In the Matter of an Arbitration under the *Labour Relations Code*

Between:

British Columbia Public Schools Employers' Association

(the "Employer")

And:

British Columbia Teachers' Federation

(the "Union")

Remedy - General (BCTF Grievance 99-2018-0002)

PRELIMINARY AWARD

Counsel for Employer:	Lindsie M. Thomson
Counsel for Union:	Steven Rogers
Date of Decision:	September 17, 2018

I

Background

The British Columbia Public School Employers' Association ("BCPSEA") is the accredited bargaining agent for all boards of education in British Columbia. The British Columbia Teachers' Federation (the "BCTF") is the certified bargaining agent representing teachers employed by all boards of education in British Columbia. The BCTF and BCPSEA are parties to a provincial collective agreement which is made up of individual district working documents which meld common provincially negotiated language and locally negotiated language for each school district in the Province (the "Collective Agreement").

Early in February 2002, the BC Legislature passed legislation which prohibited bargaining of a number of subject matters, including class size and class composition. That legislation also removed pre-existing collective agreement language on those subject matters. The legislation was challenged as unconstitutional by the BCTF.

On November 10, 2016 the Supreme Court of Canada ("SCC") determined the issue. A majority of the SCC endorsed the BC Court of Appeal dissenting decision of Mr. Justice Donald who had found that the legislation was unconstitutional and ordered that the collective agreement language removed through that legislation be restored to the collective agreement

immediately (*BCTF v. British Columbia* 2016 SCC 49 ["SCC Decision"]; *BCTF v. British Columbia* 2015 BCCA 184, para 401).

Letter of Understanding ("LOU") No. 17 forms part of the Collective Agreement and was negotiated by the parties in anticipation of the SCC Decision to determine what the parties would have to do if the SCC Decision impacted Collective Agreement language. LOU No. 17 required the parties to re-open negotiations regarding the collective agreement provisions that were restored by the SCC.

In March 2017 BCPSEA, BCTF and the BC Ministry of Education agreed to the terms of a Memorandum of Agreement (the "MOA") which dealt with how the restored language would function.

II

Class Size and Composition

It was acknowledged by the parties that the Employer would not be able to comply with the restored class language and composition provisions in all circumstances so they agreed in advance what remedies would apply for non-compliance.

Article 24 of the MOA is the relevant provision:

> Remedies for Non-Compliance
>
> Where a School District has, as per paragraph 22 above, made best efforts to achieve full compliance with the restored collective agreement provisions regarding class size and composition, but has not been able to do so:

A. For classes that start in September, the District will not be required to make further changes to the composition of classes or the organization of the school after September 30 of the applicable school year. It is recognized that existing "flex factor" language that is set out in the restored collective agreement provisions will continue to apply for the duration of the class.

   For classes that start after September, the District will not be required to make further changes to the composition of classes or the organization of schools after 21 calendar days from the start of the class.

   It is recognized that existing "flex factor" language that is set out in the restored collective agreement provisions will continue to apply for the duration of the class.

B. Teachers of classes with the restored class size and composition provisions will become eligible to receive a monthly remedy for non-compliance effective October 1, 2017 (or 22 calendar days from the start of the class) as follows:
   (V) = (180 minutes) x (P) x (S1 + S2)
   V = the value of the additional compensation;
   P = the percentage of a full-time instructional month that the teacher teaches the class;
   S1 = the highest number of students enrolled in the class during the month for which the calculation is made minus the maximum class size for that class;
   S2 = the number of students by which the class exceeds the class composition limits of the collective agreement during the month for which the calculation is made;

Note: If there is non-compliance for any portion of a calendar month the remedy will be provided for the entire month. It is recognized that adjustments to remedies may be triggered at any point during the school year if there is a change in S1 or S2.

C. Once the value of the remedy has been calculated, the teacher will determine which of the following remedies will be awarded:

   i. Additional preparation time for the affected teacher
   ii. Additional non-enrolling staffing added to the school specifically to work with the affected teacher's class
   iii. Additional enrolling staffing to co-teach with the affected teacher
   iv. Other remedies that the local parties agree would be appropriate

   In the event that it is not practicable to provide the affected teacher with any of these remedies during the school year, the local parties will meet to determine what alternative remedy the teacher will receive.

The Union has alleged that some School Districts failed to provide remedy during the school year within a reasonable length of time even when practicable to do so. If those facts can be established the issue will be whether that amounts to a breach of the MOA and, if so, whether an order for remedy is

warranted. The parties agree that this arbitration board has jurisdiction over that issue and it will be addressed at a hearing on a date not yet scheduled.

The preliminary issue at this point is one of jurisdiction and relates to the final unnumbered paragraph of Article 24(C).

The question is what should happen if, despite meeting and attempting in good faith to determine an alternative remedy, the local parties are unable to reach agreement. The Union argues that this arbitration board can impose an alternative remedy. The Employer submits that I do not have jurisdiction to answer this question because it is outside the scope of the Grievance and, in any event, the imposition of a remedy is beyond this board's remedial authority and would constitute adding to or amending the agreement which is something a rights arbitrator cannot do.

The parties proceeded by written submissions accompanied by various documents including grievance correspondence, bargaining notes, proposals and counter proposals.

III

Analysis and Decision

As I understand the preliminary issue it arises in the following circumstances. A School District has made "best efforts to achieve compliance with the collective agreement provisions regarding class size and

composition": see MOA Re LOU No. 17, Article 22. Despite these best efforts, the School District has not been able "to achieve full compliance" in some classes: see MOA Re LOU No. 17, Article 24. In that situation teachers of those classes "become eligible to receive a monthly remedy for non-compliance" calculated in a specific way from a particular date: see MOA Re LOU No. 17, Article 24(B).

Article 24(C) is the next step of the process and sets out the specific ways in which the remedy can be provided. For ease of reference, it is repeated below:

> C. Once the value of the remedy has been calculated, the teacher will determine which of the following remedies will be awarded:
>
> i. Additional preparation time for the affected teacher
> ii. Additional non-enrolling staffing added to the school specifically to work with the affected teacher's class
> iii. Additional enrolling staffing to co-teach with the affected teacher
> iv. Other remedies that the local parties agree would be appropriate
>
> In the event that it is not practicable to provide the affected teacher with any of these remedies during the school year, the local parties will meet to determine what alternative remedy the teacher will receive.

It is the unnumbered paragraph at the end of Article 24(C) that is key. It comes into play when it has not been "practicable" to provide the affected teacher with any of the remedies set out in Article 24(C) (i), (ii), (iii) and (iv) during the school year.

The preliminary issue is concerned only with those situations.

Scope of the Grievance

The Employer submits that the question raised by the Union is not encompassed by the Grievance and is not part of the real issue in dispute. The Employer describes the real issue as "whether there has been a breach of the MOA by districts in providing remedy to teachers" and asserts that the Union's question "has nothing to do with a breach of the MOA at all" (Employer Submission, para. 32). The Employer argues that if this arbitration board were to answer the Union's question the board would be "embark[ing] upon a wholly different arbitration than that agreed to by [the parties]…": see, inter alia, *Goodbrand Construction Ltd. and Teamsters, Local 213* BCLRB No. 53/79; *Government of the Province of BC and BCGEU* [1988] BCLRBD No. 311. Finally, the Employer says that it is beyond the scope of this arbitration board's jurisdiction to do so.

I have considered the Employer's argument and the cases cited. I am satisfied, however, that the question concerning what should happen if the local parties are unable to reach agreement on an alternative remedy is within the scope of the Union's Grievance.

I have reviewed the Grievance documents and a key issue raised by them is whether some School Districts had violated the MOA and/or the Collective Agreement by failing to provide remedy to teachers affected by the districts' non-compliance with the restored class size and composition provisions. This is evident in the initial Grievance letter dated February 20,

2018 that states the Grievance is "regarding remedy for class size and composition violations" and includes a request for "an order that affected teachers be made whole." The question posed in this case is what should happen if an affected teacher does not receive remedy during the school year and the local parties charged with the responsibility of meeting to determine an alternative remedy have not agreed on that remedy. In my opinion that question fits comfortably within the broader issue raised in the Grievance. Furthermore, contrary to the Employer's assertion, the Union's question does include a claim of breach of the collective agreement and/or MOA by the failure to provide remedy (Union Submission, para. 12).

Two cases are relied on by the Employer. Those cases are distinguishable from the situation before me in that the issues sought to be brought within the jurisdiction of those arbitration boards were completely different issues than those within the scope of the initial grievances.

The first, *Goodbrand Construction*, was decided in the early days of the *Labour Code*. The Union had grieved the dismissals of four employees, dismissals that had taken place during or just following a work stoppage. At the outset of the termination hearing the Employer put forward a claim for damages. The arbitrator referred the issue of his jurisdiction to address the damages claim to the Labour Relations Board under what was then section 107 of the *Code* (now section 98). Vice-Chair MacIntyre (as he then was) held that the arbitrator did not have jurisdiction over the "claim for damages

under the umbrella of a dismissal arbitration" as it was a completely different arbitration than had been agreed to by the Union. The second case, *Government of the Province of BC*, resulted from the Employer's section 108 appeal of the arbitrator's decision to resolve the dispute "on the basis of an issue that had not been part of the original grievance and which both parties had expressly asked him not to consider." Not surprisingly, it was determined that the arbitrator had acted in excess of his jurisdiction and the portion of his award dealing with the issue raised only by the arbitrator was set aside. In my view these two cases bear no resemblance to the situation before this arbitration board. Here, the alleged failure to provide remedy to teachers affected by non-compliance with the restored class size and composition provisions is the essence of both the Grievance as well as the question posed about what to do if the local parties do not agree on a remedy.

An arbitration board's mandate is to "have regard to the real substance of the matters in dispute": see section 82(2) of the *Labour Relations Code*. Vice-Chair Munroe (as he then was) interpreted this provision decades ago in *Lornex Mining Corp. and USWA, Local 7619* [1977] 1 CLRBR 337 and his comments bear repeating:

> …the Code requires, not merely permits, an arbitrator to "…have regard to the real substance of the matters in dispute and the respective merits of the positions of the parties thereto under the terms of the collective agreement." That being so it is no longer necessary … for the parties to agree upon and pose a formal question … The labour arbitrator's function is no longer simply to "answer the question" as it might be framed during discussions at the beginning of the hearing… Rather, in accordance with the Code, he is to go to the heart of the matter as disclosed by the facts and the collective agreement.
>
> (para. 32)

When I "go to the heart of the matter" I am satisfied that the question raised at this preliminary stage is encompassed by the claim made in the Grievance. It follows that I cannot agree that the question posed by the Union is outside the scope of the Grievance and, for that reason, beyond my jurisdiction.

Remedial Authority

The Employer submits that when it has not been practicable to provide an affected teacher with any of the Article 24(C) remedies during the school year there is only one avenue for the parties. The local parties must meet "to determine what alternative remedy the teacher will receive." If the parties meet but are unable to agree, they must keep trying until they can determine an alternative remedy.

The Union sees it differently. The Union emphasizes that no remedy was provided to the teachers affected during the 2017-2018 school year. The Union argues that if the local parties are then unable to agree on an alternative remedy, this arbitrator can award remedy to those teachers. The Union characterizes the remedy provisions as having been "exhausted" (Union Submission, para. 3) and describes its claim this way:

> During the 2017-2018 school year, the Union alleges that a number of school districts failed to provide remedy to teachers during the school year. The local parties have met and have not determined an alternative remedy.
>
> Thus, school districts failed to provide remedy to teachers following the school districts' failure to comply with class size and composition provisions. It is this failure to provide remedy that the Union has grieved in the matter before you.
>
> (Union Submission, paras. 11 and 12)

The Union acknowledges that the parties agreed to a process and formula to calculate the value of the remedy where there has been non-compliance. But the Union argues that "following completion of that process" (Union Submission, para. 29), an arbitrator is not precluded from awarding a remedy to affected teachers.

After considering the submissions of the parties, I have concluded that this arbitration board does not have the jurisdiction to impose a remedy in the circumstances specified earlier. My reasons follow.

Let me begin with a brief summary.

Part III of the MOA is headed: "Class Size and Composition Compliance and Remedies." Articles 21 through 24 have headings such as "Efforts to Achieve Compliance" (article 21), "Best Efforts to be made to Achieve Compliance (article 22), "Non-Compliance" (article 23) and "Remedies for Non-Compliance" (article 24). The contents of these articles reflect the recognition by the parties that not all School Districts in all instances would be able to comply with the restored class size and composition provisions. What is contemplated is that, as long as best efforts are made by the School Districts, non-compliance will result in a remedy whose value is calculated according to a formula devised by the parties in advance. The affected teacher can then choose a remedy from Article 24(C).

I pause to note that if the Union alleged that "best efforts" had not been made, a grievance could be filed: see Article 25. Further, if the Union alleged that some School Districts failed to provide remedy during the school year even though it was "practicable" to do so, a grievance could be filed. However, if it was not "practicable" to provide remedy during the school year, Article 24(C) provides that the local parties are to determine an alternative remedy for the affected teacher.

But what if the local parties have met and have not determined a remedy? Can an arbitrator impose a remedy?

It is trite law that an arbitrator's authority to award a remedy is contingent upon a finding that there has been a breach of the collective agreement: see, inter alia, *PCL Construction Pacific Inc. and IUOE, Local 115* [1999] BCLRBD No. 327 at paras. 16-17. Indeed the entirety of the Union's argument is based on the premise that a breach has been established.

What is the breach upon which the Union bases its claim that this arbitration board has the authority to award the remedy sought? The Union describes the situation this way:

> ...In this case there is no dispute that there have been collective agreement breaches. The breaches by school districts of the class size and composition provisions triggered the remedy provisions of Article 24 of the MOA, but no remedy has been provided by school districts to certain teachers. As noted above, it is the failure to provide remedy that underlies the Union's application for a remedy order... in this case.
> ... While the parties have agreed to a process and formula for calculating the remedy for teachers where there is non-compliance with the restored class size and composition language, there is nothing in the MOA to suggest that the parties agreed to preclude an arbitrator from awarding

> remedy to teachers who are not provided remedy for collective agreement breach following completion of that process.
>
> (Union Submission, paras. 28 and 29)

As I understand the Union's submission, the breach is the failure on the part of some School Districts to comply with the class size and composition requirements coupled with a failure to provide remedy to affected teachers once the remedy provisions have been exhausted.

The Employer does not concede that a failure to meet class size and composition requirements results in a breach of the Collective Agreement. Instead, the Employer argues that if there is such non-compliance – a term used in the MOA rather than the word "breach" – the MOA requires the Employer to comply with Article 24 which provides the remedies.

Further, the Employer does not concede that it has breached the Agreement merely because remedy remains outstanding for a number of teachers. The following paragraph captures the Employer's argument on this point:

> Further, simply because a remedy is outstanding as of today, or as of any date, that does not prove a breach of the Collective Agreement. The Collective Agreement states that if it is not practicable to provide the affected teacher with any of the remedies in Article 24.C of the MOA during the school year, the local parties will meet to determine what alternative remedy the teacher will receive. The Collective Agreement does not state that the local parties must agree by a particular date or that the remedy must be provided by a particular date. The Collective Agreement language contemplates that the local parties will meet in circumstances where the affected teacher has not received a remedy during the school year which clearly points to the fact that discussions between the district and the local could be occurring after the school year ends. Therefore it simply cannot be accepted that a remedy that is outstanding as of the Union's June 16th letter, or the Employer's July 27th submissions, the Union's August 17th submissions or these present submissions, or any other date, is in violation of the Collective Agreement

> simply because it remains outstanding. Quite plainly there is no stipulated deadline for the remedy to be provided. This arbitration board therefore cannot conclude that there is a breach of the Collective Agreement simply because a remedy owing to a teacher remains outstanding as of today. This illustrates once again, why it would be an error to issue orders requiring a remedy for an alleged breach that has not been found.
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> (Employer Reply Submission, para. 25)

It is common ground that a failure to conform to the class size and composition requirements constitutes non-compliance with those provisions. It is unnecessary to decide at this point whether such non-compliance can properly be described as a Collective Agreement "breach" since it is clear from Part III of the MOA that non-compliance is to be dealt with in a particular way and the remedies have been agreed upon in advance. The Union's request for a remedy order is based not only on non-compliance with the class size and composition provisions but also requires that the non-compliance be accompanied by a failure to provide remedy.

It follows that in order to find that there has been a breach of the agreement as the Union argues, I would have to be persuaded that the process set out in Article 24(C) for the local parties to determine an alternative remedy has been "exhausted" or completed as the Union claims. Such a characterization is necessary to the Union's argument.

Is there anything in the unnumbered paragraph in Article 24(C) or elsewhere in that Article that indicates that the remedy provisions become exhausted at a certain point? Is there any language in that paragraph or

elsewhere that specifies a time or event when the process for determining the remedy is completed?

In my opinion there is no language in Article 24 upon which a finding of exhaustion or completion of the remedy process can be based. And it should be noted that, apart from the claim of exhaustion and completion, the Union did not point to any wording in the MOA that supports such a finding. If I were to reach such a conclusion, I would be "add[ing] something not contemplated in the relatively comprehensive existing language": see *Commonwealth Construction Co. Ltd. and BC Council of Carpenters* BCLRB L36/80. That is something I cannot do.

The Employer compares what these parties provided in the final paragraph of Article 24(C) as "an agreement to agree" and argues that their inability to agree to this point does not give an arbitrator the authority to make an agreement for them: see, inter alia, *Cu&C Health Service Society and OTEU, Local 15* [1996] BCCAAA No. 197 (Gordon); *Tad Foods Ltd. and UFCW, Local 2000* [1996] BCCAAA No. 59 (Germaine); *Viterra Inc. and ILWU* [2010] CLAD No. 402 (Hood).

I have considered the Union's argument that this remedy dispute is distinguishable from the cases cited by the Employer concerning "agreements to agree." The Union submits that this dispute "is more akin to the

implementation of an arbitration award where the parties cannot agree as to remedy" (Union Submission, para. 45).

> The law is settled that an arbitrator can order remedy in such cases, even if a right to do so is not expressly reserved.
>
> (Union Submission, para. 46)

The Union cites *Gearmatic Co. and USWA, Local 6613* [1977] BCLRBD No. 12 in support of the proposition that arbitrators have such authority and argues the following:

> In our submission, although there has been no prior award, your jurisdiction to award remedy in implementation of the MOA is analogous to that of arbitrators asked to implement remedy flowing from prior awards. In the instant case, the parties have agreed as to a remedy formula and framework in the event that school districts breach class size and composition provisions, but the Employer has failed to provide remedy consistent with that framework. Again, it is on that basis that the Union seeks an order from you to implement remedy consistent with the framework set out in the MOA.
>
> (Union Submission, para. 50)

There is no doubt that an arbitrator has the authority to complete an award once a breach has been found even when the remedy issue has been referred to the parties who have failed to reach agreement and even when the arbitrator has not expressly reserved jurisdiction. But it is fundamental to the arbitrator's authority in such cases that the parties agreed to her jurisdiction and that a collective agreement breach was found by the arbitrator. In this case, there is no agreement to my jurisdiction as illustrated by the need for this preliminary determination. Nor has a breach been established.

In my opinion the Union's analogy is flawed and the situation here is more comparable to the "agreement to agree" cases. A failure to agree where the parties have a provision that requires them to meet "to determine [an] alternative remedy" does not, without more, give an arbitrator the authority to make that agreement for the parties. If an arbitrator is to have that authority, the parties must agree to that in clear and express language: see *Viterra Inc.,* supra, para. 55. Such language is not present in Article 24(C).

By way of contrast, the parties did turn their minds to a process in the event a dispute arose over whether a School District made "best efforts" to comply with the class size and composition provisions. Article 25 provides as follows:

> i. The local parties will meet and attempt to resolve the dispute;
> ii. Where, after meeting, the local parties are unable to resolve the dispute, the local parties, with the assistance and representation of the Provincial Parties, will meet again and attempt to resolve the dispute;
> iii. Where, after meeting, both the local and Provincial Parties are unable to resolve the dispute, either party may file a grievance and utilize the grievance procedure to resolve the dispute.

Language similar to that in Article 25(iii) could have been added in Article 24(C) after the reference to the meeting of the local parties such as the following: *Where the local parties are unable to determine an alternative remedy by X date (or after meeting) either party may file a grievance to resolve the matter (or an arbitrator may determine the remedy).* The absence of any such language provides support for the Employer's position.

For the foregoing reasons, I cannot agree that this arbitration board has the jurisdiction to award remedy to affected teachers in the particular situations described earlier in this award.

I should add that the Employer put forward two other arguments; one relied on language elsewhere in the MOA establishing interest arbitration, and the other was based on a bargaining proposal advanced by the Union in February 2017. While I considered these arguments, in the end my decision does not rest on either point so I have not repeated them here.

Finally, I agree with the Union that Article 24 places an obligation on School Districts to provide remedy in cases of non-compliance and that obligation is not discharged until the teacher affected has received one of the remedies described in Article 24(C)(i) through (iv) during the school year or an alternative remedy determined by the local parties. It is important to acknowledge that unlike many of the "agreement to agree" cases the parties here have agreed by virtue of Article 24(C) that the affected teachers are entitled to a remedy and the value of the remedy has been established. The outstanding issue is simply how that remedy will be awarded if it cannot be provided during the school year. The method the parties have agreed upon to achieve that end involves meetings by the local parties to determine the remedy. The local parties must continue to meet until such a determination has been made.

IV

I have concluded that the question posed by the Union is encompassed by the claim made in the Grievance and is not beyond its scope. However, I have determined that I do not have the authority to award a remedy to affected teachers in the circumstances where the local parties have been given that task. Accordingly, the Employer's preliminary objection to my jurisdiction must be upheld.

Dated at the City of Vancouver this 17th day of September, 2018.

Marguerite Jackson