

IN THE MATTER OF AN ARBITRATION UNDER THE  
BRITISH COLUMBIA LABOUR RELATIONS CODE

BETWEEN:

BRITISH COLUMBIA SCHOOL EMPLOYERS ASSOCIATION  
SCHOOL DISTRICT NO. 73 (KAMLOOPS)

("BCPSEA" and/or the "Employer")

AND:

BRITISH COLUMBIA TEACHERS FEDERATION  
KAMLOOPS THOMPSON TEACHERS ASSOCIATION

("BCTF" and/or the "Union")

(Freedom of Expression – Black Armband)

ARBITRATOR:	Emily M. Burke
COUNSEL FOR EMPLOYER:	Judith Anderson
COUNSEL FOR THE UNION:	Carmella Allevato and Robyn Trask
DATE AND LOCATION OF HEARING:	April 13, April 14, April 15, September 20, September 21, September 22, September 23, September 24, October 7, 2010  Kamloops, B.C.
DATE OF AWARD:	February 17, 2011

## 1. INTRODUCTION

This case concerns the Union's allegation the Employer violated Section 2(b) of the Canadian *Charter of Rights and Freedoms* (the "*Charter*") when on February 11, 2009 it directed the Grievor, a teacher at Stuart Wood Elementary and other teachers, to remove a black armband associated with a protest against Foundation Skills Assessments ("FSAs") and refrain from speaking about the FSA with students. The Union filed a grievance on February 13, 2009 and maintains this violation is not a reasonable limit that can be demonstrably justified in a free and democratic society. It relies upon *BCPSEA v. BCTF* (2005), 257 DLR (4<sup>TH</sup>) 388 where it points out the British Columbia Court of Appeal concluded teachers' expression within the school setting is protected expression under the *Charter*.

By letter dated June 23, 2009 the BCTF referred this matter to arbitration. In the referral to arbitration, the grievance was described as follows:

In this Kamloops/Thompson case, the board directed the grievors to remove black armbands worn in protest of the FSAs. The union believes this a violation of the collective agreement and teachers' rights of free expression, as established in a number of arbitration and Court of Appeal decisions. The union is seeking remedies including a declaration of the violation, an order to make all affected teachers and the union whole and an order for future compliance.

The Employer maintains the direction by school administration that teachers remove black armbands signifying protest against FSA is a reasonable limit under Section 1 of the *Charter*. It maintains freedom of expression is not absolute. The Court must use a contextual approach when performing a Section 1 analysis. The Supreme Court of Canada in *R. v Oakes* [1986] 1 SCR 103 set out appropriate considerations. These, the Employer maintains, lead to the conclusion the limits imposed by the Employer were proportional and a balanced limitation upon the teachers' freedom of expression within the duty of loyalty and fidelity and within the requirements of the *Oakes* test for the

application of Section 1.

## II. BACKGROUND

The British Columbia Teachers Federation (the "BCTF") is the certified exclusive bargaining agent on behalf of all employees included in the bargaining unit established under the *Public Education Labour Relations Act*. The Kamloops Thompson Teachers Association ("KTTA") is a local union of the BCTF. The British Columbia Public School Employers Association ("BCPSEA") is the bargaining agent for all school boards established under the *School Act* including the Board of School Trustees of School District No. 73 (the "School District"). The BCTF and the KTTA are parties to a collective agreement with BCPSEA and the School District. The KTTA represents approximately 1000-1100 members. There are 45 to 46 schools in the school district. Thirty-eight of these schools are elementary schools. Approximately 14,000 students are in the School District.

Karl deBruijn was the Assistant Superintendent – Elementary in the school district during the 2008-09 school year. Terrance Sullivan was the Superintendent. David Komljenovic was the President of the KTTA and is currently a member of the BCTF Executive Committee.

Stuart Wood Elementary School is a small school with approximately 100 students. During the 2008-09 school year, the school had four classes: a kindergarten/grade 1 class; a grade 2/3 class; a grade 4/5 class and a grade 6/7 class. The teachers at the school included Bernice Machuck, a half-time learning resource teacher; Janet Lewis, Sue McDaniel, Vicki Antoniak, Susie Corbet, Beth Morgan, Cathy Piva, and a preparation time teacher. Carol Robb was the Principal of the school. Two school support workers also worked at the school.

Corbet has been employed as a teacher with the School District since 1999. The 2008-09 school year was her third year teaching at Stuart Wood. During the 2008-09 school year, Corbet had a .7 contract with .1 medical leave. This resulted in her working .6. Corbet taught the grade 4/5 class two days a week and the 6/7 class one day a week. Corbet shared her grade 4/5 class with Piva and her 6/7 class with Morgan. Corbet's grade 4/5 class was composed of 29 students: 16 grade 4 students and 13 grade 5 students. Kim Glendinning, a school support worker, was assigned to the grade 4/5 class. As of September 30, 2009, three students had individual education plans ("IEPs"). The school was however working on obtaining Ministry categories for other students. Glendinning supported a student with special needs in the grade 4/5 class. She was in the Corbet class two days a week from 9 a.m. until lunchtime. Glendinning also did recess and lunch supervision. Corbet's 6/7 class had 26 students: 12 grade six students and 14 grade seven students. That class also had a school support worker and two students with IEPs.

Prior to the 2008-09 school year the previous principal and staff had some conflict. Robb, as the new principal, was trying to build relationships and create a positive climate at the school. Corbet and Robb knew each other socially and had worked together prior to Robb coming to the school as principal in the beginning of the 2008-09 school year. The two got along well and were happy to be colleagues.

Corbet is regarded as a good teacher and valuable member of the teaching staff at Stuart Wood. There is no dispute that she is a dedicated teacher who cares about the students she teaches and wants them to succeed.

The Foundation Skill Assessment ("FSA") is a set of reading, writing and numeracy tests administered annually to B.C. students in grades four and seven. There is a significant difference of opinion between the school district and the teachers on the merits of this set of tests. I do not need to resolve the

differences concerning the merits of the FSA for the purpose of this case. I will set out a summary of the respective views.

The Employer points out the FSA measures reading, writing and math problem-solving skills that students have gained during several years of learning. The level of difficulty of questions varies. Students answer multiple-choice questions on the computer and do written work in a booklet that goes home to parents along with the students' overall assessment results. FSA results do not count toward student grades. FSA provides a "snapshot" of how well individual students are doing as well as B.C. students in general. The results answer questions such as whether a student is learning vital skills; is student achievement improving over time; are there trends in student performance at the school, district or provincial level; and how specific groups of students are doing. The results of the FSA are provided to school districts and schools and used for planning purposes for the next school year. Individual results are provided to parents. Class results are made available to classroom teachers in March to enable teachers to use the results in their teaching for the rest of the year. School districts and individual school results are tabulated and made available to the public on the Ministry of Education website.

The writing of FSA tests has been required of school districts and schools since the 1999-2000 school year.

Under the provisions of the *School Act*, RSBC, 1996, ch. 412, the Minister of Education has jurisdiction with respect to a number of matters. Section 168(2) provides the authority to make orders:

- (d) preparing a process for the assessment of the effectiveness of educational programs and requiring a board or a francophone education authority to cause its schools to participate in the process for the purpose of comparison to provincial, national and international standards.

Pursuant to Section 81 of the *School Act*, a board must prepare and submit to the minister reports and statements in the form, with the information and at the time required by the minister.

The Student Learning Assessment Order, Ministerial Order 60/94 as amended provides for assessments to be conducted for the purpose of assessing the effectiveness of educational programs by comparison of educational programs to provincial, national and international standards, and measuring individual student performance. FSAs are administered pursuant to and under the Student Learning Assessment Order.

The Student Learning Assessment Order sets out the School Board's responsibilities with respect to FSA. Specifically, Section 2 states as follows:

2. For the purpose of assessing the effectiveness of educational programs through assessments, a board or francophone education authority must ensure that
  - (a) the assessments are administered and completed, and that the data collected from the assessments are transmitted to the minister in accordance with the assessment protocols, instructions and invigilation procedures sent to the board or francophone education authority by the minister with each assessment,
  - (b) the students completing the assessments are supervised by a teacher, principal, vice principal or director of instruction or other person designated by the minister or board or francophone education authority,
  - (c) the information received from the minister about the results of the assessment is communicated to the appropriate school and district staff, and
  - (d) the person designated by the minister or board or francophone education authority has access to any school, classroom or student for the purposes of the assessments.

The administration of the assessments is also dealt with in that Order. It

says:

...a teacher, principal, vice principal or director of instruction or other person designated by the minister or board or francophone education authority, must

- (a) Supervise the students who are completing the assessments,
- (b) Ensure that the assessments are administered and completed, and that the data collected from the assessments are transmitted to the minister...
- (c) Ensure the security of assessments...

Teachers, principals, vice principals or directors of instruction, or any other persons designated by the Minister or Board, are required to supervise students who are completing assessments, ensure the assessments are administered and completed and the data collected from the assessments are transmitted to the Minister in accordance with the assessment protocols, instructions and invigilation procedures sent to the board by the Minister with each assessment, and ensure the security of assessments including retaining completed assessments for any period of time set by the Minister. Sullivan agreed it was open to the school board to assign individuals other than teachers to administer the FSAs.

While the writing of the FSA test is scheduled over 4.5 hours of classroom time, there is dispute over how much time the test takes out of teaching time. There is also some dispute about whether the FSA covers grade 1 to 3 learning outcomes or whether it introduces grade 4 learning outcomes in the grade 4 test. The Union says FSAs are only one component of the achievement contract and only one tool used to determine the needs of aboriginal students. In grades that do not have the FSA, the Union points out the school district can also make the comparison between aboriginal and non-aboriginal students. The Union says the participation rate of students writing the FSA is high in Kamloops because parents cannot excuse the students from the exam. deBruijn testified that the student participation rate in the FSAs in Kamloops had gone down last year,

although it was still higher than the provincial average. He attributed this decrease in participation to the BCTF and KTTA campaigns regarding the FSA. There is disagreement between the school board and teachers regarding which students should be exempted from the FSA. The Union is of the view the test could have use but should be administered on a random sampling basis and the information not used to evaluate specific students or schools.

In recent years, the BCTF developed an action plan whose goal is the elimination of the FSA tests or their modification so they are administered on a randomized sampling basis with neither school nor students identified. During the 2001-2002 school year the BCTF issued a direction to its members not to supervise the FSA tests being administered that year. In dealing with a complaint on this matter, the Labour Relations Board in *B.C. Public School Employers' Association/School District No. 36 and British Columbia Teachers Federation/Surrey Teachers Association* BCLRB No. B123/2002 concluded supervision of FSA tests was *prima facie* work which teachers were obligated to perform. The Labour Relations Board issued an interim order directing the BCTF to suspend its direction to members not to supervise the test.

Komljenovic testified the question of FSAs was very significant for teachers. Teachers have concerns about the amount of time put into the FSAs and the time needed to prepare students for the exam. He testified teachers may spend between three weeks to a month preparing students for the FSAs. Teachers were concerned about the tests causing anxiety for students; the structure of the FSAs and the time it takes away from LART and library time, teaching the curriculum and the ranking of schools based on FSA score results. He testified teachers were concerned about parents using FSA results and school rankings as rationale for why one school should be kept open over another. While the school board and KTTA have always agreed the ranking of schools on the basis of FSA scores is not appropriate, he noted the public still relies on it, as had occurred recently in meetings concerning school closures.



Komljenovic testified while the ranking of schools on the basis of FSA results is one of the KTTA's primary concerns about the FSA, it is not the only concern. Teachers also raised concerns about technical problems with the computer portion of the test; the use of resources for the creation of the tests, preparation of the tests, marking the tests as well as cost for photocopying and printing, technological support and TOC coverage for split classes to write exams.

Corbet testified she did not like the FSA results being used by the Fraser Institute to rank schools. She had concerns about the stress of the exams on particular students in her class, the time taken to write the FSAs not being the best use of classroom time and she was not able to teach students during this time. Corbet and Robb had several discussions about the FSAs. Corbet expressed her concern. While Robb was empathetic, she maintained her position students could not be excused from the exam even if their parents requested them to be excused. All of the students Corbet had concerns about wrote the FSAs. One autistic student away on vacation during the FSAs did not write the test. Corbet had similar concerns to those expressed by Komljenovic concerning the use of school resources in administering the test.

During the 2008-09 school year the BCTF and local teachers unions conducted political campaigns regarding the FSAs throughout the province. As part of the BCTF campaign, Komljenovic sent an e-mail to teachers in his e-mail group attaching a BCTF pamphlet regarding the FSAs titled "A message to parents about the Foundation Skills Assessment". Approximately 350 to 400 teachers were on this list. Seventy Union staff representatives in the local would also have received the e-mail.

The KTTA also sent a pamphlet titled "FSA testing can be harmful to your child's learning" to staff representatives and teachers directly. Information in the

media included Union advertisements with an attachment at the bottom for parents to cut off and request their child not write the FSAs. Komljenovic testified the primary purpose of providing these materials was to communicate with parents and the public about the FSAs so they would understand what teachers' position was on the subject. The Union sought to provide parents with information and a means for them to request their child be excluded from the FSAs. The Union hoped the broader public would engage in the debate and discussion about the FSAs and understand why the teachers had an issue with this assessment and the way it was used. The Union hoped to eventually pressure the government to meet with representatives of teachers and have the FSA conducted on a random sampling basis. Schools could not then be ranked and random sampling would not require the same amount of time.

The Employer noted random sampling as opposed to the census approach does not produce the necessary information for Districts and the Province and for teachers and students. Information would not be available to show how particular groups performed such as First Nations or boys. It would not provide individual information for each parent nor would it provide a classroom teacher with information on how his or her class did on particular questions.

In the time period leading up to the 2008-09 FSAs, an event was held at the Henry Grube Education Centre by the district Parents' Advisory Council at which the teachers and school board presented their views and issues regarding FSAs. Parents asked questions and Komljenovic and deBuijn from the school board responded. Komljenovic also made two presentations to the School Board on teachers' concerns. The Board of Education agreed with the KTTA in opposing the ranking of schools by the Fraser Institute. It was otherwise supportive of the FSAs.

The FSA tests were scheduled to be administered to the Grade 4s and the

Grade 7s at Stuart Wood Elementary during the week of February 9-13, 2009. Prior to this time, Corbet had posted an information pamphlet regarding FSAs outside her classroom door for parents to read while waiting to pick up their children. The pamphlet was visible to parents, teachers, the principal and students. After the pamphlet had been up for some time, Corbet found it one day on her desk. She did not know why it had been placed on her desk or who have placed it there. She re-posted it outside her classroom door. Sometime later the pamphlet was removed by Robb. Robb testified it was her understanding any correspondence to parents must be put in sealed envelopes so children would not view it.

Corbet testified she also had a BCTF pamphlet regarding FSAs present on her desk during her discussions with parents at parent-teacher interviews. Corbet's understanding was that some parents signed the forms to exempt their children from the FSAs.

In December 2009 teachers across the province voted not to prepare for, administer, or mark the FSA exams. The BCTF directed its members not to administer FSA in February 2009. Teachers signed letters indicating their intent not to prepare for, administer or mark the FSAs unless the administration of the exam was changed to a random sample with neither schools nor students identified. Three hundred and sixty-four of 512 elementary school teachers submitted these letters to the school district. One hundred and forty grades 4 and 7 teachers sent a letter.

Sullivan wrote to each of the teachers to advise them of their duty regarding the FSA. He encouraged them to fulfill their responsibilities, advising the FSA and the requirements of the FSA were grounded in the School Act and Regulations. He noted the Boards of Education are given the responsibility to ensure that the FSA proceeds without disruption in accordance with the Student Learning Assessment Order.

The BCPSEA made an application to the Labour Relations Board to deal with this matter. On February 2, 2009, the Labour Relations Board concluded administering/supervising FSA tests was *prima facie* work which teachers are obligated to perform. The BCTF was ordered on an interim basis to cancel its direction to members not to administer/supervise FSA tests; communicate that cancellation to its members; and cease and desist from authorizing or directing its members not to administer/supervise FSA tests. This direction was communicated to teachers in Kamloops. Teachers ultimately participated in the administration of the FSA. Teachers voted in favour of the recommendation to comply under protest with the order of the Labour Relations Board. Corbet testified she took this to mean that teachers would be administering the FSA under protest.

Komljenovic testified at a Union meeting during the evening of February 3, 2009 teachers discussed various ideas regarding what "under protest" meant. Teachers discussed wearing buttons, black attire, writing letters and talking to the public. He testified that there is a long history in the district of teachers expressing political views through wearing political messages on buttons.

At around this time, Stuart Wood Elementary sent home a newsletter with information and advice to parents regarding the FSAs. Corbet was upset when she read the newsletter. She believed the newsletter contained factual inaccuracies, was one-sided and did not take into account concerns teachers had about the FSAs. Corbet was also upset staff had not been given a heads up this information would be going home in the school newsletter. After reading the newsletter on February 7, 2009 Corbet composed an e-mail to Robb expressing her strong feelings about the newsletter. In that lengthy e-mail to Robb, Corbet indicated she was offended by the newsletter and detailed her concerns using strident language.

Corbet and Robb met the following morning and discussed that e-mail. Robb testified she cautioned Corbet regarding the tone she employed in the e-mail. Corbet believed Robb had perceived the tone of the e-mail differently than she intended but thought the meeting ended on a positive note.

A week after the February 3, 2009 vote to comply with the Labour Relations Board ruling under protest, Komljenovic sent an e-mail to his Union e-mail list regarding the administration of the FSAs under protest. That e-mail dated February 9, 2009 included the following:

...

Further, in regards to the "protest" part of the administration of the FSAs, Surrey has started a "black armband/attire" campaign whereby teachers wear black or a black armband every Wednesday in support of teachers who must administer the FSAs. Teachers who are administering the FSAs may want to wear black on the days they must administer the FSAs as a form of protest.

Some teachers asked for me to provide a statement that would convey to students the reality of the FSA test is a way that would reduce stress. Such a statement could be:

This test is a snapshot and cannot reflect your full abilities as a student. It is also important that you realize that this test is not reflected in your final mark and should not be a source of stress. You answer the questions as you best see fit."

How you choose to protest, though, is up to you.

Corbet read the e-mail on the evening of February 10, 2009. She thought wearing a black armband or attire seemed like a good way to protest. In her view teachers on the frontlines who administer the test were not being listened to. Corbet wanted to convey her peaceful protest that teachers' voices were not being heard. Corbet testified wearing the black armband was "just her little thing". She viewed it as a silent protest because "it was a quiet thing" that she did for herself; made her feel better as it "was not ok that voices were not

being heard". She called it a silent protest because it was not loud or confrontational and did not engage the students. When cross-examined on this point Corbet said in her opinion it was silent as she was not engaging students about her viewpoints. Corbet testified she always tells her students to do their best. She did not advise students to "answer questions as they see fit" as she thought that might give them an excuse not to do their best. She testified "I teach kids that sometimes we don't like what we have to do but we have to do it to the best of our abilities". Corbet testified she regularly tells her students if they disagree with something to let her know and do it in a respectful way. She believes her students know she appreciates and respects differences in opinions.

Corbet created a black armband and wore it to work on the morning of February 11, 2009. She wore black dress pants, a white shirt and a black band around her left arm. Corbet arrived at the school between eight and 8:20 a.m. She went to the main office, greeted Robb and removed her jacket. She pointed to her armband and stated she was silently protesting the FSAs. Robb agreed Corbet came to the main office at this time and pointed out her armband indicating it was a silent protest. There is some dispute about this brief interaction. Corbet indicated Robb stated in a jovial exchange words to the effect "you are such a goof"; "you go girl"; and "I wonder what Karl would say". In cross-examination, Corbet said while perhaps it was not those exact words, it was something of that nature. Robb testified she may have smiled but did not say "you go girl". At this time Robb did not provide any direction to Corbet regarding her armband or speaking to students. After her conversation with Robb, Corbet went upstairs to teach her grades 4/5 class of the day. The Grade 4 students wrote an FSA that day. In cross-examination, Corbet agreed she wore the black armband signifying her protest/disagreement with FSA while in a class that was writing the FSA. She noted however she always tells her students to do their best on any exam.

At some point during the day on February 11, 2009, Corbet took the

grades 4/5 students to music class. As the students were coming out of music class and walking towards the main school building, the grade 6/7 class was coming out of the school. A couple of grade 6/7 students asked Corbet why she was wearing the armband. Corbet replied she was silently protesting the FSAs. The students said "yea" and cheered. The Grade 4/5 students did not make any comments to Corbet on this exchange. Corbet testified one to three students cheered. She noted "what student likes an exam".

Corbet described the interaction as a quick exchange. Corbet testified she did not believe students would have thought they did not have to write the exam. Glendinning who was at the back of the line of the students at this time heard this exchange. She did not hear any response from the students and indicated Corbet's reply was in her typical voice. Glendinning testified she did not hear any conversation in the classroom about the armband or about Corbet's views on the FSA. She also did not hear students talking about the armband when she was conducting recess and lunch supervision. She agreed however she was assigned one on one to a particular special needs student. She also supervised the Grade 2/3 students in a different part of the yard during lunch and recess. Corbet recalled when she was in the staff room at lunch, other staff were teasing her regarding the armband and she joked about it.

KW was a grade 6 student in the grade 6/7 class when the Grievor wore the black armband on February 11 and 12. He had attended the school for a number of years, had Corbet as teacher for both grade 6 and 7 and thought she was a good teacher. KW remembered the Grievor wearing a black armband on both days. He first noticed the armband when going to the music portable. Another student asked what it was for. KW testified Corbet said it was "a ban for FSA". KW testified "we said that it was kind of cool; it was cool if the FSAs were banned because the class would then not have to write the test." KS was a Grade 5 student in the grade 4/5 class. She did not write the FSA. The Grievor taught her class on February 11, the first day of wearing the black

armband. KS testified the Grievor wore the black armband in class. She testified "she was talking against the FSA and how she did not think it was fair and that she did not like the FSA".

At the end of the school day on February 11, 2009, Robb overheard the Grievor advise another staff member she was silently protesting the FSAs by the wearing of the black armband; that students asked her about the black armband; that she advised the students it was her silent protest against the FSA; and the students cheered. Corbet testified at the end of the school day she came to the main office, had a conversation with another teacher regarding her armband and the question the grade 6/7 students had asked her. Robb asked Corbet what the students had said. Corbet told Robb "a couple of kids asked me about it and they cheered". Corbet testified she and Robb teased each other and Robb did not indicate it was a bad thing the students cheered. Robb did not ask Corbet any further questions. She did comment to Corbet "I wonder what Karl would say". There is dispute about whether this was said in a joking manner.

Robb became concerned about the wearing of the black armband but decided to see what happened at school the next day. In my view it was likely Robb's comment at the end of the day on February 11, 2009 referencing Karl was not a joke but rather due to her rising concern about the situation.

On the evening of February 11, Corbet and one of her teaching partners, Morgan, went to the home of another teacher, Piva to socialize. During the evening, there was discussion about Corbet's armband. Corbet advised the other teachers she was going home to make more black armbands. There is dispute as to whether she said these were for the students in her two classes or to provide to other staff at the school. Morgan, her partner Grade 6/7 teacher told her she should not do so. She cited an incident during the 2005 job action when elementary children held signs and were part of the picket line. Parents were very upset and the students did not continue to participate. Corbet denies



such a discussion took place. Corbet was shocked when she became aware of Morgan's account of their visit. Corbet testified she would never have made armbands for the grade 4 or 7 students. In her view, it must have either been a misunderstanding or a joke.

The Union maintains there is no evidence Corbet ever provided any armbands to students. I agree. As a result, I do not have to resolve this disputed evidence.

On February 12, 2009, the Grievor was the teacher for the grade 6/7 class. On that morning, Corbet arrived at work with 5 to 8 additional armbands she intended to provide to other staff. Corbet went to the main office area outside Robb's office. When another teacher came into the area she held out the armbands and said "would you like to have an armband to show the FSAs don't help teachers teach or students learn." Several teachers took the armbands. The school secretary testified this was being done in a loud manner. She was as a result unable to do her work. She said to the group "this doesn't sound like a silent protest to me". She advised the teachers "this is a CUPE office" and "I'm a CUPE member trying to do my job". The teachers then left. Robb testified she again said "I wonder what Karl would say".

KW, a student in the Grade 6/7 class, testified on February 12 when asked about the black armband, the Grievor told the whole class it was a ban for the FSA. Some kids were really happy and some wanted to make and wear a black armband. The Grievor told the class if they really wanted to wear a black armband to go home and ask their parents.

BM, a Grade 7 student at the time, was in the Grade 6/7 classroom at the time the wearing of the black armband by the Grievor. She testified on that morning before the assembly the Grievor wore the black armband to class. Students questioned her about it and she responded to the questions. The

Grievor told the class the black armband was her protest against the FSA. She told the class it was not right and it was not right for kids to take the test and for the teacher to have to give the FSA. BM testified the Grievor also told the class she thought the results depended on how smart the kids were or how well the teachers were teaching. More questions were asked and answered. BM then said "later we went to the assembly in the gym."

Corbet does not recall expressing any views regarding the FSA or her armband to students that morning before the assembly.

Corbet's e-mail to friends later that day indicates:

... I was told that it was involving children in my political views. When I responded truthfully saying that I have not talked to my students about my views on the FSAs, I was told that because the students could ask why I was wearing the band indeed I was. I mentioned that yesterday a couple of my students asked and I responded with "I'm silently protesting the FSAs."

Around 9 a.m. Corbet took her class to the gym for the assembly and band performance. After the morning announcements Robb called deBruijn and sought his advice. He indicated he would call BCPSEA to seek clarification. deBruijn called Robb back and advised Robb was to ask all teachers to remove the black armbands and to refrain from speaking about FSAs in a negative fashion. deBruijn testified when he spoke to Robb he did not know the number of teachers wearing armbands but Robb had informed him students had been engaged in discussion. His advice was to ask the teachers to remove the armbands and to refrain from discussing their viewpoint on the FSA. Robb spoke to a number of teachers and directed them to remove their armbands.

Sullivan testified he spoke to deBruijn at this time. deBruijn told him there was an issue at the school with teachers wearing armbands; students had cheered; there was animated loud discussion by teachers and some disruption of

the school.

Robb came into the assembly and advised Corbet she needed to talk to her. They proceeded to Robb's office. Once there, Robb informed Corbet she had been directed to tell her to take off her armband. Corbet's reaction was "are you serious". She became emotional; was very upset and started to cry. An hour-long meeting took place between the two discussing this direction. Corbet testified she was upset and started to cry because she was upset by the injustice. She believed she was doing something simple to express dissatisfaction. She told Robb she "was not carrying posters or talking to kids about it". She "felt her little voice was silenced again". Robb advised the Grievor when she overheard the Grievor say the students had cheered, the protest was no longer silent. The students could see it and it was a visual protest. There was some discussion about the choice of a black armband. Robb told the Grievor she was to remove the black armband and not discuss with the students the wearing of the black armband and the protest against FSA. Corbet indicated she would comply but would be grieving the direction as a violation of her *Charter* rights. Robb indicated she would take Corbet's class to provide her with a recess break to compose herself. Corbet refused and stormed out of the principal's office saying she had an FSA test to administer and she got paid to work through her recess. Corbet and Robb agreed the meeting did not end on a good note.

Corbet testified she did not recall Robb telling her to refrain from discussing views on FSA with the students. She recalled being told to take off her armband as it was a visual protest and not silent as the students could see it and ask about it. Corbet testified her discussion with Robb did not center around the exchange she had with students. The discussion was around the message. Corbet testified she did not believe she was engaging students. Students asked her questions and she answered their questions as simply as she could.

As Corbet left the office she saw the teacher on call for the Grade 4/5 class and told her to take the armband off. Corbet testified she returned to her classroom and knew the students could tell she had been crying. She was concerned the students would think something bad had happened. Corbet testified she wanted to ensure she did her job; administer the FSA; did not want students to be worried or upset; did not want students to think she was mad at Robb. Corbet told her students "you will have noticed that I am no longer wearing my armband." Some of the students wanted to hug her. She said "no we need to sit down, we have stuff we need to do". She recalled a student asking if they could wear an armband and she told him that was something they would have to talk to their parents about. She told the students "I am not mad at Robb, I'm mad at the direction I was given. Apparently, the *Charter of Rights and Freedoms* does not exist." Corbet got her students ready to write the FSAs. She went through what they needed to do and told the students to do their best. If they needed help, she would come around and assist. Corbet testified she did not tell students it was her view that they should not have to write the FSAs.

KW testified the Grievor came to class and was pretty upset. She told the class "someone told her she couldn't believe in something she felt strongly about". KW said the class could see she did not have the black armband on and was crying. BM a grade 7 student testified after the assembly she noted the Grievor looked pretty upset like she had been crying. BM testified some kids asked why she was upset and she told them she got into trouble for wearing the black armband and for protesting the FSA. Some students asked more questions and she answered their questions. BM testified Corbet was asked by a student why Ms. Robb was mad at her. Corbet replied teachers were not supposed to say their opinion about things like that. BM also recalled kids talking and joking about the black armband the next day; joking about wearing the black armband.

Corbet spoke to her Union representative at lunchtime on February 12,

2009 about this issue. On the evening of February 12, 2009 Corbet wrote an e-mail to her teacher friends regarding the direction she received to remove her black armband:

As a silent protest to the administration of the FSAs, I wore a black tie around my upper arm. I wore it on Wednesday and there was no problem. Today when I wore it, it became a serious problem. I was told that it changed because there were three others in my school (Stuart Wood Elementary) who wore it to support the stance that FSAs do not help teachers teach or students learn. I was told that it was involving students in my political views. When I responded truthfully saying that I have not talked to my students about my views on the FSAs, I was told that because the students could ask why I was wearing the band I indeed was. I mentioned yesterday that a couple of students asked and I responded with "I am silently protesting the FSAs". I was told that my black armband (a symbol of mourning in some cultures) was visual, therefore is not a "silent protest".

Corbet agreed on reflection she should have given herself time to settle down before going back to class. She also agreed the situation affected her relationship with the principal and staff. Morgan, another teacher, agreed this issue was very stressful; disruptive to the school and to her personally. Morgan shared the Grade 6/7 class with Corbet in 2008/09 and 2009/2010. Following the wearing of the black armband, Corbet distributed an e-mail to a wide audience relaying parts of the event February 11 and 12. Robb testified the e-mail was damaging to her reputation. Robb also testified the situation impacted on her relationships with the students in school.

Two other teachers in the school who were wearing the black armbands that day were also told by Robb to remove the black armbands. One teacher did so willingly and the other teacher, the Union staff representative, required a direction from the Principal to do so. Neither of those teachers were directly involved in the administration of the FSA to Grade 4 or Grade 7 students in the school. The third teacher, a TOC who wore the black armband has taken it off by the time Robb talked to her.

The Union filed a grievance by letter on February 13, 2009, as a general notice as it involved a number of teachers. In addition to filing the grievance the Union sent out an e-mail to the teaching community suggesting they wear pink or black armbands on February 18, 2009 one week before anti-bullying day. On February 18, 2010, Komljenovic testified he observed teachers wearing this attire when he visited several schools on that day. He also wore a black armband that day. Robb testified a couple of teachers wore pink or black at Stuart Wood but none wore a black armband.

Rick Turner, a former Union president, testified on behalf of the Union. He identified a number of buttons he and others had worn over the years while he was a high school teacher in the district. Those buttons included comments such as "Underfunding Undermines Education"; "Negotiate the Going Rate" KDTA; Stop Bill 82 Education Cutbacks; Local Contracts = Quality Education; B.C. Teachers Federation; Now More Than Ever Again! BCTF; Teachers Make a Difference; Save the Coquihalla; A Deal's a Deal: Say No to Bill 82. Turner testified students asked him about the buttons he wore. He would answer the students in language appropriate to the student. Komljenovic testified he wore a number of the same buttons and was not challenged by the administration. He wore an "FSA No Assessment Yes" button when visiting schools in the 2008-2009 year.

Both Dr. Sullivan and deBruijn testified they had never seen any teacher wearing any of the buttons in school or in a classroom except for the "Proud to be a Teacher" button. Komljenovic testified he wore a "FSA No! Assessment Yes" button in February 2009 and saw two or three teachers at a lunch meeting at schools wearing that button. Sullivan and de Bruijn testified they did not see teachers wearing that button in a school or a classroom; nor did any school administrator advise them a teacher was wearing that button in the school.

#### IV. ARGUMENT

The Union points out the Supreme Court of Canada has found that generally, all human activity, including speech and non-violent conduct, that conveys meaning is protected by Section 2(b). Government action that purports to restrict expression will not prevail unless it meets the test set out in Section 1 of the *Charter*. Contextual factors are considered during the Section 1 analysis. The closer the expression is to core values of the guaranteed freedom, the higher the level of protection it will be afforded. Political expression has been held to be at the core of democracy. Any infringement upon political expression must be subjected to a "searching degree of scrutiny". The Union maintains this case is no different from those already decided in British Columbia regarding teachers' freedom of expression. While the particular facts regarding the black armband may be different, the expression at issue and the rationale for the infringement cited by the Employer are the same.

The Union relies upon a series of cases establishing teachers' expression within the school setting is a protected expression under the *Charter*. It cites *BCPSEA v. BCTF*, *supra*, where Mme. Justice Huddard of the B.C. Court of Appeal states teachers cannot be silent members of society in light of the importance of a free and robust public discussion of public issues to democratic society (at para. 65). School boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School grounds are public property where political expression is valued and must be given its place.

The Employer has conceded the direction to teachers to remove their armbands was a violation of Section 2(b) of the *Charter*. The burden therefore shifts to the school board to justify its actions under Section 1 of the *Charter*.

As per *R. v. Oaks* [1986] 1 SCR 103 the Union points out the party seeking to uphold the limitation must demonstrate there is a pressing and

substantial objective and the means are proportional. The means must be rationally connected to the objective; should impair the right as little as possible; and there must be proportionality between the infringement and the objective.

Contextual factors are considered during the Section 1 analysis. The Union submits teachers' political expression is part of the core values sought to be protected by the *Charter* and must be considered as such.

The Union points out in *BCTF v. BCPSEA* [2009] BCCA No. 39 at paragraph 73 while the Court found mid- contract strike restrictions satisfied the elements of the *Oakes* test, and the government had met the onus of justification, the Court found minimal impairment because "means of free expression other than through work stoppages remained unimpaired." Teachers sought to use these other means of free expression in developing materials for teachers to hand out to parents during parent-teacher meetings and to post on bulletin boards. Directives were issued not to discuss class-size issues, distribute materials to parents at parent-teacher interviews and not to post any material on teacher bulletin boards that were visible for students and parents about the class-size issue or complaint against government. The Union grieved these directives as a breach of Section 2(b) of the *Charter*. In the *BCPSEA v. BCTF*, *supra*, the Court noted that discussion on political issues relevant to school administration with parents or posting information about those issues on school bulletin boards fosters political and social decision-making and furthers at least one of the values underlying Section 2(b).

Prior to turning to the Section 1 analysis, the Court examined the contextual factors present in the case before it. The Union says contextual factors are important because they determine the type of proof a Court will require as justification and speak to the degree of deference the Court will give to the means chosen to implement a policy or purpose. The Court will look at the potential harm that could flow from the teachers expressing their collective



political views on school property. In dealing with the question of whether teachers are permitted to use parent-teacher interviews to hand out materials expressing their collective political view, the Union argues the Court ultimately concluded the educational context was a positive factor in the balancing of the school board and the teachers' interests. The Union points out also the Court took note that when teachers voice concerns about government policies on issues of particular importance to them they are engaging in political expression of a kind deserving of a high level of constitutional protection.

The Court found the restrictions failed the minimal impairment test. While it was important to balance the teachers' right to political expression of society's interest in effective parent-teacher interviews and public confidence in the school system, this does not mean that teachers lost their Section 2(b) protection when they step onto school grounds.

The Union relies upon *BCPSEA v. BCTF (Pamphlet Grievance)* (2008) 172 LAC (4<sup>th</sup>) 299 where the issue of teachers communicating with parents using school property arose again. In that case the Union's grievance was upheld. The arbitrator noted a school board can not prevent teachers from expressing opinions just because they step onto school grounds. School grounds are public property where political expression must be valued. The arbitrator concluded the method of communication, sending the pamphlet home with students in a sealed envelope was not repugnant to the functions of a public school or the values of Section 2(b). The Employer's refusal to permit teachers to send the pamphlets home infringed upon the teachers' freedom of expression under Section 2(b) of the *Charter* in its effect is not its purpose.

The Union also relies upon *BCPSEA v. BCTF* [2010] BCCAAA No. 32 (Steeves) where removal of a sign outside a teacher's classroom door which read "staff representative" amounted to a violation of Section 2(b) of the *Charter*. This violation was not favoured to be justified under Section 1 of the *Charter*.

The Union cites *Tinker v. Des Moines Independent Community School District* [1969] USSC 35 where students were suspended for wearing black armbands to school to symbolize their objection to the Vietnam War. The court found a generalized fear of a disturbance does not override the right to freedom of expression. The Union also points to *James v. Board of Education of Central District No. 1 of the Town of Addison* [1972] USCAZ 297 where the wearing a black armbands as a sign of protest by teachers was addressed by the U.S. Court of Appeals. In that case the court held his right to freedom of speech had been infringed. It noted an undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.

The Union points out the contextual factors to be considered include the nature of the harm and inability to measure it; the vulnerability of the group; the group's subjective fears and apprehension of harm; and the nature of the infringed activity. The Union maintains there is no evidence the teacher's expression in this case resulted in any harm to the school or society in general. There is no evidence any student was affected in a negative way by teachers wearing black armbands. The Union does not submit the teachers are particularly vulnerable group such as farm workers as noted by arbitrator Steeves. With respect to the group's subjective fears and apprehension, the Union says there was evidence the teachers were concerned about being disciplined if they did not follow the Employer's directive regarding administration of the FSAs and curtailed the expression at issue in this case. The nature of the infringed activity the Union maintains is a critical contextual factor. The expression is clearly political expression inspired by a Union vote to comply under protest with the Labour Relations Board ruling and was clearly a political issue important to teachers. The expression was peaceful political protest. The black armband was not aggressive or strident at the time of presentation.

In this case, the Union submits the school board's actual concern was to

prevent the wearing of the black armbands from spreading from Corbet to other teachers. If the school board's concern was with regard to communication with students, Robb had opportunity to direct Corbet not to speak to students about her armband before the time she was issued a direction on February 12 2009. The Union maintains the direction was not rationally connected to the Employer's objectives. The Employer's objective of maintaining confidence in the integrity of public education is not adversely affected by teachers wearing black armbands. The Union submits the Employer's objective of maintaining confidence in the integrity of the public education is not rationally connected to the direction to teacher to remove their armbands. Other than the opinions of school officials, there was no evidence presented to establish teachers wearing black armbands would undermine confidence in the public education system. Conversely, parents' knowledge of school ranking based on FSA results did undermine public confidence in the education system. Further, teachers' opposition to the FSA is well known in the community. The wearing of black armbands during FSA administration would not alter public perception of the integrity of public education. There was also no evidence any the events affected the administration of the FSAs. Students wrote the exam as scheduled.

The Union submits the Employer's objective of ensuring the integrity of the administration of the FSAs is not rationally connected to the direction. The Employer cites its obligation to administer the FSAs in this regard. The Union submits the applicable legislation says the FSA has to be administered; it does not say that everyone has to agree with the examination. There was no evidence any of the events which took place affected the administration of the FSAs. Students wrote their exams as scheduled. There is no evidence that FSAs' results were affected. In this context, the Union submits this objective is not rationally connected to the direction to teachers to remove their armbands.

The Union agrees promoting a tolerant and respectful neutral classroom environment is a pressing and substantial objective. It submits however there is

no evidence there was a genuine concern at the time regarding Corbet imposing political views on students entrusted to her care. The Union also agrees the protection of students from confusion and political views of teachers may be a pressing and substantial objective but this objective is not rationally connected to the direction given to the teachers in this case. There was no evidence of students being confused about whether or not they had to write the FSAs. At most, one student testified he thought it would be sort of cool if the FSA was banned because then he wouldn't have to write the test. The Union maintains if there was any genuine concern at the time regarding imposing her political views on students, the appropriate course of action would have been for the school principal to speak to Corbet prior to her going to her classroom on February 11.

The Union submits the Employer's direction cannot meet the minimal impairment elements on the *Oakes* test. The Employer chose the most restrictive means to meet its objective. The Employer directed all teachers who were wearing black armbands to remove them and not to wear them anywhere in the school. The Union submits there were other options open to the Employer that would not have restricted the teachers' freedom of expression so completely. The Employer could direct the teachers not to talk to students about the armbands, directed teachers they could not wear the armbands in the classroom, directed teachers they could only wear the armbands in the staff room, and directed teachers they could not wear the armbands while administering the FSAs. While the Union did not concede these directions would have amounted to a justifiable limit on expression, they show the Employer cannot meet the minimal impairment requirement in a Section 1 analysis.

The Union also submits the Employer cannot establish the fourth component of the *Oakes* test. The Employer must establish the deleterious effects of the direction are outweighed by the salutary effects of the direction. The Union submits there is extensive evidence to establish teachers' political expression regarding various campaigns often aimed at government legislation

and working and learning conditions, is an ordinary part of the school setting. These types of expression are carried out routinely without any evidence of detriment to students or the public education system as a whole. These types of campaigns are always contrary to some sort of government action or legislation.

The Union submits teachers wearing black armbands did not create a big stir. There was a brief explanation provided to students and a brief positive response from a couple of students. There was no evidence of any complaint by students or parents regarding the black armbands. The Employer overreacted in this direction to teachers to remove armbands in this case.

The Union points out this case concerns political expression which is a very high constitutional value. To direct effectively all teachers at all times to refrain from wearing a black armband as a silent protest against the FSA is a serious and broad infringement on this right. There is no evidence of any beneficial effect that would justify such a severe limitation.

The Union notes political expression is at the very heart of the value sought to be protected by the freedom of expression guaranteed in Section 2(b) of the *Charter*. Teachers' political freedom of expression is no exception. Arbitrators and courts have recognized teachers' political expression must be valued and given its place within schools. This case is no different than other teachers' freedom of expression cases that have been decided in British Columbia. Ultimately, the Employer cannot meet the burden required to establish the infringement of this expression is justified as a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society. Accordingly, the Union seeks a declaration the Employer's directive to teachers violated Section 2(b) of the *Charter*, an order all affected teachers be made whole; an order for future compliance, and any other remedies appropriate in the circumstances.

The Employer maintains this is a case of first instance between teachers in British Columbia and their employers concerning the right of teachers to freedom of expression to students at school during school hours. No other case involves students and teachers. The Employer notes Section 2(b) has been held to apply and provide protection to teachers' communications and expressions to parents. In *British Columbia Public School Employers Association and British Columbia Teachers Federation (Freedom of Expression Issues)* (2004), 129 LAC (4<sup>th</sup>) 245 (Munroe), teachers were permitted to express to parents during teacher interviews, their concerns about class sizes and were permitted to hand out related information to parents. Arbitrator Munroe's decision was upheld by the B.C. Court of Appeal in *British Columbia Public School Employers Association v. British Columbia Teachers Federation*, *supra*.

The Employer noted in *British Columbia Public School Employers Association and Board of Education of School District No. 5 (Southeast Coupe) and British Columbia Teachers Federation (Cranbrook/Fernie District Teachers Association (Pamphlet Grievance))*, *supra*, teachers were permitted to send home information in sealed envelopes with students to encourage parents to protest the FSA. Arbitrator Kinzie held free expression in public schools is consistent with the purposes of Section 2(b). The Employer noted he described the free speech in the Munroe arbitration and the discussion between teachers and parents and administration and parents about FSA as discussion that furthers the values of democratic discourse and truth finding which underlies freedom of expression. The Employer points out however discussions with students were specifically excluded. In his decision, the arbitrator noted the students were not inappropriately involved in this discourse because the pamphlet is sent home in a sealed envelope to the parents. (at page 47)

The Employer notes it is clear from the reasoning in *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board*, (2002) 213 OLR

(4<sup>th</sup>) 17 that limits on teachers' free speech must meet the test of Section 1. The Employer in this case does not challenge the non-application of Section 2(b) of the *Charter*. The Employer relies on the application of Section 1 of the *Charter*. The Employer maintains the direction by school administration that teachers remove their black armband signifying protest against FSA is a reasonable limit under Section 1 of the *Charter*.

The Employer notes there is no issue the directive from the school administration for the removal of the black armband is "prescribed by law" within the meaning of Section 1 of the *Charter*. There is also no issue proving the infringement on freedom of expression was justified lies with the Employer. The standard of proof is one of "preponderance of probabilities". The Employer also agrees the starting point of a Section 1 analysis is the decision of the Supreme Court of Canada in *R. v. Oakes, supra*. The Employer points out a contextual approach must be used when performing a Section 1 analysis (*Rocket v. Royal College of Dental Surgeons of Ontario* [1990] 2 SCR 232).

In applying the *Oakes* test, the Employer points out the arbitrator is required to consider relevant contextual factors. These include the nature of the harm and inability to measure it; the vulnerability of the impacted group; the group's subjective fears and apprehension of harm; and the nature of the infringed activity. In *BCPSEA v. BCTF, supra*, the British Columbia Court of Appeal discussed the relevance of contextual factors. It also identified the type of public body responsible for the impugned conduct as another contextual factor. The Employer points out the Court concluded some deference is owed to the school board's judgment because they are elected by members of the community to serve to operate public schools. The Employer refers to the dissent of Justice Lowry noting context is of particular importance as the school boards were endeavouring to serve their mandate in the face of the BCTF's attempt to advance a political agenda using the schools where its members are employed to teach children and young people.

The Employer also refers to Mr. Justice Lowry's dissent when commenting on harm. Both the majority and dissent noted harm was not something that can be measured with any degree of precision or easily proved. In this case, the Employer maintains the harm is twofold. In addition to the harm to the integrity of the system as a whole, there is direct and real harm caused by the teachers which directly impacted upon the students and their participation in FSAs and which impaired the fulfillment by the District of its legislative mandate to administer the FSA. The Employer maintains the harm caused to the student participation in the FSA cannot be measured. It must be inferred as described in the legal authorities. The Employer also notes there was evidence of disruption in the school the morning of February 12 in the main office and evidence of disruption to the school and stress to relationships in the school following this incident.

The Employer maintains using captive children to deliver a political message harms the integrity of the system itself. Teachers are hired to teach children. They are not hired to use their position of trust and responsibility for and over children to use them as tools to advance their political views. The Employer also points out there was considerable evidence of media coverage. The media coverage of the wearing of the black armbands harmed public confidence in the system. Ultimately, the Employer maintains the evidence establishes the wearing of the black armband has caused real and substantial harm to the participation of students in FSA, in the operation of the FSA program, in the relationships at Stuart Wood school, in the public confidence in the school and the District.

The Employer notes the students are a vulnerable group and a captive audience. Three students testified. They are extremely young, impressionable and vulnerable children. The students are exposed to the politicization of the school environment by the teacher who is the very individual who administers the



test she is commenting on. The Employer maintains the Supreme Court has repeatedly noted the vulnerability of students to their teachers, most significantly in the *Ross* decision. Young children are especially vulnerable to the message conveyed by their teachers and more likely to accept derogatory views espoused by a teacher. The Employer notes that same point was made in *Green Township Education Association v. Rowe*, 746 A.2d 499 (2000); 328 N.J. Super 525. In that case, the courts noted that teachers serve as authority figures and students are their captive audience. The classroom is not a free market of ideas. There is often no counterpoint to the views expressed by the teacher.

The Employer points to evidence concerning student involvement in teacher job action in January 2001. Students left class to protest the withdrawal of the extracurricular activities. There were safety issues and some students participated so they would have an excuse to skip class. Students were involved for the wrong reasons and created an unsafe environment for many students. Ultimately, the Employer points out the evidence of the students shows how vulnerable the students were to the messages from their teacher. The students respected and wanted to support their teacher. Their participation in the FSA was affected negatively by the expressions of their teacher on FSA.

Having reviewed these contextual factors, the Employer notes in applying the *Oakes* test one must first determine the legitimate interest and objectives of the School District directing that teachers not wear black armbands protesting FSA in school and in classroom and to refrain from expressing their views on FSA to students.

The first pressing and substantial objective is a need for the District to insulate students while in attendance at school from political messages that impact directly on the educational program. Young children are particularly vulnerable. The Grievor's actions put students in conflict with the school, the school system, and their parents. The students may have been confused when

they saw the teacher with a black armband protesting FSA. They may believe they may be harmed by writing the test, confused by the fact the teacher does not want them to write the test even though she is administering the test; confused by having their parents tell them the test is important when their teacher is telling them the test is negatively affect them; upset by the principal's refusal to let the teacher wear a black armband; and may not take the test conscientiously as a means of showing support for the teachers, thus invalidating the data.

The Employer maintains all these results occurred here. Teachers are authority figures to students and must be careful to ensure they do not abuse the power and influence they have over them. The Grievor in this case conveyed a negative message by using the word protest on the very day students wrote the assessment. The Employer points out Arbitrator Kinzie recognized the need to keep students isolated from the teachers' political campaign against FSA. He required the materials to be distributed to parents in sealed envelopes so the students would be excluded from the political message.

While the Union attempted to find support for its grievance by the critical skills mandated in social studies and language arts IRP's, a topic for critical thinking cannot be a matter that is part of the students' provincially mandated program. Further, the Employer says topics for critical thinking must be age-appropriate and must present all sides of the issue. No one viewpoint must be presented as to correct the point. That did not occur here. The protection of a vulnerable student is a pressing and substantial objective under Section 1.

The Employer points out the second pressing and substantial objective is the District's duty to ensure the statutory mandated FSA is effectively delivered in a manner that does not undermine the effectiveness of the assessments. The wearing of the black armband and a discussion with students occurred during the very week when the teachers were administering the FSA to students. The

teachers had a statutory and legal duty to administer the FSA. The actions of the teachers in this case undermined and negatively affected the performance of statutory duties. American courts have accepted a teacher's right to free speech is qualified in the workplace by the requirement that the expression not disrupt an Employer's business unduly (*Deborah Mayer v. Monroe County Community School Corp. et al*, 474 F 3d 477; United States Court of Appeals for the Seventh Circuit).

The third pressing and substantial objective is the School District's legitimate interest in ensuring the professionalism of its teaching staff and the maintenance of public confidence in the school and the public education system. (*BCPSEA v. BCTF, supra*). Teachers are obliged to maintain their professionalism and to foster an open and supportive education environment. The Union agreed in cross-examination it was advocating teachers break the law. Its rationale was the law was illegal. The Employer argues such position is misguided and not justification for teacher to advocate against the FSA. Such action by teachers is contrary to the role and status and their professionalism. When political issues are brought into the school setting, the professionalism of teachers is brought into question. Conflict occurs among teachers and the public to which they owe their professional services. Public confidence in the system was adversely affected by the teachers' actions. The black armband was worn on the very day students were engaged in the writing of FSAs. Students have no choice. They must participate. Parents see teachers acting in unprofessional manner when teachers oppose what students are legally mandated to do. Parents question whether children should attend public schools and be subjected to teachers who do not support the requirements of the public education system.

The Employer points out the actions of the teachers can also erode public confidence in the system when the advocate against a mandated part of the students' program. Parents will question why the system requires the children

to write tests that are harmful. Parents' confidence in school administration of school programming or potentially relevant. The Employer says student confidence in the public school system is also negatively affected. Students question why they should have to participate in writing a test that teachers oppose. The Principal's relationship with her students was adversely affected for the balance of the school year. When there is a poor relationship between a principal and students, public confidence is affected as is the integrity of the system.

The Employer points out there was much evidence about the media campaign. Several of the press clippings were introduced in exhibits. Anytime there is such public reporting of differences between teachers and the mandate of the public system, public confidence is affected. The reduced numbers of students participating in the FSA is illustrative of the decreasing public confidence in the issue.

The Employer notes the fourth pressing and substantial objective is the need for the District to ensure the results of the FSAs are reliable and can be used both provincially and in the District in making important educational decisions to students. The use of the FSA results is multifaceted. It is an integral measure used to track progress of students in the District. The trend lines from the FSA and other assessment tools are used to determine if more effective measures need to be implemented for numeracy or literacy.

The FSA is a diagnostic tool for teaching. Decisions are made in the District on areas in the curriculum that require more action based on the FSA. Of prime significance is the Enhancement Agreement between the District and the First Nations bands which enshrined within the FSA results. The First Nations Education report concerning the 2008-9 school year refers to the BCTF action of the negative affect the action had on the FSA results and their ability and usefulness for First Nations Education.

The actions of the Grievor and other teachers who wore the black armband could skew the results in a negative way. Students could be motivated not to do their best. The Employer points out the B.C. Court of Appeal in *BCPSEA v. BCTF, supra*, reviewed the purpose of parent-teacher interviews when it considered the Section 1 objective that parent-teacher interviews must meet their stated legislative purpose. In this case, the Employer maintains, similarly the teachers' delivery of the FSA must not impede or affect the stated legislative purpose of the FSA. When the results of the FSA are adversely affected by the teachers' political expressions and delivery of results of the FSA, this legitimate objective is not met.

The Employer notes the fifth pressing concern is the duty of loyalty and fidelity. The duty of loyalty and fidelity is also a reasonable limit prescribed by law for the purposes of Section 1. This is particularly significant in the present case when the communications are specifically directed at undermining a program the School District must deliver and which monitors achievement in the school district. As such, the communications are directly inimical to the interests of the School District and on their face inconsistent with the duty of loyalty the teacher gives to the school district. The duty of fidelity was discussed in *Hayden v. Canada (TD)* [2001] 2 F.C. 82 which concluded the duty of loyalty can be a reasonable limit under Section 1 of the *Charter*. The Employer also relies upon *Simon Fraser University and Association of University and College Employees, Local 2* (1985), 18 LAC (3d) 361; *Alberta Union of Provincial Employees v. Alberta* 2000 ABQB 600; [2000] AJ No. 1046.

The Employer notes there is little doubt there is a rational connection under the *Oakes* analysis between the measure (the direction to remove the black armbands) and the objectives. The directive was a rational attempt by the District to preclude political activity by teachers that affects a vulnerable group, that undermines the mandated FSA, that affects public confidence and affects

the results and usefulness of FSA and that is contrary to the duty of loyalty and fidelity.

The Employer points out it is critical to understand Supreme Court what it means by "minimal impairment". The Employer relies upon *R. v. Sharpe* (2001) SCC 2 to point out it suffices if the means adopted fall within the range of reasonable solutions to the problem confronted. In this case, the Employer points out the direction to remove the black armband occurred on the second day the Grievor wore the black armband. The direction occurred after the principal was advised the wearing of the black armband was resulting in the engagement of students and controversy in the school; the disruption in the secretarial area before school commenced on February 12. The Principal could have legitimately directed the removal of the black armband on the first day. She was not however aware of it until the end of the day. She took action early in the morning of the second day. The Employer maintains there does not need to be evidence of actual negative effect on the students. It is sufficient for the armband to be worn in class. The very wearing of the armband signifying a silent protest is enough for limits to be placed on discussions with students and the wearing of the black armbands prohibited in classrooms. The Grievor did not engage in a silent protest. Once the black armbands are worn, a message is conveyed. The message is FSA is not appropriate and is harmful to the students. Students will always ask what is the black armband for. Once the black armband is worn, students will be and are engaged.

The Employer maintains the minimal impairment test is also met by the direction for all teachers to remove their black armbands on February 12. Once the black armband was worn on February 11, there was an immediate conveying to students of a political message to a captive audience of students directly affected by the FSA.

It was not sufficient to have only the Grievor remove her black armband.

It was necessary for all teachers to refrain from the wearing of the black armbands. It can be implied that students were receiving the political message by the very existence of the black armbands without the necessity of showing actual debate and discussion by each teacher with students in the school.

The Employer maintains the limits imposed by the District were proportional and were a balanced limitation upon the teachers' freedom of expression within the duty of loyalty and fidelity and within the requirements of the *Oakes* test for the application of Section 1.

#### IV. ANALYSIS

At the outset I note I was greatly assisted in the case by the thorough and thoughtful arguments of each of the parties and their counsel. The submissions were extensive and the matter is not easy to resolve.

The issue of teachers' freedom of expression in the context of FSA, has most recently been addressed in *BCPSEA v. BCTF (Pamphlet Grievance)*, *supra*. It is helpful to summarize some of the conclusions in that and other cases to establish the framework in which this matter must be determined.

##### A. Background and Framework

The Union in that case had filed a grievance against the Employer's decision to not permit teachers to send a pamphlet prepared by the BCTF that opposed the use of FSA in schools. The pamphlet also provided a form letter that parents could complete requesting their child be excused from writing the tests. The teachers wanted to send the pamphlets home in a sealed envelope addressed to the parents of the student concerned.

In dealing with this matter, Arbitrator Kinzie first noted comments in *BCPSEA and BCTF (Freedom of Expression Issues) supra*, (Munroe). In that case teachers wanted to post certain materials on teacher bulletin boards expressing their concerns about the consequences of the provincial government's removal of class size and composition from the collective agreement and permissible scope of collective bargaining. These bulletin boards were located in areas of the school where students and their parents had access. Teachers also wanted to distribute certain material regarding these changes and discuss them with parents during parent-teacher interviews. School boards directed teachers to not engage in either of these activities. The BCTF grieved those restrictions, alleging they offended, *inter alia*, teachers' freedom of expression under Section 2(b) of the *Charter*.

Arbitrator Munroe concluded B.C. public school boards were subject to the *Charter* by virtue of Section 32(1) of the *Charter*. In doing so he noted:

There are two decision in which the Charter guarantee of freedom of expression (subject to Section 1) has been applied to teachers during working hours on school property; indeed, in the classroom during teaching hours. The first is *R. v. Keegstra* [1990] 3 S.C.R. 697. The second is *Morin v. PEI Regional Administrative Unit No. 3 School Board* [2002] P.E.I.J. No. 36. The former is a decision of the Supreme Court of Canada; the latter a decision of the Prince Edward Island Supreme Court (Appeal Division), but leave to appeal to the Supreme Court of Canada having been denied at [2002] S.C.C.A. No. 414.

(at para. 47)

He went on to say as noted in *Morin*:

...Any argument that individual self-fulfillment as an aspect of free speech does not apply to an individual's actions in the work environment is put to rest by the Supreme Court's decision in *Irwin Toy*, *Reference re ss. 193 and 195.1(1)(c)*, and even *Keegstra*. The capacity within which you express yourself does not limit the right you have pursuant to s. 2(b), whether you are carrying out that expression as an aspect of your employment, livelihood, or



just for fun. Such capacity may provide the framework for a justification on your free expression right under s. 1, but that is a different matter. There is nothing in any of the cases put before me that suggests that the capacity in which you express yourself determines whether or not your expression is protected pursuant to s. 2(b) of the Charter.

(at para. 48)

Arbitrator Munroe concluded the materials teachers wanted to post, distribute and have discussion about with parents were “attempts to convey meaning and thus have expressive content.” He determined whether the function of the place is considered as part of the Section 1 test or is considered as part of a threshold to screen out claims, under either approach, the school board directives offended Section 2(b) of the *Charter*. (See *Committee for the Commonwealth of Canada vs. Canada* [1991] 1 SCR 139). Under the approach of Lamer, C.J.C., Munroe saw no “incompatibility between the teachers’ intended communications, on the one hand, and the principal function or purpose of a public school on the other” (at 274). If utilizing the approach of McLachlin, J., Munroe was of the view the “values and interests at stake” favoured protection under Section 2(b) because the school boards’ purpose “was to restrict the content of expression and to control the ability of the teachers to convey expressive meaning” (at para. 46).

With respect to BCPSEA’s argument that its direction not to post materials or discuss this matter with parents at parent-teacher interviews was a reasonable limit under Section 1 of the *Charter*, Arbitrator Munroe stated:

...I am not of the view either that the School Boards’ exercise of property rights or the duty of fidelity comprise a s. 1 justification for the purported limitation on the teachers’ freedom of expression as guaranteed by *Charter* s. 2(b).

(at para. 54)

The Munroe Award was appealed to the B.C. Court of Appeal under

Section 100 of the *Labour Relations Code*. The B.C. Court of Appeal concluded teachers' political expression in the workplace was constitutionally protected. The majority judgment noted:

...In my view, the arbitrator correctly decided the impugned directives restrict content. If they did not, and it became necessary to decide whether the forums – parent-teacher interviews and teacher bulletin boards – invoke the values underlying the guarantee, it seems self-evident that discussion of political issues relevant to school administration with parents or posting information about those issues on school bulletin boards fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(b). It seems, therefore, that the appellant accomplishes no more by its primary submission than to restate as a threshold or definitional issue the second question under the *Irwin Toy* analysis: whether the purpose or effect of the impugned government action is to restrict freedom of expression.

(at para. 34)

Huddart, J.A., then considered whether the school board directives were justified under Section 1 of the *Charter*. She referred to the test in *R. v. Oakes*, [1986] 1 S.C.R. 103 and noted:

...BCPSEA must next establish the School Boards' objective is of sufficient importance to warrant overriding or limiting the teachers' expression rights and that its chosen means balance the interests of society and teachers in the sense they are rationally connected to the objective, impair the rights as little as possible, and the deleterious effects of its means do not outweigh its benefits.

(at para. 46)

After commenting upon the School Boards' objective and concluding a rational connection under the *Oakes* test did exist, she dealt with the minimum impairment aspect of the test. She said:

...School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School grounds are

public property where political expression must be valued and given its place.

(at para. 37)

She went on to conclude the School Board directives had not met the minimal impairment test and accordingly were not saved by Section 1 of the *Charter*. As part of her analysis she noted:

To achieve their objective, the School Boards might have reinforced the teachers' professionalism by reminding them of their obligation to ensure the goals of parent-teacher interviews were reached, that those meetings were not to be dominated by discussion of class sizes or school resources, and that any such discussion must be reasoned. If the concern was teachers' abuse of parent-teacher interviews, I would think disciplinary proceedings before the College of Teachers would be a more appropriate response. It would also, of course, be appropriate for School Boards to respond reasonably to complaints from parents about a teachers' conduct during parent-teacher interviews.

Therefore, in my opinion, the absolute ban of discussion on school property during school hours did not minimally impair teachers' rights. Few places would be more appropriate for a discussion of the need for resources for public schools than a parent-teacher interview dedicated to one child's education. The Supreme Court noted in *Pepsi*, [2002] 1 S.C.R. 156, "[f]ree expressions in the labour context benefits not only individual workers and unions, but also society as a whole" (at para. 35). The same holds true for teachers. Their political expression benefits society as a whole even where the concerns arise out of a labour relations dispute.

(at para. 67-68)

Arbitrator Kinzie considered this jurisprudence and applied it to the question of whether the employer could direct the teachers not to send a pamphlet home to the parents in a sealed envelope with the students opposing the use of FSA. He ultimately concluded:

In summary, I am of the view that the Employer's refusal to

permit its Grades 4 and 7 teachers to send home in a sealed envelope with their students the BCTF's pamphlet expressing concerns about FSA tests so that their parents could read it infringed upon those teachers' freedom of expression under Section 2(b) of the *Charter*. That pamphlet clearly conveyed meaning, i.e., teachers' opposition to such tests and why they were so opposed. The Employer argues that the handing of the sealed envelope to students in the class is not an expressive act. I do not agree. In my view, it is an important part of a single process that culminates in the communication of the teachers' concerns about FSA tests to the parents of those students, a process similar to mailing a letter. Further, in my view, neither the method of communication nor its location removed the protection provided to this communication under Section 2(b). The teachers followed their usual method for communicating with parents on matters relating to their children's education. They sought to prevent students from being exposed to their expression of concerns by placing the pamphlet in a sealed envelope addressed to the parent. Public schools are places where teachers' freedom of expression has been recognized and protected. See *BCPSEA v. BCTF*, *supra*, and *Morin v. P.E.I. Regional Administrative Unit No. 3 School Board*, *supra*.

(at para. 107)

Arbitrator Kinzie then moved on to whether this limit was saved by Section 1 of the *Charter*. He said:

These conclusions bring me to the final question – is the limit the Employer has placed on its teachers using the school's internal mail delivery system, thereby preventing the delivery of the pamphlet on FSA tests to the parents of Grade 4 and Grade 7 parents through this means, saved by Section 1 of the *Charter*. Again, that provision

...guarantees the rights and freedoms set out in [the *Charter*] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Is the Employer's restriction a "reasonable limit"? Can it be "demonstrably justified in a free and democratic society?"

In *City of Montreal v. 2952-1366 Quebec Inc.*, *supra*, McLachlin,

C.J.C., and Deschamps, J., speaking for the majority stated that:

Under s. 1, the onus is on the City 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 to 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. 102.

(at para. 88)

As part of his ultimate conclusions in this case, the arbitrator said:

The only “pressing and substantial” concern with respect to the pamphlet relates to its content pertaining to the withdrawal of children from writing the tests. The pamphlet is misleading because it does not provide the whole story with respect to that subject matter. The evidence in School District No. 5 (Southeast Kootenay) is that the pamphlet’s misleading description of this process caused confusion and conflict within the schools concerned.

The fact that the pamphlet constitutes a political expression of opinion and that students are being used to deliver the pamphlet to their parents do not constitute “pressing and substantial” concerns. The B.C. Court of Appeal in *BCPSEA v. BCTF*, *supra*, has said that “school grounds are public property where political expression must be valued and given its place” (at para. 65). Placing the pamphlet in a sealed envelope addressed to their parents or guardians insulates the students from being involved in the process, unless the parents decide to involve them.

By placing an absolute ban on teachers using its internal mail delivery system to communicate its concerns to parents about the FSA tests, the Employer did not impair its teachers’ freedom of expression in a reasonably minimal way. Thus, the restriction placed on teachers’ freedom of expression in this case is not saved by Section 1 of the *Charter*.

A reasonable and balanced solution for addressing the “pressing and substantial” concern the Employer had with the pamphlet would have required the Union to amend the pamphlet to more accurately address the circumstances in which a student could be excused from writing the tests. Such a restriction would have met

the requirements to save the restriction under Section 1 of the *Charter*.

If the Employer had asked the Union to make those amendments and the Union had refused, the Employer would have been justified in preventing teachers from sending the pamphlet out through the school's internal mail system.

(at para. 129)

In this case, the Employer does not challenge the application of Section 2(b) of the *Charter*. Rather it relies upon Section 1 of the *Charter* and maintains the direction by the school administration that teachers remove their black armbands signifying protest against FSA and refrain from expressing their views on the FSA with students is a reasonable limit under Section 1 of the *Charter*. Indeed the teachers here, as in other cases, were intending as teachers in their work environment to express themselves on this educational issue by wearing the black armband.

The Union relies heavily on the arbitrator's conclusion in *BCPSEA v. VBCTF (Pamphlet Grievance)*, *supra*, that the Employer's restrictions on Grades 4 and 7 teachers to use the school's internal mail delivery system to send the BCTF pamphlet opposing FSA testing home with students for their parents violated the teachers' freedom of expression under Section 2(b) of the *Charter*. The Employer however points to the arbitrator's comments concerning student involvement as follows:

The second aspect to the Employer's rationale is that Grades 4 and 7 students should not be involved in this process carrying this type of information home to their parents. It might be argued as Ms. Airton did in her April 12, 2007 column in the "24 Hours" newspaper that doing so inserts the students into the policy discussion and causes them to feel "uncertain about two very important sets of people in their lives", i.e., their parents and their teachers, where the parents disagree with their teacher. While that might be the case, the union in School District No. 5 (Southeast Kootenay) took the step of asking its member teachers

who did decide to send the pamphlet home with students to place it in a sealed envelope addressed to the parent or guardian of the student. In my view, this step constitutes a reasonable attempt to address this concern.

(at para. 114)

The Employer points to the difference in this case where students were not insulated from the teacher's expression on this educational issue. Rather, they were engaged in the debate by the wearing of the armband and the resulting classroom discussions.

In considering Section 1 of the *Charter* and whether the direction to remove black armbands signifying protest against FSA is a reasonable limit under Section 1 of the *Charter*, comments by the B.C. Court of Appeal in *BCPSEA v. BCTF*, *supra*, set out the framework for analysis on this point. The B.C. Court of Appeal stated on this point:

Under the test laid down in *R. v. Oakes*, [1986] 1 S.C.R. 103, BCPSEA must establish the School Boards' objective is of sufficient importance to warrant overriding or limiting the teachers' expression rights and that its chosen means balance the interests of society and teachers in the sense they are rationally connected to the objective, impair the rights as little as possible, and the deleterious effects of its means do not outweigh its benefits.

In applying the *Oakes* test, as this Court recently noted in *Kempling v. British Columbia College of Teachers*, [2005] B.C.J. No. 1288, 2005 BCCA 327 at para. 73, a court should consider the context of the government action. The context of the impugned activity determines the type of proof a court will require of a public body to justify its measures *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 at para. 76). As well, contextual factors "speak to the degree of deference to be accorded to the particular means chosen...to implement a legislative purpose" (*Harper*, at para. 111). In this case, any discussion of contextual factors depends on inference from both the impugned School Boards' directives and the BCTF documents. The BCPSEA put forward no direct evidence of the effect or potential effect of the BCTF's Action Plan.

In *Harper*, the majority considered the four contextual factors Bastarache J. identified in *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 (at paras. 90-91): the nature of the harm and the inability to measure it; the vulnerability of the group; that group's subjective fears and apprehension of harm; and the nature of the infringed activity. Two of these factors are relevant in this case: the nature of the harm and the nature of the infringed activity.

(at para. 47 and 48)

As both parties point out contextual factors are important in this case. They determine the type of proof required as justification and speak to the degree of deference the Court will give to the means chosen to implement a policy or purpose. The B.C. Court of Appeal in *BCSPEA v. BCTF*, *supra*, concluded as the Union says, that the educational context was a positive factor in the balancing of the school board and the teachers' interests. The Court also concluded some deference is owed to the school board's judgment because they are elected by members of the community to serve to operate public schools. The question of the measurement of harm is also pertinent in this case. As set out in *BCPSEA v. BCTF*, *supra*, the context of the impugned activity determines the type of proof a court will require of a public body to justify its measures.

Another contextual factor relevant to this enquiry is the vulnerability of the group. While the BCTF says they are not claiming teachers are a vulnerable group, in my view the group at issue which must be considered is the students. As set out in *Ross v. New Brunswick No. 15* [1996] 1 SCR 825, children are particularly vulnerable to the messages of their teachers. In that decision, the Supreme Court of Canada said:

There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance



of education of all ages is acknowledged, of principal importance is the education of the young. As stated in *Brown*, [*Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954)], education awakes children to the values of society hopes to foster and to nurture. Young children are especially vulnerable to the messages conveyed by their teachers. They are, therefore, more likely to feel threatened and isolated by a teacher who makes comments that denigrate personal characteristics of a group to which they belong. Furthermore, they are unlikely to distinguish between falsehoods and truth and more likely to accept derogatory views espoused by a teacher. The importance of ensuring an equal and discrimination free educational environment, and the perception of fairness and tolerance in the classroom are paramount in the education of young children. This helps foster self-respect and acceptance by others.

(at para. 82)

While the facts of this case are very different from those in *Ross, supra*, the vulnerability of children as a group in this context must be recognized.

This aspect has not been as germane in the recent freedom of expression cases in B.C. as in this one. The BCTF pamphlets criticizing FSAs were sent home to parents with students in a sealed envelope as set out in *BCPSEA v. BCTF (Pamphlet Grievance)*, *supra*. While there was debate as to whether in *BCPSEA v. BCTF (Freedom of Expression Issues)*, *supra*, which dealt with material on teacher bulletin boards were located in areas within the school where students and their parents have access, in *BCPSEA v. BCTF (Head Grievance)*, *supra*, the arbitrator did conclude some expression was outside staff rooms to which students and parents had access. In this most recent award, a sign at issue "staff representation" was placed outside the grievor's classroom door. Neither of these cases however directly engaged the issue raised by the Employer – the vulnerability of a young group of elementary students engaged in writing a test their teacher was "protesting". The impact on students as a vulnerable group in this context has not previously been dealt with.

B. S. 1 - Is the Direction a Reasonable Limit in a Free and Democratic Society?

I turn now to the specifics of the Section 1 analysis as it unfolds in this case. The principles are set out in *R. v. Oakes, supra*. As part of the *Oakes* test, one must determine the legitimate interest and objectives of the School District in directing that teachers not wear black armbands protesting FSA in school and in the classroom and to refrain from expressing their views on FSA to students. I reiterate for ease of references the test set out in *Oakes* as expressed in *BCPSEA v. BCTF, supra*:

Under the test laid down in *R. v. Oakes*, [1986] 1 S.C.R. 103, BCPSEA must establish the School Boards' objective is of sufficient importance to warrant overriding or limiting the teachers' expression rights and that its chosen means balance the interests of society and teachers in the sense they are rationally connected to the objective, impair the rights as little as possible, and the deleterious effects of its means do not outweigh its benefits.

(at para. 46)

(a) School Board's Objectives – Is the Limit Rationally Connected to the Objectives?

In this case the School Board directed the teachers to remove their black armbands and refrain from discussing the FSA with students. In considering this direction I must deal with the facts before me. I conclude the direction at issue to be a direction to the teachers in this 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.

The Employer says its first pressing and substantive objective is the need

for the School District to insulate students while in attendance at school from political messages that impact directly on the educational program. I accept as the Employer says that young people are particularly vulnerable as apparent here. There is no doubt the Grievor is a respected dedicated teacher who did not wish to adversely affect her students. She testified she would have told her students to do their best on the FSA assessment, as she would any test that her students were required to write. While I do not doubt this, I find the Employer's direction was in furtherance of the objective of insulating students while in attendance at school from political messages that impact directly on their mandated educational program – in this case the mandated FSAs.

The Union argued there was no evidence of students being confused about whether they had to write the FSAs. At most one student testified he thought it would be sort of cool if the FSA was banned because then he wouldn't have to write the test. Students wrote the exams as scheduled and there was no evidence the FSA results were affected. While the Union says no students came to Robb to discuss the armband and no parents contacted her to complain, I do not find that to be the measure of harm in this case.

Three students testified in this case. Their testimony is important and compelling. At the pertinent time, two of the students were in the Grade 6/7 class and one in the Grade 4/5 class. At the time of the events, they were respectively 10, 11 and 12 years old. At the time of their testimony in this case they were respectively 12, 13 and 14 years old. All were young, impressionable and respected their teacher. The students were credible and gave their testimony in a quiet straight-forward manner. I accept that testimony as to the events over the critical two days. I find as indeed the Grievor has made clear, this to have been a very emotional issue for her. This may have affected her recollection of some of the events in particular her view that she did not discuss the FSA at certain times reported by these students. Her emotional response may well have contributed to some lapses in memory in particular whether she

had a conversation with the Grade 6/7 class before the assembly on February 12, 2009. I conclude on the basis of consistent testimony from two of the students that she did have a conversation about the FSA with the Grade 6/7 class before the assembly on February 12, 2009.

The Grievor wore the black armband on two consecutive days. On the first day, February 11, 2009, the Grade 4 students wrote the FSA. On the second day, February 12, 2009, the Grade 7 students wrote the FSA. When questioned by the students on February 11, 2009, the Grievor indicated her black armband was a protest about the FSAs. K.S., a Grade 5 student testified she recalled the Grievor coming into class with a black armband on. She testified her teacher, the Grievor, was talking about how she was "against FSA" and "did not think they were fair". K.W., a Grade 7 student, recalled another student asking the Grievor about her armband as she walked with the Grade 4/5 class on the way back from music near the portable classroom on February 11, 2009. He said "we went into class talking about how it would really be cool if the FSA were banned," because "we would not have to write the test". K.W. testified the next day, February 12, 2009, a student asked the Grievor about the armband she was wearing. The Grievor said it was a ban for the FSA. K.W. recalled being very happy about this and recalled some students wanted to make armbands. He also recalled the Grievor told them not to; if they really wanted to, they would have to talk to their parents about it. Later that day when his teacher (the Grievor) returned to the classroom, K.W. said the students could tell she was quite upset; she had been crying. She said she was "really upset as someone had told her she couldn't believe in something she felt strongly about". K.W. said "she didn't tell us but we could see she did not have the armband on."

B.M., the oldest of the students and in Grade 7 at the time, said while initially the Grievor did not explain her armband, when asked questions by the students, sometime later she said it was to protest the FSA. When asked by the students why she protested FSA, she said "she did not feel it right for kids to

have to take the test as it depended on how smart the kids were and how well the teacher was teaching". B.M. said some kids asked more questions which she answered. The class then went to the assembly that morning. This was the morning of February 12, 2009. After the assembly B.M. said she could see her teacher (the "Grievor") in Robb's office. The Grievor came back to the classroom; looked upset; like she was crying. B.M. said "she told the class she had gotten into trouble for wearing the black armband and for protesting the FSA". A student asked the Grievor why Robb got mad at her for wearing the black armband. B.M. said she replied "teachers weren't supposed to say their opinion about things like that". Later on and the next day, B.M. indicated some kids joked about wearing black armbands. The students did not dispute that the Grievor told them to do their best on the exams.

The Grievor testified on her return to the classroom on February 12, 2009 she said to the students "you will have noticed that I am no longer wearing my armband". One or more students tried to hug her as she was clearly upset after her meeting with Robb. She told them "no we need to sit down, we have stuff to do". She told the students "I am not mad at Ms. Robb, I'm mad at the direction she was given. Apparently, the *Charter of Rights* does not exist". The students as evident by these events were young and clearly supportive of their teacher. The Grade 7 students wrote the FSA test that day.

The Grievor agreed students do not like to write tests; that students listen to her and respect her views as their teacher. The two classes were comprised of children aged 8 or 9 to 12 years old. The children were at an impressionable vulnerable age. There is no dispute all Grades 4 and 7 students in the two classes except for any students who had special needs as defined in the Ministry materials were required to participate in the FSA; a required educational expectation.

The Grievor maintained she was not engaging the students in the FSA

dispute. Rather, it was students who are engaging her in the discussion. The reality is that the discussion occurred because the Grievor was wearing the armband and she informed them when asked it was her protest against FSA.

The Grievor has insisted throughout this was her silent protest. The persistent flaw in the Grievor's insistence she was engaged in a silent protest, is the reality students would notice her black armband and ask questions concerning the black armband. This "silent protest" led to the inevitable engagement of students in her protest and concerning her protest. As argued by the Employer it is inevitable students will notice and will ask about the armband. The Grievor failed to consider any potential effect her "silent protest" would have or might have on students in her two classes.

The Union argued other teachers who were directed to remove their armband did not engage the students in discussion about FSA nor were they directly involved in administering FSA.

The Employer maintains however all teachers needed to be directed to remove the black armbands as soon as it was known by students that the wearing of the black armband signified a protest against FSA. It is that message that is the essence of the issue in these proceedings. I agree. As pointed out by the Employer once the students were told the significance of the black armband, any teacher who wore the black armband was conveying that same message to students.

While Corbet testified she got her students ready to write the FSAs; went through what they needed to do and told the students to do her best, at a minimum 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 the 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.

The Courts have addressed the question of harm or impairment by noting as did the B.C. Court Of Appeal in *BCPSEA v. BCTF, supra*, the context of the impugned activity determines the type of proof a Court will require of a public body to justify its measures. As noted by the Employer the harm caused to the student participation in the FSA cannot be definitely measured. It must be inferred. In this case, that inference is supported and directly attributable to the candid testimony of these young witnesses. Clearly they were affected by the "protest" of an exam they were required to write that day. It is troubling the wearing of the armband took place on the very days these students were writing the FSA.

The Union maintains none of this would have occurred but for the direction given to the Grievor which caused her to be upset. I do not agree. As set out above, the testimony of the students established the Grievor's protest and discussion about the negative aspect of the FSA took place both prior to and after the direction was made. There was also evidence of disruption in the school the morning of February 12 in the main office and stress to relationships in the school following this incident. The wearing of the armband created tension between the staff and the Grievor. It also affected the relationship between the Principal and staff and the Principal and students as expressed by Robb's testimony.

The second pressing and substantive objective identified by the Employer is the District's duty to ensure the statutory mandated FSA is effectively delivered in a manner that does not undermine the effectiveness of the assessments. There is no doubt the wearing of the black armband and discussion in class negatively affected the delivery of the FSA. The wearing of the black armband

and discussion with students occurred in the same week; the same day that the teachers were administering the FSA to students. 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.

Comments in *BCPSEA/School District No. 62 (Sooke)* and *BCTF/Sooke Teachers Association – (Sihota)* (September 22, 2009, unreported (Dorsey) are pertinent to this point:

Legislation, regulation and Ministry and board of Education policies circumscribe teachers' professional autonomy. Teachers must teach the curriculum defined in educational programs and assess students on prescribed learning outcomes. They have autonomy to decide the instructional and assessment strategies to do that. Article F3 recognizes their autonomy must be exercised "within the bounds of the prescribed curriculum and consistent with recognized effective educational practice."

Beyond these boundaries or limitations, teachers do not have unfettered discretion to comply with or refuse to comply with employer policies or directions on all matters that relate to teachers' duties and responsibilities. Teachers work and are employed in a bureaucratic professional educational enterprise. The nature and extent of their contractually guaranteed right of individual professional autonomy must be interpreted within this context. It must be interpreted in a manner consistent with the fulfilment of responsibilities by others who are assigned roles and duties within the highly regulated structure of public education. It must be interpreted in a manner that is harmonious with those statutory and regulatory assigned responsibilities and duties and not in a manner that trumps or frustrates them. In some situations, when the conflict arises between two independent exercises of discretion and judgment, this might mean balancing competing rights and responsibilities.

(at para. 143-144)



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.

The third and fifth pressing and substantial objectives can be dealt with together. The School District maintains it has an interest in ensuring the professionalism of its teaching staff and the maintenance of public confidence in the school and the public education system. The fifth pressing objective is the duty of loyalty and fidelity. This argument is to a certain extent dealt with in *BCPSEA v. BCTF (Freedom of Expression)*, *supra*, when Arbitrator Munroe concluded while the School Board had a legitimate interest in the professionalism of the teaching staff and the maintenance of public confidence in the School Boards' administration of the public school system, if the communication if uttered or distributed or worn as here in a public forum would be unobjectionable in terms of duty of fidelity, that duty cannot become a reasonable limit justifying the prohibition of the same type of communication in the school grounds (at par. 52). I also note I have not dealt with these two objectives in great detail, due to my conclusion on the Employer's first two objectives.

The fourth pressing and substantial objective of the Employer was to ensure the results of the FSA are reliable and can be used both provincially and in the District in making important educational decisions to students. I find this relates to the first and second objectives. I agree as noted in *Hamilton-Wentworth District of School Board*:

Yet, as the union urges, students – even young students – should not be insulated from issues which surround them, and which might have a significant impact upon them (as in this case they did, when the teachers were locked out of their schools by the employer). Children cannot, nor should they, be shielded entirely from all outside controversy, particularly when that controversy has a bearing upon them. Whatever the reasonable limits are to such exposure, I am concerned here with the extent to which the employer's operational needs required a limit to union activity.

The employer has tolerated the use of more overtly political buttons that the one at issue in this case and there is nothing to suggest that those buttons, like the one in this case, caused any operational difficulty for the employer. The employer has accepted that children can be exposed to some level of political controversy, without their learning being disturbed.

(at para. 49)

I note here as in *Hamilton-Wentworth, supra*, there was evidence of buttons worn that commented upon a variety of political activity. None of it however was directly related to an activity the students were mandated to undertake. Unlike *Hamilton-Westworth, supra*, the protest in this case was directed at a requirement of these young students. It was not about bargaining or political matters from which the students are distanced by the fact of their youth. I also do not find the evidence of the "FSA No" button helpful as it was isolated and without the knowledge of the Employer. Similarly the evidence of other buttons does not assist with the specific facts of this case. I cannot without more definitive evidence find the Employer in this case tolerated the buttons or that these did not cause operational difficulties for the Employer.

In my view, the actions of the teachers who wore the black armband could skew the results 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 effectiveness of the assessments and the reliability and ability to utilize the FSA results in making educational decisions for students. An example of the potential effect on the ability to utilize FSA results was set out in a First Nations Education report entered into evidence. It stated:

The Enhancement Agreement between the District and the First Nations Band enshrines within it the FSA and the FSA results.

The First Nations Education report concerning the 2008-2009 school year refers to the BCTF action and the negative effect the action has had on the FSA results and their validity and usefulness for First Nations Education. In particular:

The most puzzling and discouraging achievement results in this Annual Report are the FSA results. In almost every area, the results for all District students are lower than last year. In fact, the overall results for all students in the Province (Aboriginal and non-Aboriginal) are lower than last year. The following observations are offered as a context for these results.

- Because of their disagreement over the purpose and testing process of the FSA's, the B.C. Teachers' Federation has made a concerted effort to discourage parents from having their children participate in the FSA's. For the '09 test, there was a relatively high non-participation rate for student: 7% for non-Aboriginal students and 12.5% for Aboriginal students. This lower participation rate may have had an impact on results. Our School District normally has one of the highest participation rates in the Province. It would appear that the BCTF's efforts are having an impact.

In view of all the above, I must then consider whether the action the Employer took – the direction to remove the armbands and refrain from discussions with students concerning the armbands and the protest against FSA – was rationally connected to addressing these three “pressing and substantial” concerns. 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 mandates FSAs.

(b) Is the Limit a Minimal Impairment of Expression?

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? In answering the question I note I am dealing only with the factual foundation for this arbitration; the particular direction given in the circumstances of this case. As noted earlier, the teachers in this case were directed to remove their black armbands and to refrain from discussions with students concerning the black armbands and the protest against FSA.

The B.C. Court Of Appeal commented on minimal impairment in *BCPSEA* and *BCTF*, *supra*, as follows:

The difficult question is whether the means the School Boards chose to achieve their objective satisfy the minimum impairment test. As McLachlin J. observed in *Commonwealth*, at para. 272, the minimum impairment requirement will be met "[i]f the limit represents a reasonable legislative choice tailored so as to limit the right in question as little as possible".

The BCPSEA submits the directives minimally impaired teachers' rights because they restrict only the time and place of teacher expression; they did not limit teachers' ability to write letters to the editor, speak at public meetings, or hand out material and engage in other types of expression off school property outside of work hours. The BCTF says the School Boards did not minimally impair teachers' expression rights because they issued the directives despite the lack of evidence teachers' activities interfered or would interfere with student education or parent-teacher interviews. It also submits the decisions of the Supreme Court of Canada in *Commonwealth* and *Pepsi* establish it is irrelevant teachers could have expressed their opinions elsewhere.

It is at this stage of the analysis this Court must undertake the difficult balancing to decide whether the directives go too far in light of the importance of teachers' political expression.

In *Fraser*, at 467-68, Dickson C.J. for the Court wrote:

...our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged, to participate in that discussion.

...

On the other side, however, it is equally obvious that free speech or expression is not an absolute, unqualified value. Other values must be weighed with it. Sometimes these other values supplement, and build on, the value of speech. But in other situations there is a collision. When that happens the value of speech may be cut back if the competing value is a powerful one. Thus, for example, we have laws dealing with libel and slander, sedition and blasphemy. We also have laws imposing restrictions on the press in the interests of, for example, ensuring a fair trial or protecting the privacy of minors or victims of sexual assaults.

While the Chief Justice was discussing the pre-*Charter* right of free expression, his observations are helpful in discerning how to balance the societal interest in restricting political expression on a teacher bulletin board or at a parent-teacher interview with the individual interest in freedom of political expression. In this case, a teacher's right to political expression must be valued and balanced with society's interest in effective parent-teacher interviews and public confidence in the school system.

Generally, this Court should not interfere only because it can conceive of an alternative which seems to it to be less restrictive than that chosen by the School Boards. That said, as with public servants in *Fraser*, teachers cannot be "silent members of society" in light of the importance of a "free and robust public discussion of public issues" to democratic society (at 466-67). The School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School grounds are public property where political expression must be valued and given its place.

(at para. 61-65)

As noted in the B.C. Court of Appeal comments above, it is at this stage the difficult task of balancing whether the directives go too far in light of the

importance of teachers' political expression, must take place. In this case, the Employer maintains the teachers' right to express views on FSA exists and is protected by the *Charter* only when the expression does not involve students.

As reflected in the above jurisprudence, it is not necessary to show the least restrictive means of achieving that end. The Court of Appeal in *BCPSEA v. BCTF*, *supra*, rejected the Section 1 argument on the basis of the minimal impairment test in *Oakes*. The majority of the Court decided the limits went too far in light of the importance of the teachers' political expression. The Employer maintains in this case, the teachers' right to express views on the FSA exists and is protected by the *Charter* when and only when the expression does not involve students. There was considerable evidence presented that showed the various forums where teachers' views and expressions on FSA were made. The Employer is not seeking to prohibit the Union and teachers' ability to have and express views concerning the FSA. It is seeking to limit the expression of those views in schools and in classrooms with students who must write the FSA, a mandatory educational requirement. The limits on free speech are a minimal impairment as the limits are only with students, with other forms available for free speech.

Let me say at the outset, it is important to recognize as noted by Dickson, C.J. in *Fraser v. Public Service Staff Relations Board*, [1985] 2SCR 455:

...our democratic system is deeply rooted in, and thrives on, free and robust public discussion of public issues. As a general rule, all members of society should be permitted, indeed encouraged to participate in that discussion.

( at p. 467)

This is a fundamental tenet in our democratic society. Competing values however impact on the breadth of that right as referenced by the example of protecting the privacy of minors. It is appropriate at this time to reiterate the

comments made by the Supreme Court of Canada in *Ross*, *supra*:

There can be no doubt that the attempt to foster equality, respect and tolerance in the Canadian educational system is a laudable goal. But the additional driving factor in this case is the nature of the educational services in question: we are dealing here with the education of young children. While the importance of education of all ages is acknowledged, of principal importance is *the education of the young...*

(emphasis added)  
(at para. 82)

The Union has relied upon two American cases dealing with freedom of expression and the wearing of black armbands. *James v. Board of Education*, *supra*, dealt with a teacher wearing a black armband in class in symbolic protest against the Vietnam War. The United States Court of Appeals, Second Circuit, said:

Any meaningful discussion of a teacher's first amendment right to wear a black armband in a classroom as a symbolic protest against this nation's involvement in the Vietnam War must begin with a close examination of the case which dealt with this question as it applied to a student. *Tinker v. Des Moines Independent Community School District*, *supra*. Mary Beth Tinker, a junior high school student, her older brother and his friend, both high school students were suspended from school for wearing black armbands in school to publicize their opposition to the war in Vietnam. Nothing that neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, 89 S.Ct. at 736, the Supreme Court held that a school cannot bar or penalize students' exercise of primary first amendment rights akin to "pure speech" without "a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* At 513, 89 S.Ct. at 740.

(at para. 14)

The Court commented on *Tinker v. Des Moines Independent*, *supra*, also relied upon by the Union as follows:

With respect to both teacher and student, the responsibility of school authorities to maintain order and discipline in the schools remains the same. The ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstractions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers. Although it is not unreasonable to assume that the views of a teacher occupying a position of authority may carry more influence with a student than would those of students inter sese, that assumption merely weighs upon the inferences which may be drawn. It does not relieve the school of the necessity to show a reasonable basis for its regulatory policies. As the Court has instructed in discussing the state's power to dismiss a teacher for engaging in conduct ordinarily protected by the first amendment: "The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education* [1968] USSC 125; 391 U.S. 563, 568 [1968] USSC 1125; 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968).

(at para. 15)

It went on to say:

It is to be noted that in this case, the Board of Education has made no showing whatsoever at any stage of the proceedings that Charles James, by wearing a black armband, threatened to disrupt classroom activities or created any disruption in the school. Nor does the record demonstrate any facts "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities..." *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 514, 89 S.Ct. at 740. All we can learn from the record is that in the opinion of Edward Brown, the District Principal, "wearing the armband would tend to be disruptive and would possibly encourage pupils to engage in disruptive demonstrations." "But," the Supreme Court warned in *Tinker*, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* At 508, 89 S.Ct. at 737.

(at para. 16)



The Employer points out however the Court's conclusion was predicated in very specific factors. The Court noted:

Several factors present here compel the conclusion that the Board of Education arbitrarily and unjustifiably discharged James for wearing the black armband. Clearly, there was no attempt by James to proselytize his students. It does not appear from the record that any student believed the armband to be anything more than a benign symbolic expression of the teachers' personal views. Moreover, we cannot ignore the fact that James was teaching 11<sup>th</sup> grade (high school) English. His students were approximately 16 or 17 years of age, thus more mature than those junior high school students in *Tinker*.

(at para. 22)

I note also the comment of the Supreme Court of Canada in *Greater Vancouver Transportation Authority v. Canadian Federation of Students* (2009) 309 DLR (4<sup>th</sup>) 277:

...It is clear from this Court's Section 1 jurisprudence on freedom of expression that location matters, as does the audience. Thus, a limit which is not justified in one place may be justified in another. And the likelihood of children being present matters, as does the audience's ability to choose whether to be in the place...

(at para. 78)

I reiterate as expressed by Arbitrator Kinzie in *BCPSEA/BCTF (Pamphlet Grievance)*, *supra*, the teachers in that case dealing with the same issue:

...sought to prevent students from being exposed to their expression of concerns by placing the pamphlet in a sealed envelope addressed to the parent.

(at para. 107)

As set out by the Supreme Court of Canada in *Greater Vancouver*

*Transportation Authority, supra*, when dealing with a Section 1 limitation “the likelihood of children being present matters”. Indeed, as pointed out in *James v. Board of Education, supra*, the age of the children matters. In that case, the facts the children were in Grade 11 rather than junior high school made a difference. In this case, the reality that the students here were all elementary students cannot be ignored. It is a significant factor in considering the Section 1 limitation in this case.


The teachers are free to express themselves and have done so when they are not engaging students at the elementary school in an FSA protest. There was extensive evidence of the Union's campaign in the media, at the School Board, in a meeting set up by the Parent Advisory Committee and through e-mails to its members. In addition, parents were given pamphlets that outlined the position of the Union in parent-teacher interviews. The Employer's direction did not prohibit the Union and teachers from expressing views concerning the FSA. It directed the teachers to remove black armbands and refrain from discussions with students about the armbands and the protest against FSA.

In my view, the deleterious effect of the School Board's direction upon the teachers' freedom of expression is 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.

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 this direction. 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 view of all the above, the grievance is dismissed.

Dated at Vancouver, British Columbia, this 17<sup>th</sup> day of February, 2011



EMILY M. BURKE  
ARBITRATOR