

## Freedom of Expression Arbitration Update

### *BCTF/Kamloops Thompson Teachers' Association and BCPSEA/SD No. 73 (Kamloops/Thompson): Black Armbands*

On February 21, 2011, Arbitrator Emily Burke released her award in the School District No. 73 (Kamloops/Thompson) grievance on the board's direction to teachers to remove black armbands worn at school in protest of the Foundation Skills Assessment (FSA). The grievance was dismissed, upholding the right of the school district to direct the teachers to remove black armbands and refrain from speaking to students about the armbands and the protest against the FSA. In her conclusion, Arbitrator Burke stated,

"I find therefore this direction is a justified infringement upon the freedom of expression of the teachers and a reasonable limit under Section 1 of the *Charter*."

In this case, an elementary school teacher wore a black armband on the day her class was scheduled to write the FSA. She also made additional armbands and provided them to other teachers the following day. Students asked the teacher why she was wearing the arm band and she said it was to protest the FSA. Some students cheered. The school principal directed the teacher and all teachers in the school to remove their black armbands and refrain from discussing with students the black armbands and the protest against the FSA. The teacher was upset by the direction, removed the armband and returned to the classroom despite being offered a recess to compose herself. Students asked her why she was upset and she indicated it was because she had been told to remove the armband. She told the class "apparently the *Charter of Rights and Freedoms* does not exist."

Arbitrator Burke described the action of the district under scrutiny in the case as a "direction to the teachers in the elementary school in which two grades — Grades 4 and 7 — were writing the FSA to remove their black armbands and refrain from discussing with students the black armbands and the protest against FSA."

There was no controversy in this case that the district's direction infringed teachers' expression. The issue to be decided by the arbitrator was whether the district's direction could be justified as a reasonable limit under Section 1 of the *Charter*.

### Contextual Factors

Before addressing the Section 1 analysis, the arbitrator reviewed contextual factors relevant to the dispute. The arbitrator found that a significant contextual factor in this case is the vulnerability of students, particularly young students, to the messages conveyed by their teachers.

## Section 1 Analysis

“Under s. 1, the onus is on the [employer] to show that the limit is directed at a pressing and substantial objective, and that the limit is proportionate in the sense of being rationally connected to the objective, impairing the right of freedom of expression in a reasonably minimal way, and having an effect in terms of curtailment of the right that is proportionate to the benefit sought.” *R. v. Oakes*, [1986] 1 S.C.R. 103.

### Rational Connection to Pressing and Substantial Objectives

Arbitrator Burke accepted that the district’s direction was rationally connected to three pressing and substantial objectives:

#### 1. Insulating students while in attendance at school from political messages that impact directly on their mandated educational program.

Arbitrator Burke referred at length to the evidence of the student witnesses who recounted that they understood the armband to be against the FSA and that the teacher was very upset about being asked to remove the armband. Arbitrator Burke did not accept that the armband was a “silent protest” as argued by the teacher, but rather it had the effect of drawing students into the FSA debate.

*“I conclude the situation as described, in combination with the previous comments of the grievor that she was ‘protesting the FSA’ created confusion in a student population that was required to write the FSA. I conclude also it created disruption of the task of writing the test as evidenced by the description of events above. Arbitrator Kinzie in his analysis pointed out students were insulated from the political discussion by virtue of the BCTF message on FSAs being sent home to parents in a sealed envelope.”*

#### 2. District’s duty to ensure the statutory mandated FSA is effectively delivered in a manner that does not undermine the effectiveness of the assessments.

With respect to this objective, Arbitrator Burke stated:

*“There is no doubt the wearing of the black armband and discussion in class negatively affected the delivery of the FSA. I have set out the testimony of the students above in some detail. In my view, it confirms the impact and potential confusion created by this situation which required students to write a test their teacher actively disapproved of as evidenced by her comments. These young students did not have a choice. It put them in a difficult position, creating potential conflict with the school and their parents.”*

Arbitrator Burke quoted from the previous *Sihota* arbitration in School District No. 62 (Sooke) on page 57 regarding the limits of professional autonomy and then concluded:

*“Having considered these two objectives, I am of the view the confusion and conflict that arose as a result constituted a pressing and substantial concern that the Employer was justified in addressing in a reasonable way.”*

### 3. Ensuring the results of the FSA are reliable and can be used both provincially and in the district in making important educational decisions to students.

Arbitrator Burke found that:

*“...the actions of the teachers who wore the black armband could skew the results of the FSA in a negative way. Whether one agrees with the utility of the test or not, the standardized assessment was mandated and its delivery to ensure reliable results is a pressing and substantial objective of the District. I find largely through the evidence of the students, that it did affect the delivery of the FSA, the effectiveness of the assessments and the reliability and ability to utilize the FSA results in making educational decisions for students.”*

Arbitrator Burke summarized the first part of the Section 1 analysis as follows:

*“In my view there was a rational connection between this direction and the three substantial and pressing objectives outlined above. It was a rational attempt to preclude political activity that impacted directly on an educational program that affected a vulnerable group and potentially undermined the results and usefulness of the mandated FSAs.”*

#### **“Minimal Impairment” and “Proportionality”**

With respect to the “minimal impairment” and “proportionality” aspects of the Section 1 analysis, Arbitrator Burke accepted that it is not necessary to show that the district’s direction was the least restrictive means of achieving its objectives. She accepted that it was appropriate to consider whether the direction imposed by the employer impaired the teachers’ freedom of expression in a “reasonably minimal way.”

Arbitrator Burke characterized the inquiry in this way:

*“In considering whether the limit is a minimal impairment of the teachers’ freedom of expression, I must consider whether the School District balanced the interests of teachers’ freedom of expression with its concerns about the black armband and the resulting classroom discussions. A related issue is whether the direction imposed by the Employer impaired the teachers’ freedom of expression in a ‘reasonably minimal way.’ Was the means chosen to implement the objective reasonable and proportionate to the teachers’ interest in disseminating their message pursuant to their right under Section 2(b) of the Charter to freedom of expression?”*

The district’s position was that teachers’ right to express views on FSA exists and is protected by the *Charter*, but only when the expression does not involve students.

Arbitrator Burke found that the district was not seeking to prohibit the teachers’ ability to have and express views concerning the FSA. Rather, it was seeking to limit the expression of those views in schools and in classrooms with students who must write the FSA (a mandatory educational requirement). She then concluded that the limits on free speech imposed by the district met the “minimal impairment” test as the limits imposed were only in relation to students with other forums available for free speech.

Arbitrator Burke also concluded that the deleterious effects of the district's direction upon the teachers' freedom of expression was limited to the extent necessary to the attainment of its purpose.

*"The teachers are free to exercise their fundamental freedoms as long as they do not participate in a protest which engages the young elementary students who are in a mandated educational program; and required to write the FSA. Indeed, as set out above, the teachers have vigorously and actively exercised this right as it pertains to FSA. The direction only restricted the teachers' freedom of expression to the extent it prohibited the teachers from wearing and discussing with students the black armband and the protest against the FSAs. These are the young students who are required to write this mandated test. Free expression on this matter other than through this avenue remains unimpaired."*

This decision is significant for school districts which must continue to balance impact on students with a teacher's right to free speech. This award does not establish an "all or none" situation regarding the free speech in schools.

## **Conclusions**

Arbitrator Burke concluded her award with the following summary of her findings:

*"The teachers are not prevented from voicing their objection in the many other forums that are available to them, including parent/teacher interviews, media outlets, school board and PAC meetings. Whether or not one agrees with the FSA or its use, the objectives of insulating young students from political messages that directly impact on their mandated educational program as in this case, and ensuring the statutorily mandated FSA is delivered in a manner that does not undermine its effectiveness and reliability, outweighs any negative effects produced by the direction. I find therefore that this direction is a justified infringement upon the freedom of expression of the teachers and a reasonable limit under Section 1 of the Charter."*

## **Analysis**

This decision is significant for school districts, particularly in light of the current political context and the desire of some teachers to seek out opportunities to express themselves in schools on various contentious educational or political issues.

This decision confirms that school districts have both a responsibility and a right to insulate students from "political messages that directly impact on their mandated educational program." In addition, school districts have a responsibility to ensure mandated programs and requirements are not impeded by messaging by either employees or their unions. While employees have the freedom to express their views on issues, they do not have an unfettered right to speak out when their actions draw children into the debate or have a negative effect on the ability of the school district to deliver mandated programs and services.

The effect of any employee action on children is always an important consideration for school districts. While the district has an obligation to support the rights of employees, it also has a responsibility (both legally and morally) to shield students from any undue harm that might occur. This responsibility to children does not change whether the harm is direct or indirect, intentional or unintentional. The arbitrator considers this responsibility in her award.

In future, school districts will have to consider both the rights of employees as well as their obligations toward students and in respect of the delivery of programs and services when determining limitations on freedom of expression in schools. Each situation will need to be evaluated on its own merits in an ongoing attempt to find the appropriate balance between rights and responsibilities. Failure to properly consider either side of the equation may place a district in jeopardy.

Full text of Arbitrator Burke's decision is on the BCPSEA website at <http://www.bcpsea.bc.ca/publications/bulletins/issue.aspx>.

## **Questions**

Please contact your BCPSEA labour relations liaison for further information.