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BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION

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Distribution of this Bulletin

Please ensure that this bulletin is circulated to all administrative staff in both the district office and schools who must rely on the collective agreement in the performance of their duties.

Court of Appeal Award — Freedom of Expression Update

School District No. 5 (Southeast Kootenay): Union Political Materials Posted in Schools/Buttons Worn in Classrooms

Today the BC Court of Appeal rendered its decision in respect to the BCTF's appeal of Arbitrator Mark Thompson's award dated October 30, 2011 pertaining to the employer restricting teachers from posting union political materials on school walls/doors and wearing union political buttons in the classroom.

Issue

Under Section 2(b) of the *Charter of Rights and Freedoms* (*the Charter*), does the right to freedom of expression of a teacher extend to posting, in the view of students, union political materials related to educational policy on the walls outside of their classroom and permit the wearing of buttons in the classroom? Does the employer have legitimate Section 1 arguments to restrict or minimally impair this freedom of expression by teachers in schools?

Facts

The BCTF adopted and implemented a political campaign entitled "When Will They Learn." The three main messages in this campaign were: "When will they learn —- special needs neglected," "When will they learn — 177 schools closed," "When will they learn — 10,000 overcrowded classes." This campaign was launched first in conjunction with the municipal elections of 2008 and later with the provincial election of May 12, 2009.

In School District No. 5 (Southeast Kootenay), just prior to the provincial election, three elementary teachers and one secondary teacher were directed to remove the "When Will They Learn" materials, which were on display in their classroom or taped to the wall outside of their classroom. In addition, one elementary teacher was directed to refrain from wearing a "When Will They Learn" button while visiting a middle school. The teachers were advised that these materials could instead be posted on the union bulletin board provided in each staff room.

Employer's Position

It is not appropriate for a teacher who is acting in an instructional role/setting in the presence of students to wear a button displaying a union and/or political message or to post such materials in the view of students. The role of the teacher is to educate students and not to advance their individual or union's interests. School districts must be aware of the vulnerability of children to the messages conveyed by their teachers. Teachers are authority figures to students — as students are a captive audience and as there may not be a counterpoint to the views of the teacher, particularly in an elementary school setting, it is important to ensure that the classroom and the learning environment of a school are unimpaired by a teacher's use of the classroom to advance a political agenda. Teachers are obliged to maintain their professionalism and to foster an open and supportive education environment. Such an environment can be undermined where teachers use the classroom to advance their political views.

Arbitrator Mark Thompson's Original Ruling: October 30, 2011

> "I conclude that insulating students from political messages in the classroom is a "pressing and substantial objective" as required by the Oakes test.
>
> To summarize, I have concluded that the materials used in this case were political, but not partisan. Teachers may not introduce such materials, either in the form of printed matter or buttons worn on their garments into the classroom or the walls or doors immediately adjacent to classrooms. For these reasons the grievance is denied."

BC Court of Appeal Ruling: May 21, 2013

Today, the BC Court of Appeal allowed the appeal, set aside the arbitration award of Arbitrator Thompson and allowed the grievance.

The Court found that the specific facts of this case were indistinguishable from those of a freedom of expression case already ruled upon by the BC Court of Appeal in 2005 [*BCPSEA v. BCTF, 2005 BCCA 393, 44 B.C.L.R. (4th) 1 (Munroe)*].

> The BCPSEA seeks to distinguish *Munroe* on its facts. In my opinion, *Munroe* is indistinguishable from this case, and is binding on the court.
>
> *Munroe* concerned materials produced by the BCTF for a political campaign against the provincial government's legislation and policies concerning the scope of teachers' collective bargaining about class size and composition. Several school boards issued directives advising teachers they were not to post materials relevant to the campaign on bulletin boards in areas of the schools where students and parents might see them, and they were not to distribute materials to parents either during parent-teacher interviews or otherwise on school property. The school boards also advised teachers that parent-teacher interviews could not be used to discuss class size or collective bargaining issues.
>
> While the reasons for judgment in *Munroe* focus in more detail on the impact of teachers using political materials in parent-teacher interviews, the question of whether the teachers could post those materials on bulletin boards where both parents and students could see them was squarely before the Court.

The Court further ruled that, **in general,** insulating students from political messages is not a pressing and substantial objective that alone can be relied upon by the employer.

> Despite the similar lack of evidence of any harm or potential harm to students from the possible exposure to political material on bulletin boards or buttons worn by teachers in schools, and the express finding in *Munroe* that a similar prohibition was not a reasonable limit on teachers' rights, the arbitrator in this case inferred from *Munroe* (and other arbitration awards) that the goal of insulating students **generally** from such messages was a pressing and substantial objective.
>
> This conclusion misconstrued *Munroe* by failing to give effect to the Court's express consideration of that issue, and failed to distinguish the issues in the other arbitration awards cited as supporting limiting teachers' rights of expression in order to insulate students from political messages.

While the Court of Appeal confirmed that insulating students **in general** from political messages was not a pressing and substantial objective to prohibit free speech, it also re-confirmed that teachers' right to freedom of expression in schools is not unlimited and that, in certain circumstances the insulation of students from political messages has been found to be a pressing and substantial objective.

> In *Burke*, the school board directed teachers not to wear black armbands in schools to demonstrate their opposition to the standardized assessment tests, and to refrain from discussing their opposition to the tests with students. There was direct evidence that the wearing of armbands and discussion between teachers and students of the teachers' protest against the tests had disrupted the education process and confused elementary school students who were required to write the tests. The arbitrator found, on the facts of that case, that the school board's objective in insulating the students from political messages that impact directly on the educational program was pressing and substantial.

In the particular facts of the SD 5 (Southeast Kootenay) case, the Court found that there was no evidence of actual or potential harm.

> There was no evidence in this case of any actual or potential harm to students from being exposed to the materials about educational issues, nor any facts from which an inference of harm could be drawn. On the contrary, Canadian jurisprudence, including Munroe, stands for the principle that open communication and debate about public, political issue is a hallmark of the free and democratic society the *Charter* is designed to protect. 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…
>
> … It is likely that most Canadians would agree that when the exercise of a person's rights is shown to have interfered with or harmed others in the exercise of their rights, or where rights are exercised without corresponding responsibility, there may be justification for some limiting actions.

The Court confirmed that the facts of this case and this ruling did not apply to "political electioneering" in schools.

> The facts of this case do not permit me to address the issue of "political electioneering" in schools. It would be a different case if schools became a political battleground, festooned at election time with competing political messages. On those facts, it might be expected there

> would be direct evidence, or fair inferences, of interference with the educational process and some harm to students' educational experience.

Further, the Court commented on the concern about "the extent to which school children should be exposed to but one side of any societal views and opinions as part of their educational experience." Their educational experience should be free from bias.

> At a minimum, as Madam Justice Huddart pointed out in her majority reasons in *Munroe*, the professionalism of teachers includes their obligation to ensure that any discussion in which they engage in the school setting concerning the education of children must be a reasoned one.
>
> Where the issue upon which teachers choose to exercise their rights to free speech is a political one, their rights must be balanced against the rights of their students to an education that is free from bias. That brings into play, as it did in *Harper*, the concern that if a group is able to monopolize its message on any issue, competing views will be deprived of a reasonable opportunity to be heard.
>
> While exposing children to diverse societal views and opinion is an important part of their educational experience, exposure to only one view of an issue, where there are legitimate competing views could represent a failure to uphold the principles of tolerance and impartiality that the education system must promote and foster.

The concluding remarks of Mr. Justice Hinkson predicted that future cases will determine the limits of teacher expression on political issues.

> As my colleague points out, *Munroe* is a full answer to the present appeal. However, the proportionality aspects of s.1 of the *Charter* reserve for another case the evidence required to establish and the point at which teachers' rights of freedom of expression in schools must yield to the rights of students to be educated in a school system that is free from bias.

Next Steps

This is a very complex legal issue and award. There have been many grievances that have been filed and held in abeyance pending the outcome of this BC Court of Appeal decision. The provincial parties will now need to meet to discuss those grievances. Following a thorough review, BCPSEA will provide districts with further analysis.

Questions

In the meantime, should you have any questions regarding this award or have such materials posted or worn in your schools, please contact your BCPSEA labour relations liaison.