

## Summary of Arbitrator John Kinzie's conclusion on the Freedom of Speech award in Cranbrook

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*The following direct quote from the award contains the arbitrator's summary of his conclusions:*

"I now wish to summarize my conclusions in this matter. Having considered all of the evidence and argument, I am of the view that:

1. Teachers in School District No. 5 (Southeast Kootenay) have traditionally used a school's internal mail delivery system through the medium of students to communicate with parents on matters pertaining to their children's education.
2. The BCTF pamphlet 'FSA testing can be harmful to students!' expresses teachers' concerns about the impact these tests have on students' education, and accordingly it conveys meaning.
3. Grade 4 and Grade 7 teachers in School District No. 5 (Southeast Kootenay) who wished to send this pamphlet home to parents of students in their classrooms were not claiming a positive right to access this internal mail delivery system. They have traditionally had access to it to communicate matters concerning their students' education. Instead, the Employer was seeking to restrict their access because of the content of the BCTF pamphlet and their use of students to deliver it.
4. Neither the method for nor the location of the teachers' expression of their concerns was such as to remove the teachers' expressions of concerns about FSA testing from the protection of Section 2(b) of the *Charter*.
5. The Employer's restriction preventing Grade 4 and Grade 7 teachers from sending these pamphlets home to parents in a sealed envelope had the effect of infringing upon their freedom of expression under Section 2(b) of the *Charter*.
6. 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.
7. 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.
8. 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*.
9. 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*.
10. 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 delivery system.

In the result, the Union's grievance succeeds. I declare that the Employer's restriction on Grade 4 and Grade 7 teachers using a school's internal mail delivery system to send home with students for their parents to read the BCTF pamphlet opposing FSA testing violated the teachers' freedom of expression under Section 2(b) of the

*Charter*. I further declare that the Employer has not made out a case that an absolute ban on sending this pamphlet out to parents using this means is a 'reasonable' limit 'demonstrably justified in a free and democratic society' within the meaning of Section 1 of the *Charter*. I direct the Employer not to interfere in this manner with its teachers' freedom of expression concerning FSA testing in the future."

\**BCPSEA v. BCTF* (2005), 141 L.A.C. (4<sup>th</sup>) 385