

BRITISH COLUMBIA
PUBLIC SCHOOL EMPLOYERS'
ASSOCIATION

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

August 24, 2009

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 award concerning class size and composition grievances for the 2006-2007 and 2007-2008 school years. Given the length of the award (354 pages), following for ease of reference are relevant quotes excerpted from the award.

Purpose of Representative Schools – Pages 9-10

The union and employer agree the representative schools and classes, which have a variety of missions and purposes, English as Second Language programs, immigrant settlement patterns, Aboriginal children populations, curricula, support and remediation programs and special education needs, have been truly a representative cross-section of the Grades 4 to 12 schools and classes across the province. The evidence with respect to each of the seven representative schools is summarized in Appendix 4.

The agreement on this process was predicated on an intention it would produce some clear criteria for addressing recurring differences on the same issues, establish some predictable guidelines for resolution of many differences and avoid divergent outcomes before different arbitrators. One goal is to fashion some structured approach that provides predictability and efficiency in resolving many, if not most, differences over classes that exceed the legislated class size and composition standard.

Remedy – Pages 10-12, 111, 146

By agreement, no evidence was adduced or submissions made on remedy, which will be addressed after the union and employer have discussed the application of this decision to the other classes grieved in the 2005-06 and 2007-08 school years. Proceedings on the 2008-09 school year are scheduled to commence in September.

[17] In this phase of the arbitration, the employer claims its was prejudiced in its ability to respond to the grievances for one reason generally applicable to all representative schools and for two separate reasons in School District No. 36 (Surrey). The first generally applicable basis of the employer's claim of prejudice is as follows:

The ... issue concerns the destroying of class records by the majority of the teachers who testified in these proceedings. Most of the teachers testified that they did not know that they should keep their records in that they were not told by the Union that their classes would be advanced to arbitration.

For those teachers who did not destroy their notes, it has been shown that the evidence with respect to their classes is far superior to the evidence with respect to teachers who no longer have any of their class records.

Had the teachers retained their records there would have been a better opportunity to review the specifics with respect to each of those classes and to make appropriate determinations with respect to the class. ...

In all of the proceedings, teachers were asked whether their school administration had directed them to retain their records. The evidence generally was that there was no specific direction with respect to retention.

This is a Union grievance that was processed and directed at the provincial level. The obligation was on the Union to notify its members to retain records that would be relevant to the proceedings. School Districts were not advised by the Union which classes were in dispute. Indeed, the evidence from teachers from each of the schools confirmed their lack of knowledge of the dispute concerning their particular class.

The Employer bears no responsibility for the failure of the Union to promptly notify its members to retain documents or for the failure of the Union to provide information to the Employer to use in requesting School Districts to retain records.⁵

[18] This objection relates to accurate class size lists before and after September 30th. There might be circumstances when events after September 30th are relevant. If an impending change after September 30th in the size or composition of a class for which there was a required consultation was known before September 30th, that subsequent event might be relevant to the formation of the principal and superintendent opinions. In that case, the principal would have advance notice and, perhaps, discussed the anticipated event at a principal-teacher consultation. The employer would have records to follow-up that the anticipated event occurred.

[19] Otherwise, if there was a change after September 30th in the size or composition of a class for which there was a required consultation, that subsequent event would not be relevant to the issues in dispute in this phase of the arbitration. That event might be relevant to fashioning or mitigating a remedy if there was no meaningful consultation on the class or a principal or superintendent opinion the class was appropriate for student learning was flawed. As was said in the decision on the preliminary objections: "If the conduct of the union or employer has aggravated a violation or impacted the ability to mitigate a violation that is a matter that can be considered when fashioning a remedy."⁶ By express agreement, remedy and mitigation are not matters for this phase of the arbitration.

[352] Similarly, the employer submits in this arbitration: "If it is determined that the class had 30 or fewer students for all or part of the school year or semester, a decision of compliance for all or part of the year or semester must be made."²¹⁶ This is not consistent with the scheme of the legislation or with timely dispute resolution. 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, unless in other circumstances the applicable date is January 15th or May 15th.²¹⁷

[494] Similarly, 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.

Prejudice to Employer – Pages 11-14

1. Destroying records

[20] Returning to class lists on and before September 30th, the employer knew class sizes and compositions in each instance when the principal was required to consult the teacher within fifteen school days after school opening day. The principals maintained records of those consultations. They formulated and confirmed their opinions on those classes and reported to school planning councils. Principals reported to superintendents who formulated opinions on classes and reported to boards of education and district parents' advisory councils. The size and composition of each class as of September 30th was reported to the minister who made them publically accessible through the internet.⁷

[21] These were record keeping obligations on the employer, not the teachers or the union. Teachers must maintain records required by the principal and district,⁸ but there was no requirement for them to keep these records. And, as was unknown and incorrectly anticipated by participants as these proceedings progressed, the school districts did not maintain and were unable to produce point in time records of class size and composition. This generated considerable unanticipated inquiry and frustration for which the teachers or the union cannot be held responsible.

[22] There was extensive litigation and delay before these grievances arrived at a hearing on their merits. During that time, school districts knew they did not possess and were unable to generate accurate lists for any class, whether grieved or not, despite having publically reported on the class as of September 30th in each of the two school years. No steps were taken to inform the union or the teachers, who were equally prejudiced by not having access to accurate point in time class lists. Where there is a difference about the class size and composition numbers, not the students' names, the public report must be presumed to be accurate, despite the instances in which there was evidence that they contained inaccuracies. This first claim of prejudice by the employer is not meritorious and is dismissed.

2. Muzzled by union

[26] As reported in the decision on the employer's preliminary objections to these grievances, the Surrey Teachers' Association filed a grievance in January 2007. The steps Mr. Bastien took and what followed are also summarized.¹² These events might or might not be relevant to future disposition of the grievance for the 2006-07 school year. However, they are not the basis for a finding the employer was prejudiced with respect to the issues at this stage of the arbitration dealing with representative classes at Guildford Park Secondary School in the 2007-08 school year. This third claim of prejudice by the employer is not meritorious and is dismissed.

Legislative Interpretation – Pages 34-35

[96] Interpretation and application of the *School Act* and regulations is central to a final resolution of these grievances.

[97] Today, the preferred approach to interpreting a statute is no longer application of rules such as plain meaning, mischief, to express one thing is to exclude another [*expression unius est exclusion alterius*], of the same kind [*ejusdem generis*], golden, etc. Statutory interpretation is a more principle directed activity aided by the use of the rules to understand the text and legislative intention and to establish harmony with other

legal norms. It is a purposeful activity analyzing and integrating word definitions, legislative purpose, presumptions, consequences and other factors to interpret the words, resolve overlapping laws, address gaps in legislation and give modern application to statutory rules.

[98] This “modern approach” that has been adopted repeatedly by the courts and arbitrators in a broad range of situations was succinctly stated in 1983 as follows:

“Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”⁹¹

[99] An interpretive analysis looks to the text, the intention, the purpose or purposes sought to be achieved and the consequences of a proposed interpretation. Hopefully, the meaning of the text coincides with the intention and produces results that fulfill the purpose.

[100] This class size and composition dispute is over the meaning of words and phrases in section 76.1 of the *School Act* that are susceptible to differing interpretations. The union and employer variously relied on analyses of the text, the legislative scheme, the policy or values and concerns that informed both the intention and purpose, as they constructed it, and the consequences of their and opposing interpretations. They liberally used legislative sources, evolution and history to support their analysis. The union and employer differed on how the legislation applied to the facts in the representative schools and classes.

[101] While the union and employer share common educational goals, they formulated their competing interpretations and applications of the disputed text by assigning differing importance and value to the 2002 legislation removing class size and composition standards from the collective agreement and future collective bargaining; teacher workload and student learning conditions; and pedagogical and financial considerations. As is to be expected in relationships with extended history disputing a complex and contentious issue, at times rhetoric and an element of cost free moral posturing trumped analysis.

[112] The history of legislation is admissible evidence to determine the background and purpose of legislation. The history includes legislative debates in Hansard, which are to be considered with care.¹⁰¹ The 2002 and 2006 amendments to the *School Act* in dispute have a lengthy and complex history. Because of the representative nature of this phase of this arbitration; the comprehensive nature of the submissions with frequent reference to, and reliance on, Hansard and the processes preceding the amendments; and the broader impact this ruling is intended to have for the parties in the 2006-07, 2007-08 and later school years, the legislative history is reviewed in detail.

Integration of Students with Special Needs — Support Services Accessible to all Students – Pages 64-67

[166] 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.”¹⁴⁹

[170] One of the major strategies to achieve inclusion is “integration”, formerly called “mainstreaming.”

With integration, students with special needs are included in educational settings with their peers who do not have special needs, and provided with the necessary accommodations determined on an individual basis, to enable them to be successful there. The principle of "placement in the most enabling learning environment" applies when decisions are made about the extent to which an individual student is placed in regular classrooms, or assigned to an alternate placement.¹⁵⁴

[171] The policy of inclusion is succinctly stated in the Minister’s *Special Needs Students Order*. 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 educational program for the student with special needs should be provided elsewhere.”¹⁵⁵

[172] Effective inclusion of students with special needs in safe and welcoming learning environments requires timely and comprehensive assessment of their needs and an appropriate response to their strengths and needs in the delivery of educational programs. Educating students with special needs in neighbourhood school classrooms with students their age and grade can include use of resource rooms, self-contained classes, community-based programs and specialized settings. Students with special needs may be placed in other settings after the board has made all reasonable efforts to integrate the student and integration cannot meet their educational or social needs or, after considering their education needs and those of others, placement in another setting is the only option.

[173] Boards of education provide school-based and district support services that are accessible to all students. They include:

- School-based learning assistance services to support classroom teachers and students with mild to moderate difficulties in learning and behaviour. The learning assistance services include consultation, collaborative planning and co-ordination with the school-based team and instruction. Learning assistant teachers have a key role in the identification, assessment and designation of students with special needs.
- Counselling services support students, families and educators. They facilitate the educational, personal, social, emotional and career development of students in schools and in the community.
- Psychology services support students, school personnel and parents in enhancing academic, adaptive and social skills. They have a supportive role in identifying, assessing, planning, implementing, reporting and evaluating processes for individual education plans.
- Speech-language pathology services are designed to support students whose education is adversely affected by oral communication difficulties.
- Physiotherapy and Occupational Therapy.
- Hospital education services for hospitalized students.
- Homebound education services for students absent from school and homebound for extended periods.
- Distributed or distance learning programs.

[174] Boards of education also supply more direct classroom services that assist classroom teachers to provide an inclusive educational program for special needs students. These include para-professional support from special education assistants, with various job description titles, who provide academic, behavioural, social, physical

and emotional supports. Methods for allocating special education assistant hours to schools varied among the representative school districts. Some allocated hours for special needs students in high incidence category designations. Others did not.

Broadening of Special Needs Designation – Page 69

[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 comparison can be made between the former class composition provisions deleted from the collective agreement and those in the current *School Act*.

Class Building — 9 Month Process (January-September) – Pages 77-84

[210] The provincial government and elected boards of education co-manage the K-12 public school system. Each year the provincial government budgets the amount for its Ministry of Education and the amount of grant funding for school districts. It uses a formula to allocate this money to the boards of education, which allocate and manage the funds based on their priorities. The province also funds capital costs and special programs through supplemental grants to boards of education.

[214] Boards of education adopt policies and formulas for the allocation of resources to district administration and programs, schools and other programs.

[215] In each school district, a high value is placed on equitable distribution of funds and resources among schools. Formulas based on student FTE and divisors are used to determine enrolling teacher FTE allocations, which are calculated to the second or third decimal point, to elementary, middle and secondary schools.

[216] District formulas based on student to non-enrolling teacher ratios or another basis are used to allocate non-enrolling teacher FTE to schools. The legislated class size and composition standards do not set or direct these ratios or formulas for non enrolling teacher FTE allocation to schools, as was provided under deleted provisions of the collective agreement after the contentious 1998 Agreement in Committee.

[219] Tentative staffing and resource allocations to schools are made and adjusted in discussions between principals and district administrators in March, April and May while proposed budgets are being prepared and submitted to boards of education for review and approval.

[220] As June approaches, school staffing allocations are becoming more firm and less susceptible to being increased on the basis of principal pleas or teacher, parent, union or other advocacy. The extent to which there is school autonomy is difficult to discern. In June, schools, classes and timetables are becoming firm and final and tentative teacher assignments for the following school year are being made. Teaching position vacancies are posted and filled and the changes they cause are being addressed. A parallel process is occurring for school support staff.

[221] At the end of June, teachers in elementary and middle schools are placing students in classes organized for the following school year by the principal based on resource allocation to the school. There are variations in the manner in which this is done from school to school; the role receiving teachers have in the composition of their class for the next year; the role counsellors and others have; and the manner in which parents' choices of teachers for their children are addressed. By the end of June, there

are tentative class lists for September. At secondary schools there are individual student timetables that are distributed in July.

Workload is not a Factor Considered by the Legislation – Page 85 – Split Classes

[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.

Workshop, Home Economics and Science Classes – Pages 85-86

[255] Many workshop, home economics and laboratory oriented science classes are held in specialized classroom facilities. For safety, effective student participation, facilities design, historical and other reasons, these classes have often been, and in some school districts continue to be, organized with fewer students than in other classes. This practice was reflected in many of the deleted collective agreement provisions that agreed to smaller classes of varying sizes. In some there was a flexibility factor that could be applied to increase the agreed number.

[256] In several of the disputed classes teaching these courses there was evidence of the physical space and facilities for these classes. There were ingrained preferences and commitments to smaller class sizes, although smaller classes for these courses are not mandated by the class size and composition standards in the *School Act*.

Definition of Class – Pages 90-91

[277] The *Class Size Regulation* defines “class” as “a group of students regularly scheduled to be together in a classroom for the purposes of instruction in an educational program”¹⁷⁸ for determining average class size in the aggregate and, since June 27, 2008, for the new definition of “consult.” The regulation also defines a class for the purposes of determining the number of students in combined classes containing students from Kindergarten to Grade 7. Kindergarten is a class with Kindergarten students and students in any other grade. Grades 4 to 7 is a class containing students in those grades and any other grade except Kindergarten and Grades 1 to 3, which is a class containing students in those grades and any other grade except Kindergarten.¹⁷⁹

[278] With an expansive interpretation of “classroom” to include all the settings in which teachers give instruction, the *Class Size Regulation* definition of “class” is appropriate for the interpretation and application of Section 76.1 of the *School Act*. 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.

School Act — No Distinction between Types of Classes to Trigger School Act – Pages 91-92

[280] It has been and continues to be common experience that certain courses in Grades 8-12 frequently have more than thirty students in a class. The most often cited examples are Band, Choir, Drama and Physical Education classes. It was common for deleted collective agreement provisions, as reflected in those formerly in effect in the representative school districts, to address this situation with express negotiated exemption from class size maxima after consultation with the affected teacher or local union or by a process of documented teacher request.

[281] Previously negotiated class size maxima provided for reduced maxima for certain course and learning environments. The common situations were combined grades classes, laboratory oriented science courses, workshops and home economics. Less common were reduced maxima for specific courses such as secondary Language Arts or minimum essentials courses. Some teachers strenuously disagree with the elimination of those lower maxima and there were strongly voiced opinions that classes with more students are not appropriate learning environments. In some school districts, as a matter of board of education policy, maxima lower than thirty students have been adopted for some classes. An example is workshops in the Surrey school district.

[282] There are no such similar approaches in the *School Act*. It does not make distinctions among classes and does not set higher or lower class size standards for different types of classes within the same grade groupings. An amendment to introduce a class size standard of twenty-four students for shops, laboratories, home economics and similar hands-on activity classes was turned away.¹⁸¹

[285] In establishing a class size standard of three students with an individual education plan for Grades K-12 and using four or more students with an individual education plan in a class as the trigger for requiring principal-teacher consultation, the *School Act* makes no distinction among the variety of classes, courses and classroom environments that exist in these grades or, with one exception, the difference in special needs funding designations that lead to a student being entitled to an individual education plan. The single exception is in section 76.1(5) of the *School Act*, which states:

In this section, "student with an individual education plan" means a student for whom an individual education plan must be designed under the Individual Education Plan Order, Ministerial Order 638/95, but does not include a student who has exceptional gifts or talents.

These excluded students are in designation category "P."

Teacher Re-arranged Classes – Pages 92-93

[288] By agreement between or among teachers, with or without the prior approval of a principal, teachers may make special organizational arrangements to provide instruction to students at a grade level or in a course.

[289] This happened in the instruction of two Foods 9 courses at Guildford Park Secondary School; the exchange of two Community Recreation courses at Claremont Secondary School; the organization of single gender Physical Education class at Qualicum Beach Middle School; and the platooning of students across classes to group and teach students with similar levels of mathematics and reading ability as happened in different instances.

[290] These are not necessarily principal decisions on class organization or student placement. If these re-arrangements result in class sizes and compositions that would otherwise trigger a duty to consult if the decision was made by the principal, they do not trigger that duty when the decision is made by the teachers.

Who is Counted as Having an IEP – Page 94

[293] Students designated as having exceptional gifts or talents (P) are not counted when determining whether four or more students with an IEP are included in the

composition of a class. Otherwise, all students entitled to an IEP are to be counted because, for the purposes of the consultation threshold, 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.”¹⁸⁴ This includes a student entitled to an IEP, whether one has been developed or updated in September.

IEPs — Can’t Exclude – Pages 94-96

[294] The principal is responsible to determine the number and identity of the students with an IEP in each class organized in the school. Although, it was not done in any of the classes in dispute in the representative schools, the employer submits:

... the first step is a determination of whether the students that have designations in that class have designations that have an impact on or for that particular class. If the designation has no impact on the class, the Principal and Superintendent can conclude that the class has fewer designated students to be considered.¹⁸⁵

The essence is that designations does not equate with disability or special needs for a class or course.

[295] Relying on this approach – no impact on the class – the employer identified classes in which:

- a student had a full-time special education assistant and was or was not in the class but did not participate in the class;
- a student was in the class once a month;
- students participated only “for short periods of time”;
- the student was hearing impaired, participated fully and received a high mark;
- the students’ visual impairment had no relevance to the Physical Education or Woodworking course;
- the student attended with a full-time special education assistant but did not participate fully in the Physical Education course;
- the students’ learning disability related to academic courses and “has no relationship whatsoever”¹⁸⁶ to elective non-academic courses, such as Home Economics, Art, Drama, Design Craft and Woodworking;
- designations in Physical Education classes, including Community Recreation, “were of no relevance or impact”;¹⁸⁷ and
- enrolled designated special needs students with an IEP on a class list who do not attend class or seldom attend should not “be considered as students enrolled in the regular classroom” because inclusion on the list was simply to honour the policy of inclusion.¹⁸⁸

[296] There is no legislative basis cited for this approach. It is not contemplated by, and cannot be inferred from, the legislation. There is no provision for reporting classes to have fewer students with an IEP than are enrolled in the classes or not fulfilling the duty to consult with the teacher of a class because the principal has formed the opinion, without consultation with the teacher, that a student’s designated will not have an impact on the class. The only students with an IEP who are exempted from inclusion for the purposes of the numerical class composition standard from any class, and it is from all classes, are students designated as having exceptional gifts or talents.

[297] Designated special needs students do not lose their designation as they move from class to class. There are no partial designations. Hopefully, the students are always in classes in which they can succeed with or without individualized support. 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 of 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.

[298] An issue arose about students at Qualicum Beach Middle School with an IEP enrolled in Grade 6 and 7 French classes, but exempt from French. The employer submits students are not to be considered as either a student or a student with an IEP for the French class even if they remained in the class assigned other work during the French lesson.

[299] There is no legislative basis cited for this approach and it cannot be inferred from the legislation. It may be there are matters for consultation about the attendance or supervision of an exempt student during the French period. The student may be the centre of the consultation. The student's exemption from French does not remove the student from the composition of the class for the purposes of requiring consultation just as the attendance of a student with an IEP at a pull-out program for Language Arts or Mathematics does not remove that student from the composition of the class for the purposes of requiring consultation.

[300] The legislative scheme for class size, composition, consultation, opinion forming and reporting is not a highly nuanced scheme. While the scheme has been variously referred to as arbitrary, blunt and inflexible, the class size and composition standards are based on fixed numbers and the consultation and reporting requirements are driven by the numbers, not the character of students' IEPs. The scheme is to be inclusive and comprehensive with only clearly defined exemptions in the *School Act* and *Class Size Regulation*.

Which Teachers Need to be Consulted – Pages 96-97

[304] The employer submits: "There is no requirement to consult with more than one classroom teacher for any given class and/or course. The legislation requires consultation with 'the' teacher of the class."¹⁸⁹

[305] Some classes have more than one regularly scheduled teacher. Under the collective agreement and board of education policies, teachers may job share and coteach a class with an equal or unequal share of an 1.0 FTE teaching assignment. Relying on section 8 of the *Interpretation Act*,¹⁹⁰ which states "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects"; reading the singular "teacher" as plural to give the word a meaning that accords with and fulfills the inclusive and comprehensive nature of the professional consultation contemplated in the legislation; and reading the legislation and collective agreement in harmony, I conclude the duty to consult extends to all teachers of a class and not simply to the teacher who spends the greater or greatest portion of time with the class.

[308] The employer submits "no consultation is required with preparation relief teachers." ¹⁹¹ Again, I disagree for the same reasons as I find the duty to consult extends to all job share teachers.

Unions Submission on Consultation – Pages 99-100

[312] The union submits the critical procedural elements are:

- a) sufficient paid release time to prepare for consultation including reviewing student records and Individual Education Plan information;
- b) sufficient information of the students requiring additional assistance, including ESL and grey area students including meeting with resource teachers;
- c) involvement of staff representatives;
- d) consultation with all teachers teaching the class, including preparation relief teachers and job share teachers; and
- e) ongoing consultation with the addition of every student with an IEP or students numbering over 30.¹⁹⁵

[313] The union's submission is that the substantive elements of consultation include:

- a) review of all students in the class, including students without IEPs, by the principal, teacher, and staff representative;
- b) review of student IEPs and a determination if the IEPs can be met with resources available;
- c) a discussion of appropriate for student learning criteria,
- d) soliciting the teacher's opinion on class and whether it is appropriate for student learning;
- e) principal advocating for additional resources if necessary; and
- f) if concerns continue and the principal believes the class is appropriate for student learning, explaining why his opinion differs from that of the classroom teacher.

There is to be follow-up by the principal on teacher concerns and positions; advocacy for more resources for the class and school; scheduling follow-up meetings; and reporting unresolved concerns to the superintendent.

[314] The union developed a consultation matrix for examining and evaluating a principal-teacher consultation. The matrix elements are as follows:

Information

- Teacher provided an opportunity to review IEPs and student records
- Teacher provided an opportunity to meet with non-enrolling teachers to discuss student IEPs and special needs of students
- Consultation proceeding after teacher has knowledge of students and assigned resources

Time

- Adequate paid time for consultation meeting with release time from teaching
- Adequate notice of consultation meeting with paid release time to prepare

Discussion

- Involvement of staff representative during consultation meeting
- Principal and teacher review of class lists and discussions of all students and IEPs
- Teacher was asked if additional resources were required
- Discussion of criteria of appropriate for student learning 100
- Opinion of the teacher on whether class is appropriate for student learning solicited by and communicated to principal

Commitment

- Principal advocacy for additional resources if necessary
- Additional consultation with teacher if necessary
- Principal communicates teacher concerns to superintendent if concerns unresolved

[315] These elements extend beyond the union's opening position on the content of consultation; they extend beyond the practice and procedures the union staff representatives agreed to and participated in at the representative schools in September 2007; and they extend beyond the union's description of consultation to teachers in September 2007, which was:

What does it mean to be consulted?

It is more than being given mere notice. It includes an exchange of information between parties in which each has an active role to discuss, express opinions, make their views known, and have a say. It means teachers must be provided with all relevant information regarding the class and students involved. The principal must be open to suggestions, other options, and input and must make an effort to address the concerns raised by the teacher before the final decision is made.¹⁹⁶

[316] Finally, the union submits:

Indeed it is hard to imagine there could be any other plausible, efficacious, or just definition of consultation than one which requires the full participation of all parties, a discussion of why the classes are or are not appropriate for student learning, and gives full consideration to the views of the classroom teacher who will be in working in the classroom five days a week for 10 months.

Employer's Submission on Consultation – Pages 100-102

[318] The employer's position is stated as follows:

In order to meet the requirement of consultation under Bill 33 a teacher must be given the opportunity to provide the Principal their input with respect to the organization of the class. The Principal must consider the input prior to reaching a final decision on whether the organization of the class is appropriate for student learning.

The purpose of a consultation meeting in mid-September when classes are already established and in session is to provide an opportunity for the teacher to provide the principal with relevant information with respect to the class, students in the class, resources provided to the class, and resources considered to be needed by the teacher.

In order to meet the test of consultation under the legislation, the principal must approach each consultation meeting with an open mind and must be prepared to seriously consider any legitimate concerns raised by teachers. Consultation is a two-way dialogue that includes a genuine sharing of all information relevant to the discussion by the teacher and a genuine attempt by teachers to work with and problem solve with the principal concerning issues with the class.

There is no specific amount of time that need be allocated to a consultation meeting. The length of a consultation meeting will vary depending upon the

quality and length of dialogue and the needs of a particular class. The legislation requires the principal and the teacher to be in attendance at the consultation meeting. Whether there are any additional individuals present at the consultation meeting is a matter for discussion in each school district and in each school.

When interpreting the legislative requirement to consult, “context” must be considered. The “context” may include:

- a. discussions with the classroom teacher in the previous spring and in early September by administration, by counsellors and by other teachers concerning students in their class;
- b. the knowledge the teacher has gained of the class during the school days in September prior to the consultation meeting;
- c. discussions and flow of information between and among teachers, both enrolling and non-enrolling, respecting the size and composition of the class in early September;
- d. classroom teachers’ involvement in the building of the class in the spring prior to the consultation meeting;
- e. the teacher’s previous knowledge of students in the class through past involvement with the students and their siblings/families; and
- f. information available at the school accessible to teachers concerning students in the class.

There is no requirement for the Principal to share his or her rationale or opinion of what is appropriate for student learning at consultation meetings. The forming of the Principal’s final opinion on a class organization appropriate for student learning will occur after the consultation process and after the Principal has considered the content of and the discussion at consultation meetings. There has been much evidence concerning the various [recording and reporting] forms that were used. The form itself is not important. What is important is what information was shared by the teacher with the Principal.

Information contained on a Union form that was not shared with the Principal is information that cannot be considered as relevant in these proceedings. The forms are the recording of the information flow that occurs at the consultation meetings. There is no legislative requirement to have a form or to share the forms with the other party.¹⁹⁸

Arbitrator Decision — Consultation — General Comments – Pages 102, 110-112, 116, 118

[323] The teacher’s agreement with the organization of the class for which there is consultation may be an outcome of the consultation, but the teacher’s consent to the organization of the class is not required as it is for classes in Grades 4-7 with more than thirty students.

[324] As a practical and operational matter, all students are placed in classes on the first day they attend school in the school year. The thirty-first student or fourth 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.

[350] The date for reporting class size averages under the *School Act* is September 30,[214] 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 [111] standards must be met or, if exceeded, by which the statutory requirements to exceed must be met. As Arbitrator Munroe determined in 2006, there is no grace period after September 30th to achieve compliance as there was in deleted collective agreement provisions that sometimes set the compliance date at October 15th. [215]

[357] It is the principal's obligation to consult and the principal will schedule the time and place for consultation if there is an absence of agreement or collaboration to facilitate a consultation. Teachers may forego their right to be consulted.

[375] 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.

[384] There are no reporting requirements for individual consultations and various reporting forms were used in the representative schools. In School District No. 5 (Southeast Kootenay), there was collaboration between the school district and local union that ensured common, shared and timely information reporting for the school district and local union, including teacher agreement or disagreement. Some of the other reporting forms used by school districts and local unions separately captured the same and some additional information.

Fine Tuning Concept — Consultation After Organization of Class – Pages 102-105

[324] As a practical and operational matter, all students are placed in classes on the first day they attend school in the school year. The thirty-first student or fourth 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.

[325] Although students may withdraw from a class or move to another school at any time during the school year, the teacher knows in September with a high degree of probability that he or she has a class that has been organized in a manner that will require the principal to consult with him or her.

[326] 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.

[327] With new hiring, spring and summer position vacancy postings, reassignments and class reorganization in September, which were factors in September 2007 at Claremont Secondary and Frank J. Mitchell Elementary schools, the number of students in the teacher's class or the number with an IEP may be completely unknown to the

teacher until the first or a subsequent day in the first fifteen school days.

[328] 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.

[329] Some would say it is an exercise in asking forgiveness rather than prior agreement to consult about a class already in session. 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 education policy manual. The class building is finished and the students and parents have been engaged. It is unlikely the building permit is to be revoked or have restrictions imposed after the fact.

[330] The context and timing is more akin to having simply supportive consultation. With some merit, some teachers realistically view it as after-the-fact. With this reality, they do not want to transform a collegial principal-teacher relationship into an adversarial one. Or to speak publically about their students and their teaching challenges to impeach the organization of the class after-the-fact. Having good teachers testify about bad student behaviour and the failings in their classes is an enterprise that this system should not perpetuate.

[331] In some cases, there are discussions with the teacher in September before an additional student or an additional student with an IEP is placed in the teacher's class because the student is newly enrolled in the school or there are changes in a student's choice of exploratory or elective courses.

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

[333] The timing and context of this consultation requirement is unlike consultation frequently seen in other contexts where persons who are to be impacted by or will implementing a decision are consulted before the decision is made. This process does not support the Minister's statement: "I think the bill clearly outlines that principals will now be required to talk to their professionals, their teachers, about the class that they're about to put children and professionals into."201

[334] As was clear from the evidence, the focus of the consultation discussion is how to support the class or make the existing organization work. It is not about changing the size or composition of the class. Teachers are loath to suggest the principal remove one or more students from their class and place them in a colleagues' class or to deny a student that elective in that semester. Teachers correctly assume the principal has stretched the resources allocated to the school as far as possible and any suggestion that an additional class be organized and staffed is futile.

[335] As was seen in the representative schools, there can be varying degrees of teacher input and decision-making on class organization and student placement in classes in Grades 4-12 in the differing contexts of elementary, middle and secondary schools. It is the exception that Grade 4-7 teachers are completely passive recipients of

whoever appears in their classrooms in September. It is closer the norm in the many more classes in Grades 8-12.

[339] This statutory principal-teacher consultation about class organization is not a relationship or issue involving the honour of the Crown in fulfilling a fiduciary duty to consult and potentially accommodate before exercising discretionary control over Aboriginal interests.²⁰⁵ This analogy of consultation is not apposite for the principal teacher relationship or consultation context. The principal-teacher consultation about a specific class is not the consultation between state authorities and teachers' organizations contemplated in ILO and UNESCO Recommendations to their member states.²⁰⁶

[340] The principal-teacher consultation on class organization is not in the nature of the consultation a workers' compensation board must undertake with an injured worker entitled to compensation benefits to fulfill the board's obligation to provide appropriate rehabilitation assistance.²⁰⁷

[344] The court's discussion of a statutory duty to consult is instructive, but again the principal-teacher relationship and context of class organization consultation is qualitatively different than the fiduciary-like relationship a school district has with a child.

[345] The statutory consultation between the principal and teacher under section 76.1(2.2)(b) and (2.3)(b) is to be a meaningful professional dialogue in a specific operational and organizational context during the initial three weeks of a new school year. The timing of the September statutory consultation is most instructive of the intended nature of the consultation. In the abstract, it would be axiomatic that to involve someone in discussion after the fact is not meaningful consultation. It could easily lead to a sense that the consultation is futile, merely paying lip service and a ritual without meaning. This was a sentiment expressed by teachers who had been involved in two or more September consultations before they testified about the consultation in September 2007. The message they took away from the experience the first year was the cupboard is bare and there is no money to order take-out.

[346] By the time of the consultation in mid-September, one of the most dynamic periods in the annual organizations of schools and classes, the size and composition of classes is a reality and it is this fact that triggers the requirement to consult. The context and circumstances do not permit timely discussion of information in the consultation before the decision that triggered the consultation. The size and composition of a class is a fact the teacher has been dealing with, and will have to continue to deal with for the remainder of the year, term or semester.

[347] The consultations did have some educational value for teachers and principals. Teachers learned more about the organizational constraints under which principals operate and organize classes and schools and the limits of their autonomy. Principals had a greater appreciation of the instructional, classroom management and assessment challenges teachers face to meet the diverse and varied learning needs of a unique group of students. These were by-products, not the purpose of the consultation.

[348] 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.

[349] This may be difficult to schedule in some of the busiest weeks in the school year, particularly if there are many classes for which there must be a consultation, as there have been in secondary schools.²¹³ The teacher's cooperation to facilitate consultation is presumed. In all instances in the representative schools in September 2007 the teachers were cooperative and obliging.

Can the Class be Over 30 and 3 in September Before the Consultation and the Opinion of Superintendent and Principal – Page 103, 110-111.

[324] As a practical and operational matter, all students are placed in classes on the first day they attend school in the school year. The thirty-first student or fourth 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.

[350] The date for reporting class size averages under the *School Act* is September 30,²¹⁴ 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 requirements to exceed must be met. As Arbitrator Munroe determined in 2006, there is no grace period after September 30th to achieve compliance as there was in deleted collective agreement provisions that sometimes set the compliance date at October 15th.²¹⁵

[351] In 2006, the employer unsuccessfully argued the legislation required compliance for what Arbitrator Munroe concluded was only one day of the year with the right to exceed the class size limits any other day of the year. He found this was not in keeping with the scheme of the legislation.

[352] Similarly, the employer submits in this arbitration: "If it is determined that the class had 30 or fewer students for all or part of the school year or semester, a decision of compliance for all or part of the year or semester must be made."²¹⁶ This is not consistent with the scheme of the legislation or with timely dispute resolution. 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, unless in other circumstances the applicable date is January 15th or May 15th.²¹⁷

Spring Process not Consultation but Part of Context for September Consultation — Consult Must Take Place in September – Pages 103 & 111

[325] Although students may withdraw from a class or move to another school at any time during the school year, the teacher knows in September with a high degree of probability that he or she has a class that has been organized in a manner that will require the principal to consult with him or her.

[326] 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.

[353] Consultation must take place “within 15 school days after the school opening day.”²¹⁸ There is no issue in this arbitration about the calculation of the date by which consultation was required in September 2007. There is no justiciable issue about any obligation to consult between the fifteenth or sixteenth school day and September 30th.

Requirement to Consult after September 30th – Pages 111-112

[354] The requirement to consult can recur when there is a subsequent change in the organization of a class after the date for which a superintendent’s signed report must be submitted to the board of education and any district parents’ advisory council. Section 76.4 of the *School Act* states:

(1) In this section, "student with an individual education plan" has the same meaning as in section 76.1.

(2) If the size of any class for any of grades 4 to 12 in any school in a school district exceeds 30 students, subject to subsection (4), the board of that school district must ensure that the class size does not increase unless

(a) in relation to a class for any of grades 4 to 7, the requirements of section 76.1 (2.1) (a) and (b) are met, or

(b) in relation to a class for any of grades 8 to 12, the requirements of section 76.1 (2.2) (a) and (b) are met.

(3) If any class in any school in a school district has more than 3 students with an individual education plan, subject to subsection (4), the board of that school district must ensure that the number of students with an individual education plan in the class does not increase unless the requirements of section 76.1 (2.3) (a) and (b) are met.

(4) Subsections (2) and (3) apply to a board, in relation to a school year, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10) for that school year.

(5) Subsection (6) applies if, after the date under section 76.3 (5) on the report that the board submits to the minister under section 76.3 (10), the size of a class for any of grades 4 to 12 in a school in the school district changes and, as a result of the change, the size of the class

a) exceeds 30 students, or

(b) increases, in accordance with subsection (2) of this section.

(6) As soon as practicable after the change in the size of a class referred to in subsection (5),

(a) the principal of the school must provide the school planning council with the rationale for the change in the organization of the class,

(b) the superintendent of schools must provide the board and the district parents' advisory council, if established for the school district, with the rationale for the change in the organization of that class, and

(c) the board must provide the minister with the rationale for the change in the organization of that class.

(7) The minister must make available to the public the rationale received under

subsection (6) (c).

[355] There is one situation in this phase of the arbitration where the union grieves that a consultation required by section 76.4 did not occur.

Paid Release Time for Consultation and Preparation for Consultation – Pages 112-113

There were situations when the principal arranged classroom coverage and the consultation was during instructional time. There were instances when teachers gave up professional development time to facilitate consultation. 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.

[357] It is the principal's obligation to consult and the principal will schedule the time and place for consultation if there is an absence of agreement or collaboration to facilitate a consultation. Teachers may forego their right to be consulted.

[358] Class size provisions in the *School Act* are part of the terms and conditions of employment of teachers.²¹⁹ Their terms and conditions of employment do not include paid release time from teaching unless it is otherwise provided in the collective agreement.

Union Representation at Consultation – Page 113

[359] Similarly, the class size provisions of the *School Act* do not address attendance and participation by union staff representatives at consultation meetings. It may be addressed in the collective agreement. In School District No. 36 (Surrey), principals were informed by district Human Resources that under the collective agreement the decision to have a union representative attend a consultation meeting "resides solely with the teacher." In six of the seven representative schools, the principals and staff representatives collaborated to ensure the process was organized and carried out in a timely manner with involvement of staff representatives.

Information and Preparation for Consultation & Professional Dialogue During Consultation – Pages 113-116, 117, 118, 145

[360] In the context of the annual, time driven, interactive process of school and class organization reliant on funding being appropriately allocated and available to principals, there are presumed and essential components of information that form the foundation of the consultation dialogue.

[361] 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.

[362] 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.

[363] 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.

[364] 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.

[365] 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.

[366] 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.

[367] 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.

[368] 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.

[369] 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.

[370] 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.

[371] Simply holding a consultation does confer on the board of education the power to exceed the class size and composition standard regardless of the effects it may have on the teacher and students. The consultation must be thoughtfully, carefully organized and conducted in good faith.

[372] There is a reciprocal obligation on teachers to participate fully and in good faith in the consultation process. There must be reciprocal disclosure of information about any matter that may affect the appropriateness of the class for student learning and some dialogue about this critical issue. As School District No. 39 (Surrey) Associate Superintendent Brian Bastien aptly told principals in August 2007:

The Act does not limit the scope of consultation with teachers. As such, consultation could be about anything to do about the class or class composition. It is imperative, however, that that the consultation include a discussion about whether or not the class is appropriate for learning. That, after all is the bottom line. It is what you and the Superintendent are required to attest to in writing during the reporting phase of the process.²²⁰

It may be informative, but is not essential, for these two professionals as a matter of form or rote to engage in general discussion or debate about ideals or the nuances of each others understanding of the elements of a class appropriate for student learning. However, the focus is a specific class with a specific composition in a specific grade or course in a specific school that provides an education program to an identifiable community of students with its unique characteristics.

[373] There is an expectation the principal and teacher will discuss all the relevant issues and information that arise 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 that meets the class size and composition standard, which is presumed in the *School Act* to be appropriate for student learning.

[374] There may be a hope or expectation the dialogue will be a collaborative consultation with a problem-solving focus. However, this is not an essential feature of the consultation and, as the British Columbia School Trustees Association reported in 2007, some discussions may become confrontational. The reality is that often personal style, relationships between the principal and teacher and within the school, the availability of resources and the importance of the outcome to either will influence the extent to which the nature of the consultation is collaboration, accommodation, compromise, competition or avoidance.

[378] As a full participate 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. The teacher's statement to the principal that he or she does not agree that the organization of a class is appropriate for student learning is a reciprocal responsibility to the principal's to earnestly listen to the feedback from the teacher and to sincerely consider the information and the teacher's opinion.

[380] Although the teacher's opinion was not offered or asked and sometimes deliberately kept confidential between the teacher and union staff representative in some of the consultations in the representative schools, it is imperative the teacher communicate and the principal know and consider the teacher's disagreement with the organization of the class as appropriate for student learning. The principal must know whether this is a class about which the principal and teacher share a common point of view or have differing perspectives.

[384] There are no reporting requirements for individual consultations and various reporting forms were used in the representative schools. In School District No. 5 (Southeast Kootenay), there was collaboration between the school district and local union that ensured common, shared and timely information reporting for the school district and local union, including teacher agreement or disagreement. Some of the other reporting forms used by school districts and local unions separately captured the same and some additional information.

[490] In an *Issue Alert* dated September 4, 2007, the union encouraged teachers to continue to apply pressure to achieve smaller classes and firmer limits on class composition. In some school districts, this information was supplemented by literature from the local union and advice from local union executive members and school union staff representatives. Various, the advice was that the limits were the limits and any higher number of students was inappropriate; it was union policy not to agree to classes that had more students or more students with an individual education plan that the thirty and three standard; teachers should not agree to the organization of a class if the class has both more than thirty students and more than three students with an individual education plan; teacher should not agree unless confident the class organization will not negatively affect any child in the class; and teachers should not agree unless all requested additional resources are provided.

[491] Some teachers who testified were not willing to agree to the organization of any class that did not meet the thirty and three class size and composition standard. They attended the consultation meeting predisposed to disagree. As a consequence, the employer submits: "Many of the teachers did not approach the consultation process with an open mind in the spirit of the legislation."

In summary, prior advice from the BCTF to staff representatives and teachers coloured the process in such a way that many teachers did not participate in the consultation meetings in the true spirit of consultation, the true spirit of sharing ideas and addressing the learning environment of each class.²⁷⁶

Consideration of the Information – Pages 116-118

[376] 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.

[377] 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.

[380] Although the teacher's opinion was not offered or asked and sometimes deliberately kept confidential between the teacher and union staff representative in some of the consultations in the representative schools, it is imperative the teacher communicate and the principal know and consider the teacher's disagreement with the organization of the class as appropriate for student learning. The principal must know whether this is a class about which the principal and teacher share a common point of view or have differing perspectives. This is essential information for subsequent action by the principal and district administrators and the formation of the principal's and superintendent's opinions.

[381] Knowledge of teacher disagreement is important in the formation of the principal's opinion if the teacher's role in the consultation is to be a central role. It is important and relevant information to communicate to the superintendent for the formation of his or her opinion. It may be information that school planning councils, district parent advisory councils and boards of education consider relevant in the accountability scheme for class size and composition standards. This may be particularly so when the principal's organization of a class is the consequences of meeting a district average class size in the aggregate or the teacher's disagreement is rooted in district resource allocation decisions.

Follow-up After Consult

[375] 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.

[379] 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.

[384] There are no reporting requirements for individual consultations and various reporting forms were used in the representative schools. In School District No. 5 (Southeast Kootenay), there was collaboration between the school district and local union that ensured common, shared and timely information reporting for the school district and local union, including teacher agreement or disagreement. Some of the other reporting forms used by school districts and local unions separately captured the same and some additional information.

[383] 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.

Timely Grievances & Communication of Disagreement – Pages 118, 135, 144

[383] 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.

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

[486] In this approach, there is sufficient evidence from the union that a class is not appropriate for student learning to require an evidentiary response from the employer if the union proves (a) the teacher told the principal during the consultation that the teacher disagreed with the organization of the class, (b) the sum of the students in the class and the students with an IEP is greater than thirty-three (students + students with IEP ≥ 34) and (c) the union has filed a timely grievance.

Over 3 and 30 is not a Violation it is a Trigger – Page 120

Classes may have more than three students with an individual education plan and be appropriate for student learning if there are adequate supports for the students and teacher in the classes.

Appropriate for Student Learning — Union Argument – Pages 120-121, 123-125

[391] The union submits the class size and composition standard is not designed to “maximize course offerings and timetable flexibility which benefit a majority of students at the school if it negatively impacts the education of students” or to “require that the educational experience of students in one class be truncated by violating the class size and composition limits in order to increase the variety and number of classes offered at the school.”²²⁵

[392] As stated in the preamble to the *School Act*, boards of education must provide an educational program that enables each student to develop their individual potential. WHEREAS it is the goal of a democratic society to ensure that all its members receive an education that enables them to become literate, personally fulfilled and publicly useful, thereby increasing the strength and contributions to the health and stability of that society; AND WHEREAS the purpose of the British Columbia school system is to enable all learners to become literate, to develop their individual potential and to acquire the knowledge, skills and attitudes needed to contribute to a healthy, democratic and pluralistic society and a prosperous and sustainable economy; The meaning of “appropriate” for student learning is, therefore, “exceptional educational achievement.”²²⁶

[393] Further, because “appropriate” is an ambiguous word it must be given an objective and measurable meaning that can be consistently applied to all classes in the public school system in British Columbia. Otherwise, it will be rounded or stretched out by school districts in the name of flexibility, as was done under the 2002 enactments,²²⁷

or interpreted in a manner that does not fulfill the scheme of the legislation.²²⁸

[394] The union submits clarity whether the concept is stated as “appropriate for student learning” or “educationally sound” is essential for focused and meaningful consultation. Being capable of objective measurement, such as being able to fully cover all requirements of the prescribed learning outcomes and meet all the requirements of IEPs, will lessen potential for divided opinions and decrease the potential for arbitration. The definition must ensure students and teachers can meet all their obligations.

Finally, the standard of appropriate for student learning should produce the same result when applied to different teachers, classes, and schools. A complex split grade class with several students with IEPs should not be appropriate for student learning only because it is taught by an experienced teacher with a masters degree in special education. A standard of appropriate for student learning which varies depending upon the skills and abilities of the teacher invites differing class sizes and workloads for teachers.

Not only is such a system unfair, it becomes unworkable when another teacher is required to teach the class, either as a TOC, or teaching the class another subject. A class with four students with IEPs that is not appropriate for student learning in affluent Metro Vancouver suburb because it does not fit the historical pattern of classes at that school or profile of other classes at the school should be not appropriate for student learning at a small interior community school simply because a principal determines that the class composition fits the historical pattern of classes at that school.²²⁹

[401] The union separates the formation of the principal’s opinion from the definition of appropriate for student learning. It submits the principal’s opinion must be reasonably held as assessed against the definition. “A principal must make an objectively reasonable determination that the organization of a class is suitable to permit students to meet the standards of learning articulated by the Ministry of Education, Government, and educators in order for a class to be appropriate for student learning.” The opinion cannot be based on subjective criteria.

[402] The union submits the classroom teacher is best able to determine the learning situation in a class and “it should only be in the most extreme circumstances in which a principal can reasonably hold a different opinion.” If the principal does and an arbitrator disagrees with the principal, then the principal’s opinion was not reasonably held. To be a reasonably held principal’s opinion, it must be:

- a) based on knowledge of the students and their learning needs and abilities;
- b) objectively reasonable and capable of assessment;
- c) when different from the class room teacher, defensible; and
- d) in the best interests of the students in the particular class. ²³⁵

[403] To establish a principal’s opinion meets the criteria, the union submits, the following must be established: (1) meaningful consultation occurred; (2) the principal allocated additional resources (3) the principal reduced class size or addressed class composition; (4) comparison of class composition with previously bargained collective agreement provisions; (5) evaluation of all student learning needs and abilities; (6) the principal determined whether IEP requirements could be met with sufficient time to do the necessary adaptations and modifications; (7) the principal determined whether prescribed learning outcomes for the curriculum could be met; (8) the principal had sufficient chance to observe class; and (9) the principal provides a rationale to explain rejection of the teacher’s view that the class is not appropriate for student learning or

why the teacher disagrees with its organization.²³⁶

[405] To establish a superintendent's opinion meets the criteria, the union submits, the following must be established: (1) full review of consultation forms; (2) full knowledge of teacher views on whether the class is appropriate for student learning; (3) rationale to explain rejection of teacher's view of whether class is appropriate for student learning; (4) full disclosure to board of trustees of all of teacher's concerns; (5) consideration of allocation of additional resources to class; (6) superintendent has explained why each class is appropriate for student learning; and (7) consideration of reduction of students in classes.

Appropriate for Student Learning — Employer Argument – Pages 125-130

[406] The employer submits the organization of a class refers to the teacher, the students, the class or course to be taught and the resources provided. These are the elements that are structured or arranged in a systematic way for each school year. The employer has the presumptive right to organize and structure operation of schools.²³⁹

[407] The employer refers to dictionary definitions that define "appropriate" as suitable, proper or fitting for a particular situation and a Supreme Court of Canada statement, referring to a section of the *Criminal Code*, that: "The word "appropriate" ("indiqué") generally confers a very broad latitude and discretion."²⁴⁰ Consistent with this, the employer submits, there are no legislated limits on the factors to be considered by principals and superintendents in arriving at their opinions about a class.²⁴¹

Principals have the authority to organize classes pursuant to section 5(7) of the School Regulation. To place restrictions on the Principal's authority to organize classes in addition to the consultation requirement of Bill 33 would be in breach of the School Regulation and would be tantamount to adding restrictions on the exercise of the discretion that are not in the legislation. In other words, adding restrictions to the Principal's exercise of the discretion would be rewriting the legislation.²⁴²

[408] The employer submits the analysis of appropriateness of the organization of a class for student learning centres on the opinion of the principal and superintendent "without any restrictions or criteria placed on that decision making in the legislation."²⁴³ It is their approval and the accountability scheme that ensures appropriate learning standards are maintained, provided there has been consultation. They are held accountable by the boards of education, as clearly happened in School District No. 39 (Vancouver) in the 2007-08 school year; by consultation with school planning and district parents' advisory councils; and by submission of reports made public by the Ministry of Education.

Another reason to support the interpretation put forward by the Employer is the lack of any requirement in the legislation for the reporting of the reasons for the formation of the opinions of the Superintendents and the Principals. It is clear that the Superintendents and Principals have been given the sole decision making authority based on their expertise and experience.²⁴⁴

[409] Further, the employer submits, the class and opinion formation happens within a legislative scheme that restrains class size and composition through mandatory district class size averages in the aggregate; requires published rationale for organization of classes with more than thirty students; requires two separate opinions; centres on student learning, not teacher workload; distinguishes when teacher consent is required

and when consultation is required; and speaks to “appropriate”, not ideal or some other standard. In addition, there are school district directions and policies on minimum class sizes. School district mission statements or core value statements are goals and ideals, they do not deal with classes appropriate for student learning.

[410] The employer submits the legislative provisions “must be interpreted in the context of the public interest; they must be interpreted in the context of rights of parents and students; and they must not be interpreted as a workload issue or terms and conditions of employment for teachers as would be the case if the provisions were contained in the provincial collective agreement.”²⁴⁵

[411] The employer submits the legislated class size and composition standard is directed at students learning not teacher workload, as it could be argued collective agreement provisions were. Consequently, several factors teachers testified affected their workload are not relevant to the issue of an opinion the organization of a class is appropriate for student learning. These include additional work when a student leaves for a planned absence or returns from a brief or long absence; adaptations and modifications for students with an IEP; teacher designed classes; and any disruptions that occur with student pull-outs to attend support programs. A teacher’s workday is longer than the instructional hours. For purposes of insurable employment it is 9.1 hours per day.²⁴⁶

That is not to say that classes that created significant workload issues for a teacher will be appropriate. The classes that are in dispute in these proceedings are not classes that create significant workload issues. They are all classes “at the margin”.²⁴⁷

[412] The employer submits teacher judgments as testified about the appropriateness for student learning of a class were “based on ideal or optimal learning” not what is appropriate.²⁴⁸ They ought to be expressed in the consultation process, but to place “any weight on the opinion of the teachers would amount to a rewriting of the legislation.”²⁴⁹

The opinions of the teachers were all premised on a higher level of resource allocation from the provincial government. Their measure or standard was not based on the current legislation nor was it based on current funding levels. The teachers in reality seek more funding from the provincial government and for small classes with fewer designated students in any one class.²⁵⁰

[413] In addition, the employer submits the teacher’s testimony does not accord with the student achievement in their class as reflected in grade marks introduced by the employer, which show there was significant student learning in the classes.

[414] The employer submits that disruption by students in class is not a relevant factor in assessing whether a class is appropriate for student learning.

Several of the Union witnesses testified with respect to disruptions in the classes caused by some of the behaviour students and also by some of the non-128 designated students. Their evidence was that these disruptions affected the appropriateness of the class for student learning.

It must be acknowledged that all students, including the behaviour students, have a legal right to be in a classroom. All students have a right to an education. No matter which class these students are placed in there will be disruptions and

they will need to be dealt with in the context of the provisions of their IEP and school and district procedures.

It would be astounding if the conclusion to be drawn from the inclusion of these students in classes is that the class then becomes a class organization that is not appropriate for student learning.

The emphasis must be on how the teacher and the Principal deal with the disruptions and with the student's continued right to be in a regular classroom. The evidence is overwhelming and uncontradicted that Principals have to and do deal with these students within the bounds of the legislation. ...

There are numerous examples of students spending time in the Principal's office; of suspensions; of partial day programs; of home schooling; of placement in other schools; and of placement in District programs.

In response, various Employer witnesses testified that these disruptions were "for a moment in time". What happens when there is a disruption is that the teacher deals with it and the class then proceeds. The evidence was overwhelming from the Employer's witnesses that classes do have disruptions but that those disruptions do not make the class organization inappropriate for student learning.²⁵¹

[415] The employer submits there are other avenues under the *School Act* to review class size and composition – by a special administrator and parent and student appeals.²⁵² Arbitral review must be consistent with those reviews.

[416] The employer submits, in the tradition of review of public decision-makers, arbitral review of principal and superintendent opinions must recognize the opinions are formed in a discrete and special system in which the principals and superintendents have expertise and that there can be more than one reasonable opinion on the organization of a class. An arbitrator should defer to any defensible principal or superintendent opinion in the range of possible acceptable organizations of a class unless it was made in bad faith or arbitrarily.²⁵³ The principal and superintendent are in a better position to make the assessment than a reviewing arbitrator, who should not substitute his or her opinion unless there is "some extreme deviation from an accepted educational practice and conclusion." ²⁵⁴

[417] This is consistent with the deference arbitrators give to employer exercise of management rights in decisions based on the employer's opinion about the suitability of probationary employees²⁵⁵ and the skill and ability of job applicants²⁵⁶ and the obligation to post a vacancy when there is adequate work to justify a new position.²⁵⁷

[418] The employer submits the legislative debates make it "very, very clear" principals and superintendents were given authority to decide.²⁵⁸ Teachers were give consent approval to organize classes with more than thirty students in Grades 4-7. Otherwise, approvals to have classes exceed the class size and composition standard were given to principals and superintendents.

[419] The employer submits the disputed classes generally have four to six students with an IEP in academic courses. Those with more have either reduced class sizes or supportive assistance. Classes with a larger number of students with an IEP are nonacademic classes "specifically designed for those types of students."²⁵⁹ Class with more than thirty students are mainly at the margin with thirty-one or thirty-two students.

The specialty and Science classes are within the range of previously negotiated collective agreements in the districts. None is a substantial deviation from the norm.

[420] The employer submits: "The Principal's and Superintendent's opinions cannot be based on unknowns, that is events that occur after September and cannot be anticipated in September, such as change of teacher for the class or a class not being what the teacher expected and chose."

The determination of the opinion in September is also based on the Principal's and Superintendent's knowledge that resources are available at the school and in the School District to be used if issues arise after September 30. There is considerable evidence to show that when circumstances changed during the year, the Districts responded in a reasonable and acceptable manner. 260

[421] The employer submits the appropriateness of the classes in dispute is affirmed by the simple fact that other similarly organized classes in the same schools in the same school year were not grieved – presumably because they were considered by the teacher and local union to be appropriate for student learning.

[422] The employer submits a decision upholding the grievance, in whole or in part, will require resource reallocation across the system and have dire consequences, including: reduction in non-enrolling support helping a broad spectrum of teachers in favour of more enrolling teachers; exclusion of special needs students from schools with high numbers of special need students; separation of students clustered under current practice for important educational reasons; elimination of advanced placement courses with small enrolments; reduction in timetabling choices to accommodate teacher requests; fewer smaller secondary classes adversely impacting the vibrancy and choice in secondary schools; disruptive holdbacks in resources to be allocated after consultations in September; and a reduction in the number of special education assistants.261

Opinion — Appropriate for Student Learning — Arbitrator – Pages 130-136, 142, 143

[423] The dispute on this issue underscores the tension between what would like to be done in education programs in the public Kindergarten to Grade 12 system and what is achievable with available resources budgeted by the provincial government. It underscores labour-management tension between teachers and administrators in neighbourhood schools striving for the best for the students in their schools and district administrators equitably allocating resources in accordance with board of education priorities and Ministry of Education policies and directives.

[425] As has been its tradition, the union advocates for an interpretation of the legislative standard for class size and composition that, effectively, makes a teacher's opinion determinative. This is rooted in a solid conviction that the classroom teacher has a relationship with the students whose names, character and families the teacher knows. The union's approach to developing the proposed matrices for both consultation and formation of principal and superintendent opinions on appropriateness for student learning effectively and essentially converts teacher consultation to teacher consent and substitutes the class teacher's opinion for the principal and superintendent opinions.

[426] This is consistent with the union's roles and responsibilities and its commitment to education, teachers, students and a civil society. It is not consistent with the scheme of the class size and composition provisions in the *School Act* and the compromises

among competing interests it enacts.

[428] Experience with the administration of the negotiated or legislated language is then assessed to determine if the original goals are being achieved in the use and application of the language. Often the true test is whether the administration of the language produces situations that are statistical outliers, attract controversy or are commonly viewed as unintended or undesirable.

No factor is presumptively or legislatively excluded from the principals' consideration. This does not mean factors such as the class having a first year teacher should not be examined when the reasonableness of the principals' opinion is under review.

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

[433] This phrase implies the focus of the principals' decision is to be the goal of successfully providing an education program to the students in the class. At the same time, while individual student development to its fullest is a goal, it is not a guarantee in the Kindergarten to Grade 12 education system. There are many factors beyond a class and a school that will affect success for each student today, as it was at the time of the Royal Commission. Principals are constrained to act within the mandate of the public education system and direct resources as effectively as possible to achieve competing goals.

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

[435] At the same time, "appropriate" is not an unfettered term. It must take its meaning from the context in which it is used.²⁶³ 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.

[440] 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.

[441] The factors to be considered by an arbitrator in reviewing a principal's decision to organize a class that exceeds the class size and composition standard and the principal and superintendent opinions the class is appropriate for student learning are factors that relate to transparency, the reason the class was organized as it is and the basis of the opinions the class is appropriate for student learning.

[442] Transparency will be fulfilled by meeting the consultation and reporting

requirements. The reason for the organization of the class involves an explanation of the alternative class organizations explored and the reason the organization in dispute was chosen. The basis for the opinions that the class is appropriate for student learning involves all the reasons and factors that led the principal and superintendent to their opinions the class is appropriate for student learning. These may include teacher requests, class, school and district supports for the class and the students in the class.

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

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

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

[446] Principals and superintendents can reasonably hold and act on opinions with which others sharing common values and goals disagree. In their efforts to be wise professional decision-makers and stewards of school district resources, principals and superintendents can make decisions and have opinions about the appropriateness for student learning of a class influenced by both pedagogical and fiscal considerations that turn out to be incorrect.

[447] As chief administrative officers of schools and chief executive or education officers of school districts implementing board of education policy, school and class organization can be complex. Like the situations facing teachers every day in the classroom, administration is also about making choices every day. 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.

[448] 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.

[449] 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.

[450] 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. Principals, superintendents, boards of education and, perhaps, parents need to know if teachers do not believe their classes are appropriate for student learning.

[451] If the principal's opinion is reasonably held, the superintendent's opinion cannot undermine the principal's opinion. If the principal's opinion is not reasonably held or is formed without the required consultation, the superintendent's opinion cannot resuscitate the failed process at the school.

[479] However, the purpose and intention of this legislative scheme, despite using clear words such as "ensure", "exceed" and "unless", is to give school districts a latitude in class organization and opinions about class organization appropriate for student learning to which there is to be arbitral deference. It is not absolute deference as submitted by the employer. It is deference to classes presumptively within a range of instructability. It is deference that:

- recognizes the intended measure of flexibility to organize classes with more than thirty students that is implicit in school district aggregate class size averaging;
- recognizes the legislative expectation that in some situations some classes must have more than three students with an individual education plan;
- allows for differences in schools and school districts operating under a single set of class size and composition standards;
- will provide a high degree of predictability that certain classes with more than thirty students or more than three students with an individual education plan or both will, except in the rarest of situations, not be reorganized by an arbitrator,
- perhaps requiring expenditures from contingency funds reserved for other purposes;
- will minimize the instances in which teachers will be called to testify despairingly about past or current students and classes and their behaviours and deficits; and
- will facilitate expeditious identification of classes whose organization may be problematic and are to be avoided or organized, supported and approved with care and caution, especially in the future organization of classes.

Onus to Prove and Onus to Lead Evidence – Pages 140-144

[469] A grievance alleging a class has been organized contrary to the provisions of the *School Act* must be proven by the union asserting the contravention.

1. Consultation pages 140 - 141

The union must lead evidence to prove who the teacher or teachers are who were to be consulted. Again, it will likely be the rare exception that these are not self-evident. If the allegation is that there was no consultation whatsoever, the union must lead evidence to establish this fact.

[471] If the union alleges there was a failure to consult in the manner required under the *School Act*, then the union has the onus to prove this and must lead evidence to establish the failure which is alleged to constitute a contravention of the *School Act*. There is no relationship between a teacher and principal similar to the fiduciary-like relationship between the Government and Aboriginals that justifies placing the onus on the employer to prove there was meaningful consultation in each disputed class simply because a grievance has placed it in dispute.

2. Opinions – Appropriate for Student Learning

[473] Once it is established there is a class subject to a specific grade class size and composition standard for which there has been a consultation, the more challenging question is who should have the burden of adducing evidence to impeach or justify the principal and superintendent opinions on which the existence of the size and composition of the class depends.

Teacher Agreement – pages 141 - 142

[477] If it is alleged the principal has not obtained the consent of the teacher of that class, the most efficacious way of proceeding is to place the burden on the employer to adduce evidence of the identity of the teacher who consented and the nature of the consent on which the employer relied to organize the Grades 4-7 class with more than thirty students. This is because the responsibility to obtain the consent and the organizational due diligence to be assured a consent was obtained lies wholly with the employer. The circumstances on which it relies to assert there was consent justifying the size of the class typically will be within the knowledge of the school district which has not proceeded and reported without having obtained something it considers to be consent from the correct teacher. Ultimately, of course, the onus to prove there was no “consent” from the teacher of that class remains with the union.

No Teacher Agreement – pages 142 - 144

The union has the onus to prove there has been a contravention of the *School Act*. The teacher is privy to some of the information available and relevant during September, but is not privy to the basis on which the principal and superintendent have formed their opinions. Much of the information may be exclusively known to and within the control of the employer. In some legislative schemes, this would justify requiring the employer to adduce evidence to explain why it did not “ensure” the size and composition of the class was in accordance with the class size and composition standard or why it decided it could exceed that standard and have a class appropriate for student learning.

[479] However, the purpose and intention of this legislative scheme, despite using clear word such as “ensure”, “exceed” and “unless”, is to give school districts a latitude in class organization and opinions about class organization appropriate for student learning to which there is to be arbitral deference. It is not absolute deference as submitted by the employer. It is deference to classes presumptively with in a range of instructability. It is deference that:

- recognizes the intended measure of flexibility to organize classes with more than

- thirty students that is implicit in school district aggregate class size averaging;
- recognizes the legislative expectation that in some situations some classes must have more than three students with an individual education plan;
- allows for differences in schools and school districts operating under a single set of class size and composition standards;
- will provide a high degree of predictability that certain classes with more than thirty students or more than three students with an individual education plan or both will, except in the rarest of situations, not be reorganized by an arbitrator,
- perhaps requiring expenditures from contingency funds reserved for other purposes;
- will minimize the instances in which teachers will be called to testify despairingly about past or current students and classes and their behaviours and deficits; and
- will facilitate expeditious identification of classes whose organization may be problematic and are to be avoided or organized, supported and approved with care and caution, especially in the future organization of classes.

[480] 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 30th 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 \leq 33)

[481] 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.

[482] 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.

[483] 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.

[484] 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.

[485] Most will be classes whose combination of size and composition exceeding the legislated standard will be akin to statistical outliers among the 68,000 or so classes organized each year. They are classes not necessarily highlighted in the public reports and not necessarily immediately obvious on a review of the reports. They are not just classes with higher numbers of students, many of which are in programs in which the teacher agrees with the organization of the class. Most of the classes calling out for an

explanation do not have teacher agreement and are less obvious and more complex classes.

[486] In this approach, there is sufficient evidence from the union that a class is not appropriate for student learning to require an evidentiary response from the employer if the union proves (a) the teacher told the principal during the consultation that the teacher disagreed with the organization of the class, (b) the sum of the students in the class and the students with an IEP is greater than thirty-three (students + students with IEP ≥ 34) and (c) the union has filed a timely grievance.

[487] This union evidence is not a *prima facie* case that the class is appropriate for student learning. It is not evidence raising a presumption that must be rebutted, but it is sufficient evidence to place an obligation on the employer to adduce evidence to explain the reason it organized the class in excess of the class size and composition standard and why there were dual opinions it is a class appropriate for student learning.

[488] This is an evidentiary burden on the employer because the organization of the class is not given deference as being presumptively appropriate for student learning. It is not an onus to prove the class is not in contravention of the *School Act*. That onus remains with the union to prove there has been a contravention of the *School Act* and the collective agreement.