

LABOUR RELATIONS CODE
(Section 84 Appointment)
ARBITRATION AWARD

BRITISH COLUMBIA TEACHERS' FEDERATION

UNION

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

EMPLOYER

(Class Size Regulation, s. 1(4) – Definition of “consult”)

Arbitration Board:	James E. Dorsey, Q.C.
Representing the Union:	Carmela Allevato
Representing the Employer:	Judith C. Anderson
Date of Hearing:	September 8, 2009
Date of Decision:	September 11, 2009

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1. Grievance, Jurisdiction and Preliminary Issue

[1] The union and employer agree I am properly constituted as an arbitrator under their collective agreement and the *Labour Relations Code* to finally decide the union's grievance over class size and composition organization in the 2008/09 school year. Disclosure, discussion and case management are ongoing. The arbitration hearing is scheduled to commence in October.

[2] The union and employer agreed to proceed in an expedited manner to obtain a decision on one issue they anticipate will assist this month in the administration of the *School Act* class size and composition provisions for the 2009/10 school year. It is agreed this decision will apply on a "go forward" basis and is not determinative of the issue for the 2008/09 school year grievance.

2. Definition by Regulation of Principal-Teacher Consultation Process

[3] When any class at any grade level is organized with more than three students entitled to an individual education plan and when any Grades 8-12 class is organized with more than thirty students, the principal of the school must consult with the teacher of that class. Principal-teacher consultation is required under the following four sections of the *School Act*.

Section 76.1(2.2)(b)

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 ...

(b) the principal of the school has consulted with the teacher of that class.

Section 76.1(2.3)(b)

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

(b) the principal of the school has consulted with the teacher of that class.

Section 76.2(a)

In each school year, the principal of a school must, within 15 school days after the school opening day set out in the school calendar applicable to the school for the school year,

(a) if applicable, ... consult with the teacher of a class as required by section 76.1 ..., (2.2)(b) or (2.3)(b),

Section 76.3(8)(a)(i)

If the board instructs the superintendent of schools to revise the report,

(a) the superintendent must instruct the principal of a school, within the period established by the superintendent,

(i) if applicable, to ... consult with the teacher of a class as required by section 76.1 ..., (2.2)(b) or (2.3)(b),

[4] Section 175(2)(f) of the *School Act* empowers the Lieutenant Governor in Council to make regulations “defining any expression that is used but not defined in this Act.” (See also *Interpretation Act*, RSBC 1996, c. 238, s.41) Section 76.1(3)(d) empowers the Lieutenant Governor in Council to make regulations to “define terms used in this section for the purposes of a regulation under this section.”

[5] The 2002 *Class Size Regulation*, B.C. Reg. 245/02 was amended effective June 27, 2008 (B.C. Reg. 205/08) to define “consult” and “consulted” for purposes of the four sections of the *School Act* as follows:

... “consult” means

- (a) provision by the principal of a school to the teacher of a class with
 - (i) information relevant to a proposal for the size and organization of the class, and
 - (ii) 2 school days before a decision is made respecting the size and organization of the class for the teacher to consider the proposal and provide the principal with the teacher’s views in that regard, and
- (b) consideration by the principal of the teacher’s views, if any have been provided,

and “consulted” has a similar meaning.

3. Agreed Consultation Process Issue for Decision

[6] The agreed issue in dispute is a single aspect of the defined consultation process that might have significant impact on the effectiveness, burden and administrative cost of the process.

[7] The issue is whether principals can meet the consultation process requirement for provision to teachers with “information relevant to the proposal for the size and organization of the class” by instructing teachers how to access documents containing relevant information or whether principals must provide teachers with copies of the documents containing the information.

4. Background and Context of Defining Consultation Process

[8] The four sections of the *School Act* were enacted in 2006 effective for the 2006/07 school year (*Education (Learning Enhancement) Statutes Amendment Act, 2006*, S.B.C. 2006, c. 21, ss. 11-12). There was no definition or direction in the amending legislation on the expected or required components of a consultation process to be followed by principals.

[9] During the legislative debates, concerns were raised about the nature, scope and content of the required consultations that will most frequently have to happen in September, one of the busiest times in the school year. The Minister said the principle was that there is to be consultation about class organization and the government believed there were different ways to consult depending on such things as the size and complexity of the school and whether it is an elementary or secondary school. The Minister was unequivocal that the expectation and best practice was a conversation between principals and teachers. They meet and talk to each other about the best way possible to meet the students’ needs.

[10] The *Education (Learning Enhancement) Statutes Amendment Act, 2006* required the Minister within one year to appoint a fourteen member committee to review the new district aggregate class size averages and class size and composition standards and requirements for consultation, reporting and accountability. The review committee was constituted in the same manner as the Learning Roundtable that had been convened in October 2005. The Minister appointed the members of the Roundtable as the members of the review committee.

[11] On June 20, 2007, members of the Roundtable and review committee presented their organizations' views on the operation and efficacy of the new legislation. The BC Principals' & Vice-Principals' Association said the legislated timelines were onerous and the consultations were time-consuming and took time away from other important activities at school opening. The Association suggested relaxing the timeline; allowing consultations to take place in the spring; delaying reporting dates to later in the school year; and streamlining data gathering. (BC Principals' & Vice-Principals' Association, "Brief to the Learning Roundtable," June 20, 2007)

[12] The British Columbia School Superintendents Association reported that among the challenges were "the teaching and leadership time (particularly evident in larger secondary schools) needed to manage, meaningfully, the ambitious consultation timelines and reporting requirements contemplated in the legislation." Due to declining enrolment trends and projected increases in the percentage of identified students with special learning needs, the Association predicted "the time for consultation respecting educationally sound practices (a major investment during 2006/07, particularly in secondary schools) will increase." It recommended "more reasonable timelines for consultation, specifically in secondary schools." (British Columbia School Superintendents Association, "Review of Bill 33 Provisions and Implementation," June 20, 2007, pp. 3 and 4)

[13] The British Columbia School Trustees Association suggested streamlining the consultation process. It reported negative impacts of the legislation included:

The most evident concern related to the implementation was the amount of time needed by district and school staff to complete teacher consultations and the reporting requirements. The tight timelines for implementation of the provisions negatively impacted the normal process for reviewing and reorganizing class assignments, and took administrative focus away from other priorities. In some districts higher TOC costs were incurred for consultation meetings with teachers.

...

There are also concerns that BCeSIS is unable to provide the level of information needed to properly inform the placement process, particularly for high schools where timetable building has been made even more complicated due to the class size provisions. (British Columbia School Trustees Association, "Report to the Learning Roundtable on the Impacts of Bill 33", June 20, 2007)

[14] There were no changes to the *School Act* or *Class Size Regulation* for the 2007/08 school year - the second year the consultation requirements were administered at schools.

[15] The Ministry of Education had gathered and published province-wide data on class organization for the 2005/06 and 2006/07 school years. The data reported, in December 2007, for the 2007/08 school year was that there were 1,458 schools with 68,693 reported classes. Of these, 3,179 classes in Grades 4-12 had more than thirty students. The preponderance of classes was in Grades 8-12. In all grades, 10,313 classes had more than three students entitled to an individual education plan. Only 141 of these classes were in Kindergarten to Grade 3. The number of classes with both more than thirty students and more than three students entitled to an individual education plan was not reported. (Ministry of Education, *Overview of Class Size and Composition in British Columbia Public Schools 2007/08 (Provincial Overview)*)

[16] Two conclusions from this data are that in September 2007 consultations were required in over 18% or more than one-sixth of all classes and the preponderance were in the higher grade classes at larger secondary schools.

[17] To give this some school-based context, the two representative secondary schools selected for hearing in the 2007/08 school year grievance were Guildford Park Secondary School (School District No. 36 (Surrey)) and Claremont Secondary School (School District No. 63 (Saanich)).

[18] In September 2007, at Guildford Park, there were 38 of 177 classes with more than thirty students and 73 with more than three students entitled to an individual education plan. Eighteen classes had both more than thirty students and more than three students entitled to an individual education plan. This meant 93 principal-teacher consultations were required for 52.54% of the classes. (Ministry of Education, *Overview of Class Size and Composition in British Columbia Public Schools 2007/08 (Guildford Park Secondary)*)

[19] At Claremont, there were 32 of 159 classes with more than thirty students and 23 with more than three students entitled to an individual education plan. Three classes had both more than thirty students and more than three students entitled to an individual education plan. This meant 52 principal-teacher consultations were required for 32.7% of the classes. (Ministry of Education, *Overview of Class Size and Composition in British Columbia Public Schools 2007/08 (Guildford Park Secondary)*)

[20] Assuming an average of ten minutes per consultation, or six per hour, the

principal at Guildford Park potentially met with teachers for 15.5 hours. If the meetings averaged fifteen minutes, it would be 23.25 hours. At Claremont, it was 8.7 or 13 hours. The meetings, attended by school staff representatives on behalf of local unions, had to be scheduled for pre-assigned periods of time. They had to be scheduled at times during the day when the teachers were not in class or a teacher-on-call or administrator could substitute for the teacher.

[21] The next Roundtable and review committee meeting after June 20, 2007 was on December 10, 2007. At this meeting, a Superintendent of Achievement representing the Ministry of Education reported the outcomes of the work of a subcommittee that had reviewed the impact and efficacy of the legislated:

- a. No recommendations for amendments to the existing legislation were forthcoming from the committee. The committee suggested that the effect of the amendments should be monitored on an ongoing basis.
- b. The committee agreed with some administrative changes, including electronic reporting of statements of rationale, that were intended to streamline and make reporting more efficient.
- c. A draft regulation intended to add clarity to the definition of what was intended by the "consultation" was circulated. Members of the Roundtable were asked to provide their views of this draft prior to the next meeting. Minister Bond asked for a response to the consultation draft by January 15. (Learning Roundtable Minutes, December 10, 2007)

[22] The draft regulation was discussed at the January 29, 2008 Roundtable meeting. The minutes record:

- a. All members of the Roundtable with the exception of the BCTF, agreed with the draft definition provided by Minister Bond at the last meeting.
- b. Minister Bond restated her view that the intent of the legislation was to create meaningful and professional conversation between teachers and principals regarding the organization of classes.
- c. BCTF delegates indicated that this goal has not been reached and many teacher members of the BCTF did not view the consultation process as positive or resulting in any substantive outcomes.
- d. The BCTF provided an alternate to the ministry draft of the definition of consultation. Minister Bond undertook to consider the suggested changes and come back to a subsequent meeting with her decision. (Learning Roundtable Minutes, January 29, 2008)

[23] The next Learning Roundtable meeting was a year later on January 27, 2009. The *Class Size Regulation* was amended effective June 27, 2008.

5. BCPSEA Advice to Members for the 2008/09 School Year

[24] BCPSEA is not a partner organization of the Learning Roundtable, but is

responsible to advise its board of education employer members on the implementation of the new regulation. BCPSEA published guidelines on August 26, 2008 identifying what might be relevant information and ways it could be provided to teachers.

The definition of consult does not require that the relevant information be provided in any specific form. Therefore, it is not mandatory that the information be provided in writing or that the information be provided in person directly to the teacher. The methods of providing the relevant information that are likely acceptable under the definition of consult, include:

- Written material delivered to each applicable teacher
- Information verbally provided to the individual teacher
- Combination of verbal and written material provided to the individual teacher
- Where appropriate, a meeting with the affected teachers as a group

As there is nothing in the legislation that requires a particular form for the provision of information, each district should adopt a process that is consistent with its operating culture. Although not required by the legislation, there may be value to having the principal meet with the teacher to provide the information. (BCPSEA, @issue 2008-11, "Class Size – Guidelines for New Regulations", August 26, 2008, p. 2)

The guidelines further stated that "... it is not mandatory that the information be provided in writing" (p. 5).

[25] While the union says this initial approach to the regulation supports its interpretation that copies of documents containing relevant information are to be delivered to teachers to be consulted, BCPSEA says class lists are the written material that was envisioned to be delivered to each applicable teacher.

6. BCPSEA and BCTF Advice to Members for the 2009/10 School Year

[26] Following my August 21, 2009 decision on the grievances for the 2006/07 and 2007/08 school years, BCPSEA issued *Guidelines for Implementing Class Size and Composition Provisions*. Part of its advice is that, while not required, principals send letters to teachers to be consulted that include:

1. Copy of the class list and identified students for the purposes of Bill 33.
2. Any other information that may be relevant to the class.
3. Instructions on how the teacher can access students records, IEPs, and any other documents that may be relevant.
4. Set a date, time and location for a consultation meeting and ask the teacher to confirm whether they would like to participate in the consultation to provide their view on the class organization, i.e., under the new Regulations the teacher is not required to do so and have the right to opt out of providing their views of the class in a consultation.

Please note: In order that there is no confusion this notification package to the teacher should include a tear off sheet or other method for the teacher to confirm **in writing** whether he/she wishes to participate in the consultation or not. If he/she chooses not to, this written record should be kept in case the matter should proceed to arbitration. Furthermore, when providing information or access to information to the teacher, please ensure that privacy legislation requirements are complied with. (pp. 6-7)

BCPSEA advises once the consultation is confirmed, "... the principal is expected to gather relevant information for the consultation dialogue, which is not a one-way conversation" and teachers are expected "... to access the relevant information they deem necessary to prepare themselves for the consultation" (p. 7). BCPSEA developed a sample letter for principals to send to teachers.

[27] BCPSEA shared the letter and *Guidelines* with the BCTF on September 3rd. The sample letter includes the following:

A copy of each of the class lists has been attached and students who require an IEP have been identified. You may access further information on the students, such as student files, IEPs, etc., by contacting _____ and making arrangements to view the documents.

Disagreement by the BCTF with this content of the sample letter led to an agreement on September 4th to schedule this expedited dispute resolution process.

[28] While BCPSEA was developing and distributing its *Guidelines* and sample letter, on September 2nd the BCTF distributed step-by-step suggestions for consultation that include: "Members request, in the consultation process, copies of IEPs and all other relevant information regarding the organization of their class(es)." The BCTF advises: "It is not sufficient that the principal direct the teacher to sources where the information can be found." BCTF advice documents were disclosed to BCPSEA at the hearing on September 8th.

[29] For all but two school districts, the 2009/10 school year began September 8th. Because of this late start in September, the date by which consultations must be held is September 29th. Classes must be organized in accordance with the *School Act* by September 30th.

[30] This means that for classes with more than thirty students or with more than three students entitled to an individual education plan or both, the relevant information must have been provided, the requisite consultations must have been held and all requisite dual opinions formed by principals and superintendents by September 30th.

This timeline, much tighter than the past two school years when school opened September 4th and 2nd, provides the minimum time for superintendents to receive and review principals' reports and opinions.

7. Union and Employer Submissions

[31] The union submits the principal is required to deliver to the teacher a copy of all the relevant information, not just an annotated class list. This was the correct interpretation and advice given by BCPSEA in August 2008. At that time, there was no option identified to direct the teacher to where the information could be viewed.

[32] The union submits the principal's obligation to provide relevant information must be interpreted in a manner consistent with the legislative intention with respect to consultation. The ordinary meaning of provide is to supply, furnish or give, as "be provided with" was interpreted in the context of preparation time to mean to give or to furnish, not just make available (*British Columbia Public School Employers' Association* [2007] B.C.C.A.A.A. No. 60 (Kinzie) (QL)). Simply making preparation time available by scheduling it at times it was unlikely to be used was not consistent with the purpose of the agreement. Similarly, pointing to where information can be viewed is less than a minimalist approach and does not fulfill the regulatory requirement.

[33] The union submits that, while consultation has been directed by legislation during the busiest weeks of the school year, the operational pressures this creates cannot be invoked by the employer to detract from the regulatory requirements with respect to consultation. This operational reality was well known when the statute was enacted and when consultation was defined by regulation. Despite this, the legislative intention is to have teachers fully included in discussions about classes that exceed the class size and composition standard and to ensure accountability throughout the system.

[34] The union submits meaningful consultation enhancing accountability is advanced by furnishing teachers with all information principals consider relevant to the proposed organization of the classes. Directing teachers to get in line to speak to someone to view, to read, to make notes from and, perhaps, to copy documents is not. This approach does not respect teachers as full participants in the consultation. It places teachers at a distinct disadvantage when principals have control over all documents containing the relevant information.

[35] The union submits teachers are to receive the relevant information in advance of the consultation. Directing teachers to go gather the relevant information does not make the consultation any more meaningful or less futile than giving it to them for the first time at the consultation meeting, as was happening during the 2006/07 and 2007/08 school years before the definition of “consult.” What was previously provided to teachers at the consultation meeting must now be provided in advance of the meeting. This gives teachers the opportunity to reflect and reread the information and to develop an informed opinion. Having to go find and read the documents and later recall and reflect undermines the purpose and importance of the consultation.

[36] The union submits administrative chaos will flow from requiring multiple teachers, perhaps seven or eight at secondary schools, to seek access to the same student files at or about the same time. Who gets access first? Who gets custody? Where can it be viewed? What if a teacher wants to see it a second time to review or confirm some matter? “Given that administration is already gathering the information and copying class list, it would make more sense to copy the other documents and provide these to the teachers.”

At most, BCTF’s interpretation will require clerical support time to photocopy the relevant information and attach it to the letters to the teachers. Most of this is material, such as IEPs and safety plans, which teachers are entitled to receive upon request. Consequently, at some point, clerical support time for photocopying will be used. (*Outline of BCTF’s Submission*, ¶34)

[37] The employer’s position is that its advice to boards of education is not binding on them and each may decide to do something different.

[38] The employer submits class lists and individual education plans contain relevant information but “... other information pertaining to students in the class may or may not be relevant. The teacher is to determine what is relevant after the teacher’s review of the student records, etc.” (*Argument of the Employer*, ¶16). Teachers know where and what to look for in their schools.

[39] The employer submits acknowledging the relevance of individual education plans does not answer the question how they are to be provided to teachers. The employer’s approach is “not to have volumes of paper distributed within the school” that would require “a tremendous redirection of resources at each school for photocopying and for distribution” (*Argument of the Employer*, ¶ 19).

[40] The employer submits the purpose of the regulation is to have available to teachers information they consider relevant. It is not to broadly distribute sensitive student information at the risk of not protecting the students' privacy and maintaining the confidentiality of their records, which are obligations of boards of education under section 79 and other sections of the *School Act*.

[41] The employer submits because there is no adequate method of ensuring the privacy of photocopied documents it could not have been intended that this would be the manner in which relevant information was provided. "Having volumes of sensitive student information distributed in a school would provide countless opportunities for the information to be seen by persons not entitled to the information" (*Argument of the Employer*, ¶ 33).

[42] The employer submits if the consultation process requires principals to give or supply relevant information in the manner the union advocates then each principal would be confronted with two choice – first review student files and decide what is relevant, which could not be achieved within the timeline required for consultation and reporting under the *School Act*, or instruct secretarial staff to photocopy documents, which would be "costly, time consuming and certainly a breach of the student's privacy." "Neither of these options is viable or fits the reality and practice in schools." (*Argument of the Employer*, ¶ 36 - 37)

[43] The employer submits teachers are professionals and know what information is relevant to form their views about the organization of a class. Having principals select the information they consider relevant is "limiting access to information teachers consider relevant" (*Argument of the Employer*, ¶ 39). If teachers consider individual education plans relevant they can ask for copies after reviewing them. Some teachers choose not to review student files or individual education plans and prefer to form their own opinions based on current observation and assessment of the students.

[44] The employer submits it is not administratively feasible in most schools to copy and give documents to all teachers entitled to be consulted. It is not the current reality or practice to distribute student information. It is made available on a "need to know" or request basis. In the past, teachers have not been given "volumes of student information in the first 15 days of the school year" (*Argument of the Employer*, ¶ 42).

[45] The employer submits copying and distributing documents is not consistent with a paperless, green society most strive for and many teachers advocate. In some schools, it would duplicate what has already been distributed to classroom teachers by non-enrolling student support services teachers.

[46] The employer submits providing teachers with open access to student files meets both the practical needs of the system and the spirit of the regulation. It is not a barrier to meaningful consultation. It supports teacher involvement in consultation by having access to and participating in determining what is relevant.

[47] The employer explains the intention of its advice is that principals would refer class teachers to non-enrolling teachers, such as learning assistance teachers and other student support services teachers, who would share all information needed by a teacher who is to be consulted. “The student support services teachers will be able to direct teachers to the “need to know” or relevant materials” (*Argument of the Employer*, ¶ 56).

[48] The employer submits that a wholesale copying of documents must be tempered by what will serve the interests of the process and not constitute an unnecessary waste of time and materials, as was the decision in an analogous situation in *Gillespie v. Gillespie* [1997] B.C.J. No. 1231 (QL). The court decided a representative of the plaintiff must first review documents before making a demand for copies of them. Also, in *Mordo v. Nitting* [2006] B.C.J. No. 1085 (QL), the court decided it can relieve against slavish compliance with a procedural Rule of Court if the cost of compliance “would be oppressive, expensive, or overbroad; or where the prejudice to a party’s privacy right outweighs the probative value of the documents sought” (¶ 21).

[49] The employer submits the ordinary meaning of “provision” is to furnish or to make available. As the Ontario High Court of Justice said in *Buildveco Ltd. v. Monarch Construction Ltd.* [1990] O.J. No. 782 (QL), “The plain meaning of the word does not denote or connote any limitation as to the source or means by which a person makes available the thing that is to be furnished” (p. 8). The court held M. Ltd. could collect interest from its joint-venture partner B. Ltd. under the terms of their agreement because, as agreed, M. Ltd. did “provide” money on B. Ltd.’s default even though the money was paid by another company on M. Ltd.’s behalf. Having “provision” include

methods other than giving directly is also the approach in the definition of “provide” in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19, s. 2(1) – “provide means to give, transfer, or otherwise make available in any manner whether directly or indirectly and whether or not for consideration.”

[50] The employer submits to be relevant the material must not only advance the inquiry, but also its value must be worth the cost and have sufficient probative value. For this reason, the Ontario Court of Appeal affirmed a criminal trial judge’s decision to exclude evidence proffered by the defence of a deceased person’s disposition to violence (*Regina v. Yaeck* [1991] O.J. No. 2062 (QL) (C.A.) leave to appeal dismissed [1992] 1 S.C.R. xii).

[51] Finally, the employer submits:

For class size and composition consultations, there could be hundreds of documents that have some potential relevance. Surely the process at schools where student privacy rights are zealously protected and where hard copies of documents rarely occur, there needs to be an examination or viewing of student records by the teacher if the teacher chooses to do so. To produce hard copies of all documents would be costly, inefficient and would jeopardize privacy rights of students and their families. (*Argument of the Employer*, ¶ 79)

8. Discussion, Analysis and Decision

A. School Organization Context

[52] The class size and composition legislation operates within the context of the organization of schools. Under the *School Act*, principals are appointed “to perform the duties and have the powers set out in the regulations” (s. 20(1)). Under the *School Regulation*, B.C. Reg. 265/89, principals are responsible for the administration and supervision of schools. Section 5 of the *School Regulation* states, in part:

- (6) The principal or, if so authorized by the principal, the vice principal of a school shall,
 - (a) perform the supervisory, management and other duties required or assigned by the board,
 - (b) confer with the board on matters of educational policy and, where appropriate, attend board meetings for that purpose,
 - (c) evaluate teachers under his or her supervision and report to the board as to his or her evaluation,
 - (d) assist in making the Act and this regulation effective and in carrying out a system of education in conformity with the orders of the minister,
 - (e) advise and assist the superintendent of schools in exercising his or her powers under the Act,

- (f) recommend to the superintendent of schools the assignment or reassignment of teachers to positions on the teaching staff of the board,
 - (g) recommend to the superintendent of schools the dismissal or discipline of a teacher,
 - (h) perform teaching duties assigned by the board,
 - (h.1) administer and grade, as required by the minister, Required Graduation Program Examinations,
 - (h.2) ensure the security of Provincial examinations, including retaining completed Provincial examinations for any period of time set by the minister, and
 - (i) represent the board when meeting with the public in the capacity of principal or vice principal of a school.
- (7) The principal of a school is responsible for administering and supervising the school including
- (a) the implementation of educational programs,
 - (b) the placing and programming of students in the school,
 - (c) the timetables of teachers,
 - (d) the program of teaching and learning activities,
 - (e) the program of student evaluation and assessment and reporting to parents,
 - (f) the maintenance of school records, and
 - (g) the general conduct of students, both on school premises and during activities that are off school premises and that are organized or sponsored by the school,

and shall, in accordance with the policies of the board, exercise paramount authority within the school in matters concerning the discipline of students.

[53] Under section 17 of the *School Act*, teachers' responsibilities "include designing, supervising and assessing educational programs and instructing, assessing and evaluating individual students and groups of students." They must perform the duties set out in regulations. Section 4 of the *School Regulation*, speaks to a teacher's duties:

- (1) The duties of a teacher include the following:
 - (a) providing teaching and other educational services, including advice and instructional assistance, to the students assigned to the teacher, as required or assigned by the board or the minister;
 - (b) providing such assistance as the board or principal considers necessary for the supervision of students on school premises and at school functions, whenever and wherever held;
 - (c) ensuring that students understand and comply with the codes of conduct governing their behaviour and with the rules and policies governing the operation of the school;
 - (d) assisting to provide programs to promote students' intellectual development, human and social development and career development;
 - (e) maintaining the records required by the minister, the board and the school principal;

- (f) encouraging the regular attendance of students assigned to the teacher;
 - (g) evaluating educational programs for students as required by the minister or the board;
 - (g.1) evaluating each student's intellectual development, human and social development and career development, including, as required by the minister, administering and grading Required Graduation Program Examinations;
 - (g.2) ensuring the security of Provincial examinations, including retaining completed Provincial examinations for any period of time set by the minister;
 - (h) providing the information in respect to students assigned to the teacher as required by the minister, board or, subject to the approval of the board, by a parent;
 - (i) when required to do so by the minister, verifying the accuracy of the information provided to the minister under paragraph (h);
 - (j) regularly providing the parents or guardians of a student with reports in respect of the student's school progress as required by the minister or the board; and
 - (k) attending all meetings or conferences called by the principal or superintendent of schools for the district to discuss matters the principal or superintendent of schools considers necessary unless excused from attending the meeting or conference by the principal or superintendent of schools;
 - (l) admitting to his or her classroom to observe tuition and practise teaching, student teachers enrolled in a university established under the *University Act* or in an institution for training teachers established under any other Act, and rendering the assistance to the student teachers, and submitting the reports on their teaching ability or on other matters relating to them or to their work, considered necessary for the training of teachers by the university or institution.
- (2) Reports referred to in subsection (1) (j) shall be made at least 5 times during the school year as follows:
- (a) 3 written reports, one of which shall be at the end of the school year
 - (i) on a form approved by the minister, or
 - (ii) on a form approved by the board containing information and, when required, using reporting symbols ordered or approved by the minister;
 - (b) at least 2 informal reports.
- (3) In conjunction with the written reports required under subsection (2) (a), each teacher of a student in kindergarten to grade 3 must provide to the parents or guardians of the student, oral or written comments on the student's school progress in intellectual, human and social development with reference to the standards of development for children in a similar age range.

[54] Both principals and teachers perform their responsibilities and duties in the delivery of educational programs and services as employees of bureaucratic

organizations which have structured processes and delegated assignments of authority. Through these organizations they perform their assigned responsibilities and duties to carry out the public policy mandates expressed in the legislation, regulations, ministerial orders and policies and board of education policies and directions. They use and follow various operational policies, procedures and practices adopted by the boards of education.

B. Special Needs Students and Individual Education Plans

[55] Two of the many sources of policy and direction are the *Special Needs Students Order*, Ministerial Order 150/89 and the *Individual Education Plan Order*, Ministerial Order 638/95. An individual education plan is designed for an individual student and includes one or more of the following:

- (a) learning outcomes for a course, subject and grade that are different from or in addition to the expected learning outcomes for a course, or subject and grade set out in the applicable educational program guide for that course, subject and grade, as the case may be;
- (b) a list of support services required for the student to achieve the learning outcomes established for the student;
- (c) list of the adapted materials, or instructional or assessment methods required by the student to meet the learning outcomes established for the student in the IEP, pursuant to a ministerial order or in a local program. (*Individual Education Plan Order*, s. 1 "IEP")

[56] The Ministry of Education policy manual states the responsibility of a teacher of a student with special needs as:

The teacher responsible for a student with special needs is responsible for designing, supervising and assessing the educational program for that student. Where the student requires specialized instruction, this is best done in consultation with resource personnel available, with the parents and with the student.

Where the student's program involves specialized instruction by someone other than the classroom teacher, collaborative processes are required to make best use of the expertise of the specialists available to assist and to ensure a coordinated approach.

In secondary schools, where several teachers may be involved in the student's program, coordinated planning is especially important. (Ministry of Education, *Special Education Services: A Manual of Policies, Procedures and Guidelines* (July 2006), pp. 9 – 10)

In the recent decision on the 2006/07 and 2007/08 school year grievances, I summarized the teacher's responsibility as follows:

It is clear that in implementing the provincial integration policy the classroom teacher is the primary source of assistance and support for each student and has the primary responsibility for all students enrolled in the class. Regardless of the number and variety of other supports for individual students, the classroom teacher has to request, coordinate and integrate those supports and services for the benefit of the student. (*British Columbia Public School Employers' Association*, unreported, August 21, 2009 (Dorsey), ¶ 205)

[57] The same Ministry policy manual describes the purposes of an individual education plan as follows:

The development of an IEP serves a number of purposes:

- It formalizes planning decisions and processes, linking assessment with programming.
- It provides teachers, parents, and students with a record of the educational program for an individual student with special needs, and serves as the basis for reporting the student's progress.
- It serves as a tool for tracking individual student learning in terms of agreed upon goals and objectives.
- It documents the relationships between any support services being provided and the student's educational program.
- It provides parents and students with a mechanism for input into the individualized planning process. (pp. 15 - 16)

[58] Under the class size and composition standards in the *School Act*, including more than three students entitled to an individual education plan in the proposed organization of a class triggers the requirement for principal-teacher consultation. Maintaining the organization of a class with more than three students with an individual education plan after September 30th requires dual opinions by the principal and superintendent that the class is appropriate for student learning.

[59] In setting a standard for class size and composition, the Legislative Assembly selected the number of three students entitled to an individual education plan, regardless of their special needs designation. This was done knowing the number of designated special needs students in the public school system and their distribution by school district, school and grade level. In the 2007/08 school year, there were 57,349 designated special needs students in a total public school student population of 582,691 students, or 9.84% (Ministry of Education, *2007/08 Summary of Key Information*, February 2008, pp. 2 and 12).

[60] The class size and composition standard was selected and enacted knowing the pressures and operational impacts that would flow, some of which were highlighted by the June 20, 2007 presentations to the review committee and one of which underscored

a likely increase in the percentage of designated students with special needs and the time required for consultation.

C. Many Sources of Relevant Information

[61] There might be many sources of information that either the principal or teacher considers relevant to their professional dialogue during a consultation about the proposal for the size and organization of a class. The recent decision on the 2006/07 and 2007/08 grievances includes the following on information and professional dialogue in the consultation process:

The shared knowledge about curricula, instruction, assessment and evaluation strategies and requirements and similar professional knowledge, together with knowledge about the policies and practices of the school district and school, form a foundation and background for this dialogue between education professionals. Principals may have to ensure new teachers are informed about relevant matters specific to the school and how it operates.

There is no requirement to have at hand and discuss at the consultation the Integrated Resource Packages for the classes or their prescribed learning outcomes. It might be that a teacher who has not taught a curriculum for some time or is teaching a curriculum for the first time or is teaching a new curriculum will have concerns and want to discuss them. It might be that a teacher has concerns that the composition of the class does not lend itself to teaching the prescribed curricula and its size and composition will be a barrier to achieving the prescribed learning outcomes at an acceptable level. If these concerns are sincerely raised by the teacher, they are within the realm of legitimate concerns that should seriously engage the principal's interest, attention and thoughtful consideration.

In many, but not all, circumstances and especially at secondary school the class organization is driven by numbers, not students' names. Principals in elementary and middle schools have a greater familiarity with the individual students in their smaller community of learners. It is not a prerequisite to a meaningful dialogue in consultation at any grade level that the principal attend and observe the class during the first weeks of September.

For all principals, the consultation is an essential feedback loop. The principal will be looking for reinforcement from the teacher that the class formation assigned to the teacher is considered by the teacher to be, in the vernacular of the profession, "educationally sound" or an "effective learning situation" or, in the language of the *School Act*, "appropriate for student learning" despite exceeding the class size and composition standard in some respect.

That reinforcement will often come from teachers who tell the principal the class size and composition is "O.K."; is acceptable; is as was previously discussed; is as requested by the teacher; is as decided by the department; or in some other manner communicates acceptance of, or agreement with, the organization of the class.

The teacher's knowledge of the students in the class may be more than what was acquired in the school days in September before the consultation. The teacher may have taught some of the students in a previous year; have taught

siblings of students and know their families; know students from school, community and neighbourhood activities; have spoken to the students' previous school year teachers; have read the students' paper or electronic school files and IEPs; have spoken to the student services support, learning assistance or resource teacher; or in some other manner gathered information about the students. Many of these are more likely in lower grades where an enrolling, not a preparation relief, teacher will have a single class all day than in higher grades where a subject teacher may have four classes and over 120 students in a term.

In some cases, teachers choose not to inquire and gather information about students. They prefer to make their own assessments through their interactions with the students and observations in the classroom. In some cases, there is no readily available information because the student is new to the school from another school district, province or country or is an international student with no previous connection to the school or country. In some cases of citizen and resident students, there are no or not easily accessible avenues of communication with the students' families, whatever that may be and how committed or chaotic they may be. Language skills can be another barrier to readily gathering information from and assessing a student.

Principals can have broad knowledge about the students in their schools, particularly those who have come to the principal's attention because of their behaviour. Principals may have knowledge about some students through teaching them or interacting with them in school activities. They will have knowledge about some students' families. The more problematic a student's behaviour is in the school community, the more likely the principal will have knowledge about and, perhaps, an established relationship with the student.

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 fulfil the school district's obligations to the child and parents contain relevant information.

In many principal-teacher consultations, the functional and operational context of the consultation and the individual or shared experience of the principal and teacher will provide a presumed and broad knowledge base and framework for the discussion that does not have to be documented and confirmed. (*British Columbia Public School Employers' Association*, unreported, August 21, 2009 (Dorsey), ¶ 361 – 370)

D. Mischief Sought to be Suppressed and Remedied

[62] Against this background, the narrow issue to be decided is the manner in which principals may carry out their responsibility to make provision of information relevant to a proposal for the size and organization of the class. Do principals have to give teachers paper copies of documents containing the information or can principals direct teachers to where the information might be reviewed?

[63] The starting point is to ask why the Lieutenant Governor in Council included this requirement, with the concurrence of the Ministry of Education and the organizations representing principals, superintendents and trustees, in the 2008 amendment to the

Class Size Regulation.

[64] Identifying the mischief to be suppressed and remedied by an enactment is a test of its purpose or object and intended operation and administration. Neither the union nor the employer could confidently identify a source stating the nature of the mischief sought to be suppressed and remedied by the 2008 amendment to the *Class Size Regulation* defining “consult” and “consulted.”

[65] From the data known at the December 10, 2007 meeting of the Learning Roundtable when a draft regulation was first circulated, the magnitude of the incidents of mandatory consultation was known. It was known that the organization of classes in excess of the class size and composition standard was not evenly distributed among small elementary schools with a smaller number of all-day classes and larger secondary schools with a much larger number of single block classes. It was known that, if the class organization pattern was to continue in the 2008/09 school year as it had in the previous two school years, the greatest burden of consultation was on secondary schools and their principals.

[66] The reports and recommendations to the Learning Roundtable and review committee reflect concerns of organization representing principals, superintendents and trustees, which endorsed the new regulation, that there were administrative burdens, time demands and problematic timing in the school year. However, the definition of consult made does not respond to these concerns.

[67] While the mischief the definition was intended to cure two years after the legislation was enacted is not revealed by any extraneous record of proceedings of the Learning Roundtable or ministerial statement, it can be clearly deduced from the nature and contents of the definition. It was not to respond to the suggestions of organizations representing principals, superintendents and trustees that they be given relief from the requirements and timelines of the *School Act*.

[68] The act of making this regulation two years after the consultation requirement became effective suggests there were government concerns about the adequacy and efficacy of some of the consultation practices adopted to implement the legislation in the first two years. Defining “consult” ensures the process will have a consistent minimum universal standard of consultation practice. It brings an element of predictability, rigour

and consistency to the process for all participants.

[69] The striking feature of the definition is that it addresses what principals must do for teachers. They must provide information. They must provide time to consider the information before engaging teachers in consultation. They must consider any teachers' views that are provided.

[70] Principals must provide "information relevant to a proposal for the size and organization of the class." This suggests there was a concern with the quality or accessibility of the information base on which principal-teacher consultation dialogues were taking place.

[71] Principals must provide the information at a time that gives teachers two school days to consider the proposal for the size and organization of the class and to provide their views to the principal "before a decision is made respecting the size and organization of the class."

[72] In the context of annual school organization, it is common that teachers will know the proposed size and organization of their class or classes on the first day of the school year when they receive a class list and meet their students. In some instances, it may be a few days later because of timetables or a school practice of having teachers spend the first days with students from the previous year.

[73] This context suggests the concern was not with the teacher knowing the proposed size and organization of the class or the names of the students in the class, which might be known as early as June, but with ensuring teachers have adequate access to information and time to reflect before being asked to articulate their views on the proposal. An unprepared consultation can be a hurried consultation that leaves teachers being consulted deciding it was neither a genuine opportunity to express their views nor a sincere effort to seek their views. Conversely, it can be an unfocused, inefficient, perhaps prolonged, search for accurate information that is not productive for either the principal or the teacher. In either scenario, it can be correctly characterized as futile or meaningless.

[74] Principals must consider teachers' views in making a final decision about the organization of the classes. This reassures teachers their participation and expression

of views will be considered.

[75] The cumulative effect of these three obligations on principals is to promote informed and enhanced engagement by teachers in the consultation process and to reinforce of principals' accountability for the process.

E. Conceptual and Operational Conflict at Heart of Dispute

[76] It is difficult to separate the narrow issue submitted for decision from the broader issue of what is "information relevant to the proposal for the size and organization of the class." The difficulty is occasioned by the fact that in many cases the "proposal" for the size and organization of the class, as reflected in the class list with the identified students with special needs entitled to an individual education plan, will not have been made by the principal. It will have been made by a combination of timetabling software; student course selection; student placement by enrolling and non-enrolling student support services teachers, perhaps pairing or grouping special needs students to maximize utilization of support services; student placement recommendations from enrolling and non-enrolling teachers at a feeder school; assent to parental choice for student placement; course requirements for Certificates of Graduation; subject area departmental decisions; direction from district personnel, perhaps to achieve district class averages in the aggregate; or other factors or persons.

[77] Principals are accountable for the proposals, but may have had minimal or no input or decision-making in shaping proposals for the size and organization of the classes for consultation. Principals may have relied on the professional collegiality of the teachers in the school, the feeder schools and district personnel in class formation. In schools like Guildford Park and Claremont and larger secondary schools, it is unrealistic to expect principals or vice-principals to be familiar with and make decisions about the proposed size and organization of each class and perhaps not each class that exceeds the class size and composition standard unless the number of classes exceeding the standard is greatly reduced.

[78] This leads to the conceptual and operational conflict at the heart of this dispute exemplified by the union's approach that all relevant information must be identified and given to the teacher before the two school days and the employer's approach that the teacher is to determine the relevant information. In the statutory scheme, are principals

expected to identify and gather information relevant to proposals for the size and organization of classes before giving notice of consultation to teachers? Or are principals expected to wait until the consultation process is underway to gather, receive and review all relevant information about proposed class size and organization (for which they had limited influence in forming) in order to decide whether the organization of the classes are appropriate for student learning?

F. Management Structure on which Legislative Scheme is Predicated

[79] The legislative scheme for class size and composition is predicated on a hierarchical management structure driven by an accountability and governance model. It is not predicated on a collaborative, collegial decision-making model. It is predicated on a management rights model in which class size and composition may not be the subject of collective bargaining. It is the exclusive prerogative of management.

[80] The legislation establishes class size and composition standards that boards of education are directed to ensure are adhered to. Principals as lead educators in schools may approve variations from those standards. Superintendents must approve those decisions and publically report a rationale for the organization of any class with more than thirty students. Boards of education are held accountable for their decisions.

[81] In this structure, it is principals, not someone else, who are responsible for making proposals for the size and organization of the class, regardless whether the classes are structured by others on behalf of the principals. It is the principals who must then consult with teachers of the classes and, after considering any teachers' views, must decide whether a proposed class organization is appropriate for student learning or change the proposal with or without different or additional supports for the class.

[82] The requirement on principals to provide information must be interpreted in this context, which is entirely unlike the context of suppressing and containing the use of controlled substances and drugs, which requires an expansive definition of the concept of provision; and is not to further joint venture commercial ventures where one party assumes liabilities for another and seeks agreed repayment and compensation for having done so; and is not a search for potentially concealed family assets for division in which sensible restraints must be attached to the Rules of Court, which are to be read in a manner that sensibly serves the litigation process and restrains the literalist.

[83] The context is to support and advance informed meaningful professional dialogue between principals, who have the highest level of authority and control in schools, who must assist in making the *School Act* effective and who are responsible to maintain school records, and teachers, who must teacher classes to which they are assigned.

G. “Provision” of Information Relevant to a Class Organization Proposal

[84] The requirement for “provision” in the definition of “consult” has two applications. One is to make available to teachers two school days for consideration of proposals for the size and organization of classes and the information relevant to the proposals. The application of “provision” in this context is scheduling, unlike the outcome in *British Columbia Public School Employers’ Association* [2007] B.C.C.A.A.A. No. 60 (Kinzie) (QL). An integral part of this “provision” is that teachers actually have the relevant information for at least two school days and do not have to spend those days seeking access to the information.

[85] This requirement might be recognition of the many demands on teachers’ time in the first weeks of the school year for individual and collaborative activities. At the same time, it places another burden on principals who must manage the process and have equal or greater demands on their time.

[86] The second application of “provision” is the one in dispute. BCPSEA is correct to advise that the notification package include a current class list identifying designated special needs students entitled to an individual education plan. The up-to-date list may be different in some respects than the list distributed the first day of school or any revised list distributed in subsequent days.

[87] BCPSEA is correct to advise that the notification package enclose “any other information that may be relevant to the class.” This information is known to principals who in the legislative scheme are responsible for making the proposals for class size and organization. In many, if not the preponderance of situations, this information will not be known to teachers, especially in large secondary schools.

[88] As the BCTF agrees, if the information is electronically available, principals do not have to reproduce it. It can be provided to teachers by directing them to the means by which it can be accessed. The distinction between information in electronic and

paper files is because electronic data can be instantaneously and simultaneously accessed by multiple authorized users from various in-school or remote access points often without restrictions on the time or day on which it can be accessed.

[89] BCPSEA is not correct in advising that instructing teachers how to access relevant information about individual students and having the teachers seek out and perhaps compete with colleagues and administrators for access to that information, with or without the assistance of non-enrolling colleagues who likely have ongoing student service and teacher responsibilities away from their offices or classrooms, is meeting the responsibility to make provision of information relevant to a proposal for the size and organization of the class.

[90] This approach, in effect, continues the *status quo* before the regulatory amendment and is not consistent with remedying a mischief or establishing a consistent consultation practice as was intended by making the regulatory amendment. Nor is it consistent with effective and timely consultation practice to have multiple users seeking access to a single source at the same time with the accompanying high risk of delay and frustration of the required consultation.

[91] Principals are responsible to ensure there is a meaningful and effective consultation process, regardless whether teachers choose to take advantage of it. Timely notice, advance disclosure and provision of information that principals consider relevant, time for teachers to consider the information and open-minded consideration of teachers' views and whatever information teachers think is relevant and provide to principals are benchmarks or good practices that principals are directed to follow for an effective and meaningful consultation process. Timely provision of relevant information may persuade some teachers they will not disagree with the proposed size and organization of the classes and waive their right to continue with the process.

[92] Adherence to these practices will promote meaningful professional dialogue during the consultation, discharge the principals' consultation responsibility and avoid the risk that organization of a class in excess of the class size and composition standard is impeached for failure to consult.

[93] This does not mean there must be wasteful, inefficient duplication of documents. If the school practice is to provide each teacher with a copy of the individual education

plans for each of their students before, when they first meet or shortly after meeting their classes in order for them to fulfil their and the board of education's responsibilities with respect to those students and their commitments to the students' parents, then principals can simply state in the notification package that the individual education plans for students in the class have been provided.

[94] If copies of the individual education plans for each teacher's students have not been provided by the time of the notification package, the information in the individual education plans is relevant information. Principals are required to provide this information to teachers either by electronic access or by delivering copies of the documents to the teachers.

[95] There is no issue of protection of privacy or confidentiality with individual education plans for students who teachers' teach. Teachers must have these documents to teach their students and to make the required adaptations and modifications. They have a need to know.

H. Decision and Declaration

[96] When the government proposed and the Legislative Assembly enacted the class size and composition standards and time-driven consultation and reporting process in 2006 and when the Lieutenant Governor in Council made the amendment to the *Class Size Regulation* in 2008, they must be taken to have known about the busy, dynamic, interactive period in September in schools and that schools are not resource rich autonomous organizations. However, despite the burden on schools and principals, the enactments unambiguous intention is that principal-teacher consultation be meaningful and conducted in accordance with sound consultation practice.

[97] The definition of "consult" in section 1(4) of the *Class Size Regulation* must be interpreted in a manner that does not limit disclosure or diminish sharing of relevant information that is to be part of the basis of the professional dialogue during principal-teacher consultations and thereby diminish teacher involvement and participation in the consultation process and adversely affect the quality of consultation or generate cynicism about it.

[98] In short, principals will not discharge their responsibility to make provision of relevant information to teachers by telling them the nature of the information relevant to

the proposed size and organization of the classes assigned to them and saying to them if they want to discuss this information at the scheduled consultation meeting they can get it whenever it might be accessible to them through the custodian of the information.

[99] There is potential for differences after the consultation process over what is relevant information to principals' opinions that the organization of a class that required consultation is appropriate for student learning. However, at the beginning of the consultation process the question of relevant information relates to principals' proposals. What principals consider to be relevant information is within their knowledge. They must provide that information to teachers who are to be consulted.

[100] For the purposes of this dispute, decision and declaration it is not appropriate to comment on any source of potentially relevant information other than individual education plans, which have been determined and agreed to be relevant sources of information. If individual education plans for students in the class have not been distributed to teachers before the consultation notification package and they are not electronically available to the teachers, copies must be included with the materials in the notification package.

[101] I retain and reserve jurisdiction to decide any question arising from or relating to the interpretation and application of this decision.

SEPTEMBER 11, 2009, NORTH VANCOUVER, BRITISH COLUMBIA.

James E. Dorsey

James E. Dorsey