

## Freedom of Expression: Distribution of Union/Political Materials on Educational Issues on School Property to Parents or Through Students

It is recognized that respectful debate about educational issues is important. In that regard, judicial and arbitral jurisprudence have clarified that teachers have the right to engage in political discussion on educational issues and have the freedom to express their views to parents on such educational issues under Section 2(b) of the *Charter of Rights and Freedoms* (the Charter). Any restrictions on expression have to be justified under Section 1 of the Charter. Accordingly, teachers' right to further the debate with parents must be valued, but it must also be balanced with society's interest in an effective and efficient school system which maintains the confidence of students, parents, and the public.

This important constitutional matter will continue to evolve in our sector. Following is a summary of the present advice on this matter. For more detailed information, including quotes from the arbitrations, please refer to the following:

- @issue 2008-13 dated September 30, 2008
- @issue 2008-16 dated December 18, 2008
- @issue 2009-10 dated February 5, 2009.

### Present Case Law in the K-12 Sector

There have been three main cases (one of which also went to the courts) that have proceeded to arbitration on the issue of a teacher's right to provide parents with union information on educational issues. The first case involved teachers providing parents with union material on class size and composition issues during parent-teacher interviews. This case was arbitrated by Donald Munroe and subsequently reviewed by the Court of Appeal. The second and third cases involved teachers providing students with union information to take home to their parents on the Foundation Skills Assessment (FSA). These cases were arbitrated by John Kinzie in School District No. 5 (Southeast Kootenay) and John Hall School District No. 39 (Vancouver).

While each case must be assessed in light of its own unique circumstances, following are some principles, in BCPSEA's view, that can be drawn from these three cases and may provide guidance with respect to teachers distributing union materials to parents on school property either directly or through students:

1. Under Section 2(b) of the Charter, teachers have the right to express themselves on educational issues.
2. Although an absolute ban by the employer would generally be a violation of the Charter, some restriction on expression may be justified under Section 1 of the Charter. Section 1 provides that the rights and freedoms guaranteed under the Charter are subject to "reasonable limits prescribed

by law as can be demonstrably justified in a free and democratic society". Judicial and arbitral jurisprudence has provided guidance on whether a particular restriction would be justified under Section 1."

3. In order to justify a restriction on teacher expression under Section 1 of the Charter, the employer must establish that the reason for the restriction is in furtherance of a "pressing and substantial" objective; the restriction is rationally connected to that objective; the restriction impairs as little as possible the Charter rights; and there is proportionality between the objective and the deleterious effects of the restriction."
4. In the achievement of the employer's "pressing and substantial" objective, there must be a balancing of rights. Any limit or restriction placed on free speech by the employer must be taken to minimally limit the teacher's right of free speech while at the same time achieving the objectives of the school district.
5. The following is a list of "pressing and substantial" objectives that may be found to allow for a restriction or limit on a teacher's right to freedom of expression under section 1 of the Charter:
  - The objective of maintaining public confidence in the public school system
  - The objective of ensuring that a parent-teacher interview meets its purpose
  - The objective of ensuring that accurate information is provided to parents about educational matters
  - The objective of duty of loyalty and fidelity owed by employees to their employer. Please note, as the expression by the teachers in these three cases involved opposition to government policy (class size/FSA) and not opposition to an employer policy, the issue of duty of loyalty and fidelity was not relevant in these decisions. However, should the union material on an educational issue relate to a decision or policy of the school district, then the objective of the duty of loyalty and fidelity owed by employees to their employer would be considered.

The above are examples of the kinds of "pressing and substantial" objectives which may justify a restriction on expression. Boards need to examine carefully any policy, rule or direction and consider the mandate of the public school system and what actions may be required in order to allow.

6. Subject to the Charter rights, past practice and the collective agreement, school districts have the management right to control what is being sent home to parents by teachers through students. In order to assess whether a limit of these expressions is justified under section 1 of the Charter in the distribution of union materials on an educational issue, the employer will need to first review the content of the union material in advance of its distribution.
7. Upon review, if the employer believes that the content of the information on an educational issue is misleading and/or inaccurate or otherwise undermines a pressing and substantial objective of the school system, the employer should request that the teacher/union amend the information accordingly. If the teacher/union is unwilling to amend the inaccurate and/or misleading information, the employer would then be justified in restricting the distribution of the entire document. It is suggested that advice is obtained if you are confronted with this situation.

8. Information contrary to the Ministry guidelines recommending that parents withdraw their children from writing the FSA was found to be inaccurate and misleading by Arbitrator Kinzie. "Extenuating circumstances" under the Ministry's guidelines does not include opposition to FSA.
9. Currently only teacher/union communication directed at educational issues have been considered in the jurisprudence.
10. The communication itself must clearly identify who the communication is coming from; i.e., this is the view of the BCTF, letterhead, logo, etc.
11. If the union material on educational issues has been approved by the employer and the teacher wishes to send the material home to parents through student, the following applies:
  - Communication through students should be limited to teachers who normally communicate with parents on educational matters about their children in this fashion
  - The information must be in sealed envelopes and clearly marked/addressed to the parent/guardian.

### **Upcoming Arbitrations**

There are currently different views between the parties on the interpretation and application of the Charter and Kinzie/Hall awards. The BCTF has declined requests from BCPSEA to work together to establish procedures and protocols for the distribution of union materials to parents from teachers. As a result, these differences will have to be addressed in further arbitration.

The BCTF has filed a provincial policy grievance with respect to the content of the September 30, 2008 @issue referenced above. Also expected to be included in this grievance will be examples of recent board policies in this area, as well as examples of the many disputes in districts that arose during the distribution of FSA materials in January/February 2009.

This grievance has recently been referred to arbitration with the parties currently in the process of choosing an arbitrator and setting dates. Further, two arbitrations are proceeding in front of Arbitrator Hall on the distribution of FSA material to parents from the previous year (January/February 2008). One will be heard in June 2009 (SD No. 68 Nanaimo-Ladysmith), while the other is scheduled for November 2009 (SD No. 58 Nicola-Similkameen).

### **Recommended Action for Districts**

1. It is suggested that the Board of Education either pass a resolution or adopt a district policy that requires prior approval for a teacher to distribute union/political information on educational issues directly to parents or through students. An example of such a resolution or policy for your consideration is as follows:

#### **Guideline**

Procedures for distributing union/political information on educational matters to parents must be considered within the established legal framework.

It is recognized that respectful debate about educational issues is important. In that regard, judicial and arbitral jurisprudence has clarified that teachers have the right to engage in political discussion and the freedom to express their views to parents on such educational

issues under Section 2(b) of the *Charter of Rights and Freedoms* (the Charter). Any restrictions on expression have to be justified under Section 1 of the Charter

Accordingly, teachers' right to further the debate with parents must be valued, but it must also be balanced with society's interest in an effective and efficient school system which maintains the confidence of students, parents and the public.

### Procedures

- The Board of Education requires teachers to obtain prior approval of their <title of employer representative or designate> when distributing union/political information on educational matters on school property to parents or through students.
  - The school or district administration will review the information for its accuracy and relevance to educational matters. Further, the review undertaken will determine the appropriateness of sending the information from the school to parents, taking into account the "pressing and substantial" objectives of the public school system. Teachers must contact their principal for review and approval prior to distribution.
  - In determining the appropriateness of the materials for distribution, there must be a consideration of the balancing of rights and measures that may be taken to minimally impair the teacher's right of free speech while at the same time achieving the objectives of the school district.
  - Should a union/political communication on an educational matter not be approved for any reason, the employer will raise the matter with the local union.
  - With respect to the accuracy, the content of the information must be accurate so that the expression is not misleading such that confusion and/or conflict are created. If the content or a portion of the communication is inaccurate/misleading, the employer will identify and request that the employee/union amend the inaccurate/misleading information. If the employee/union refuses to remove or amend the inaccurate/misleading portions as identified, the employer would then ban the entire distribution of the communication.
  - Any approved communication by the school district must be placed in a sealed envelope and clearly marked/addressed to the parent/guardian. Further, in order to ensure there is no confusion regarding from whom this communication is coming, the document itself should clearly indicate the authorship.
2. Contact your local union president and seek assurance that when teachers are distributing union/political information on educational matters on school property to parents or through students they will follow the "Kinzie process"; i.e., prior to distribution, they will seek approval from the employer, which will review the materials to address any inaccuracies.

If your local union is in agreement, then it is recommended that a process/protocol is established with your local union consistent with the Kinzie award. If your local president is not in agreement or will not provide you with a response, below are template letters that your district may consider providing your local president and teachers. The expectation is that the Kinzie process will be followed and, if there is a disagreement, the *work now grieve later* principle be followed.

### Letter to Local Union

It is recognized that respectful debate about educational issues is important. In that regard, judicial and arbitral jurisprudence has clarified that teachers have the right to engage in political discussion and the freedom to express their views to parents on such educational issues under Section 2(b) of the *Charter of Rights and Freedoms* (the Charter). Any restrictions on expression have to be justified under Section 1 of the Charter.

Accordingly, teachers' right to further the debate with parents must be valued, but it must also be balanced with society's interest in an effective and efficient school system which maintains the confidence of students, parents and the public. Distribution of union/political information on educational matters on school property to parents or though students must be considered within this context and, in particular, the guidance provided by Arbitrator Kinzie in his award dated May 2, 2008 in School District No. 5 (Southeast Kootenay).

If you wish to distribute material through the schools, I ask that you provide me a copy of the material in advance of it being sent home. This is consistent with the award of Arbitrator Kinzie. In the event that your local union does not intend to follow the Kinzie process (i.e., provide me with a copy of the union/political information on educational matters in advance and address any inaccurate and/or misleading statements prior to distribution), the district will be providing teachers with notice not to distribute union/political information on educational matters on school property to parents or though students without the prior authorization of their principal. The district expects teachers to follow this direction and, if not in agreement, to follow the *work now, grieve later* principle. I understand that the BCTF has already filed a provincial grievance in relation to this matter, which may provide additional guidance on this important matter.

In the meantime, I hope that you will reconsider your position and work with the district in accordance with the Kinzie process on this very challenging issue.

### Letter to all Teachers

Memo to: All Teaching Staff  
From: Superintendent  
Subject: Distribution of Union/Political Information on Educational Matters on School Property to Parents or thought Students

It has come to my attention that some teachers may have been advised by their union that they have the right to distribute union/political information on educational matters to parents through the school or students, without the prior approval of the school Principal. The purpose of this memorandum is to notify all teachers that any such union publications intended to be distributed to parents or though students at the school must be approved for distribution by your Principal **prior** to the material being sent home or otherwise distributed.

The district is attempting to reach a resolution with the local union on a process to provide the district with a copy of the union/political materials and address any issues related to the publication prior to its distribution.

If you have any questions or are not clear on this notification of this direction, please contact your Principal.

## Questions

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

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