



# British Columbia Teachers' Federation

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*Working draft*

**MEMO TO:** Delegates to Summer Conference 2009  
**FROM:** George Popp and Carmela Allevato, BCTF staff, and  
Craig Bavis, Victory Square Law Office  
**DATE:** August 24, 2009  
**SUBJECT:** **Class Size and Composition: The Arbitration Decision re 2006–08 School Years**

## **Background**

Bill 33 was enacted in June 2006, as a reaction to the positive public response to our campaign and actions in 2005 around bargaining rights, and especially class size and services for students with special needs. Since that time, the teachers, through the BCTF and our local unions, have been trying to enforce the provisions in that legislation.

The legislation contains a limit on the number of students, and the number of students with individual education plans, that can be in a class. In primary grades, the class size limits may not be exceeded. For Grades 4–7, the class size limits can only be exceeded if the teacher consents. For Grades 8–12, the size limits can be exceeded if the following two conditions are met:

1. The teacher is consulted.
2. The principal and the superintendent are of the opinion that the class is appropriate for student learning.

For Grades K-12, the limits on numbers of students with IEPs can be exceeded provided the following two conditions are met:

1. The teacher is consulted.
2. The principal and the superintendent are of the opinion that the class is appropriate for student learning.

This award deals with those two categories of exceptions. Where consultation was faulty or non-existent, classes were found to be in violation. Where the opinion of the principal and superintendent was not one that could reasonably be held, classes were found to be in violation.

Local teacher unions initiated class size grievances in the fall of 2006 and these subsequently were gathered into a provincial grievance the next spring. In the subsequent school years, we have initiated provincial grievances. The ruling brought down by the arbitrator on August 21 deals with the years 2006–07 and 2007–08. The facts brought before him from those years involve 1,666 classes from 17 different districts. There were more classes which actually exceeded the supposed limits around the province, but which were not reported to the Federation,

or for which the reported facts did not adequately support advancement. A timeline of events has been attached for reference.

In the proceedings since late November of last year, we have heard from seven representative schools from seven districts around the province. A total of 34 teachers, 1 local president, 9 principals or vice principals, 6 superintendents or former superintendents, 1 HR director, 3 assistant or associate superintendents, and 2 directors of instruction gave evidence on 81 classes over 49 days of hearings. Five days of argument followed in July of this year.

The decision is a complex document, encompassing 355 pages and including over 200 footnotes.

The arbitrator begins with a comprehensive review of the history of bargaining and legislation around class sizes and guidelines/limits concerning designation, inclusion and/or mainstreaming of students with special needs, how classes are constructed in different school settings.

He then considers the issues in dispute: the consultation process, the roles of the parties in the consultation and subsequent events, the applicability of IEPs to any particular class, what factors can be considered in assessing the appropriateness of a class, how much weight to give to the opinions of the parties, who should know about those opinions, and which classes need to be examined more closely.

The arbitrator then specifies which classes are in violation, which are not, and goes on to describe the testimony of the witnesses in each of the classes in question. The award is available on the BCTF website at: [www.bctf.ca/BargainingAndContracts.aspx](http://www.bctf.ca/BargainingAndContracts.aspx)

## **The ruling**

### **The arbitrator has comment on the legislation itself.**

He writes that the legislation was deliberately worded to be imprecise in order to make it difficult to legally challenge the views of the administrators with respect to what is appropriate for student learning.

### **The arbitrator spends a great deal of time dealing with the mechanics and purpose of the consultation process.**

He adopts many of the elements argued by BCTF to be important. The decision sets out important procedural and substantive rights for teachers to ensure that meaningful consultation occurs and that consultation will provide an opportunity for teachers to influence and exchange information with principals.

Teachers are expected to participate in consultation when scheduled and that may occur outside the classroom hours

It is the employer's obligation to retain class records, not that of the teachers (para. 21).

The principal has to ensure that new teachers are aware about all relevant matters specific to the school and how it operates (para. 362).

Teachers followed their own conscience in objecting to the organization of classes (para. 492).

The principal has the obligation to gather required and relevant information, including class lists and IEPs (para. 369).

An IEP is an IEP for all purposes. An IEP is not specific to one class and irrelevant for another (para. 296).

Any teacher of a class, even if 45 minutes per week, is entitled to be consulted (para. 305).

Consultations must be thorough and carefully organized (para. 371).

If a teacher has sincere concerns about the ability to meet the PLOs, these must be discussed and considered seriously by the principal (para. 362).

If a teacher believes a class is not appropriate for student learning, he/she “is expected to articulate some basis for forming 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*” (para. 373).

That is, teachers must participate fully in the consultation process, including advising the principal if they disagree with the organization of the class by the end of the process (though not necessarily at the consultation meeting) (para. 378).

The opinion of the teacher is relevant and important for school planning councils and boards of education (para. 381). Principals, superintendents, boards of education, and, perhaps parents need to know if teachers do not believe their classes are appropriate for student learning (para. 450).

Where the number of total students plus number of IEP students exceeds 33, there should not be a presumption that the classes are appropriate for student learning (para. 480).

A lesser teaching load in one class does not justify exceeding limits in another class (para. 545).

The arbitrator found that the group consultation model at Hastings Elementary did not meet the standard of Bill 33. The arbitrator also found violations of the duty to consult at Qualicum Beach Middle School and Thornhill Elementary when the principals did not meet with all teachers of one class and the music teacher teaching the class 45 minutes per week.

While the arbitrator recognized that many teachers felt frustrated by the consultation process, he also documents in the decision instances of teachers requesting and being given additional resources as a result of the consultation meetings and, in the case of Thornhill Elementary, the

principal reaching the conclusion that all the classes in the school were not appropriate for student learning. Finally he says that the boards of education, and parents should be informed of the objections of teachers to inform their decisions around the appropriateness of the learning situations in classrooms.

### **Appropriate for student learning**

“Appropriate for student learning” is not defined, but the arbitrator gives guidance to the meaning as to what will not be appropriate, one which “will likely adversely affect the normal learning expectations for a class” (para. 373).

The arbitrator does however recognize that the numbers in the *School Act* should have some meaning and arrives at the conclusion that “*exceeding the legislated standard poses a greater risk of compromising the educational goals for the class.*” Accordingly, echoing former collective agreement provisions, he creates a formula which recognizes that the combination of size and composition may create some problems and sets a trigger ( $\geq 34$ ) for how to arbitrate grievances around class size and composition. However, convinced that he cannot as a matter of law replace the principal’s (the presumed expert) opinion with his own, the furthest the arbitrator will go is to determine who must first provide the evidence justifying their position.

In his decision, the arbitrator gives a high degree of deference to the administrators’ opinions on appropriateness. He says that arbitrators must be restrained in questioning the merits of administrative decisions.

The arbitrator says that the administration can factor a number of external concerns such as availability of resources or funds in forming their opinions. The actual issue in question is not whether the class is appropriate but can the principal’s opinion, in the light of what she or he knows at the time, be reasonably held. The opinion may not necessarily be correct, but is it reasonably held?

It is also evident, from the examples cited by the arbitrator, that if a teacher does not inform the principal of his/her disagreement with the class or request additional resources during the consultation process, then challenging the reasonableness of the principal’s opinion will be very difficult (para. 444).

The bottom line is that of the 81 classes about which testimony was given, 21 were found to violate the provisions of the *School Act*; either with respect to the propriety of the consultation (19 classes) or with respect to the reasonableness of the Principal’s opinion of the class. In the next while, the BCTF and BCPSEA will meet to arrive at a remedy or go back before the arbitrator to decide.

## Timeline for 2006–08 Bill 33 Grievance

Fall 2006	Local grievances launched on violations of Bill 33 (Section 76.1 of <i>School Act</i> )																																										
April 2007	Provincial grievance initiated Schedule of SDs in violation created (various reasons) Included in original schedule are: <table><tr><td>SD 05</td><td>Southeast Kootenay (01 Fernie and 02 Cranbrook locals)</td></tr><tr><td>SD 20</td><td>Kootenay-Columbia</td></tr><tr><td>SD 28</td><td>Quesnel</td></tr><tr><td>SD 33</td><td>Chilliwack</td></tr><tr><td>SD 53</td><td>Okanagan-Similkameen</td></tr><tr><td>SD 61</td><td>Greater Victoria</td></tr><tr><td>SD 62</td><td>Sooke</td></tr><tr><td>SD 63</td><td>Saanich</td></tr><tr><td>SD 67</td><td>Okanagan-Skaha</td></tr><tr><td>SD 68</td><td>Nanaimo</td></tr><tr><td>SD 70</td><td>Alberni</td></tr><tr><td>SD 79</td><td>Cowichan Valley</td></tr><tr><td>SD 82</td><td>Coast Mountains</td></tr><tr><td>SD 87</td><td>Stikine</td></tr><tr><td>SD 91</td><td>Nechako Lakes (55 Burns Lake and 56 Nechako Valley)</td></tr></table> <p>Later, the schedule was amended to include: SD 08 (Kootenay Lake) (07 Nelson and 86 Creston Valley), SD 36 (Surrey), SD 39 (Vancouver), and SD 43 (Coquitlam).</p> <p>Based on fact patterns and quality of fact, this schedule was amended to 6 districts:</p> <table><tr><td>SD 08</td><td>Kootenay Lake</td></tr><tr><td>SD 36</td><td>Surrey</td></tr><tr><td>SD 39</td><td>Vancouver</td></tr><tr><td>SD 53</td><td>Okanagan-Similkameen</td></tr><tr><td>SD 62</td><td>Sooke</td></tr><tr><td>SD 67</td><td>Okanagan-Skaha</td></tr></table>	SD 05	Southeast Kootenay (01 Fernie and 02 Cranbrook locals)	SD 20	Kootenay-Columbia	SD 28	Quesnel	SD 33	Chilliwack	SD 53	Okanagan-Similkameen	SD 61	Greater Victoria	SD 62	Sooke	SD 63	Saanich	SD 67	Okanagan-Skaha	SD 68	Nanaimo	SD 70	Alberni	SD 79	Cowichan Valley	SD 82	Coast Mountains	SD 87	Stikine	SD 91	Nechako Lakes (55 Burns Lake and 56 Nechako Valley)	SD 08	Kootenay Lake	SD 36	Surrey	SD 39	Vancouver	SD 53	Okanagan-Similkameen	SD 62	Sooke	SD 67	Okanagan-Skaha
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May 2007	BCPSEA responds <ul style="list-style-type: none"><li>• grievance filed out of time—violates timelines</li><li>• actually a series of individual grievances with unique facts</li><li>• cannot add new violations/facts subsequent to the submission of the original schedule</li></ul>																																										
Fall 2007	EC decides to launch provincial grievance only. Locals requested gather consultation forms for 2007–08 school year and submit to BCTF in October 2007.																																										

We received data from 20 local unions:

01	Fernie
02	Cranbrook
20	Kootenay Columbia
28	Quesnel
31	Nicola Valley
36	Surrey
37	Delta
391	Vancouver Elementary
392	Vancouver Secondary
43	Coquitlam
44	North Vancouver
61	Greater Victoria
62	Sooke
63	Saanich
68	Nanaimo
69	Qualicum
70	Alberni
73	Kamloops
80	Terrace
86	Creston

Jan 2008	BCPSEA proposes to drop objections in 2006–07 grievance, if BCTF agrees that any decision will be declaratory only.
March 2008	BCTF responds, rejecting that offer and advancing 2007–08 grievance to arbitration.
April 2008	BCTF proposes combining 2006–07 and 2007–08 into one process.
May 2007	BCTF and counsel meet with prospective locals to identify individual classes and witnesses. BCPSEA eventually agrees to combination of the two years in question without prejudice to its objections which are the same in both years.
June 2008	Arbitrator hears arguments on BCPSEA preliminary objections. BCTF submits summary list of districts in dispute.
September 2008	Arbitrator issues ruling rejecting objections and advancing to hearing on the merits of the grievance.
October 2008	Case management meeting. BCTF submits the particulars ordered by the arbitrator. BCPSEA objects to inclusion of Delta and Coquitlam in particulars. A summary had been issued in June which mistakenly excluded Coquitlam–114 classes. A clerical error had left out Delta (6 classes) in October. BCPSEA proposes hearings using

representative districts. BCTF requests hearings involving individual classes. The arbitrator rules he will hear about classes in representative schools.

Either side can select a school or schools to represent their case.

BCTF selects Qualicum Beach Middle School(39 classes), Spencer Middle School (51 classes) (Sooke), Claremont Secondary School (25 classes)(Saanich), Guildford Park Secondary School (73 classes) (Surrey), Frank J. Mitchell Elementary School (2 classes) (Sparwood), Thornhill Elementary School (11 classes) (Terrace).

BCPSEA makes no selection at this time. Parties agree that discussion and ruling, if necessary, concerning remedy will follow arguments and ruling on merits of grievance.

November 2008	Hearings begin in Nanaimo on the merits concerning classes in Qualicum Beach Middle School.
December 2008	Claremont Secondary School (Saanich) hearings
January 2009	The arbitrator rules (without hearing oral argument) that Coquitlam and Delta are excluded from this grievance.
February 2009	Thornhill Elementary (Terrace) hearings. Conclusion of Claremont Secondary and Qualicum Beach Middle testimony.
March 2009	Employer selects Merritt Central Elementary (6 classes) and Hastings Elementary (6 classes) (Vancouver).
May 2009	Frank J. Mitchell Elementary Hearings, Merritt Central Elementary Hearings, Guildford Park Secondary Hearings.
June 2009	Conclusion of Merritt Central, Guildford Park Secondary, Thornhill Elementary. Opening Hastings Elementary.
July 2009	Conclude Hastings Elementary, final arguments July 13–17, 2009
August 2009	Arbitrator issues ruling