

**IN THE MATTER OF AN ARBITRATION**

**BETWEEN:** British Columbia Public School Employers' Association/  
The Board of Education of School District No. 5 (Southeast Kootenay)  
(the "Employer")

**AND:** British Columbia Teachers' Federation/Cranbrook District Teachers'  
Association  
(the "Union")

**APPEARING FOR THE PARTIES:**

Judith Anderson, for the Employer

Robyn Trask, for the Union

**DATE AND PLACE OF HEARING:**

May 9, 10, 2011, Cranbrook, BC

**ARBITRATOR:** Mark Thompson

Freedom of Expression Grievance

**AWARD**

**INTRODUCTION**

This case arose from a grievance filed by the Cranbrook and Fernie Teachers' Association on May 5, 2009 regarding a directive by School District No. 5 (Southeast Kootenay) that employees remove materials from bulletin boards and classroom doors and to remove buttons that expressed political opinions. The

Teachers' Association initiated the grievance as a step 3 Provincial Matters grievance under Article 6.4 of their collective agreement. The parties met, but were unable to resolve the grievance. On March 17, 2010, the British Columbia Teachers' Federation (the "BCTF" or the "Union"), the certified bargaining agent representing the Teachers' Association, referred the grievance to arbitration under Article 6.7 of the collective agreement in a letter to the BC Public School Employers' Association (BCPSEA, the "Employer"), the accredited bargaining agent for School District No. 5 (Southeast Kootenay). At the time the grievance was filed, a collective agreement containing all current terms and conditions of employment in a collective agreement between the BCPSEA and the BCTF as those terms applied to School District No. 5 (Southeast Kootenay) was in force.

The parties presented their cases through an agreed statement of facts and extensive argument. At the outset of the hearing, they agreed to my jurisdiction.

#### **AGREED STATEMENT OF FACTS**

On October 16, 2008, the BCTF launched a political campaign entitled "When Will they Learn." The campaign had three main messages:

- When Will They Learn  
special needs neglected
- When Will They Learn  
177 schools closed
- When Will They Learn  
10,000 overcrowded classes

This campaign took place prior to municipal elections, which include the election of school trustees, which occurred in November 2008. The campaign resumed in January 2009, addressed to the May 12 provincial election. The campaign was reported widely

in newspapers and other media in the province and included paid advertisements in many locations. The BCTF also produced three videos as part of the “When Will They Learn” campaign.

The BCTF, together with other unions, also challenged provisions of the *Elections Act*, passed by the Liberal government of British Columbia that limited on advertising expenditures by third parties during the 60 days prior to the beginning of the 28-day election campaign. The BC Supreme Court ruled that the expenditure limit was unconstitutional. After its successful court challenge, the BCTF spent approximately \$425,000 for political advertising before and during the 28-day election period.

The Director of Instruction/Human Resources in School District No. 5 (Southeast Kootenay) send an e-mail to all principals on April 23, 2009 advising them that political posters or information should not be displayed in school hallways, classrooms or on school grounds. The director further advised that materials pertaining to the Union could be displayed on assigned bulletin boards provided in each staff room. In Steeples Elementary School on or about May 1, 2009, two teachers posted materials related to the “When Will They Learn” political campaign outside their classroom doors in the hallways of the school. The classrooms were near the school entrance in a place where parents could easily see them. Shortly after the materials were posted, perhaps the same day, the principal directed the teachers to remove them from the classroom door and school hallway areas and to restrict their display to the staff room.

Early in May 2009, prior to the May 12 provincial election, a teacher from another school brought a grade 6 student to Parkland Middle School for transition to grade 7 classroom experience. The teacher wore a button which said “When Will They

Learn.” The principal at Parkland Middle School directed the teacher to remove the button. She complied. At about the same time, the acting principal at Pinewood Elementary School observed the same teacher wearing the “When Will They Learn” button. The acting principal did not advise the teacher to remove the button, as she did not understand that the e-mail from the Director of Instruction/Human resources did not refer to the wearing of buttons.

Also at Pinewood Elementary School, a student services teacher, who worked with individual and small groups of students in a small classroom, posted one side of the “When Will They Learn” poster outside of her classroom door and one side of the poster inside the classroom door. The teacher met with parents in her classroom regularly, and parents spoke to her about the poster. In particular, one parent asked about the special needs neglected message, and the teacher responded that the teachers were asking for more support for special needs students. After the poster had been displayed for approximately two weeks, the acting principle directed the teacher to remove it. The acting principal told the teacher that the political poster was not appropriate, and the teacher removed the poster from the classroom.

At Mount Baker Secondary School, the principal advised a teacher to remove a bumper sticker/postcard with the “When Will They Learn” political message from the window of her classroom facing into the hallway. The bumper sticker/postcard was located where parents entering the school could see it, as could students entering or leaving the classroom. The teacher complied with the instruction to remove the materials from the window.

At other schools in the School District, principals reported that the “When Will

They Learn” campaign materials were not present in the schools other than in the staff room or on union bulletin boards.

The Cranbrook and Fernie Teachers’ Association sent an e-mail to the Director of Instruction/Human Resources on May 1, 2009 advising the Director that the Association disagreed with the direction given to principals. The Association further stated that if the Districted continued with its direction to principals, a Step 3 grievance would be filed.

The Director replied by letter on May 4, 2009, reiterating the position of the District, citing previous arbitration awards and a court decision that addressed the issue of information posted in schools where students and their parents could see them. In the case of the schools where this issue had arisen, there were no teacher bulletin boards which parents could see—bulletin boards were in staff rooms.

The Association filed a grievance on May 5, 2009 regarding the direction to employees to remove materials from bulletin boards, classroom doors and to remove buttons they were wearing.

The parties attempted to resolve the grievance, and the BCTF referred the matter to arbitration, including my appointment.

## **BACKGROUND**

Before an examination of the parties’ positions and the analysis necessary to resolve this grievance, a brief review of the background of the disputes between the parties, including freedom of expression, is appropriate. In *Re British Columbia Teachers’ Federation and British Columbia Public School Employers’ Association* [2009] unreported, (the “Dorsey award”) Arbitrator Dorsey discussed these factors in

his decision on class size and composition, as did the British Columbia courts in decisions discussed below.

The provincial government granted teachers' organizations the right to bargain over a variety of subjects, including class size and composition and other workload issues in 1987. Previously, the BCTF had launched a constitutional challenge to the existing exclusion of teachers from full bargaining rights under the *Canadian Charter of Rights and Freedoms* ("the Charter"). Three rounds of bargaining followed from 1988 to 1994. Most collective agreements contained provisions regulating class size and composition, including language which recognized conditions specific to school districts or schools. A number of bargaining impasses led to strikes, interest arbitration awards or both.

In 1995 the province enacted legislation that replaced negotiations at the level of the school district with provincial bargaining between the BCTF and the BCPSEA. Initial rounds of provincial bargaining were difficult. Legislation barring strikes in education during a provincial election was passed in 1996. The two provincial parties signed their first collective agreement, with the assistance of a mediator in 1996. That agreement generally preserved local agreements, with the addition of some provincial language. The agreement included a provision for a review of all issues related to staffing of schools to a committee with representatives from the BCTF, the BCPSEA and the provincial government.

The review process produced data, but no agreement between the parties. The subsequent round of bargaining ended in an agreement between the BCTF and the provincial government, rather than the BCPSEA. Although the agreement provided for

no salary increase for teachers, but did cover ratios for non-enrolling teachers. The members of the BCPSEA rejected the agreement. The legislature enacted the settlement as part of a renewed collective agreement to run from July 1998 to June 2001. Implementation of the agreement was difficult, including a number of arbitrations.

Negotiations for a new collective agreement (the third round of province-wide negotiations) commenced in 2001. Teachers commenced limited job action in the fall, and the Minister of Labour directed the Labour Relations Board to designate essential services. When little progress was made in bargaining, the government passed legislation in January 2002 (Bill 27) that enacted outcomes for collective bargaining. It eliminated a number of local agreements, and mandated a wage increase and provided for a commission to recommend improvements in collective bargaining in education. The agreement expired in June 2004.

At the same time, the government enacted Bill 28 that excluded school organization, class size and composition and student and non-enrolling teacher ratios from collective bargaining. The act established arbitration to implement the legislation by May 2002. An award was issued despite the refusal of the BCTF to appear. The BCTF challenged the award successfully in the BC Supreme Court in a decision issued in January 2004. The provincial legislature then overturned the Court decision and reinstated the arbitration award effective July 1, 2002.

The BCTF launched a campaign criticizing the government's actions. Some the materials in the campaign were designed to be given to parents during parent-teacher meetings. Several school boards ordered that flyers be removed from teacher bulletin

boards in schools and directed teachers not to discuss class size issues in parent-teacher interviews or to make BCTF materials available to parents. The Union grieved these actions, and Arbitrator Munroe ruled that the school boards' actions violated the *Charter*.

The BCPSEA appealed the award to the Court of Appeal. After a thorough review of the application of the *Charter* to public school teachers, the Court sustained the award. The Supreme Court of Canada denied leave to appeal.

Continuing the pattern of litigation, the BCTF launched a constitutional challenge to Bill 27 and Bill 28. Other actions involved the determination of class sizes under the existing legislative framework. Ultimately, the challenge to Bill 27 and 28 was generally successful in a decision by the Supreme Court of British Columbia in April 2011.

The parties did not reach agreement on a new collective agreement in 2004. An impasse occurred in September 2005, followed by limited job action by teachers. The government responded by legislation extending the collective agreement to June 30, 2005. This action provoked a complete withdrawal of services, the appointment of an Industrial Inquiry commission to facilitate the next round of bargaining. The strike ended on October 24, 2005.

## **PREVIOUS DECISIONS**

The case before follows a series of disputes between these parties concerning the right of teachers, collectively or individually, to express their views on public issues in the province. Several of these earlier cases were part of the history of collective bargaining between the parties described above. The decisions have provided an



extensive body of jurisprudence by arbitrators, courts in British Columbia and the Supreme Court of Canada. The parties directed my attention to these decisions in the course of their argument. Each contained language regarding the rights of teachers to communicate their views in one of various locations.

In the summer and fall of 2004, the BCTF conducted a political campaign prior to the 2005 provincial election. As part of its campaign, the BCTF sought to purchase advertising space on the outside of buses operated by the Greater Vancouver Transportation Authority. When the Authority refused to accept political advertisements, the teachers and other organizations challenged that position in court. Eventually, the Supreme Court of Canada upheld the Court of Appeal and expressed its support for the placement of political advertisement on buses. See *Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295 (the “Greater Vancouver Transportation Authority” decision).

The first of the arbitration decisions was *Re British Columbia Public School Employers’ Assn. v. British Columbia Teachers’ Federation* [2004] 129 L.A.C. (4<sup>th</sup>) 245, [2004] B.C.C.A.A.A. No. 82 (Munroe) (“the Munroe award”). After the government imposed a collective agreement in 2002, teachers protested in a variety of ways. Some school boards ordered teachers to refrain from several forms of political activity in schools. The Union grieved these orders. Arbitrator Munroe heard the grievances and dealt with a number of issues arising from school boards’ directions to teachers not to engage in political activity on school property. In particular, relevant to this case, teachers were told not to post certain materials on teacher bulletin boards in schools where students and parents might see them. School boards further directed teachers that

class sizes and collective bargaining issues were not to be discussed parent-teacher interviews and that BCTF documents on these subjects should not be provided to parents. The arbitrator upheld the teachers' grievance. The BCPSEA appealed the award to the BC Court of Appeal. In *Re British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation* [2005] B.C.J. No. 1719, 257 D.L.R. (4<sup>th</sup>) 385 ("the Court of Appeal decision"), the Court upheld the Munroe award. The Supreme Court of Canada denied leave to appeal in 2005.

Another case determined whether teachers could communicate their views regarding a provincial standardized test (the Foundation Skills Assessment, FSA). In 2006, some school boards prohibited teachers from sending home pamphlets in envelopes for parents opposing the use of the FSA. Again, the Union grieved and Arbitrator Kinzie upheld its grievance in *Re British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation (Pamphlet Grievance)*, [2008] B.C.C.A.A.A. No. 51, 172 L.A.C. (4<sup>th</sup>) 299 ("the Kinzie award"). In his award, the arbitrator concluded that the tests in question were clearly an educational matter, and some teachers had a different view from the Ministry of Education concerning the value of these tests.

Arbitrator Steeves reviewed the law regarding teachers' freedom of expression in 2010 in a 2010 case concerning the right of a teacher to post a "Staff Representative" sign outside of the door to her classroom. In was a case arising from a teacher's right to post a sign outside of her classroom door stating "Staff Representative." The Union grieved an order to remove the sign, and Arbitrator Steeves concluded that the order violated S. 2(b) of the *Charter*. *Re British Columbia Public School Employers' Assn. v.*

*British Columbia Teachers' Federation (Head Grievance)* [2010] B.C.A.A.A. No. 32, 193 L.A.C. (4<sup>th</sup>) 65 (“the Steeves award”).

The most recent case in the series arose when a school board instructed teachers to remove black armbands worn as an expression of protest against the requirement that they administer the FSA. The Union grieved the order, and Arbitrator Burke denied the grievance in *Re British Columbia School Employers Association/ School District No. 73 (Kamloops) and British Columbia Teachers' Federations/Kamloops Thompson Teachers Association (Freedom of Expression)* [2011] unreported, (“the Burke award”)

The Employer presented an award dated January 2009 *Re British Columbia Employers' Association (School District No. 39 (Vancouver)) and British Columbia Teachers' Federation (Vancouver Teachers' Federation/Vancouver Elementary School Teachers' Association)* (Hall)... Counsel for the Union objected to consideration of the award on the grounds that it resulted from an expedited arbitration. Article 10(i) of the collective agreement between the party's states that expedited arbitration awards are to have “no precedential value.” The article also provides that there should be no reasons for judgment “beyond those which the arbitrator deems appropriate to convey the decision.” The award is clearly marked as expedited, and contains 13 pages of text explaining the reasons for the conclusion the arbitrator reached. It contains no reference to the collective agreement. Based on this limited evidence, I conclude that the award should be governed by Article 10(i). Therefore, it cannot be entered in this case to support either party's argument.

## **PARTIES' POSITIONS**

The Union argued that its case falls under two previous decisions on political

activity by teachers, the Munroe award and the Court of Appeal decision. The Union position was that the direction to teachers in Cranbrook to remove materials they had posted and buttons they were wearing violated their rights to freedom of expression under the *Charter*. Evidence in the agreed statement of facts did not include any disruption in schools caused by the display of the materials in question. Nor was there evidence of any complaints by parents or confusion among students. The intended audience for these materials was the parents and other members of the school community who came to the school or had contact with the teachers.

Section 2 of the *Charter* states:

Everyone has the following fundamental freedoms

- (a) freedom of conscience and religion,
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication,
- (c) freedom of peaceful assembly; and
- (d) freedom of association

The Supreme Court of Canada, in *Retail, Wholesale and Department Store Union, Local 580 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156 (“*Pepsi-Cola*”) expressed an expansive view of freedom of expression, including advocating change and improving the wider social, political and economic environment. In *Irwin Toy Ltd. v. Québec (Attorney General)* [1989] 1 S.C.R. 927 (“*Irwin Toy*”), the Court stated that the first step in determining whether freedom of expression has been limited, contrary to the *Charter*, is to examine whether the conduct in question is protected by s. 2(b) of the *Charter*. The second step is to determine whether the purpose or effect of the government action is to restrict freedom of expression.

British Columbia case law supports the protection of teachers’ freedom of

expression in a school setting. The 2004 campaign had various components, including flyers critical of government action respecting class sizes and composition. At least some school boards advised teachers that they could not post these materials on teacher bulletin boards in areas within the school where students and their parents would have access. School boards also advised teachers that they were not to distribute certain documents to parents during parent-teacher interviews or otherwise on school property. The Union grieved these directives on the grounds that they violated the teachers' freedom of expression under s. 2(b) of the *Charter*. Arbitrator Munroe ruled that the *Charter* applied to school boards and that the directives did restrict teachers' freedom of expression under s. 2(b) of the *Charter*; that the directives were not saved by S. 1 of the *Charter* (the Munroe award). As noted above, the Court of Appeal upheld the award, and the Supreme Court of Canada denied leave to appeal.

Subsequently, in the Kinzie award, the arbitrator concluded that the standardized tests in question were clearly an educational matter, and some teachers had a different view from the Ministry of Education concerning the value of these tests to students' education. He stated (at para 100)

In my view, discussion on such issues between teachers and administrators, teachers and parents, and administrators and parents further the values of democratic discourse and truth finding which underlie the freedom of expression.

He cited the Court of Appeal decision supporting the value of political expression on school grounds. He found that the employer's refusal to permit teachers to send the pamphlets home with students violated the teachers' freedom of expression under s. 2(b) of the *Charter*. He further concluded (at para. 129):

Neither the method 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.

The final precedent cited in teachers' freedom of expression was Steeves award, a case arising from a teacher's right to post a sign outside of her classroom door stating "Staff Representative." The arbitrator concluded that the order to remove the sign was a violation of the teacher's Section 2(b) rights under the Charter.

In the Union's view, the employer in this case had conceded that the instruction to teachers to remove their political materials and buttons violated s. 2(b) of the *Charter*. Therefore, the Employer bore the burden of justifying its actions under s. 1 of the *Charter*.

Section 1 of the *Charter* states:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society

If an infringement of S. 2(b) of the *Charter* has occurred, the courts turn to s. 1 to determine whether the infringement is justified "in a free and democratic society." The test applied in such circumstances were stated by the Supreme Court of Canada in *R. v. Oakes*, [1986] 1 S.C.R. 103 (*Oakes*).

Stated briefly, analytical framework in *Oakes* is that the party seeking to uphold a limitation on freedom of expression must demonstrate that:

1. There is a pressing and substantial objective,
2. The means are proportional;
  - a) The means must be rationally connected to the objective;
  - b) The means should impair the right as little as possible; and
  - c) There must be proportionality between the infringement and the objective.

Chief Justice Dickson, writing for the Court in *Oakes*, expanded on the meaning of those principles. The Union pointed out that he stated that: limits on the rights and

freedoms in the Charter are exceptions to their general guarantee' (at para. 66).

The next step in the analysis of the principles governing this case is the application of s.1 of the *Charter*. The Union pointed to the contextual factors the Court of Appeal identified in its decision involving these parties. These factors include:

- (a) The nature of the harm and the inability to measure it;
- (b) The vulnerability of the group;
- (c) That group's subjective fears and apprehension of harm;
- (d) The nature of the infringed activity.

The Court noted that two of these factors were relevant to the case before them: the nature of the harm and the nature of the infringed activity.

In the case before me, the Union argued that it is reasonable to infer that teachers would fear discipline if they failed to follow the employer's directive. They followed the rule of "work now and grieve later." Consequently, none was disciplined, but their freedom of expression was restricted when the order was issued.

The nature of the activity is also important. The Union asserted that the expression in this case was political expression, as part of the BCTF "When Will They Learn" campaign. Such expression is part of the core values protected by the *Charter*, a principle supported by the Court of Appeal in the case on an earlier dispute over political expression in schools. The Union further argued that the political expression in question was non-partisan, and that it followed the provincial government's removal collective agreement provisions covering class size and composition from the parties' collective agreement. While some materials in the campaign were critical of the provincial government, they did not endorse any political party. The "When Will They Learn" campaign was launched before the 2008 municipal elections, when voters choose school trustees. Candidates for trustee positions are not necessarily identified with a party, so a

non-partisan message was appropriate. The Court of Appeal commented favorably on the value of discussion of class size and composition and the posting of materials on bulletin boards. Discussions on those subjects would enhance public confidence in the school system. “Partisan” is defined in terms of allegiance to a party, which does not describe the “When Will They Learn” campaign. The decision of this board should not be based on the propriety of partisan political literature in schools.

The Supreme Court of Canada has stated that the first step of the *Oakes* test is to determine if the objective is “of sufficient importance to warrant overriding a constitutionally protected right or freedom” (at para 69). The Court stated that the objective should relate to concerns which “are pressing and substantial in a free and democratic society before it can be characterized a sufficiently important” (at para 69).

The Employer identified five objectives as justification for the limitation on the teachers’ actions in this case.

- a) Schools must be politically neutral.
- b) Prohibition of partisan political messages in public areas is necessary for the maintenance of public confidence in the school system.
- c) Students must be insulated from partisan political messages while at school.
- d) Prohibition of partisan political messages displayed by teachers is needed to ensure the professionalism of the teaching staff.
- e) Regulation of partisan buttons is a necessary exercise of a principal’s authority to manage and organize schools.

The Union position on these points was first that they relate to partisan political activity. As stated above, the Union declared that these materials were non-partisan. In addition, the Court of Appeal supported the duty of both a school board and teachers to “ensure public schools are and seen to be places open and receptive to a wide spectrum of views, particularly in political discourse (at para 59). The Union agreed that protecting children from hateful or discriminatory speech or indoctrination would be a pressing and



substantial objective, but the materials in this case did not fall into that category. The Court further commented that teacher professionalism is regulated by the B.C. College of Teachers and the legislation under which it operates. Teacher professionalism is not a proper objective for the school board to support its case. Finally, the Union acknowledged that principals have authority to manage school property, but the principals' actions in this case were overbroad.

The next stage of the *Oakes* analysis is that the employer must demonstrate a rational connection between the objectives and the means used to achieve them. In *Oakes*, the Supreme Court described the rational connection as follows:

. . . the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective (at para 70).

In the Union's view, the Employer sought to exclude partisan politics from schools. The Union denied that its materials were partisan. The directives were not rationally connected to the objective of protecting students from indoctrination and maintaining public confidence in the school system. In previous cases between these parties, Arbitrator Munroe ruled that the posting of materials on bulletin boards did not interfere with the operation of the school. The Kinzie award found that forbidding the distribution of pamphlets discussing the FSA was not rationally connected to the employer's concerns. Similarly, Arbitrator Steeves found that the employer had not demonstrated that the removal of the "staff representative" sign was reasonably and demonstrably justified. The Ontario Labour Relations Board reached a similar conclusion in *Re Hamilton-Wentworth District School Board v. Elementary Teachers' Federation of Ontario* [2002] O.L.R.D. No 2676 (*Hamilton-Wentworth*).

Overall, the Union argued that the lack of any evidence of harm when the materials and buttons were present in the schools demonstrates that limitation on freedom of expression was not rationally connected to a pressing and substantial objective.

The second step of the proportionality test in *Oakes* is that the “means, even if rationally connected to the objective . . . should impair ‘as little as possible’ the right or freedom in question” (at para 70).

The Union argued that the employer’s direction did not meet the minimal impairment test in *Oakes*. The Court of Appeal found that school boards could have used lesser means to minimize any disruption in the operation of the schools short of a complete ban on the use of pamphlets distributed to parents (at para 67). Similar measures were open to the school district in this case.

The Union further argued that when considering the restriction on freedom of expression, the correct test is to examine the expression in question. It is not correct to consider other avenues of expression available to teachers as evidence of the expression in question was minimally impaired. See the Court of Appeal, *supra*. In *Pepsi-Cola* the Supreme Court upheld the right of a union to engage in secondary picketing although it had the right to picket at primary locations. A similar principle applies in this case.

In the Burke award, the arbitrator considered other means of expression as part of her S. 1 analysis. The Union disagrees with that analysis, which the BC Court of Appeal rejected in its 2005 decision, citing *Pepsi-Cola* and *Re Committee for the Commonwealth of Canada v. Canada* [1911] 1 S.C.R. 139. The Ontario Labour Relations Board reached a similar conclusion under the *Ontario Labour Relations Act* in *Hamilton-Wentworth*. Arbitrator Steeves found that the right of teachers to post materials on bulletin boards did

not extinguish the right of a teacher to post a sign outside her classroom.

The third component of the proportionality test in *Oakes* is the balance between the deleterious and salutary effects of the ban. The Supreme Court has emphasized the importance of *Charter* values in *Oakes*, so the Union argued that any assessment of the effects of a restriction on freedom of expression must acknowledge the importance of the right in question. In other cases involving teachers, the Court has restricted freedom of expression when the expression was hateful and discriminatory, which was itself contrary to *Charter* values. In the present case, no evidence of adverse consequences from the wearing of buttons and posting of materials in the school was presented. The materials themselves did not offend *Charter* values. In *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, the Supreme Court found that the deleterious effects of a prohibition against a student wearing a kirpan outweighed its salutary effects.

In the case at issue, the ban denied parents access to information on educational issues and sent teachers the message that their views were not valued within the school, while no deleterious effects were demonstrated.

The Employer argument began with a discussion of the BCTF political campaign, which it asserted was obviously directed against the Liberal government. It took issue with the accuracy of the themes in the teachers' materials. For example, the Employer did not concede that special needs students had been neglected. The parties participated in a process by which class size issues were addressed, culminating in the Dorsey award cited above. The assertion that 177 schools had been closed did not acknowledge that new schools had been opened or enrolment declines that had prompted some closures. The BCTF initially launched its "When Will They Learn" campaign in the fall of 2008,

prior to school trustee elections. The campaign was re-launched in January 2009 with television ads in several languages, and a video on YouTube. The video was called “May 12-Time to Make a Choice.” Other elements of the campaign did not mention any political party by name, but did state, “things are getting worse for BC students. When the provincial government won’t learn, how will our kids?”

The 2008-2009 BCTF political campaign was another event in a history of political advertising by the teachers’ organization, which resulted in litigation relevant to this case. In the fall and summer of 2004, the BCTF staged an advertising campaign in anticipation of the 2005 provincial election. The Union sought to purchase advertisements on the outside of buses operated by the Greater Vancouver Transportation Authority. The advertisements referred to fewer teachers, school closures and a statement: “Our students. Your kids. We’re speaking out for.” The Transportation Authority refused to post the advertisements because they violated a policy barring advertisements that were political (broadly defined). The Supreme Court of British Columbia heard an appeal from the Canadian Federation of Students and the BCTF.

In *Re Greater Vancouver Transportation Authority Canadian Federation of Students--British Columbia* Component [2009] 2 S.C.R. 295, the Court discussed at length the protections that should be offered to political advertising under the *Charter*. Thus, the Court accepted that the BCTF advertising was political.

During this same period, the provincial government passed legislation in 2008 to limit third party advertising in the pre-campaign period (i.e. the 60 days before the 28 day campaign period). The BCTF and other unions challenged the constitutionality of the third party spending limits. The unions alleged that the limits breached s. 2(b) of the

*Charter*. The Court of Appeal ruled that curtailing third parties' expression on political issues when candidates and political parties were not restricted did not minimally impair the right to freedom of expression. The "When Will They Learn" campaign was captured by the legislation, and it was treated as political expression by the court. The Employer argued that the campaign was a partisan political campaign that sought to defeat the incumbent Liberal government. If the "When Will They Learn" campaign was merely an expression of opinion on educational issues by the BCTF, the electoral spending limits would not have applied.

According to the Agreed Statement of Facts, a number of teachers brought BCTF campaign materials into schools. In all cases, when principals instructed them to remove the materials, they complied. In one case, involving a teacher wearing a "When Will They Learn?" button, the principal did not react because she did not understand that the e-mail referred to buttons. In one case a parent asked about the message referring to neglect of special needs, and the teacher responded that teachers were asking for more support for special needs students. In the majority of schools in the District, principals reported that the campaign materials were not present in the schools other than in staff rooms or on union bulletin boards.

The Employer pointed to the legislative framework for the operation of schools in British Columbia, in particular the *School Act* and Regulations issued under the *Act*. In general terms, the *School Act* sets out management rights for School Boards and the officials they appoint to administer schools. The duties of teachers are stated in terms of providing teaching and other educational services as required by School Boards.

Beyond the legislation, the courts have commented on the nature of the school

environment, the power of teachers over students in that environment, the vulnerability of students to their teachers and the mandate of teachers, schools and school boards. In *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825, the Supreme Court of Canada commented on the importance of teachers in integrity of the school system, their positions of trust and influence over their students. Teachers are seen to be the medium of the education message by the community, both in and outside of the classroom. The Employer drew from this decision the conclusion that public schools and their teachers must be free of preference for any one point of view on religion, politics, ethnicity and other controversial issues. Preference for a political point of view can create an environment of exclusion and intimidation for students and parents who may disagree.

American decisions support the neutrality of teachers in similar terms. In *California Teachers Association v. Governing Board of San Diego Unified School District*, 45 Cal App. 4<sup>th</sup> 1383 (1996) , ( a case that involved teachers wearing buttons) the court stated that “the only practical means of dissociating a school from political controversy is to prohibit teachers from engaging in political advocacy during instructional activities” (at p. 6).

In *Re British Columbia Teachers’ Federation and Sooke Teach4rs’ Association and British Columbia Public School employers’ Association and the Board of Education of School District No. 62 (Sooke) (Kathryn Sihota—DART Assessment—Professional Autonomy and Discipline)*. (2009) unreported (Sooke award), Arbitrator Dorsey examined the status of teachers as employees. The issue was the right of the school district to discipline a teacher who refused to administer a district-wide assessment tool. The arbitrator concluded employees, teachers do not have “unfettered discretion to

comply with or refuse to comply with employer policies or directions” that relate to their professional duties (at para 144).

In conclusion for this section of the Employer’s argument, counsel emphasized the line of teachers to the integrity of the school system; the role of teachers as a significant part of the “unofficial curriculum” because of their status as the medium of instruction; the importance of the perceived integrity of teachers to the integrity of the school system; the role of teachers in molding young minds; the importance of teachers to public confidence in the school system and the positions of trust and confidence of teachers. In addition, children are impressionable and “vulnerable” to messages from their teachers. Teachers are subject to direction from their employer, and their exercise of their duties must not frustrate the duties and rules assigned by the employer and statutes and regulations. Thus, teachers must refrain from political advocacy while at school to avoid controversy and to disassociate the school from the views expressed.

The Employer conceded that the teachers’ activity in this case fell under s. 2(b) of the *Charter*. Starting with the Munroe award, the rights of teachers to express their concerns about class sizes to parents during parent-teacher interviews, including handing out related information to parents, have been reviewed by arbitrators and the courts. Arbitrator Munroe held that the expression of views in parent-teacher interviews was protected by S. 2(b), and the school board’s prohibition did not meet the test of s. 1 of the *Charter*. See also the Kinzie and Steeves awards. Thus, the Employer in this case relies on s. 1 of the *Charter*.

The Employer position was that the order issued by the Director of Instruction/Human Resources on April 23, 2009 was a reasonable limit on teachers’

“partisan political expressions” in schools under s. 1 of the *Charter*. There was no issue that the April 23 e-mail met the test of “prescribed by law” according to the provisions of the *School Act* and the School Regulation. The Court of Appeal decision upheld the Munroe award on this point.

Similarly, the Employer accepted that it bore the onus of proving that the restriction on freedom was justified under s. 1.

The starting point for a s. 1 analysis is *Oakes*, plus later decisions expanding on the *Oakes* principles. As the Union stated in its argument, under this analysis, the adjudicator must consider the two-step examination of the evidence.

The Employer also relied on the contextual factors contained in the Court of Appeal decision, which the Union had raised previously, in particular the nature of the harm and the inability to measure it and the vulnerability of the group. In addition, the Court of Appeal identified another contextual factor as follows: “Some deference is owed to the School Boards’ judgment because they are elected by members of the community they serve to operate public schools” (para 52).

In discussing the nature of the harm test, the Court of Appeal did not “discern any potential harm from the posting of materials on a school bulletin board” (para 50). The distinction the Employer drew between the facts of the Court of Appeal and this case was that the BCTF materials were partisan as part of its campaign to defeat the Liberal government. The materials were not part of parent-teacher interviews or any connection between the message and specific educational issues in the schools in question. The Employer argued that the “main exposure” for the ‘expression’ was students, and using “captive children” to present the Union’s political message in regard to the provincial



government harmed the integrity of the school system.

The second contextual factor was the vulnerability of the group. The BCTF political message was general to the province, not directed at particular schools. None the less, students could not be expected to distinguish between alleged problems with the school system and the circumstances of their particular schools. Parents too are vulnerable to messages delivered by teachers who are viewed as a credible source of information about education. In the *Ross* decision, *supra*, the Supreme Court of Canada noted the vulnerability of young children to the messages conveyed by their teachers, at para 82.

After considering the contextual factors, the *Oakes* test should be applied, beginning with the school board's pressing and substantial objectives. The first such objective is to maintain political neutrality in schools. School districts must avoid any appearance of support for political parties or political issues. When a teacher advocates political views or opposition to a party, this intrudes on the political neutrality of a school. To permit materials in support of one political position or party will invite requests from other groups to exercise the same right, including teachers who may oppose the positions of the BCTF.

The principle of political neutrality of public employees has been accepted by the courts in other jurisdictions. In *Fraser v. Nova Scotia (Attorney General)*, [1986] N.S.J. No. 124 (S.C.), the provincial government sought to limit the political activities of civil servants. The goal of the statute in question was to ensure a politically neutral and impartial civil service, an objective the Court endorsed (at p. 10).

The Supreme Court of Canada concluded that legislation that restricted the rights

of individual public servants covered by the *Charter* was justified under s. 1 in *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69, noting that the importance of neutrality of the civil service was not contested in that case (para 57). The Ontario High Court of Justice in *Rheaume v. Ontario (Attorney-General)* [1989] O.M. No. 1931 endorsed a statute preventing municipal employees from running for political office on the grounds that the restriction on employees was reasonable under s. 1 of the *Charter*. The U.S. District Court for the Southern District of New York in *Weingarten, et al. v. Board of Education of the City School District of the City of New York et al.*, 2008 U.S. Dist. LEXIS 83256 (*Weingarten*) upheld the right of teachers to place candidate-related campaign materials on union bulletin boards, but not to wear political campaign buttons related to the 2008 U.S. presidential election in school, deferring to the judgment of the school board on the issue of the buttons.

The Public Service Commission of Canada lists a number of political activities in which federal public servants cannot engage, including the distribution of campaign literature in political elections. The *Public Service Employment Act* defines “political activity” broadly, to include any activity in support of or in opposition to a political party.

The British Columbia government addresses the issue of political neutrality of its employees. The most relevant provision in the Standards of Conduct states that “partisan politics are not to be introduced into the workplace.”

The second pressing and substantial objective the Employer argued was the maintenance of public confidence in the school system. The primary authority for this proposition is the Court of Appeal decision, *supra*. The Court stated at para 59:

It may also be seen as the School Board’s duty, and indeed as teachers’ duty, to ensure public schools are and are seen to be places open and receptive to a wide spectrum of views, particularly in political discourse. In my view, these objectives are sufficiently important to justify some limit on teacher’s freedom

of expression if the other steps of the Oakes test are met.

The Court of Appeal considered the posting of materials on teacher bulletin boards in areas where students and their parents might see them. The subject matter of the materials was the BCTF view of government policies on class size and other educational matters which might have been relevant to individual students and their parents. The Court stated at para 50:

However, while it may be reasonable to infer that the routine discussion of class sizes contemplated by the BCTF to advance its political agenda might to undermine public trust in the administration of the school system, 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 confidence in the school system. Like the arbitrator, I cannot discern any potential harm from the posting of materials on a school bulletin board.

The Employer argued that the fundamental distinction in this case from the facts in the Court of Appeal was the nature of the materials. The buttons and other materials in this case referred to a broad political campaign prior to a provincial election. The materials reviewed by Arbitrator Munroe and the Court of Appeal referred to specific education issues that could affect individual students and would thereby interest their parents.

The third pressing and substantial objective of the Employer was its desire to insulate students from partisan political messages while in school. Students could see the materials in this case. Since teachers are in positions of authority and students are a captive audience, school boards want to avoid distractions that political messages from teachers could cause. Arbitrator Kinzie recognized this concern in his decision on the provincial testing program. He required that materials be distributed to parents in sealed envelopes so that students would be sheltered from any political message. In her award

dealing with teachers wearing armbands, Arbitrator Burke accepted the employer's argument about the vulnerability of students to political messages from teachers.

The fourth objective raised by the Employer is the need to ensure teachers' professionalism. The B.C. College of Teachers recognizes this objective in its Teachers Standards for the Education, Competence and Professional Conduct of Educators in British Columbia, which states:

Educators are responsible for fostering the emotional, esthetic, intellectual, physical, social and vocational development of students. They are responsible for the emotional and physical safety of students. Educators treat students with respect and dignity. Educators respect the diversity in their classrooms, schools and communities. Educators have a privileged position of power and trust. They respect confidentiality unless disclosure is required by law. Educators do not abuse or exploit students or minors for personal, sexual, ideological, material or other advantage.

In the view of the Employer, teachers should not use their position to advance a political agenda.

While the Employer in the Court of Appeal case did not argue the issue of teacher professionalism, the arbitrator and Court discussed it in their decisions. The Court agreed with the arbitrator's view that teacher professionalism is linked to the maintenance of public confidence in the school system. However, the Court did note that the College of Teachers receives complaints about teachers' professional conduct.

The fifth pressing and substantial objective the school district sought was the maintenance of the right of principals to manage and organize schools. That right is enshrined in the *School Act* in general language that confers on school boards the responsibility for operating schools and principals the parallel responsibility for the schools they manage. The *School Act* gives school boards the right to make rules

respecting the operation, administration and management of schools they operate. Principles have the right to exercise professional judgment in managing schools. Arbitrator Kinzie recognized that the employer had the right to control what was sent home to parents through students at school. Arbitrator Steeves accepted that the employer's objective in removing a sign placed outside a teacher's office was the exercise of the principal's authority to manage school property. He agreed that the employer had met the first *Oakes* test, i.e., the pressing and substantial objective to warrant overriding a *Charter* right.

The second stage in the *Oakes* analysis the Employer must meet is the existence of a rational connection between the objectives and the means used to achieve them. This is the first of the three-part proportionality issue under *Oakes*. As the Supreme Court of Canada stated in *Health Services and Support-Facilities Subsector Bargaining Association v. British Columbia*, 2007 SCC 27, at para 148:

the government must establish on the balance of probabilities, that the means adopted in the Act are rationally connected to achieving its pressing and substantial objectives.

The Employer's position was that there was a rational connection between the order to remove the political materials and the pressing and substantial objectives to be achieved, i.e. the need of the School District to regulate the schools, maintenance of political neutrality, etc. The Steeves award commented on the right of the principal to regulate the school property.

The second *Oakes* test is the requirement that any action to limit free expression should impair that right no more than necessary to meet the objective sought. The Court of Appeal, for example, found that preventing teachers from discussing class sizes and

specialist services with parents did not the minimal impairment test (Court of Appeal decision, para 68). By contrast, the limitations in this case are minimal in that they apply only inside schools. All other fora are available to teachers. The message limited in this case was issued before a provincial election and sought to defeat the incumbent government. The teachers' message had no necessary relevance to any school in the District. The Court of Appeal decision supported the free discussion of public issues by teachers in schools. However, the Employer pointed out that the Court's decision was in the context of parent-teacher meetings or political materials on teacher bulletin boards. Neither circumstance applies in this case.

In *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 the Supreme Court of Canada reviewed legislation which restricted the political activities of public servants. The Court accepted the objective of preserving the neutrality of the civil service. The Court found that the statute failed the minimal impairment test because it prohibited all political activity without distinction as to the type of work the civil servants performed. The limits the Court reviewed were much greater than those in the present case. The Employer has not sought to restrict many political activities by teachers. Instead the dispute arose over activity during working time when a captive audience was present. Arbitrator Burke applied this rule by stating that the limits in her case applied only with students, with other forms available for free speech (at pp. 62-63). In this case, teachers were not seeking to discuss educational issues with parents. Rather they were focusing on students first and only incidentally on parents.

Moreover, the parties in this case have negotiated provisions in their collective agreement covering the posting of Union materials. The collective agreement gives the

Union the right to post its materials on bulletin boards provided in each staff room in each school building. They could have negotiated broader language on expression. Again Arbitrator Burke supported this position in her award, at p. 67, pointing out that teachers had “many other forums that are available to them, including parent/teacher interviews, media outlets; School Board and PAC meetings.”

In her conclusion, counsel for the Employer re-affirmed her position that the materials in question were partisan. Thus, the s. 1 analysis should be straightforward. If the materials were not partisan, then the other objectives should determine the outcome. Three other awards, Kinzie, Burke and Hall, all reached a similar conclusion after the Court of Appeal decision.

## **ANALYSIS**

Both parties made numerous references to the earlier cases in which they had litigated the scope of freedom of expression by teachers. It is appropriate to begin the analysis with a review of the principles governing freedom of expression by teachers the courts and arbitrators have established.

The Supreme Court of Canada has addressed the issue of freedom of expression on many occasions since the *Charter* took effect. Overall, the Court emphasizes the broad protections that the Charter confers on citizens affected by actions of government and its agencies. The earliest case cited to me was *Irwin Toy, supra*. The case arose from a challenge to Quebec consumer protection legislation which prohibited commercial advertising directed at persons under the age of 13. The Court set out the principles for analyzing alleged violations of the guarantee of freedom of expression at para 55. The first step in the analysis is to determine whether the activity is protected by the guarantee.

The exceptions, not relevant in this case, are activity which does not convey meaning or conveys meaning through a violent form of expression. If the activity does fall within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action was to restrict freedom of expression. The Court found that the government's purpose in restricting advertising were covered by s. 2(b) of the *Charter* and had to be justified under s. 1 of the *Charter*. The Court then applied the *Oakes* test, on which both parties relied in the case before me.

A second case on which BC arbitrators and jurists have based their opinions is *Pepsi-Cola, supra*. That case involved secondary picketing and was cited in the Steeves award (at para 38). At para 32 of *Pepsi-Cola*, the Court stated:

The core values which free expression promotes include self-fulfilment, participation in social and political decision making, and the communal exchange of ideas. Free speech protects human dignity and the right to think and reflect freely on one's circumstances and condition. It allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environments.

The Court ruled that picketing is a form of expression and entitled to protection under the *Charter*, although it can be regulated by the courts or legislation.

The point of departure for analyses of restrictions on freedom of expression for teachers is the Munroe award, *supra*. All arbitrations following the Munroe award have used his analysis as the starting point for their conclusions. See the Kinzie award, *supra*, the Burke award, *supra*, the Steeves award, *supra*. Some of the points before the arbitrator in Munroe are now settled law. The parties agreed that teachers have rights of free expression protected by s. 2(b) of the *Charter*. The Employer agreed that its actions had restricted those rights and based its case on the exception contained in s. 1 of the



*Charter*. The Employer agreed that the purpose of the school board's instructions were to restrict teachers' freedom of expression and based its case on s. 1. A number of forms of expression by teachers in the workplace, including posters on union bulletin boards (Munroe), signs outside of classroom doors (Steeves), discussions in parent-teacher meetings (Munroe) and notes sent home to parents with students in sealed envelopes (Kinzie) are now accepted forms of freedom of expression by teachers. The conclusions in the cases just cited all concerned political materials related to educational policy or a decision by a teacher to identify herself as a union representative.

The arbitrator's conclusions in the Munroe decision at para 49 are relevant to this case:

Those of the teachers who chose to do so, were intending, as teachers in their work environment, to express themselves on educational issues, either by posting flyers on what the Statement of Case calls teachers' bulletin boards (although in areas of the schools where parents and students have access), or by handing out materials during parent-teacher interviews. The issues had arisen as part of the collective bargaining between the BCPSEA and the BCTF, and ultimately in the context of the provincial government's legislative intervention in collective bargaining, but that is simply to state the context in which the communication was intended to occur and in which the School Boards' prohibition was promulgated; it does not provide a justification for concluding that Section 2(b) of the Charter was not engaged at all. In my view, based on the authorities, if the School Board's prohibition can be justified, it is not by the diminution of the meaning of freedom of expression in Section 2(b) of the Charter, but rather under Section 1 . . . .

In its 2005 decision, the Court of Appeal set out the principles to govern this subject in its review of the Munroe award. The Court sustained the arbitrator's ruling that questions about the freedom of expression should be considered under s. 1 of the *Charter*, not by limiting the scope of s. 2(b). In particular, the Madame Justice Huddart stated at para. 34:

In my view, the arbitrator correctly decided the impugned directives restrict

content. If they did not, and it became necessary to decide whether the forums--parent-teacher interviews and teacher bulletin boards--invoke the values underlying the guarantee, it seems self-evident that discussion of political issues relevant to school administration with parents or posting information about those issues on school bulletin boards fosters political and social decision-making and thereby furthers at least one of the values underlying s. 2(b). . . .

Madame Justice Huddart further stated (referring to *Fraser v. Public Service Staff Relations Board*, [1985] 2 S.C.R. 455) at para 65:

. . . as with public servants in *Fraser*, 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 opinions just because they step on to school grounds. School grounds are public property where political expression must be valued and given its place.

Taken together, these authorities stand for a high level of protection for freedom of expression under the *Charter*. Exercise of this right is regarded as a fundamental element of Canadian democracy, and restrictions are possible, but not easily justified. Furthermore, teachers are not deprived of this right by virtue of their position as employees of school boards or the mere fact that the expression occurs in their workplaces. Their rights extend to the discussion of educational policy issues in the contest of a provincial election.

Counsel for the Employer argued vigorously that the teachers’ materials, including their buttons, first, were political. I have no trouble accepting that position. In fact, the Union agreed with that proposition. Evidence appended to the Agreed Statement of Facts contained statements by the then president of the BCTF that the Union spends substantial funds in political advertising, in part because it does not affiliate to political parties or contribute to them. The Union has established its right (and that of other organizations wishing to influence public opinion) to use purchase advertisements on transit buses, *Greater Vancouver Transportation Authority, supra*. As the Court stated at

para 18:

The objective of the BCTF in seeking to post this advertisement was to increase public awareness of changes in the public education system which the BCTF was concerned about and to express disapproval of those changes, in advance of the provincial election of May 17, 2005.

The Transportation Authority appealed the decision to the appealed the decision to the Supreme Court of Canada, (*Greater Vancouver Transportation Authority v. Canadian Federation of Students—British Columbia Component*, [2009] 2 S.C.R. 295) which decided that the Union’s s. 2(b) rights had been infringed. It then applied a s. 1 analysis. In brief, the Court ruled that restrictions on advertising imposed by the Transportation Authority failed to minimize the impairment of political speech and placed an “unjustifiable limit” on the respondents right under s. 2(b).

As the Employer pointed out, the “When Will They Learn” campaign fell under the definition of “election advertising,” so it was affected by a provision of the *Election Act* that imposed spending limits on all third parties, including groups and individuals, in the 60 days prior to the election campaign period. The BCTF challenged that limitation as an infringement of its s. 2(b) rights.

The challenge succeeded before the Supreme Court of British Columbia (*British Columbia Teachers’ Federation v. British Columbia (Attorney General)* [2009] B.C.J. No. 619, basically on the grounds that the restrictions were overly broad and thus were not justified under s. 1 of the *Charter*. In reaching his conclusion, Mr. Justice Cole made a number of observations relevant to this case. The plaintiff unions argued that it was “virtually impossible to separate issues relating to collective bargaining from those relating to an election’ (at para. 78). The Court rejected this argument on the grounds that unions do not have a constitutional right to advertise regarding collective bargaining

issues. At para 244, Justice Cole stated:

At its core, election advertising is an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate. It includes an advertising message that takes a position on an issue with which a registered political party or a candidate is associated, commonly referred to as issue advertising.

The Employer pointed out that the materials at issue in the electoral spending case were the same as those that gave rise to the case before me.

After reviewing the authorities and the parties' positions on this point, I conclude that the advertising in the schools was not partisan. In essence, the Employer has sought to re-characterize materials that were clearly political into partisan materials because they were distributed prior to an election, either municipal or provincial.

The materials that led to the grievance were very succinct, typical of short statements that often occur in political campaigns. In other words, the expressive content was modest. The dictionary definition of "partisan" cited by the Union refers to an adherent to a party or position (a noun) or characteristic of a partisan (an adjective). In other words, there should be a link to a party or some political organization. The materials presented were issue advertisements. In other words, they addressed educational issues, not broader political philosophies or policies. They did appear in conjunction with municipal or provincial elections, but they did not mention a political party, let alone endorse one. The longest brochure submitted to me stated: "May 12<sup>th</sup> please remember our kids when you vote in the provincial election." It also contained several references to the provincial government's actions in the three areas highlighted in the campaign. I find them included in the description of "issue advertising" in the election spending case cited above. The buttons and other literature did not urge readers

to vote against the government, although they were critical of provincial policies. The BCTF did not endorse any candidates in the written or visual materials before me, in contrast to the *Weingarten* decision, *supra*. The first use of these materials was in connection with elections for school boards, which are nominally non-partisan in British Columbia. I should add that I received copies of television and YouTube advertisements, but they obviously did not attract the attention of the Employer in the workplace.

Without identifying causes or attributing blame, the history of collective bargaining in education in the province summarized above in this award is marked by heavy government involvement both in collective bargaining and in educational policies. The government legislated province-wide bargaining in 1995, followed by legislation barring strikes during a provincial election campaign in 1996. Local agreements including provisions on class size and composition were preserved in legislation imposing a collective agreement in 1998. In 2002, the government eliminated a number of local agreements and ultimately enacted Bill 27 and 28, which removed a number of provisions from collective agreements. The result is a highly centralized system for making many educational decisions.

The pattern of government intervention in bargaining persisted through several provincial governments, including periods when each of the political parties represented in the legislature controlled the government. Under these circumstances, any interest group that wished to criticize some conditions in schools, including class size, facilities for special needs students and the like, is likely to advocate policies contrary to those of the governing party. Almost any political position on educational policy as it relates to classroom activities involves some reference to the government, explicit or implicit.

The Court of Appeal has expressed its support for the right of teachers to advocate on educational policies. Interest in such questions is likely to be high before elections. To restrict political advertising during those periods would fail the minimal impairment test under s. 1.

Counsel for the Employer challenged the accuracy of the statements, especially “177 schools closed,” and “10,000 overcrowded classes.” She provided me with a copy of the Dorsey award that dealt with classes that exceeded the established limits in exhaustive detail. Even if I accept that the statements in the campaign were inaccurate or exaggerated, they fell within the range of advertising that exists in political debates in this province. The *Charter* protects freedom of expression. That freedom does not depend on a neutral assessment of the accuracy of the opinions expressed.

With these conclusions established, it is appropriate to turn to the *Oakes* analysis to determine if the restrictions on freedom of expression meet the tests of s. 1 of the *Charter*.

The Court of Appeal (at para 48) identified contextual factors that speak to the degree of deference to be given to the means chosen to implement a policy. The parties agreed that two of those factors, the nature of the harm and the inability to measure it, and the vulnerability of ‘the group,’ were relevant to this case.

The nature of the harm in this case is somewhat ambiguous. Certainly, no evidence of harm to teachers was presented, apart from the obvious restriction on their form of expression. Teachers followed instructions from school board officers to remove the materials promptly. The Employer was entitled to impose discipline (subject to the grievance procedure) had the teachers not obeyed their orders. Moreover, it is difficult to

predict what evidence of harm might be persuasive in a case such as this one. The Court of Appeal expressed its concerns on this point in the context of parent-teacher interviews at para 49, as follows:

The potential harm of teachers expressing their collective political views on school property cannot be measured with any degree of precision or easily proved. It may, however, be reasonably apprehended that distribution of BCTF materials might interfere with the proper functioning of a parent-teacher interview. The parent-teacher interview is an opportunity (sometimes the only opportunity) for parents to speak directly with their child's teacher about their child's progress and to ask questions of the teacher. It follows logically that the impression parents take from these interviews will play a role in shaping their impressions of the school system generally. If teachers are permitted to use parent-teacher interviews to hand out materials expressing their collective political view, it is reasonable to infer a risk that the public's confidence in the school system, and in particular, in teachers' abilities to foster an open and supportive education environment, may be undermined. Some parents may not have confidence in a school system where teachers, who are employed at public expense, are permitted to use the schools where they teach to advance a political agenda to which all parents may not necessarily subscribe.

After this rather cautious statement, Madame Justice Huddart concluded in the following paragraph that she could "not discern any potential harm from posting of materials on a school bulletin board."

As the Employer pointed out, the materials in this case were not used in connection with parent-teacher meetings, but were part of broader political campaigns prior to elections. The materials at issue in this case were clearly directed at parents, whose views could influence policy choices. However, the means of presenting these messages to parents involved children. Teachers wore buttons while dealing with children. Materials were posted beside classrooms and on classroom doors. I do not agree with the Employer's argument that children were the objects of the political message, but children were exposed to it.

The second contextual factor is the vulnerability of the group. The authorities

cited above do not expound on this point. The Steeves award mentioned that teachers and their union were not vulnerable, without any explanation of how he reached that conclusion. Arbitrator Burke stated in her award that the vulnerability of the students must be considered. Counsel for the Employer argued that the vulnerable groups were students and parents. In *Thomson Newspapers Co. v. Canada (Attorney General)* [1998] 1 S.C.R. 877, Mr. Justice Bastarache explained (at para 90) that the contextual approach to s. 1 indicates the “vulnerability of the group which the legislator seeks to protect,” citing *Irwin Toy* and *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, that group’s subjective fear of harm and the inability to measure the particular harm in question scientifically.

The Union argued that students did not need to be sheltered from political controversy. It pointed to *Re Health Employer’s Assn. of British Columbia v. Hospital Employees’ Union (Davis Grievance)* [2004] B.C.C.A.A.A. No. 11 125 L.A.C. (4<sup>th</sup>) 145 (Sanderson). In that case, decided under the terms of a collective agreement, the arbitrator ruled that employees could wear stickers protesting the employer’s plans to contract out services. The facility served elderly residents, most suffering from some form of cognitive impairment. The employer argued that the stickers would disrupt the workplace, as residents were easily frightened. The Union also relied on *Hamilton-Wentworth, supra*. In *Hamilton-Wentworth*, the Ontario Labour Relations Board found that the school board could not ban teachers wearing buttons urging a position in connection with a strike vote. Neither of those cases was based on the *Charter*. While the parallels with this case certainly exist, the practices in the workplaces and collective agreement language applied limit their applicability to the case at hand.



Following the logic of *Thomson Newspapers*, the goal of the Employer was to protect students and parents. While I concur with Arbitrator Steeves that teachers and their unions as objects of restrictions of their s. 2(b) rights should not be identified as vulnerable, but they were not the object of the Employer's actions.

I cannot conclude that students and parents are equally vulnerably in the circumstances of this case. The rationale for this conclusion is obvious, I believe. Parents are able to vote in most cases. They receive and can evaluate other political messages. While teachers hold positions of authority in their minds, it is reasonable to infer that parents hold teachers in less authority than children.

By contrast children/students are required to attend school. They typically have little influence over who their teachers will be. Teachers, because of their expertise and professional skills, are naturally in positions of authority. In *Ross*, the Supreme Court of Canada relied upon the status of teachers to discipline a teacher for his extreme views expressed outside of the classroom. In my view, that analysis addresses the vulnerability of students.

Logically, considering parents, teachers and students, it is the vulnerability of the students that should be given the most weight in this case. Arbitrator Burke stated in her award that the vulnerability of the students must be considered. *Hamilton-Wentworth* and *Health Employers Association*, supra were decided under different statutory frameworks, and I did not find them particularly helpful in my own analysis.

Turning to the *Oakes* test, the initial question is whether the restrictions are "of sufficient importance to warrant overriding a constitutionally protected right or freedom" (at para 69). Given the importance of the freedom of expression, the objective of the

restriction must relate to concerns that are “pressing and substantial.” The parties in this case agreed on the Employer’s objectives, although they obviously differed on their significance: maintenance of political neutrality in schools, prohibition of partisan political messages, insulation of students from partisan political messages, maintenance of teacher professionalism, the right of the Employer to manage and organize schools.

The first three Employer objectives listed in the summary of its argument referred to partisan political messages. I have already concluded that the messages were political, but not partisan. The authorities have established that teachers are entitled to engage in some forms of political activity in schools, so the neutrality of schools is not necessarily impaired. Similarly, informed discussion of educational issues should not undermine public confidence in schools. The language in the Court of Appeal decision supporting political discussions in schools applies in this case. As the Court of Appeal decision stated at para 51:

Through the various materials the BCTF asked its members to distribute, teachers voiced their concerns about government policies on issues of particular importance to them. This is, of course, political expression of a kind deserving of a high level of constitutional protection.

The facts of this case do not permit me to address the issue of “political electioneering” in schools, to use the phrase in the Employer’s argument.

Although I did not find that the facts of this case justified “insulating students from *partisan* political messages while in school” as an Employer objective, the objective of insulating students from political messages should be analyzed. The authorities make few references to the need to isolate students from political messages generally. However, this goal is implicit in the Court of Appeal decision and previous arbitration awards. Teachers hold positions of authority over students. Younger students in

particular lack an appreciation of the meaning of political messages in the classroom. The messages directed to parents in this case did not raise issues directly relevant to individual students.

The views of the Court of Appeal contained in para. 50 quoted above are relevant. The Court supported the right of teachers to discuss class size and composition “in relation to the needs of a particular child by an informed and articulate teacher.” This principle distinguishes the fact pattern of the events leading to the Munroe award from the case before me.

Similarly, the Munroe award was careful to note that the political expression at issue was the posting of posters on bulletin boards “where parents and students might see them,” and discussions in parent-teacher meetings. Later he noted that the materials in question did not interfere with education. In the Kinzie award, the arbitrator specified that messages to parents regarding the FSA the province requires could be delivered to parents only in sealed envelopes to exclude the students from the BCTF materials. His analysis of the need to protect political expression in schools referred to adults, not students.

Arbitrator Burke’s award occurred after several teachers wore black armbands in the classroom to protest the standardized test. At p. 50, she stated:

I accept as the Employer says that young people are particularly vulnerable as apparent here. There is no doubt that the Grievor is a respected dedicated teacher who did not wish to adversely affect her students.

The arbitrator then concluded that the employer’s directive to remove the armbands was in furtherance of the objective of insulating students from political messages while in attendance at school. In the hearing leading to the Burke award, the employer presented

evidence of the distraction the armbands caused the students who saw them.

Considering the contextual factors set out in the Court Appeal decision and the authorities cited, I conclude that insulating students from political messages in the classroom is a “pressing and substantial objective” as required by the *Oakes* test.

I have also concluded that the Employer’s objective of maintaining teachers’ professionalism is overly broad and vague. As the Court of Appeal has noted at para 54, the professionalism of teachers is regulated by another statute and the College of Teachers. The Union pointed out that the BCPSEA had not identified “ensuring professionalism” in its appeal to the Court, although Madame Justice Huddart commented on that point. The only description or definition of teacher professionalism was the paragraph issued by the College of Teachers, quoted above. That statement certainly is commendable, but is also open to interpretation. It did not provide much guidance in this case. The Employer did not argue that the teachers whose actions caused the grievance in this case behaved unprofessionally. Their actions were calculated to minimize any disruption in the instructional activities at their schools. Thus, there was no evidence that the teachers’ behaviour in this case or in the other authorities was unprofessional.

The statement of teacher professionalism does point to a distinction between teachers and civil servants offered by the Employer. While teachers and civil servants are both employed by agencies of the state to deliver public services, but teachers are members of a learned profession who enjoy a degree of autonomy in the delivery of services to their clients. While many civil servants are also members of professions, much of their work is directly tied to political decisions from elected officials.

The final objective identified by the Employer was the right of a principal to manage and organize schools. Counsel for the Employer cited numerous statutory authorities to support her argument that principals have that right, in particular, ss. 74 and 85 of the *School Act* and s. 5 of the *Regulation*. The language is quite general, but as the Kinzie award states at para. 82:

I am of the view that the Employer has the right to control what is sent home to parents through the medium of their children/students at its schools. In my view, the right flows from its responsibilities under the *School Act* and its management rights clause under the provincial collective agreement.

While the language is broad, as the Union argued, management rights clauses usually are general. The concept does identify an obvious fact. Employers have the right to organize and administer workplaces, obviously subject to higher statutory or legal authority or collective agreements where they exist. The proper way to treat this objective, in my view, is to identify it and assess its weight in the proportionality elements of the *Oakes* test.

The second stage of the *Oakes* test is to establish a rational connection between the objectives and the means chosen in limiting freedom of expression. The Employer in this case must “show that the means chosen are reasonable and demonstrably justified,” *Oakes*, para 70. The adjudicator has to balance the needs of the individuals (or groups) with the needs of society. As stated above, the measures first must be designed to achieve the objective in question. They must be rationally connected to the objective. Secondly, the measures should impair the freedom “as little as possible.” Thirdly, the effects of the measures should be proportional to the objective identified.

In this case, I concur with Arbitrator Burke that “there was a rational connection between the direction” and the objective of insulating students from political messages in

the classroom. The instructions to the teachers were connected to the objective as I have characterized it. Arbitrator Steeves stated at para 145:

neither a teacher or the Union has the right, constitutional or otherwise, to post any material they like on the school property.

The measures limited the teachers' expression in a manner tailored to the circumstances of the campaign. Put another way, the teachers introduced 'When Will They Learn' campaign materials into the classroom, and the Employer instructed the teachers to remove the posters and buttons. The teachers' approach to introducing political messages was limited and restrained, and the instructions were confined to the materials in question where they appeared in the presence of students, although not stated in those terms. Therefore, the measures restricted the teachers' freedom of expression minimally.

In addition, I have concluded that the messages in question were worded to influence parents, not students. However, the location for posters and button worn by teachers were unlikely to reach many parents compared to the number of students who would see them. In other words, the impairment on expression directed at parents was minimal. The deleterious effects of the restriction on teachers' expression were proportional to the salutary effects of the insulation of the students.

In the circumstances of political discourse within schools, I find that the measures were proportional to the objective of insulating students from political discourse in the classroom and adjacent areas associated with it. The effect on parents, the intended audience, was at most modest. Depending on the age of the students, the location of their classrooms and arrangements for admitting and releasing students, it is quite possible that many parents would not see the messages in question at all. In other words, they would

not be affected by the restriction in any way.

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.

Dated at Vancouver, B.C., this 30th day of October, 2011

A handwritten signature in cursive script, appearing to read "Mark Thompson". The signature is written in black ink on a white background.

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Mark Thompson  
Arbitrator