

## Freedom of Expression

There have now been two awards rendered with respect to the issue of freedom of expression for teachers to communicate with parents on matters pertaining to the education of students. The first award was a BC Court of Appeal decision (*BCPSEA v. BCTF* (2005), 141 LAC (4th) 385), which was an appeal from an arbitration award of Donald Munroe (*BCPSEA v. BCTF* (2004), 129 LAC (4th) 245) concerning teachers' right to discuss class size issues with parents during parent-teacher interviews. The second award was a decision dated May 2, 2008 from arbitrator John Kinzie concerning teachers' right to distribute (through grade 4 and 7 students in a sealed envelope addressed to parents) union information regarding Foundation Skills Assessment (FSA). Both of these awards involved the interpretation of sections 1 and 2(b) of the *Charter of Rights and Freedoms*.

BCPSEA has now reviewed these awards. The purpose of this @issue is to provide to districts the criteria and suggested processes and procedures for determining which union materials can be distributed by teachers to parents, either directly or through students. It must be noted that neither of the decisions involved off duty conduct or "expressions" concerning employer policies or actions, the decisions provide us with general legal principles concerning public expressions by teachers.

### Sections 1 and 2(b) of the *Charter of Rights and Freedoms*

Although it has been found in these two awards that, under section 2(b) of the *Charter of Rights and Freedoms*, teachers have a right to express themselves on educational issues, these expressions may be limited by the application of section 1 of the *Charter*.

Section 1 of the *Charter* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1 of the *Charter of Rights and Freedoms* has been interpreted to provide the employer with the opportunity to demonstrate that, in certain situations, some restrictions on teachers' freedom of speech are warranted. If the employer can establish a "pressing and substantial objective" and then demonstrate that the restriction on speech is rationally connected to that objective and that there is a minimal impairment to the teacher's *Charter* right, the restriction will be justified.

The awards have confirmed that the following "pressing and substantial objectives" meet the section 1 test:

1. The objective of maintaining public confidence in the public school system.
2. The objective of ensuring that a parent-teacher interview meets its purpose.

3. The objective of "accuracy" so that the expression is not misleading such that confusion and conflict is created within the school.

In addition to the "pressing and substantial objectives" for placing limits on teachers' expressions in the two BCPSEA cases, other Courts have determined that the duty of loyalty and fidelity also raises the issue of a pressing and substantial objective. The duty of loyalty and fidelity is a duty owed by employees to their employer. A teacher does not owe a duty of fidelity arising from employment to the provincial government. Therefore, this "objective" was not relevant to the two BCPSEA decisions. In both of those decisions, the "expressions" related to government policies on education.

## Suggested Processes and Procedures

The following are suggested processes and procedures that would apply to teachers communicating with parents (directly or through students), on or off school property when acting in the capacity of a teacher or being seen by the community in this regard.

1. **It is suggested that your Board of Education either pass a resolution or adopt a district policy that requires prior approval for a teacher to distribute union/political information directly to parents or through students as couriers. The content of the resolution or policy should include:**

The Board of Education requires teachers to obtain the prior approval of their (title of employer representative or designate) before distributing union/political information on school property during school hours to parents or through students as couriers. The (title of employer representative or designate) will review the information for its accuracy and its relevance to educational matters concerning students. In determining the appropriateness of the materials for distribution, there must be a consideration of the balancing of rights and measures that may be taken to minimally limit the teacher's right of free speech while at the same time achieving the objectives of the school district. Should a union/political communication be approved by the (title of employer representative or designate) for distribution through students, such communication must be in a sealed envelope and clearly marked/addressed to the parent/guardian. Furthermore, the communication itself must clearly identify the author and/or the organization from which it is coming from.

Page 35 of the Kinzie award states:

Having considered all of the evidence and argument, I am of the view that the Employer has the right to control what is sent home to parents through the medium of their children/students at its schools. In my view, this right flows from its responsibilities under the *School Act* and its management rights under the provincial collective agreement with its teachers.

2. **Distribution of information should be limited to educational issues; i.e., concerns about matters affecting their children's education and relevant to school administration. For example, it would not be appropriate to distribute political candidate flyers for the upcoming trustee or provincial elections.**

Page 49 of the Kinzie award states:

While I agree that there is a political element to the pamphlet at issue in this case, its primary message, in my view, raised concerns about the impact of FSA tests on their children's education. Thus, the pamphlet deals with the type of subject matter that

materials traditionally sent home with students commonly deal with; i.e., matters pertaining to students' education.

- 3. Such communication through students should be limited to teachers who normally communicate with parents on educational matters concerning their children; i.e., this would not apply to support staff or other employees who do not normally communicate with parents.**

Page 47 of the Kinzie award states:

This method of communication is the one commonly used by teachers to communicate with parents about their children's education. The communication in this case does concern parents/children's education through the impact FSA tests will have on it.

Page 52 of the Kinzie award states:

Teachers in School District No. 5 (Southeast Kootenay) have traditionally used a school's internal mail delivery system through the medium of students to communicate with parents on matters pertaining to their children's education.

- 4. Although these two awards deal with government policy issues (class size/FSA), if the issue instead concerned a decision, policy or action of the district, the duty of loyalty and fidelity owed by an employee to his or her employer should be considered. The employer may limit free speech provided that the limitation is rationally connected to the duty of loyalty and provides minimal impairment of the teacher's free speech. The limit must be aimed at permitting the district to effectively work towards its lawful goals and activities. The limit must also be placed on "speech" that occurs in public or quasi-public fora off school premises in addition to the restriction at school.**

Page 44 of the Munroe award states:

If the communications which are here at issue would be unobjectionable in terms of the duty of fidelity if uttered or distributed in public or quasi-public fora, I cannot see how the duty of fidelity becomes a reasonable limit prescribed by law justifying the prohibition of the exact same communications on a teacher's bulletin board or in the privacy of a parent-teacher interview.

- 5. The content of the information must be accurate so that the expression is not misleading such that confusion and conflict is created within the school. If the content or a portion of the communication is not accurate, the employer must identify and notify the employee/union and ask them to either remove or amend the inaccurate information. If the employee/union refuses to remove or amend the inaccurate portions, the employer would then be entitled to ban the entire distribution of the communication.**

Pages 51 and 52 of the Kinzie award state:

I will add though that if the Employer had requested that the Union amend the provisions of the pamphlet concerning parents requesting their children be excused from writing the tests so that they accurately reflected the Ministry's guidelines and the Union had refused, I am of the view that the Employer would have been justified in restricting teachers from distributing the pamphlet through its internal mail delivery system to parents. That refusal would have meant that an absolute ban would have been the only way that the Employer could have addressed this pressing and substantial concern.

- 6. If the communication meets the criteria listed above and is approved by the employer and the teacher wishes to distribute material through students to their parents, the communication must be in a sealed envelope and clearly marked/addressed to the parent/guardian. Also, in order that there is no confusion about from whom this communication is coming, the communication itself should be clearly marked; i.e., this is the view of the BCTF, letterhead, logo, etc.**

Page 47 of the Kinzie award states:

The students/children are not inappropriately involved in this discourse because the pamphlet is sent home in a sealed envelope to the parents.

Page 50 of the Kinzie award states:

The front page of the pamphlet has the BCTF name and logo on it and its website is referred to inside the pamphlet.

## **Questions**

Each case will have to be assessed on its individual merits. While the above-noted cases provide specific guidance for teacher activity at the workplace involving government policy and legislation issues (class size/FSA), and the use of students as couriers, future issues concerning teacher activity outside the workplace or issues regarding a teacher/union speaking out about a school district's decisions, policies and/or actions, will need to be reviewed and assessed based on their individual merits, the application of the legal concepts from the above-noted cases, and other case law.

Should you encounter the issue of distribution of union material (on or off school property), please contact your BCPSEA labour relations liaison for discussion.