggregate for primary, intermediate and secondary is a class that might be subject to the principal’s duty to consult.”

Bill 33 – Legislation: No Distinctions Between Types of Classes [para 282 – 286]

- “It does not make distinctions among classes and does not set higher or lower class size standards for different types of classes with the same grade grouping. An amendment to introduce a class size stand of 24 students for shops, laboratories, home economics and similar hands-on activity classes was turned away.”
- “... the *School Act* makes no distinction among the variety of classes, courses and classroom environments that exist in these grades ...”

Bill 33 – Who is Counted as Having an Individual Education Plan (IEP) [para 291 – 300]

- “... a 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.]”
- Even though the nature of a student’s IEP may not be related to or be relevant to the type of class, there is no legislative basis to exclude such designated students when applying the requirements of Bill 33.
- This would include students who have a full time special education assistant, a student who might be in the class once a month, a student with a hearing impairment who participated fully and received a high mark, a student with a learning disability related to academic courses that had no relationship with the elective or non-academic course such as home economics, art, drama, design craft, physical education, French exempt students, etc.
- Although these designated students must be counted under the legislation, the fact that there is little or no relevance can be considered when the principal and superintendent are forming their opinion on whether the class is appropriate for student learning.
- “The nature of a special needs student’s designation and IEP and participation in a class, if examined by the principal and forming part of the principal’s opinion that a class exceeding the class size and composition standard is appropriate for student learning, will be a relevant consideration when reviewing that opinion. Some teachers testified the special needs designation and IEP-specific students had no relevance to their participation in the teachers’ classes and no impact on the class. There will be situations in which this will properly be part of the basis for the principal’s opinion.”

Which Teachers Need to be Consulted [para 301 – 308]

- The requirement to consult extends to job-share situations and to the preparation relief teachers of the class.

Consultation — General Comments [para 323, 324, 348, 350, 357, 384]

- Consultation does not include the requirement of a teacher’s consent or agreement to the organization of the class as it does for classes in grades 4-7 with more than 30 students.

- It is the principal's obligation to schedule and provide an opportunity for the teacher to consult; however, teachers may forego this right.
- There is no reporting requirement or requirement for joint forms for individual consultations.
- The consultation requirement does not preclude the students from being in the class in September. "As a practical and operational matter, all students are placed in classes on the first day they attend school in the school year. The 31st student or the 4th student with an IEP enrolled in a class is not supernumerary. They do not wait at home or in the hallway or cafeteria for completion of the principal's consultation before being enrolled in and attending the class."
- "The date for reporting class size averages under the *School Act* is September 30th, the same date at which the school district reports enrolment to the provincial government for funding. It is agreed this is the date at which class size and composition standards must be met or, if exceeded, by which the statutory requirement to exceed must be met."
- "Events after September 30th might be relevant to issue of remedy, but they are not relevant to determining compliance with the class size and composition standards as of September 30th, ..."
- "The statutory consultation requirement imposes obligations on the principal to meet with [the teacher of that class] in an agreed place, at a scheduled time, for sufficient time to permit meaningful dialogue. The consultation is to have a measure of formality. It is not a happenstance or haphazard event. There must be some notice of the time and place to meet for the specific purpose of conducting the consultation."

Consultation — Fine Tuning Concept — Takes Place After Classes are Already Organized [para 324 – 349]

- Consultation under Bill 33 occurs in September. This is not before but after the class has already been established.
- "The mandatory principal's consultation with the teacher about the organization and composition of a class does not take place before, but after, the class has been organized, the students are placed in the class and the teacher has been assigned to the class. Often the principal has had a minimal role in student placement."
- Previous conversations and involvement of a teacher prior to September may provide a context for the consultation, but does not constitute the consultation requirement under Bill 33 or indicate an acceptance of the teacher to the organization of the class.
- "The teacher may have previously known or anticipated having a class for which a consultation would be required from the spring notice of class organization, the June student placements by last year's teachers, the students' course selections, the history of class organization in the school, a discussion with the principal, a vice-principal, school secretary, counsellor or student support services teacher or in some other manner. The employer expressly acknowledges the teachers' participation in June in student placement in classes organized by the principal for the school year commencing in September is not part of the requisite consultation or an acceptance by a teacher of the class organization. It is, however, part of the context in which consultation with some teachers will occur."
- "The reality everyone is focused on is fine-tuning, not dramatic change. Everyone wants to avoid disruption for students after a couple of weeks of school. It is not a setting and context for the collaborative consultation defined in the Ministry of Education special educating policy manual. The class building is finished and the students and parents have been engaged."

- “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.”

Consultation — Paid Release time for Consultation and Preparation [para 356 – 358]

- There is no requirement under the *School Act* to provide paid release time to teachers to prepare or take part in the consultation process.
- “Class size provisions in the *School Act* are part of the terms and conditions of employment of teachers. Their terms and conditions of employment do not include paid release time from teaching unless it is otherwise provided in the collective agreement.”
- “A teacher’s work day is not limited to instructional time, and there were meetings during scheduled preparation time, before and after school hours, during recess and at lunch.”
- “It is the principal’s obligation to consult and the principal will schedule the time and place for the consultation if there is an absence of agreement or collaboration to facilitate a consultation. Teachers may forego their right to be consulted.”

Union Representation at Consultation [para 359]

- “Similarly, the class size provisions of the *School Act* do not address attendance and participation by union staff representatives at consultation meetings. In some districts, this may be addressed in the collective agreement.”

The Consultation Meeting [para 360 – 381]

- It is a joint responsibility for the teacher and the principal to be prepared for the consultation.
- “Once a consultation is required, the principal must gather relevant information for the consultation dialogue, which is not a one-way conversation. Class lists and IEPs outlining the supports and learning activities they require to be implemented and to fulfill the school district’s obligations to the child and parents contain relevant information.”
- “There is a reciprocal obligation on teachers to participate fully in good faith in the consultation process. There must be reciprocal disclosure of the information about any matter that may affect the appropriateness of the class for student learning and some dialogue about this critical issue.”
- “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...appropriate for student learning...”
- “There is an expectation the principal and teacher will discuss all the relevant issues and information that arises in the dialogue. If it is the teacher’s opinion that the organization of the class is not appropriate for student learning, then the teacher is expected to articulate some basis for the opinion why the organization of the class will likely adversely affect the normal learning expectations for a class ...”
- As a full participant in the process in good faith, the teacher must, before the close of the consultation process, communicate to the principal whether he or she agrees or disagrees with the organization of the class ...”

Consultation — Consideration of the Information [para 376 – 381]

- “The principal must have engaged in earnest listening and sincerely consider the teacher’s information and opinion before affirming, with or without changes in size, composition or

supports, that the class is appropriate for student learning. Good faith dialogue, like sincerity, can be faked, but was not by any of the principals in the representative schools.”

- “There are essential outcomes of a principal-teacher consultation. Teacher agreement is not a necessary outcome of the consultation. The principal has the right to form an opinion about the appropriateness of the class organization for student learning and to leave the class as organized or make changes in the size, composition and supports for a class after the consultation.”

Consultation — Follow-up [para 375 – 383]

- “The consultation process may close at the end of the consultation meeting or it may extend by agreement beyond the meeting or if there is a principal’s commitment to pursue further information or to investigation or explore options.”
- “There is no requirement for any follow-up written communication from the principal to the teacher, but the teacher must be informed that the process is over and told what the outcome is.”
- “Finally, 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.”

Appropriate for Student Learning — Deference [para – 423 – 451]

- Principals and superintendent must be given broad deference by an arbitrator; i.e., only under rare circumstances would an arbitrator impose his/her opinion over that of the principal or superintendent.
- “At grievance-arbitration, against the background of public review and accountability in the legislative scheme; the legislative history and evolution of the legislated class size and composition provisions; the deliberate choice of the imprecise term “appropriate”; the general principles of deference to the exercise of delegated legislative authority in public administrative systems; and the organizational reality that principals, schools and school districts have processes and systems to respond to emergency and difficult situations, as was seen in the evidence at the representative schools, an arbitrator must be restrained in questioning the merits of the dual principal and superintendent opinions and accord them a broad deference.”
- “Review of principal and superintendent opinions that a class is appropriate for student learning must include a deferential approach that recognizes this operational and organizational reality.”
- “Principals are constrained to act within the mandate of the public education system and direct resources as effectively as possible to achieve competing goals.”
- “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.”

Appropriate for Student Learning — Superintendent’s Considerations [para 448 – 450]

- “The superintendent does not stand in the principal’s shoes, does not attend the consultation and cannot be expected to have an opinion about individual classes that approximates the knowledge a principal can be expected to have. In large school districts, highly bureaucratized processes struggle to avoid objectifying children as numbers or categories. However, superintendents do not know, and cannot be expected to know, students’ names as teachers and principals do. They cannot be expected to have the level of knowledge of the students and classes the teachers and principals do. They are not required to consult the teacher. Their perspective is necessarily and intended to be broader, but not aloof.”
- “The approach to reviewing superintendent opinions is not a rights dispute matrix predicated on future advocacy and litigation. It must be based on an understanding that the requirement for the superintendent opinion is predicated on their organizational leadership accountability within a governance structure. Their role requires them to exercise due diligence that can be executed through structured processes and delegated responsibility. There is a second opinion dependent on the existence and reasonableness of the principal’s opinion.”
- “As part of the due diligence, the superintendent must be informed about classes that exceed the class size and composition standard with which the teacher of that class agrees it is a class appropriate for student learning and those classes for which the teacher disagrees or did not express an opinion.”

Onus

- Arbitrator Dorsey found that the onus to prove a violation of Bill 33 ultimately was that of the union. However, with respect to the order in which the parties must present the evidence at an arbitration concerning the issue of “appropriate for student learning,” he utilized a mathematical formula.
- This formula distinguished “presumptive deference” to that of “not extending arbitral deference without explanation.” He ruled that “presumptive deference” should be provided by an arbitrator if the sum of the number of students in the class plus the number of designated students with IEPs is equal to or less than 33. In this circumstance, the union would be required to proceed with their evidence first in an arbitration proceeding. If, on the other hand, this number was above 33, deference would still apply; however, the employer would be required to proceed with their evidence first at arbitration to explain to the arbitrator the rationale for their opinion that the class was appropriate for student learning.
- “Using the class size and composition standard of thirty and three and with the benefit of the extended exposure to classes and their organization in the representative schools, I have concluded the formula to determine the disputed classes for which there should be presumptive deference to the principal and superintendent opinions on the organization of the class are those for which on September 30 the sum of the number of students in the class and the number of students in the class with an individual education plan equals or is less than thirty three (students + students with IEP ≤ 33).”
- “This allows for a wide range of classes from a class with seventeen students of whom sixteen have an individual education plan to a class with thirty three students of whom none has an IEP or a class of thirty-one students of whom two have an IEP. It encompasses more than classes on the margin.”
- “Some teachers and principals may consider this approach and formula as “arbitrary” as they consider the thirty and three class size and composition standard. As that standard attempts to strike a balance, this presumptive deference formula is an attempt to find a balance between respecting the intended deference to be given to principal and

superintendent opinions and affording meaningful access to arbitration over class size and composition grievances.”

- “This does not mean these classes for which there is presumptive deference to the principal and superintendent opinions are beyond challenge. The union can challenge and lead evidence to challenge their appropriateness for student learning and the principal and superintendent opinions as of September 30th. The employer will adduce evidence to respond. The union will have the ultimate onus to prove a contravention of the *School Act* and the collective agreement.”
- “Other class organizations should not be extended arbitral deference without explanation by the employer despite the opinions of the principal and superintendent and the public reporting and accountability scheme. In these classes exceeding the legislated standard poses a greater risk of compromising the educational goals for students in the class.”

BCTF Reaction

BCTF reaction to date has been of a general nature, with comments in the media describing the award as “good news and bad....”

Based on the BCTF news release issued today, it appears their current focus is to continue to put pressure on government with respect to class size and funding. The news release can be found on the BCTF website at <http://www.bctf.ca/NewsReleases.aspx?id=19076>.

We understand that the BCTF will be meeting with their local presidents on Tuesday, August 25, 2009 to discuss the award. At this point we are uncertain about their reading of the award as it does not yet appear that any technical analysis of the award has been provided.

Next Steps

Regional conference calls will take place this Wednesday, August 26, 2009 followed by written instructions and guidelines with respect to the class size legislation. We will be in contact with the BCTF in the upcoming days to discuss implementation of the award and any redress issues. At this point districts should not be discussing issues such as redress or implementation of the award at the local level with your union.

Questions

In the interim if you have any questions or require further discussion, please contact your BCPSEA labour relations liaison.