



LARRY KUEHN

Freedom of Speech for Teachers Confirmed

"2(b) or not 2(b)" is not part of an attempt to perform Hamlet through Twitter messages. Rather, it is a slogan on a T-shirt worn by a British Columbia teacher ordered by an administrator to remove the shirt.

The reference is to Section 2 of the *Canadian Charter of Rights and Freedoms*. Section 2 states:

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

This freedom, like all rights guaranteed by the Charter, is "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The drafters of the *Charter* may not have thought of T-shirts as "other media of communication," but the term covers a whole bevy of media that couldn't have been imagined when the Charter was adopted in 1982.

Controversy over the T-shirt was just one skirmish in a long battle over the right of BC teachers to express their views in the decade-long

OUR SCHOOLS/OUR SELVES

battle with the BC Liberal government over funding policies. Some administrators went beyond silliness in their directives. A button saying “Proud to be a teacher” was prohibited, as well as a quote from the Dr. Seuss book, *Yertle the Turtle*.

The courts side with free expression for teachers

The BC Teachers’ Federation have gone to the courts — several times — to establish the rights of free expression for teachers when school districts sought to discipline teachers for their displays that expressed their views on education-related political issues.

In a recent case, the BC Court of Appeal early in 2013 recognized that teachers make a contribution to democratic discourse by using their right of political expression. School boards cannot justify limits to that right if there is no evidence of harm to students.

The Court’s decision said “the principle that open communication and debate about public, political issues is a hallmark of the free and democratic society the Charter is designed to protect.”¹

A decade before the 2013 decision, BC teachers faced administrative directives at several schools prohibiting them from providing information to parents and posting materials on bulletin boards that expressed opposition to government policies that were having a negative impact on class size and other classroom conditions. The BCTF filed a grievance against these restrictions and won the grievance in an award by arbitrator Monroe. He rejected the claim that the Charter does not apply to school boards and that the directives were a restriction of the Charter’s guarantees of freedom of expression.

The BC Public School Employers’ Association (BCPSEA) challenged the arbitrator’s decision, but the BC Court of Appeal upheld it. The court said:

...it is difficult to see how discussion about class size and composition in relation to the needs of a particular child by an informed and articulate teacher could do anything but enhance the confidence in the school system. Like the arbitrator, I cannot discern any potential harm from the posting of materials on a school bulletin board.²

...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...The School Boards cannot prevent teachers from expressing opinion just because they step onto school grounds. School grounds are public property where political expression must be valued and given its place.³

BCPSEA would not accept the Appeals Court Decision and went to the Supreme Court of Canada, which denied leave to appeal, letting the decision stand.

More decisions supporting freedom of expression

This should have put an end to the attempts to silence teachers by the school boards, but such was not the case. In 2006 the BCTF filed a grievance because school boards were refusing to allow teachers to send home to parents, in sealed envelopes, information opposing the Foundation Skills Assessment, a standardized test given in grades 4 and 7.

An arbitrator (Kinzie) again ruled that the refusal to allow the envelopes to be sent home “infringes upon the teachers’ freedom to express their concerns to parents about the FSA tests.”

The arbitrator (Thompson) in a case from the Cranbrook and Fernie district took a different view. The teachers were directed to remove posters from a “When Will They Learn” campaign outside their classrooms and buttons they were wearing with that message. It focused on school closures, large classes and special needs neglected and called on voters to consider education issues in the upcoming election.

Although he found the materials to be non-partisan in not supporting a particular party, Thompson said the school district direction fit “the objective of insulating students from political discussion in the classroom and adjacent areas.” The BC Court of Appeal rejected Thompson’s decision and again affirmed freedom of expression as important to education:

...Canadian jurisprudence...stands for the principle that open communication and debate about public, political issues is a hallmark of the free and democratic society the Charter is designed to protect.

OUR SCHOOLS/OUR SELVES

Children live in this diverse and multi-cultural society, and exposing them to diverse societal views and opinions is an important part of their educational experience.⁴

Rights for teachers in Ontario

An Ontario Labour Relations Board decision also supported freedom of speech for teachers growing out of a 2002 action by elementary teachers in Ontario. Teachers wore a button in schools that said “Fair Deal or No Deal” in the week before a strike vote. The Labour Relations Board decision provides a powerful statement in support of authenticity as key to education:

....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...⁵

Limits to freedom of expression

Teachers’ freedom of expression isn’t absolute. It is subject to limitations if there is harm to students or expressions of hate and discrimination.

One BC grievance was decided on the basis of harm to students. An arbitrator upheld the direction to Kamloops teachers to remove black armbands they were wearing as a protest against the Foundations Skills Assessment. In one class, a teacher was asked by students why she was wearing the armband. She explained that it was her silent protest against the FSAs. The arbitrator ruled that the teacher had made negative comments about the FSA exams and that students “were affected by the ‘protest’ of an exam they were required to write that day.”

Three well-known cases of racist or discriminatory actions by teachers represent the extremes that are prohibited. The case of Ross in New Brunswick was based on racist and discriminatory anti-Semitic statements by the teacher who had created a poisoned environment

that interfered with the education provided. In the Kempling case, this school counsellor's discipline by the BC College of Teachers was upheld because of discriminatory homophobic statements which linked homosexuality with immorality, abnormality, perversion and promiscuity. In the Keegstra case in Alberta, the courts upheld his termination for employment because student marks suffered if they did not reproduce his views in class or on exams.

Balancing rights and potential harm

Writing in the *Education and Law Journal*, lawyers Robyn Trask and Paul Clark arrive at some key conclusions about the balance of freedom of expression by teachers:

The courts have recognised that teachers' contribution to the democratic dialogue on education funding and other issues fosters political and social decision making in Canada...In the absence of evidence of harm to the education system generally or to any student specifically, it will be difficult to justify infringement of this fundamental freedom.

Recourse to the courts to establish the meaning of the rights proclaimed in the Charter of Rights and Freedoms is expensive, but it is also essential if the Charter is going to contribute to the political health of our country.

LARRY KUEHN writes a blog on technology and education issues at digicritic.blogspot.ca.

The article is largely based on a legal review by Robyn Trask, a lawyer for the BC Teachers' Federation, and Paul Clark, a professor at the University of Regina. Their review is published in the *Canadian Education and Law Journal* 13 (2).

ENDNOTES

1 British Columbia Teachers' Federation v. British Columbia Public School Employers' Association 2013 BCCA 241 at para 50.

2 British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, 2005 BCCA 393 at para 50.

OUR SCHOOLS/OUR SELVES

3 British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, 2005 BCCA 393 at para 65.

4 British Columbia Teachers' Federation v. British Columbia Public School Employers' Association, 2013 BCCA 241 at para 50.

5 Hamilton-Wentworth District School Board, [2002] O.L.R.D. No. 2676 (Ont. Labour Relations Board) at para. 49.



The advertisement features a black and white photograph of a smiling woman on the left. The background is a light gray with faint mathematical formulas, including $\frac{d}{dx} \left(\frac{x^m}{(x^n + a^n)^{r-1}} - \frac{1}{a^n} \right)$ and $\frac{1}{a^n} = \frac{1}{a^n}$. The text on the right is as follows:

**Committed to
protecting the quality
of education in
Ontario universities**

OCUFA
Ontario Confederation of University Faculty Associations
Union des Associations des Professeurs des Universités de l'Ontario

www.ocufa.on.ca