

B.C. Arbitrator rules that school board directives not to discuss class size breach *Charter*

A British Columbia arbitrator has ruled that attempts by school boards to prohibit teachers from posting material about class size issues on school bulletin boards accessible to students and parents or discussing these issues in parent-teacher interviews breached the freedom of expression guarantee in the *Canadian Charter of Rights and Freedoms*. The origin of the dispute in *British Columbia Public School Employers' Association v. British Columbia Teachers' Federation* (May 7, 2004) was the introduction by the provincial government of legislation that removed class size and composition clauses from the provincial collective agreement.

In response to the legislation, the teachers' union adopted an "action plan" that involved the distribution to union members of materials "to help teachers inform parents about the specific educational losses that have taken place at your school". A number of school boards reacted to the teachers' initiative by directing that the material was not to be posted in areas within schools where it could be read by students and parents, and by prohibiting teachers from discussing class size issues during parent-teacher interviews. The union alleged that the employers' actions violated the *Charter* guarantee of free expression, and the parties agreed to submit the matter to an arbitrator for a ruling.

CHARTER APPLIES TO PUBLIC SCHOOL BOARDS

The employer's first line of argument was that the *Charter*, which applies only to governmental entities, did not apply to public school boards. The arbitrator disagreed. Reviewing the case law from the Supreme Court of Canada on the application of the *Charter*, the arbitrator noted that the *Charter's* guarantees apply to "all entities that are essentially governmental in nature, ... as evidenced either by the degree of governmental control exercised over them, or by the governmental quality of the functions they perform", or by a combination of those two factors. With respect to the second factor, the arbitrator also noted that the courts have held that, for the *Charter* to apply to entities other than legislatures and governments, they must be performing what can be described as "governmental" – rather than merely "public" – functions. Based on the approach adopted by the courts and on his review of the provincial statutory framework, the arbitrator held that B.C. school boards met this test:

"... I conclude that the School Boards are better characterized as performing "governmental functions", than as simply providing a "public function"; and that the School Boards of this province are subject to the *Charter* by virtue of Section 32(1). First of all, the School Board trustees are democratically elected by the general public within each school district, and are accountable to their constituents in elections held every three years. ... Unlike Parliament or the provincial legislatures, and dissimilar to municipalities, School Boards in British Columbia do not have a general taxing power. However, ... School Boards in this province are the beneficiaries of school taxes levied by municipalities on behalf of the province under the *School Act*. I note as well that under Section 112 of the *School Act*, School Boards may by resolution initiate referenda which,

if passed, result in a tax on residential land and improvements in the school district. Of some import, a School Board has the power under Section 96(2)(c) of the *School Act* to expropriate land. ... School Boards do not have a general coercive law-making power. However, as empowered by Section 85(2) of the *School Act*, School Boards may determine local policy for the effective and efficient operation of schools in the school district. ... And significantly, ... the School Boards derive their existence and rule-making authority from the province; that is to say, the powers they exercise are powers conferred on them by the provincial legislature. Those powers have to do with the delivery to the populace of public education within each school district. It is reasonable to presume that if the powers had not been conferred by legislation on the School Boards, those same powers would have to be exercised by the provincial government itself."

SCHOOL BOARD ACTIONS BREACH CHARTER

Having decided that the school boards' actions were subject to the *Charter*, the arbitrator then considered whether the teachers' freedom of expression had been breached. The school boards argued that their directives did not restrict the teachers' rights to express themselves in a public forum, but only controlled where and when they could express their views. The school boards also asserted that the right to free speech must be balanced against property rights and the rights of employers.

The arbitrator held that, while it was true that only the time and place of the teachers' expression was restricted, it was also true that the school boards were targeting specific ideas the teachers' union was seeking to convey. Courts have held that, where the purpose of a restriction is tied to content – in this case class size and composition – freedom of expression is limited.

Nor did the arbitrator accept the argument that there is no freedom of expression when the expression occurs in the workplace. Rather, he held that the right to free expression does exist in the workplace and can be limited only in accordance with section 1 of the *Charter*, which provides that *Charter* rights and freedoms are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".

NO JUSTIFICATION UNDER SECTION 1

The school boards argued that the common law duty of fidelity owed by employees to employers constituted the "reasonable limits prescribed by law" that served to justify the restriction on the right of free expression. The arbitrator disagreed, noting that the distribution of the union's material in no way interfered with the effective operation of the schools or impaired the teachers' functioning. Further, the arbitrator expressed the view that some of the employers' own arguments contradicted their contention that distribution of the material was a breach of the duty of fidelity:

"In argument before me, the BCPSEA said that the School Boards' directives to teachers were not intended, for example, to prevent a teacher from discussing the issues, or handing out the [material] at public meetings or even at parent advisory councils. If the communications which are here at issue would be unobjectionable in terms of the duty of fidelity if uttered or distributed in public or quasi-public fora, I cannot see how the duty of fidelity becomes a reasonable limit prescribed by law justifying the prohibition of the exact same communications on a teachers' bulletin board or in the privacy of a parent-teacher interview."

Accordingly, the arbitrator declared that the school boards' directives breached the teachers' *Charter* right to free expression and were not justified under section 1 of the *Charter*.

In Our View

The arbitrator noted that, in determining whether the school boards' actions were a "reasonable limit" under the *Charter*, a balance must be struck between the duty of loyalty or fidelity on the one hand, and the individual's freedom of expression on the other. The employers' legitimate interest was the professionalism of the teaching staff, and the maintenance of public confidence in their administration of the public school system. The teachers' interest lay in the dissemination of their view that certain of the positions being taken by the employers' bargaining agent in collective bargaining and, ultimately, the content of the provincial government's strike-ending legislation, ran counter to the promotion or maintenance of effective learning conditions. The fact that the right of free expression could be exercised without impeding the operation of the schools or the carrying out of the teachers' duties tipped the balance in favour of free expression.

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