IN THE MATTER OF AN ARBITRATION

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION/BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 5 (SOUTHEAST KOOTENAY)

(the "Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION/ CRANBROOK/FERNIE DISTRICT TEACHERS' ASSOCIATIONS

(the "Union")

ARBITRATOR:	John Kinzie
COUNSEL:	Keith E.W. Mitchell, for the Employer John Rogers, Q.C., for the Union
DATES OF HEARING:	February 28 and 29, March 4, 5 and 6, 2008
PLACES OF HEARING:	Cranbrook and Vancouver, British Columbia

AWARD

I

This proceeding is concerned with a grievance by the Union against the Employer's decision of May 5, 2006 not to permit teachers of students in Grades 4 and 7

to send home with those students for their parents to read a pamphlet prepared by the British Columbia Teachers' Federation (hereinafter the "BCTF") opposing the use of Foundation Skills Assessment (hereinafter "FSA") tests in schools. The pamphlet also provided a form letter that parents could complete and sign and send to the principal of their children's school asking that their children be excused from writing the tests. The teachers proposed to send the pamphlets home in a sealed envelope addressed to the parents of the student concerned.

The Union maintains that the restriction placed on its members by the Employer preventing them from sending this pamphlet home to parents with their children violates its members' freedom of expression as guaranteed by Section 2(b) of the *Canadian Charter of Rights and Freedoms* (hereinafter the "*Charter*"). It places much reliance on the decision of the B.C. Court of Appeal in *B.C. Public School Employers' Association v. B.C. Teachers' Federation* (2005), 141 L.A.C. (4th) 385, an appeal from an arbitration award of Donald Munroe, Q.C. which can be found at (2004), 129 L.A.C. (4th) 245, (hereinafter the "Munroe Award"). In its decision, the B.C. Court of Appeal upheld Mr. Munroe's determinations that school board restrictions on teachers posting materials on school bulletin boards and distributing materials and engaging in discussions with parents during parent-teacher interviews relating to teacher concerns about government initiatives with respect to class sizes and education funding violated teachers' freedom of expression under Section 2(b) of the *Charter* and that those restrictions were not saved by being "reasonable limits prescribed by law [that] can be demonstrably justified in a free and democratic society" within the meaning of Section 1 of the *Charter*. An application for leave to appeal the B.C. Court of Appeal's decision to the Supreme Court of Canada was denied.

The Employer disagrees with the Union's grievance. It says first of all that the Union's claim does not engage teachers' freedom of expression under Section 2(b) of the *Charter*. Instead, it submits, what the Union is asserting is a right to access the Employer's internal mail system for communicating with parents by sending material home with their children. It maintains that the purpose of this system is to enable schools to communicate with parents on matters of interest pertaining to their children's education; it is not there to be used as a vehicle for communicating information of a political nature. The Employer submits that there is no constitutional right of access to a forum or a means of communication. In this regard, it relies on *Haig v. Canada (Chief Electoral Officer)* [1993] 2 S.C.R. 995, *Native Women's Association of Canada v. Canada* [1994] 3 S.C.R. 627, *Delisle v. Canada (Deputy Attorney General)* [1999] 2 S.C.R. 989, *Dunmore v. Ontario (Attorney General)* [2001] 3 S.C.R. 1016, and *Baier v. Alberta* 2007 S.C.C. 31.

In the alternative, if teachers' freedom of expression is engaged in this matter, the Employer maintains that the activity the teachers wish to undertake in this case is excluded from the protection granted by Section 2(b) of the *Charter* because the method and the location of the expression are not consonant with *Charter* protection. Teachers are free to express their opposition to the use of FSA tests, but the Employer submits that expressing that opposition in an elementary school classroom through the method of

having students take the material expressing that opposition home to their parents should not be extended protection through Section 2(b) of the *Charter*. In this regard, the Employer relies on the Supreme Court of Canada's decision in *City of Montreal v. 2952-1366 Quebec Inc.* [2005] 3 S.C.R. 141.

In the final alternative, the Employer says that its restriction on teachers sending the BCTF pamphlet opposing FSA tests home with students for their parents to read is a "reasonable" limit "prescribed by law [that] can be demonstrably justified in a free and democratic society" within the meaning of Section 1 of the *Charter*.

II

The background facts to this proceeding are as follows.

The FSA is a series of tests in reading comprehension, writing, and numeracy. They are written once a year by Grade 4 and Grade 7 students in all of the province's public schools and funded independent schools. As the Ministry of Education explains in a booklet titled "Foundation Skills Assessment – Information for Students, Parents and Guardians", the tests provide

> ". . . a 'snapshot' of how well BC students are attaining foundation skills. It helps answer important questions such as:
>
> - Are students learning vital skills they will need later?
> - Is student achievement improving over time?
> - Are there any trends in student performance at the school, district and provincial levels?"

The writing of the tests take up approximately four and one-half hours of classroom time.

The results from the tests are provided to school districts and schools and they are used for planning purposes for the next school year. Individual results are shared with parents although these results are not used in grading students for those years. School district and individual school results are tabulated and made available to the public on the Ministry of Education website. The Fraser Institute for one takes these results and uses them to rank all of the public schools and funded independent schools in the province.

The writing of FSA tests has been required of school districts and schools ever since the 1999-2000 school year.

The BCTF has been opposed to the FSA tests since their inception. It has developed an action plan whose goal is the elimination of the tests or their modification so that they are administered "on a randomized sampling basis with neither school nor

students identified." In its action plan, the BCTF expressed its concerns with the tests as follows:

> - Standardized tests do no (sic) not address the individual needs of students. They tell us little if anything about what individual children are actually learning.
>
> - Standardized tests can, and do, actually harm many students. They emphasize what students cannot do rather than what they can. Too often they discourage children rather than motivate them and in the end limit their options for learning.
>
> - Standardized tests do not help teachers teach. Instead they force teachers to teach to the narrow scope of learning to be tested at the expense of a much richer learning experience. Important learning such as creative and critical thinking cannot be standardized and measured and therefore doesn't 'count'.
>
> - Standardized tests lead to standardized teaching and that means too many of the individual needs of students are not addressed.
>
> - Reliance on standardized tests as a way to evaluate the school system is not fair. Research is clear, scores on standardized tests have more to do with social and economic factors than what happens in school.
>
> We are concerned that the current accountability system with its over emphasis of standardized testing is harming students and badly affecting their opportunities for real and important learning."

The BCTF has taken various steps in furtherance of its action plan. During the 2001-2002 school year, the BCTF issued a direction to its members not to supervise the FSA tests being administered that year. The B.C. Public School Employers' Association (hereinafter "BCPSEA") and the Board of School Trustees of School District No. 36 (Surrey) complained to the Labour Relations Board that that direction constituted an unlawful declaration or authorization of a strike. The Labour Relations Board concluded that supervision of the FSA tests was, *prima facie*, work which teachers were obligated to perform, and it issued an interim order directing the BCTF to suspend its direction to members not to supervise the tests pending a final determination on the employer's complaint. The reasons for this decision can be found in *BCPSEA and Board of School Trustees of School District No. 36 (Surrey)*, BCLRB No. B123/2002.

It has also encouraged its members not to volunteer to mark the FSA tests in return for additional release time or extra pay.

It has written to the Minister of Education asking that FSA testing be eliminated. See the letter dated February 12, 2007 from Jinny Sims, the then President of the BCTF, to the Honourable Shirley Bond, the Minister of Education, where Ms. Sims commented that:

> "I am writing on behalf of the BC Teachers' Federation to call on you to eliminate Foundation Skills Assessment (FSA) testing in its current form.
>
> The FSA program has been formally in place since 2000, and the unintended negative consequences are becoming clear. What the government sees as the simple collection of data for school or district planning is having profoundly negative effects on students, teachers, educational programs and schools. Formal, census large-scale assessments are effectively 'high stakes' for students, teachers, and schools whether they are intended to be or not.
>
> For students, there are no meaningless or trivial assessments. Formal, large-scale assessments like FSA tests create test anxiety in students in a way that on-going classroom assessment embedded in day-to-day learning does not. They are also more likely to have a negative effect on students' motivation and learning, with less successful students concluding they are unable to succeed (and reduce their efforts).
>
> The utility of the FSA results is limited. Elementary schools with 30 or fewer students per grade, about half the elementary schools in the province, will never have statistically reliable FSA results. While student performance in their schools may be improving, they will never know that from their FSA results. Typically, districts and schools are ignoring statistical significance and participation rates, reporting changes in student performance that cannot be supported by the data, then making plans based on this house of cards. The pressure to find improvement does not encourage a rigorous analysis of the data.
>
> Even if the school or district has an improvement in FSA results, it does not necessarily represent a real increase in learning. The students may simply do better at FSA tests because they have been practicing FSA-type assessments like school-wide impromptu writes. Teachers feel pressured to use valuable instruction time for such test preparation and practice. Many districts now require teachers to administer school-wide and district-wide assessments that replicate FSA at the school or

district level. This represents significant loss of instructional time.

FSA results are even less useful at the individual student level. Large-scale assessment results are not very accurate for individual students. They are not diagnostic and do not help teachers plan instruction for individual students. It is effective classroom assessment that can help a student learn, not large-scale assessment. This is why teachers and others have started referring to formative classroom assessment as 'assessment *for* learning' and summative large-scale assessment as 'assessment *of* learning.' Classroom teachers have worked hard to enhance the positive effects of assessment, e.g., diverse ways of showing learning, self-assessment, descriptive feedback and emphasis on goals rather than deficits. Teachers do not want external standardized testing to wipe out their efforts.

FSA results are being misused by the media and the Fraser Institute. Fraser Institute rankings of elementary schools are misleading and create further disadvantage in already disadvantaged schools and communities. These ranking (sic) have been condemned by all the educational partner organizations and discredited by educational researchers at Simon Fraser University. They are contrary to your ministry's stated intents for the FSA program and taking attention away from more positive pursuits. We believe that large-scale assessments should be designed to prevent such misuses.

The Federation has very serious concerns about FSA but is not opposed to large-scale testing per se. Large-scale testing can provide important information. It can give us information about how well the provincially-prescribed curriculum is working, what areas might need additional support in terms of learning resources or teacher in-service, and what might need more/less emphasis when the curriculum is revised.

However, these purposes can be met without testing every student every year. This information used to be available from the Provincial Learning Assessment Program tests which were only done every three or four years, and usually not with all students. Doing the tests less often and using a sample of students allows broader and deeper assessment, is more cost effective, reduces the negative impact on students, and still fulfills the purposes.

The BCTF requests that you eliminate FSA tests entirely, or at least mitigate against the negative effects of the current program

> by changing the administration so they are done on a randomized sampling basis with neither schools nor students identified."

Letters to editors of newspapers such as the Vancouver Sun and news releases were also prepared and sent out expressing the same opinion. Advertisements in local newspapers opposing the FSA tests have also been purchased.

The BCTF also prepared a pamphlet that could be distributed by teachers to parents of children in their schools. The content of the pamphlet has changed somewhat over the years. The pamphlet that was going to be distributed in School District No. 5 (Southeast Kootenay) in the 2005-2006 school year was headed "FSA testing can be harmful to students!". On the front page, the BCTF then stated that

> "Teachers are so concerned about the negative effects of these tests on student learning that they are recommending parents withdraw their children."

At the bottom of that page, the BCTF put its name and logo in a black box to identify that the pamphlet was theirs.

On the inside of the pamphlet, the BCTF went on to explain what the FSA tests were, who wrote them, and when that year. The BCTF then commented on what teachers thought, what parents could do, and the impact of testing on students' motivation and learning in the following terms:

> "**What do teachers think?**
>
> Teachers believe that every child matters and can learn. Teachers' joy in teaching comes from meeting the needs of every student and fostering students' love of learning. The FSA tests do not help teachers do this important job. In fact, teachers believe these tests have negative effects on teaching and learning.
>
> Teachers are so concerned about the effects of FSA tests on students' motivation to learn that they are advising parents to withdraw their students from the test using the letter to the principal on the back of this brochure.
>
> **What can you do as a parent?**
>
> - Raise concerns with the teachers and principal at your child's school.
> - Talk with other parents about the negative effects of FSA tests.
> - Bring the issue to your Parent Advisory Council.
> - Raise concerns with your local school trustees.
> - Withdraw your child from the FSA tests by writing a letter to

the school principal. Simply tear off and sign the sample letter on the back of this brochure.
- Go to the BCTF web site *bctf.ca* for more information on teachers' concerns about the FSA tests.

What is the impact of testing on students' motivation and learning?

Teachers in BC are now seeing the same negative effects of testing already documented by researchers in several countries.

Teachers report experiencing pressure to:

- teach to the test
- ignore important aspects of the curriculum
- teach in less interesting ways
- spend less time addressing the individual needs of students
- spend instructional time on test practice.

Teachers report that they see students who:

- suffer from test anxiety
- value tests more than learning
- lose their motivation to learn if they do badly on tests."

The form letter addressed to the Principal to be signed by the parent on the back of the pamphlet reads as follows:

"Please excuse my child, _____ from all three Foundation Skills Assessment (FSA) tests.

I am concerned about possible negative effects of this testing on my child's motivation, learning, and self-esteem. I am also concerned that this testing may have negative effects for teachers and teaching.

I understand that the ministry provides instructions to principals on how to exempt students from the FSA tests if they receive a letter from parents requesting that their child be exempted.

Thank you for your co-operation."

The Employer does not object to its teachers distributing these pamphlets directly to parents while they are attending at the school. However, it has not permitted Grade 4 and Grade 7 teachers to send the pamphlets home with students in a sealed envelope for their parents to read.

Chris Johns is the long-time President of the Cranbrook District Teachers' Association (hereinafter the "CDTA"). He testified that the BCTF passed a number of resolutions opposing FSA tests at its annual general meeting in March, 2006. The CDTA and its members endorsed those resolutions. With respect to whether or not the pamphlets were sent home to parents with their children, he said that the Union left that up to individual Grade 4 and Grade 7 teachers. The Union did not require them to do so if they had any concerns about it.

The tests that school year were scheduled to be written during the third and fourth weeks of May, 2006. Darcy Verbeurgt was the Vice-Principal of Parkland Middle School during the 2005-2006 school year. Parkland that year had approximately 450 students in Grades 7 through 9. He testified that in early May, 2006 one of Parkland's teachers came to see him and told him that she had been given a pamphlet regarding the FSA tests by her Union representative that she had to give to students to take home to their parents. Verbeurgt said she told him she felt uncomfortable with that and asked him for advice on what she should do.

Verbeurgt reported his conversation with this teacher to Sheila Clarkson, his Principal, who called the school board office. He testified that they were told that the pamphlets were not to be sent out. Clarkson and Verbeurgt then went to the schools' Union representative and advised her of the Employer's decision. They asked her to recover the pamphlets from the Grade 7 teachers. Some had already been distributed to students and they were asked to return them. The Union representative subsequently advised Verbeurgt that she believed that all of the pamphlets had been retrieved.

Johns testified that on May 4, 2006, the day before the pamphlets were to be distributed to parents through their children, he received a telephone call from Terry Kirkham, then the Employer's Director of Human Resources. Johns said that Kirkham told him that the Employer was opposed to the pamphlet being sent home with students to be delivered to their parents. Johns sought advice from the BCTF. He said that the BCTF told him that teachers had the right to distribute the pamphlets in that way, but that the Union should follow the work now-grieve later principle in this case. With this advice, Johns called Kirkham back and the two of them agreed to send the following joint memorandum dated May 4, 2006 to all Cranbrook teachers:

> "Please be advised that the District and the CFTA [Cranbrook/Fernie Teachers' Associations] have agreed on a without prejudice basis that the above-mentioned brochure is not to be distributed until this issue of distribution has been resolved."

Steve Rogers was Vice-Principal of Laurie Middle School during the 2005-2006 school year. He said that the Superintendent of Schools, Ron Allen, and the Assistant Superintendent of Schools, Bill Gook, called his school and told he and his principal, Doug Mitchell, that these pamphlets were going to be sent home with students and that they had to stop them. Rogers testified that they were not successful in stopping the

pamphlets from being distributed; that they had already been handed out to students. He said that close to one-third of the students in Grade 7 at Laurie that year had permission from their parents not to write the FSA tests. He said that this fact caused considerable upset in the school amongst those students who had to write the tests while other classmates did not. Some of those who had to write the tests wrote "this sucks" on their papers. He testified that the two week period over which the FSA tests were written was a hectic time at Laurier Middle School. In his evidence, Mitchell described that period as "rather chaotic".

In his evidence, Verbeurgt testified that Clarkson also received a number of form letters drawn from the pamphlet back from parents during the 2005-2006 school year asking that their children be excused from writing the FSA tests. He said he did not know the precise number of such requests, but he said he did know that it was lower than the number received at Laurier Middle School.

Following another conversation with Johns, Kirkham sent out the following memorandum dated May 5, 2006 to all teachers in the school district:

> "I am writing to confirm the Districts (sic) long standing practice that any information to be sent home with students must receive prior approval from your school Principal and/or the Office of the Superintendent of Schools."

In his evidence, Johns said he was not aware of this practice. His understanding was quite the contrary; that what material was sent home to parents via their children was left up to the professional judgment of teachers. The first he had heard of any rule or policy in this regard was Kirkham's May 5, 2006 memorandum.

Johns also gave evidence concerning the types of materials teachers had sent home with students. They include Scholastic's offering of books to read for various age groups, notice regarding various events such as visits to water parks and picnics along with the accompanying consent forms and offers to drive students to them, weekly classroom reports from the teacher, notices about school portraits, health care information from Medic Alert, course outlines concerning courses being taken by students, information on accident insurance while students are attending school or school-sponsored events, information to parents on students' home reading programs and the like.

Allen agreed with Johns on the types of materials sent home with students for their parents. He also referred to information concerning behavioural issues. He said with respect to these types of information, the principal of the school may not directly approve their being sent home, but he would be aware that that was being done. However, matters such as school wide newsletters, community announcements, District Parent Advisory Council announcements and minutes, and Health Department material would all pass through the principal's office before it was sent home with students. Finally, anything with a political or religious overtone along with information from for-

profit corporations which was out of the ordinary would have to be approved by the district administration office before it was allowed to be sent home. Generally speaking, he said, political, religious or for-profit material would not receive approval. To obtain approval from the school board office, the information had to relate to students' education. Allen expressed the concern that if material is sent home with students for parents, parents perceive it as being authorized or approved by the school. This perception is particularly difficult where, as in this case, the material takes a position in opposition to that of the Ministry of Education and/or the school board. Confusion and conflict can result for parents who may not know which point of view to listen to.

In this case, the BCTF pamphlet advised readers that:

> "The ministry's instructions to principals explain how to exempt other students 'in instances where a parent withdraws a student from participation (e.g., via a letter to the school principal).' "

However, the Ministry of Education guidelines for student participation in 2007 are more specific than that. A simple parental request to withdraw is not sufficient. Instead, the guidelines specify that parents

> ". . . may request the principal to excuse a student in the event of a family emergency, a lengthy illness or other extenuating circumstances."

Further, principals must send a list of those students they have excused to their superintendents of schools.

On June 5, 2006, the Union filed a provincial matters grievance of general application asserting that the Employer had

> ". . . interfered with the distribution of the 'Foundation Skills Assessment Pamphlet' by members of the bargaining unit to grade 4 and 7 parents. The Employer, through the memo of May 5, 2006 from Terry Kirkham, was attempting to suppress, punish or threaten to punish exercises of the duty to report to parents and rights to free speech and free association, freedom from discrimination and harassment, freedom from unjust discipline, and professional autonomy."

The Union has advised that it is not pursuing its claim of a breach of its members' professional autonomy rights under the collective agreement in this proceeding. That leaves only its claim of a violation of its members' freedom of expression contrary to Section 2(b) of the *Charter*.

During the 2006-2007 school year, teachers in School District No. 5 (Southeast Kootenay) continued to distribute the BCTF pamphlet opposing the FSA tests to parents

when they met with them at school and during meetings. However, in light of the May 4, 2006 agreement, teachers did not attempt to send home those pamphlets with students for their parents to read.

During this school year, Allen wrote to parents with students in Grades 4 and 7 who would be writing the FSA tests. His letter to them dated April 25, 2007 read:

> "The Foundation Skills Assessment (FSA) is an annual province-wide assessment which is conducted in May of each year and involves Grades 4 and 7 students. The information gathered provides a snapshot of how well B.C. students are learning foundation skills in Reading Comprehension, Writing and Numeracy. The main purpose of the Assessment is to help the province, school districts and schools assess how well students are achieving basic skills and is one piece of information that can be used to help make plans to improve student achievement. The FSA is designed and marked by British Columbia educators. The skills tested are linked to the provincial curriculum and the same B.C. Performance Standards. Results are returned to districts and schools. Each student's individual results are sent to the school and the results are sent to parents.
>
> From time to time, concerns are raised about standardized testing and it is important to know that B.C. is a province with very little standardized testing. We believe, as a district, that having a student assessed twice provincially in the years between Kindergarten and Grade 9 is a reasonable amount of standardized assessment and would like to encourage all parents to become informed about this and other forms of assessment used in the schools and at the district-level.
>
> All Grade 4 and 7 students who attend public and independent schools are expected to participate in the Assessment. However a few students with exceptional needs may be excused from some or all of the Assessment. Schools receive guidelines to help identify these students. Parents and Guardians can support the FSA by encouraging their child to do their best and making sure they are well rested and attend school during the testing period.
>
> You may choose to discuss the results with your child and school staff at any time. If you have any questions regarding the FSA or your child's participation in this Assessment, please do not hesitate to contact your school principal."

This letter was not delivered to parents by having students take it home to them. Instead, it was mailed to parents. Johns said he asked Allen for the names and addresses

of all of the parents concerned so that the Union could send its pamphlet regarding the FSA tests to them as well. Allen refused to provide those names and addresses.

However, Verbeurgt testified that the Ministry of Education's information bulletin on FSA tests was sent home to parents with students. He distinguished its content from the BCTF pamphlet stating that the former was fact based and did not appear to be political, while the latter was political. Mitchell testified that he still gets form letters back from parents asking that their children be excused from writing the FSA tests. Unlike during the 2005-2006 school year, he said, that school year he contacted parents asking them to clarify their requests and to explain the Ministry of Education and the Employer's view of the tests. Of the 28 requests he received, he said he only excused nine students from writing the tests. Six of the students were excused because of anxiety and two were excused because their parents were philosophically opposed to this kind of testing.

These issues were not just occurring in School District No. 5 (Southeast Kootenay). They were also occurring in other school districts throughout the province. For that reason, BCPSEA sent out the following *@Issue* bulletin to its school board members on April 17, 2007 advising that:

> "We have been informed that the BC Teachers' Federation (BCTF) is advising its locals that it is permissible for teachers to send BCTF material regarding issues such as the Foundation Skills Assessment (FSA) tests home through students. BCPSEA does not agree with that position.
>
> A school district may direct its teachers that students are not to be used as the conduits or couriers for communication of union materials or any materials not approved by the school for distribution through it A school board is within its lawful right to direct teachers not to use students as the means for conveying union views concerning the FSA tests to parents. Neither the collective agreement nor any applicable legislation gives teachers the right to use students in this manner and to do so can be harmful to public confidence in the public education system.
>
> Teachers also may not use a school/classroom mailing list or a parent directory to obtain mailing addresses for parents of students in their class for the purpose of communicating or mailing out BCTF material. The home addresses of students and parents provided to a school or district are the personal information of the students and parents and can only be used for the purpose for which they were collected; i.e., for school-related purposes, not for the purposes of communicating BCTF views. A school board has the authority to discipline a teacher who disregards a direction about either of these matters.

> If you have any questions specific to these issues and your school district, please contact your BCPSEA district liaison."

In School District No. 39 (Vancouver), the BCTF pamphlet concerning the FSA tests was sent home to parents of children in Grades 4 and 7 via students during the 2003-2004 school year. The Vancouver School Board did not object to teachers doing so at that time. It was very similar in content to the 2006 pamphlet used in School District No. 5 (Southeast Kootenay) and quoted above in this Award. As well, the Chairperson of the Vancouver School Board wrote to all of those parents on April 18, 2004 in the following terms:

> "The Provincial Ministry of Education administers a set of tests in reading comprehension, writing, and numeracy called the Foundation Skills Assessment (FSA) each year. This year the tests will be given to students in Grades 4 and 7 in BC public schools during the weeks of May 10-23, 2004.
>
> The Ministry of Education has implemented the tests to provide a 'snapshot' of how well students are attaining foundation skills. The reading comprehension and numeracy tests consist of multiple-choice questions and open-ended questions. The writing test consists of first drafts of two writing tasks. The tests take four and a half hours of classroom time. Students' scores on these tests are not included as part of their annual reports.
>
> Results are returned to districts and schools for planning purposes. Each student's individual results will be sent to schools and they will be shared with students and parents, along with other information about the student's performance. Schools may use the results to help develop the school's plan for improving student learning.
>
> Some students may be exempted from taking one or more of the tests. Students who have not yet developed basic English skills can be exempted by the school. Schools may also exempt some students with exceptional needs. If this is the case for your child, you will be notified. You may also elect to exempt your own child if you feel the tests are not in their best interst (sic). You may do so by notifying the principal in writing or by telephone.
>
> For more information on the FSA, ask your school or visit the Ministry's Assessment Web site at www.bced.gov.bc.ca/assessment."

This letter was also sent home with students as was the Ministry of Education's information bulletin on FSAs.

In January, 2007, the teachers at Chief Maquinna Elementary School sent home a letter to parents with their students criticizing the FSA tests and asking that the parents fill out the attached letter requesting that their children be exempted from writing the tests.

In April, 2007, a teacher at Trafalgar Elementary School sent the BCTF's pamphlet home with her students for their parents to read. One of those parents was Erin Airton who writes a column for the "24 Hours" newspaper in Vancouver. In the April 12, 2007 edition of that newspaper, Airton referred to the pamphlet which she described as being "highly critical of the standardized testing that takes place in B.C. schools in grades 4 and 7." Later in her column, she stated that:

> "There are many avenues of advocacy and activism open to the union without the group needing to stoop to employing our children as their messengers.
>
> . . .
>
> We do not want them caught in the middle of a political fight between the union and the government. It is just not appropriate to insert children into a policy discussion of this nature."

Questions arose from Airton's column and from the Principal of Chief Maquinna Elementary School who was concerned that her teachers would be sending material home with students critical of the FSA tests. As a result, Nancy Stair, a Labour Relations Officer with the Vancouver School Board, sent the following memorandum dated April 19, 2007 to all of the school districts' principals with a copy to the Vancouver Elementary School Teachers' Association advising that:

> "We have been informed that the BC Teachers' Federation (BCTF) is advising its locals that it is permissible for teachers to send BCTF material regarding issues such as Foundation Skills Assessment (FSA) tests home through students. That is not the position of the Vancouver School Board. Neither the Collective Agreement nor any applicable legislation gives teachers the right to use students in this manner and to do so can be harmful to public confidence in the public education system.
>
> Teachers also must not use a school/classroom mailing list or a parent directory to obtain mailing addresses for parents of students in their class for the purpose of communicating or mailing out BCTF materials. The home addresses of students and parents provided to a school or district are the personal

> information of the students and parents and can only be used for the purpose for which they were collected, i.e. for school-related purposes, not for the purposes of communicating BCTF views.
>
> I believe this has been the topic of discussion in many schools in the past few years and this year seems to be no exception. Please remind all staff of these rules. If you believe this has happened in your school already please advise myself or your Associate so that we can decide the best way to handle this issue.
>
> This email will be sent to the Union under separate cover."

This restriction in School District No. 39 (Vancouver) has also been grieved and that matter is scheduled to be heard by arbitrator John Hall.

On January 11, 2008, the following letter from Chris Kelly, the Superintendent of Schools for School District No. 39 (Vancouver), addressed to "parents and guardians of students in grades 4 and 7" was sent home with students:

> "In light of current and ongoing discussion and sharing of information about FSA, this letter is intended to help clarify some of the facts for parents.
>
> The Foundation Skills Assessment (FSA) is given to all students in Grades 4 and 7 in British Columbia every year to assess Reading, Writing and Numeracy. The main purpose of the FSA is to provide a snapshot of how well our students are achieving basic skills.
>
> All Grade 4 and Grade 7 students are expected to participate in the Foundation Skills Assessment. Students may only be exempted under a specific set of rules (please see the attachment). The FSA will be administered February 4 to 15, 2008 so that results may be available and shared by the end of March.
>
> A main concern raised about the FSA is the inappropriate use of the results by the Fraser Institute to rank schools. The British Columbia Teachers' Federation and the Vancouver Elementary School Teachers' Association have concerns about the use of teaching time needed to complete the tests, and the possibility of causing stress to students. Consequently, parents are being encouraged to withdraw their children from writing the FSA by these organizations. It should be noted that the form letters sent to principals as part of this campaign will not automatically excuse students from writing the tests.

> As the school district's administration, we understand the concerns being raised. Debate round student testing is important in protecting the best interests of learners. At the same time, we believe the FSA gives a useful picture of students' general abilities in Reading, Writing and Numeracy. The tests are based on our curriculum and designed provincially by teachers. We intend to administer the FSA as required by the Ministry of Education and The School Act, while using our best professional judgment, together with out teachers and support staff, to serve the needs and interests of the students in our care.
>
> Should you have questions about the FSA I would urge you to discuss these with the principal and vice principal at your child's school."

On January 23, 2008, another letter concerning FSA tests to grades 4 and 7 parents went home with students in School District No. 39 (Vancouver). This one was from the executive of the Vancouver District Parent Advisory Council. The thrust of its letter was that:

> "Should you decide you do not want your child to participate, in accordance with the Ministry rules included in your letter from Superintendent Kelly,
>
> - You should write a letter **in your own words** explaining the reason you are requesting that your child(ren) not write the test;
> - Your reason may be a 'family emergency, a lengthy illness or other extenuating circumstances'.
>
> It is the DPAC executive's opinion that it is up to each family, considering what they know about their student(s) and think is in their best interest, to decide what constitutes 'extenuating circumstances'."

In School District No. 41 (Burnaby), the Board of Education of School District No. 41 (Burnaby) and the Burnaby Teachers' Association rewrote the FSA pamphlet prior to its being distributed. Their pamphlet addressed the subject matter of standardized testing under the headings of "what teachers believe", "what the research says", "what teachers are concerned about", "what teachers are doing", and "what the Ministry says". Under the last heading, the pamphlet states:

> "Principals determine which students, if any, are excused from one, two or all three components of the FSA.

> Parents may request the principal to excuse a student in the event of a family emergency, a lengthy illness or other extenuating circumstances."

The pamphlet concluded under the heading "what you [as parents] can do":

> "• speak out about the loss of instruction time to unnecessary bureaucratic testing;
>
> • talk to teachers about the variety of assessment methods that are used to support student learning;
>
> • request that your child be excused from FSAs."

In School District No. 51 (Boundary), the Board of Education objected in January, 2008 to the provision in the BCTF's pamphlet advising on how parents could request that their children be excused from writing the tests and the form letter included as part of that pamphlet. The Board took the view that those provisions were inconsistent with the Ministry of Education's participation guidelines. In a letter to all of the Board's teachers dated January 4, 2008, the Superintendent of Schools, Michael Strukoff, told them that:

> "You are directed to either remove these inaccurate references from the pamphlet or not distribute these pamphlets to parents.
>
> Failure to follow this direction may result in discipline."

The Boundary District Teachers' Association subsequently adopted a pamphlet with the same wording as that agreed to between the Burnaby School Board and the Burnaby Teachers' Association. Strukoff sent a memorandum to all teachers in his school district on January 13, 2008 advising that

> "The District does not endorse this action [distributing a pamphlet on FSA tests to parents] and would like you <u>not</u> to hand out any pamphlets in this regard.
>
> Nevertheless, possible circulation of the latest pamphlet proposed by the BDTA [the one taken from School District No. 41 (Burnaby)] will not be opposed. The January 4, 2008 letter of direction does not apply to the sample pamphlet attached to the e-mail this memo is a part of."

George Taylor, the BCTF's Assistant Director for Field Services, testified that the revised pamphlets in the Burnaby and Boundary school districts were distributed to parents in those school districts but not using students to deliver them.

In the spring of 2007 in School District No. 38 (Richmond), a dispute arose about the ability of the Richmond Teachers' Association to communicate with parents through the medium of students. That association filed a local matters grievance, as opposed to a provincial matters grievance which would have involved BCPSEA and the BCTF, in respect of the dispute.

On July 5, 2007, Bruce Beairsto, the Superintendent of Schools for School District No. 38 (Richmond), wrote to the President of the Richmond Teachers' Association, Al Klassen, proposing

> "... that when the Association wishes to communicate directly with parents it do so through a sealed envelope that bears the label 'Attention Parent/Guardian' and that reasonable advance notice and/or discussion of this communication be held with the Superintendent of Schools."

The Richmond Teachers' Association agreed with that proposed settlement of the grievance.

During the fall of 2007, representatives of the Richmond School Board and the Richmond Teachers' Association met to examine the practical and philosophical challenges of the FSA tests. They developed a discussion paper which delved into all aspects of the tests and their associated controversies. This discussion paper was posted on the school district's website.

Then, in January 2008, Beairsto sent the following letter to the parents/guardians of all Grade 4 and 7 students in the school district:

> "Beginning on February 4, 2008, the Provincial Foundations Skills Assessment (FSA) will be conducted in schools across the province. Basic information about FSA is provided on the reverse of this letter. For more extensive information please see the announcement on the district website (www.sd38.bc.ca) which includes connections to provincial websites that provide full detail of all aspects of this assessment and its use.
>
> Also enclosed is a statement of concern from the Richmond Teachers' Association. The concerns that it contains are discussed in detail in the document posted on our web site. However, the RTA has also asked that this brief statement be provided to you directly in order to ensure that parents understand that teachers do have some concerns. I have agreed to do so because our practice in the Richmond School District is to engage with such controversies openly through respectful dialogue. Please be assured that our differing points of view on some

> aspects of the FSA will in no way detract from the care and professionalism with which we do our work.
>
> If you have any questions about how FSA will be conducted in your school or about the implications for your child, please contact your teacher or school administrator."

This statement of concern was not the BCTF's pamphlet although at its end it did say to parents that they could go to the BCTF's website for more information on teachers' concerns about the tests. What the statement of concern addressed was why there was a controversy about the FSA tests, what some of the teachers' concerns were, "what about the Fraser Institute rankings", "can I withdraw my child from the FSA tests", and "what can you do as a parent". Under the last two headings, the statement of concern stated that:

> "**Can I withdraw my child from the FSA tests?**
> The Ministry expects most Grade 4 and 7 students to write the tests. Some students, such as those with special needs, beginning ESL students, and those in unusual circumstances, will receive the comment 'has not yet demonstrated expectations'. The decision to exempt any student from the FSA according to these criteria rests with the principal.
>
> **What can you do as a parent?**
> - Inform yourself about FSA testing.
> - Talk with other parents about the negative effects of FSA tests.
> - Raise concerns with the teachers and principal at your child's school.
> - Bring the issue to your Parent Advisory Council.
> - Raise your concerns with your local school trustees and MLA.
> - Explore the option of having your child not write the FSAs.
> - Visit the district web site at *www.sd38.bc.ca* for a more extensive discussion.
> - **Go to the BCTF web site *bctf.ca/fsa.aspx* for more information on teachers' concerns about the Foundation Skills Assessment.**"

The heading "**what can you do as a parent**" bears some similarities to the discussion under the same heading in the BCTF pamphlet. A significant difference though is that on the subject of withdrawing their child from the tests, the BCTF pamphlet stated that

> "Withdraw your child from the FSA tests by writing a letter to the school principal. Simply tear off and sign the sample letter on the back of this brochure."

In the Richmond Teachers' Association statement, it advised that parents could "explore the option of having your child not write the FSAs."

III

I now turn to address the issues that arise for determination in this proceeding.

The scope of teachers' freedom of expression in B.C. public schools and school board rights to place "reasonable limits" on that freedom were recently considered in a dispute involving BCPSEA and the BCTF. In that dispute, the provincial legislature had passed the *Public Education Flexibility and Choice Act*, S.B.C. 2002, c.3 in late January, 2002. That act amended the *School Act* to remove class size and composition clauses from the provincial collective agreement between BCPSEA and the BCTF and to exclude those matters from the permissible scope of collective bargaining in the public school system. What teachers then wanted to do was post certain materials on teacher bulletin boards expressing their concerns about the consequences of the provincial government's taking this action. These bulletin boards were located in areas of the school where students and their parents would have access. Teachers also wanted to distribute certain material regarding these changes and discuss them with parents during parent-teacher interviews. School boards issued directives that teachers could not engage in either of these activities.

The BCTF grieved those restrictions, alleging that they offended, *inter alia*, teachers' freedom of expression under Section 2(b) of the *Charter*. That grievance went before Donald R. Munroe, Q.C., for resolution. In the Munroe Award, he set out the position of BCPSEA as involving the arguments that the *Charter* did not apply to school boards in B.C., that if it did, it did not apply to the directives issued by the boards in that case, if it did then they were not contrary to Section 2(b) of the *Charter*, and finally, if they did offend Section 2(b), they were saved by Section 1 of the *Charter*.

Mr. Munroe concluded that B.C. public school boards were subject to the *Charter* by virtue of Section 32(1) of the *Charter*. He then dealt with the next two arguments of BCPSEA together as they were both part of its argument that the school board directives did not contravene Section 2(b) of the *Charter*.

With respect to these two arguments, Mr. Munroe first of all referred to the following portion of the majority judgment in *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927:

> "When faced with an alleged violation of the guarantee of freedom of expression, the first step in the analysis is to determine whether the plaintiff's activity falls within the sphere of conduct protected by the guarantee. Activity which (1) does not convey or attempt to convey a meaning, and thus has no *content* of expression or (2) which conveys a meaning but through a violent *form* of expression, is not within the protected sphere of conduct.

> If the activity falls within the protected sphere of conduct, the second step in the analysis is to determine whether the purpose or effect of the government action in issue was to restrict freedom of expression. If the government has aimed to control attempts to convey a meaning either by directly restricting the content of expression or by restricting a form of expression tied to content, its purpose trenches upon the guarantee. Where, on the other hand, it aims only to control the physical consequences of particular conduct, its purpose does not trench upon the guarantee. In determining whether the government's purpose aims simply at harmful physical consequences, the question becomes: does the mischief consist in the meaning of the activity or the purported influence that meaning has on the behaviour of others, or does it consist, rather, only in the direct physical result of the activity. If the government's purpose was not to restrict free expression, the plaintiff can still claim that the effect of the government's action was to restrict her expression. To make this claim, the plaintiff must at least identify the meaning being conveyed and how it relates to the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing.
>
> (at 978-979)

Mr. Munroe concluded that the materials that teachers wanted to post or distribute and have discussions about with parents in his case were "attempts to convey meaning and thus have expressive content" (at 268). However, BCPSEA argued that its members' directives were not aimed at controlling content, but were aimed at preventing the consequence of school walls and parent-teacher meetings being used for extraneous purposes. With regard to this argument, Mr. Munroe looked at the Supreme Court of Canada's decision in *Committee for the Commonwealth of Canada v. Canada*, [1991] S.C.R. 139.

In that case, a manager of a government-owned airport prohibited a group from engaging in political propaganda activities in the airport terminal. Lamer, C.J.C., commented that:

> ". . . the individual will only be free to communicate in a place owned by the state if the form of expression he uses is compatible with the principal function or intended purpose of that place.
>
> . . .
>
> A person who is in a public place for the purpose of expressing himself must respect the functions of the place and cannot in any

> way invoke his or her freedom of expression so as to interfere with those functions.
>
> . . .
>
> When an individual undertakes to communicate in a public place, he or she must consider the function which that place must fulfil and adjust his or her means of communicating so that the expression is not an impediment to that function."
>
> (at 156-157)

In the same case, McLachlin, J. put it differently. She had some concerns with the approach of Lamer, C.J.C. She stated that:

> "The concept of function is thus seen to involve a balancing of interests which arguably serves better as part of the s. 1 test than as a threshold for screening out claims which raise no *prima facie* free expression interest."
>
> (at 235)

In her view,

> ". . . the test for the constitutional right to use government property for public expression . . . should be based on the values and interests at stake and not be confined to the characteristics of particular types of government property.
>
> . . .
>
> The analysis under s. 2(b) should focus on determining when, as a general proposition, the right to expression on government property arises.
>
> . . .
>
> The test for whether s. 2(b) applies to protect expression in a particular forum depends on the class into which the restriction at issue falls. If the government's purpose is to restrict the content of expression through limiting the forums in which it can be made, then this, as Cox says, is 'usually impermissible'. The result, under the *Canadian Charter of Rights and Freedoms*, is that s. 2(b) applies. If, on the other hand, the restriction is

> content-neutral, it may well not infringe freedom of expression at all."
>
> (at 236-238)

Mr. Munroe concluded that under either approach, the school board directives offended Section 2(b) of the *Charter*. Under the approach of Lamer, C.J.C., he saw "no incompatibility between the teachers' intended communications, on the one hand, and the principal function or purpose of a public school on the other" (at 274). If he adopted the approach of McLachlin, J., he was of the view that the "values and interests at stake" favoured protection under Section 2(b) because the school boards' purpose "was to restrict the content of expression and to control the ability of the teachers to convey expressive meaning" (at 274).

He next referred to *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *Morin v. PEI Regional Administrative Unit No. 3 School Board* [2002] P.E.I.J. No. 36 (P.E.I.C.A.) He then returned to the facts of the case before him and he concluded that:

> "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 s. 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 s. 2(b) of the *Charter* but rather under s. 1: which states that the rights and freedoms set out in the *Charter* are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'."
>
> (at 276-277)

With respect to BCPSEA's argument based on Section 1 of the *Charter*, Mr. Munroe stated that:

> ". . . I am not of the view either that the School Boards' exercise of property rights or the duty of fidelity comprise a s. 1

> justification for the purported limitation on the teachers' freedom of expression as guaranteed by *Charter* s. 2(b)."
>
> (at 278)

BCPSEA appealed the Munroe Award to the B.C. Court of Appeal under Section 100 of the Labour Relations Code. Huddart, J.A., gave the Court of Appeal's majority judgment in the case, Donald, J.A., concurring. Lowry, J.A., dissented. In her decision, Huddart, J.A. observed that BCPSEA's

> ". . . fundamental complaint is that the arbitrator's decision permits a public servant to turn public property into a forum for political action. In its view, the *Charter* was never intended to give teachers expression rights not available to the general public."
>
> (at para. 1)

BCPSEA repeated the same main arguments that it advanced before Mr. Munroe. With respect to the Section 2(b) argument, Huddart, J.A., stated that:

> "The BCPSEA's first point is that neither a parent-teacher meeting nor a school bulletin board is an open forum 'where political messages of all sorts are traditionally tolerated': *Commonwealth*, McLachlin J. at para. 241. Neither are they a public place or a place of 'public debate' (at para. 249). Rather, they are resources used to fulfill the School Boards' mandate to provide public education services, about the use of which the School Boards are entitled to give directives, as they do about matters of curriculum and teachers' classroom appearance and conduct. They are places where 'the guarantee of freedom of expression has no place' (at para. 249). Its second point is that the School Boards' purpose in imposing limits on teachers' expression was not to restrict the content of expression through limiting the forums, but to prevent a school bulletin board or parent-teacher interview from being used for other than its proper purpose."
>
> (at para. 24)

She then commented that:

> "If teachers' expression is constitutionally protected at school during working hours, as the BCTF asserts, then it follows that the teachers' s. 2(b) rights were violated. The only remaining question would be whether the appellant has justified the

> violation under s. 1. This is because the teachers' proposed actions were political expression that would convey or attempt to convey meaning. The materials speak to BCTF members' concerns about government education policy and seek to build support among parents for its position on these political issues. The first step of the *Irwin Toy* test is satisfied.
>
> In my view, the BCPSEA can succeed in establishing the School Boards did not violate teachers' s. 2(b) rights only if it can exclude the proposed directives from the scope of the s. 2(b) guarantee. It can exclude the proposed directives from the scope of the guarantee only if teachers' political expression *in the workplace* is not constitutionally protected. The authorities to which we were referred have not established at the definitional stage that freedom of expression has no place at a school or some part or parts of it, but they do establish the irrelevance of the status of the speaker to the protection of expression under s. 2(b)."
>
> (at paras. 26 and 27)

After considering *Keegstra* and *Morin, supra*, Huddart, J.A., rejected BCPSEA's argument that teachers' political expression in the workplace was not constitutionally protected. She observed that:

> "The issue is whether expression at the 'location in question' is protected by s. 2(b). In neither *Keegstra* nor *Morin*, did the courts find teachers' expression of their personal views on public school property to be excluded from the protection of s. 2(b). The BCPSEA asserts the court in *Keegstra* did not consider the issue and *Morin* was wrongly decided. In the BCPSEA's submission, protecting teacher speech on school property is an overbroad reading of the guarantee.
>
> I do not agree. 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). It seems, therefore, that the appellant accomplishes no more by its primary submission than to restate as a threshold or definitional issue the second question under the *Irwin Toy* analysis: whether the

> purpose or effect of the impugned government action is to restrict freedom of expression."
>
> (at paras. 33 and 34)

On the Section 2(b) issue, she concluded that:

> "In light of this longstanding recognition of the breadth of the expression right in Canada and the significance of such rights to our democracy, I would not exclude political expression other than violence from the protection of s. 2(b) because of the role or the location of the person seeking to exercise the right. Except in the rarest of cases, public bodies should be required to justify any restriction they place on political expression.
>
> I agree with the arbitrator that, on any reading of the three main opinions in *Commonwealth*, the impugned directives violated the teachers' right to free expression under s. 2(b). It follows I would reject the BCPSEA's submission that the teachers' proposed expression at schools does not come within the scope of s. 2(b). The arbitrator correctly refused to accede to that submission."
>
> (at paras. 37 and 38)

Huddart, J.A., then turned to consider whether the school board directives were justified under Section 1 of the *Charter*. She referred to the test set out in *R. v. Oakes*, [1986] 1 S.C.R. 103 and stated that:

> ". . . BCPSEA must next establish the School Boards' objective is of sufficient importance to warrant overriding or limiting the teachers' expression rights and that its chosen means balance the interests of society and teachers in the sense they are rationally connected to the objective, impair the rights as little as possible, and the deleterious effects of its means do not outweigh its benefits."
>
> (at para. 46)

She then described BCPSEA's Section 1 argument this way:

> "On this appeal, the BCPSEA submits the School Boards' objective was to control the activities of employees on work time and the extent to which school property is used for public debate, and specifically to ensure parent-teacher interviews are not turned into forums for political debate. It submits this objective is of sufficient importance to justify the impugned directives because

> school board resources should be used only to educate students, not to promote teachers' political and collective bargaining objectives. The BCTF replies that this argument is no more compelling than it was under s. 2(b), and adds that School Boards' decisions merit little deference when political expression is at issue."
>
> (at para. 56)

She felt that BCPSEA's statement of the school boards' objective in issuing the directives they did was "too broad". She was of the view that their objective was

> "... better seen as two-fold: maintaining public confidence in the public school system; and, more specifically, ensuring a parent-teacher interview meets it (sic) purpose: reporting on the progress of a child to that child's parent. Parent-teacher interviews fulfil the informal reporting requirements mandated by subsections 5(8) and (9) of the *School Regulation*. School Boards obviously have a pressing interest in ensuring this objective is met. It may also be seen as the School Boards' 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 teachers' freedom of expression if the other steps of the *Oakes* test are met."
>
> (at para. 59)

With respect to the rational connection aspect of the *Oakes* test, she commented that:

> "At the next stage in the *Oakes* analysis, a court is to determine whether a rational connection exists between the objectives of the public body and the methods used to achieve them. The directives in this case can be seen as a rational attempt by the School Boards to preclude political activity by teachers that might undermine public confidence in the administration of the public school system and interfere with parent-teacher interviews. A rational connection exists, although I note the statement of facts contains no suggestion any such abuse had occurred."
>
> (at para. 60)

She then turned to the minimum impairment aspect of the test. She reiterated that:

> ". . . School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School grounds are public property where political expression must be valued and given its place."
>
> (at para. 65)

She concluded that the School Board directives had not met the minimum impairment test. In this regard, she stated that:

> "To achieve their objective, the School Boards might have reinforced the teachers' professionalism by reminding them of their obligation to ensure the goals of parent-teacher interviews were reached, that those meetings were not to be dominated by discussion of class sizes or school resources, and that any such discussion must be reasoned. If the concern was teachers' abuse of parent-teacher interviews, I would think disciplinary proceedings before the College of Teachers would be a more appropriate response. It would also, of course, be appropriate for School Boards to respond reasonably to complaints from parents about a teacher's conduct during parent-teacher interviews.
>
> Therefore, in my opinion, the absolute ban of discussion on school property during school hours did not minimally impair teachers' rights. Few places would be more appropriate for a discussion of the need for resources for public schools than a parent-teacher interview dedicated to one child's education. The Supreme Court noted in *Pepsi*, '[f]ree expression in the labour context benefits not only individual workers and unions, but also society as a whole' (at para. 35). The same holds true for teachers. Their political expression benefits society as a whole even where the concerns arise out of a labour relations dispute."
>
> (at paras. 67-68)

On this basis, she rejected the argument that the directives were saved by Section 1 of the *Charter*.

Relying on the Munroe Award and the Court of Appeal's dismissal of BCPSEA's appeal from that decision, the Union submits that the Employer is governed by the provisions of the *Charter*. The Employer does not take issue with this submission. Like the class size materials that teachers wanted to post on bulletin boards and distribute to parents at parent-teacher interviews, the Union submits that the pamphlets detailing concerns that teachers had with the FSA tests conveyed or attempted to convey a meaning and thus had expressive content. I do not understand the Employer to be taking issue with that submission either.

What the Union then submits is that the Employer was trying to restrict its teachers' freedom of expression by preventing them from sending the BCTF pamphlet detailing teacher concerns about the FSA tests home with students so that parents could read and consider it. It argues that the freedom of expression guaranteed by Section 2(b) of the *Charter* encompasses the means of expression. The Employer disagrees. It asserts that what the Union is actually contending for is that the Employer is obliged to provide its teachers with a forum (i.e., its internal mail delivery system utilizing students) to convey their message. It maintains that the Union is not entitled to claim such a positive right.

In support of its argument, the Employer relies on a series of Supreme Court of Canada cases culminating with its 2007 decision in *Baier v. Alberta, supra.* That case was concerned with Alberta legislation that restricted school employees from serving as school trustees in any school district. Prior to this legislation, they had only been restricted from running for election as a school trustee in the school district in which they were employed.

The Supreme Court of Canada, Fish, J., dissenting, concluded, *inter alia*, that the new legislation did not infringe upon the freedom of expression under Section 2(b) of the *Charter*. Rothstein, J., writing for himself and five other judges, provided a useful summary of the jurisprudence on the nature of the obligation imposed on governments by Section 2(b), i.e., whether it imposes a positive obligation as well as a negative obligation. In this regard, he commented that:

> "While the *Irwin Toy* test defined the scope of freedom of expression broadly, in subsequent cases this Court has clarified that s. 2(b) protection is not without limits and that governments should not be required to justify every exclusion or regulation of expression under s. 1 (*Montréal (City) v. 2952-1366 Québec Inc.*, [2005] 3 S.C.R. 141, 2005 SCC 62, at para. 79). In *City of Montréal*, McLachlin C.J. and Deschamps J., for the majority, found that the *method* or *location* of expression may remove it from s. 2(b) protection (paras. 56 and 60). For example, with respect to the *method* of expression, s. 2(b) does not protect violent expression (*Irwin Toy*, at pp. 969-70), and with respect to *location*, expression on public property may in some circumstances remain outside the protected sphere of s. 2(b) (*City of Montréal*, at para. 79). In addition, the Court has held that s. 2 generally imposes a negative obligation on government rather than a positive obligation of protection or assistance (*Haig v. Canada*, [1993] 2 S.C.R. 995, at p. 1035; *Delisle v. Canada (Deputy Attorney General)*, [1999] 2 S.C.R. 989, at para. 26).
>
> In *Haig*, this Court considered whether freedom of expression includes a positive right to be provided with a specific means of

expression. L'Heureux-Dubé J. for the majority, noted that freedom of expression has typically been conceptualized in terms of negative rights rather than positive entitlements:

> 'The traditional view, in colloquial terms, is that the freedom of expression contained in s. 2(b) prohibits gags, but does not compel the distribution of megaphones. [p. 1035]'

That case arose in the context of federal and Quebec referenda concerning proposed constitutional amendments in 1992. Mr. Haig had moved from Ontario to Quebec and was unable to vote in either the federal or Quebec referendum because of different residency requirements in the federal and provincial legislation. He challenged the federal legislation as violating his freedom of expression. The majority held that the right to vote in the referendum was governed by the *Referendum Act*, S.C. 1992, c. 30, and s. 2(b) did not require the government to extend that right to all. L'Heureux-Dubé J. stated:

> 'The Court is being asked to find that this statutorily created platform for expression has taken on constitutional status. In my view, though a referendum is undoubtedly a platform for expression, s. 2(b) of the *Charter* does not impose upon a government, whether provincial or federal, any positive obligation to consult its citizens through the particular mechanism of a referendum. Nor does it confer upon all citizens the right to express their opinions in a referendum. A government is under no constitutional obligation to extend this platform of expression to anyone, let alone to everyone. A referendum as a platform of expression is, in my view, a matter of legislative policy and not of constitutional law. [Emphasis added; p. 1041.]'

The statutory platform analysis in *Haig* has been followed in a number of subsequent cases which have held that underinclusive legislative schemes or government action did not infringe s. 2. In *Native Women's Assn. of Canada v. Canada*, [1994] 3 S.C.R. 627 ("NWAC"), the Native Women's Association of Canada ("NWAC") alleged that the government's funding of some Aboriginal organizations, along with the opportunity to participate in constitutional discussions, required the government to bestow upon the NWAC an equal chance for expression of its views, and funding to enable it to do so. The Court determined that there was no positive duty on the government to provide

funding to NWAC in the circumstances. Sopinka J., for the majority, stated:

> '[I]t cannot be said that every time the Government of Canada chooses to fund or consult a certain group, thereby providing a platform upon which to convey certain views, that the Government is also required to fund a group purporting to represent the opposite point of view. [p. 656]'

and

> 'The freedom of expression guaranteed by s. 2(b) of the *Charter* does not guarantee any particular means of expression or place a positive obligation upon the Government to consult anyone. [p. 663]

...

The statutory platform analysis in *Haig* has also been applied in cases raising claims under *Charter* s. 2(d) freedom of association. In *Delisle*, the Court considered whether underinclusive labour legislation offended s. 2(d) or 2(b). Bastarache J., for the majority, found that neither s. 2(d) or 2(b) required that RCMP officers be included in a statutory labour regime. He made clear that underinclusive legislation would generally not offend s.2:

> 'The structure of s. 2 of the *Charter* is very different from that of s. 15 and it is important not to confuse them. While s. 2 defines the specific fundamental freedoms Canadians enjoy, s. 15 provides they are equal before and under the law and have the right to equal protection and equal benefit of the law. The only reason why s. 15 may from time to time be invoked when a statute is underinclusive, that is, when it does not offer the same protection or the same benefits to a person on the basis of an enumerated or analogous ground (on this issue, see *Schachter v. Canada*, [1992] 2 S.C.R. 679), is because this is contemplated in the wording itself of s. 15. ... However, while the letter and spirit of the right to equality sometimes dictate a requirement of inclusion in a statutory regime, the same cannot be said of the individual freedoms set out in s. 2, which generally requires only that the state not interfere and does not call upon any comparative standard. [para. 25]'

Citing Dickson J.'s definition of 'freedom' as 'the absence of coercion or constraint' *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 336), Bastarache J. went on to state at para. 26:

> 'It is because of the very nature of freedom that s. 2 generally imposes a negative obligation on the government and not a positive obligation of protection or assistance.'

As Bastarache J. stated at para. 27 of *Delisle*, except in exceptional circumstances, ss. 2(d) and 2(b) require only that Parliament not interfere with these fundamental freedoms.

While *Haig, NWAC, Siemens* and *Delisle*, found s. 2 was not offended by underinclusive legislation or underinclusive government action and that there was no right to a particular platform for expression, the Court left open the possibility that, in exceptional cases, positive action by government may be called for under s. 2. In *Haig*, for example, L'Heureux-Dubé J. left the door open to positive government action being required in some cases. At p. 1039, she stated:

> '. . . a situation might arise in which, in order to make a fundamental freedom meaningful, a posture of restraint would not be enough, and positive governmental action might be required. This might, for example, take the form of legislative intervention aimed at preventing certain conditions which muzzle expression, or ensuring public access to certain kinds of information.'

In *Dunmore v. Ontario (Attorney General)*, [2001] 3 S.C.R. 1016, 2001 SCC 94, a majority of the Court found such an exception to the general rule that s. 2 does not require positive government action. Labour legislation excluding agricultural workers from a protective regime was found to infringe s. 2(d). Bastarache J., for the majority, considered the factors relevant to establishing an exception:

> '(1) Claims of underinclusion should be grounded in fundamental *Charter* freedoms rather than in access to a particular statutory regime (para. 24).
>
> (2) The claimant must meet an evidentiary burden of demonstrating that exclusion from a statutory regime permits a substantial interference with activity protected under s. 2 (para. 25), or that the purpose of the exclusion was to infringe such activity (paras. 31-33). The exercise of

> a fundamental freedom need not be impossible, but the claimant must seek more than a particular channel for exercising his or her fundamental freedoms (para. 25).
>
> (3) The state must be accountable for the inability to exercise the fundamental freedom: '[U]nderinclusive state action falls into suspicion not simply to the extent it discriminates against an unprotected class, but to the extent it substantially orchestrates, encourages or sustains the violation of fundamental freedoms' (para. 26).'

In *Dunmore*, these factors were met. The appellant agricultural workers sought protection for the freedom to establish and maintain an employee association. They were substantially incapable of exercising their fundamental freedom to organize without protective legislation. Furthermore, their exclusion from the legislative regime 'function[ed] not simply to permit private interference with their fundamental freedoms, but to substantially reinforce such interferences' (para. 35). Agricultural workers were distinguished from the RCMP officers in *Delisle* because RCMP officers were capable of associating despite exclusion from a protective regime. Unlike agricultural workers, for RCMP officers, inclusion in a statutory regime would serve to enhance rather than safeguard their exercise of a fundamental freedom.

While *Dunmore* concerned freedom of association rather than freedom of expression, the three factors for challenging underinclusive legislation were described as applicable to s. 2 in general. As Bastarache J. noted, *Haig, NWAC* and *Delisle* circumscribed, but did not foreclose, the possibility of challenging underinclusion under s. 2 of the *Charter*. Thus, *Dunmore* makes clear that while claims of underinclusion may raise concerns under *Charter* s. 15 equality rights, in certain cases, underinclusion may offend s. 2 itself.

In cases where a government defending a *Charter* challenge alleges, or the *Charter* claimant concedes, that a positive rights claim is being made under s. 2(b), a court must proceed in the following way. First it must consider whether the activity for which the claimant seeks s. 2(b) protection is a form of expression. If so, then second, the court must determine if the claimant claims a positive entitlement to government action, or simply the right to be free from government interference. If it is a positive rights claim, then third, the three *Dunmore* factors must be considered. As indicated above, these three factors are (1) that the claim is grounded in a fundamental freedom of expression

> rather than in access to a particular statutory regime; (2) that the claimant has demonstrated that exclusion from a statutory regime has the effect of a substantial interference with s. 2(b) freedom of expression, or has the purpose of infringing freedom of expression under s. 2(b); and (3) that the government is responsible for the inability to exercise the fundamental freedom. If the claimant cannot satisfy these criteria then the s. 2(b) claim will fail. If the three factors are satisfied then s. 2(b) has been infringed and the analysis will shift to s. 1."
>
> (at paras. 20-23 and 25-30)

In my view, one of the critical questions in this case is whether the Grade 4 and Grade 7 teachers wanting to send a pamphlet expressing their concerns about FSA tests home to the parents of students in their classes with those students are claiming a positive entitlement to government action, i.e., permission to do so, or whether they are simply seeking the right to be free from government interference in doing so.

Having considered all of the evidence and argument, 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, this right flows from its responsibilities under the *School Act* and its management rights under the provincial collective agreement with its teachers. In this regard, I note that the Union is not pursuing in this proceeding its grievance in respect of its members' professional autonomy rights under that agreement.

However, in my view, the evidence I have heard does not support the statement in Kirkham's May 5, 2006 memorandum to all teachers in School District No. 5 (Southeast Kootenay) that the school district had a

> ". . . long standing practice that any information to be sent home with students must receive prior approval from your school Principal and/or the Office of the Superintendent of Schools."

There is no written policy to this effect. There is no evidence of any forms or process that had been established for teachers to obtain the prior approval from their principal or the Superintendent of Schools. Finally, there is no evidence of teachers following this practice by going to their principals or the Superintendent of Schools for prior approval.

Instead, the evidence supports the conclusion, in my view, that where the information teachers wanted to send home with students for their parents to review concerned their students' education, they simply did so. Principals, by virtue of their position and role within the school and the collegial nature of public schools, would invariably be aware of what was going home, and if they had any concerns, they might stop it. That is what happened in this case with the FSA tests. The principals involved and the Employer's district administrators exercised their undoubted authority to control

what was distributed to parents through this internal mail delivery system. The point is though that teachers have traditionally used this internal mail delivery system to communicate with parents of their students on matters pertaining to the education of their children.

I am of the further view that the pamphlet the teachers wanted to send home to parents in this case through the medium of students expressed a variety of concerns about the impact the FSA tests would have on the parents' children's education. In exercising the control that the Employer has to restrict the teachers' ability to express those concerns through this medium of expression, the Employer, in my view, was interfering with that expression. I am of the view that this is not a case where the teachers were claiming "a positive entitlement to government action" to use the words of Rothstein, J., in *Baier v. Alberta, supra.*

Finally, I should say that I accept that the decision as to whether to distribute the pamphlet to parents through the medium of students was left up to the individual Grade 4 and Grade 7 teachers and was not required of them by the Union. In this regard, I prefer the direct evidence of Johns, the President of the CDTA, over the hearsay evidence of what the unnamed concerned teacher told Verbeurgt in May, 2006.

The Employer next submits that the Supreme Court of Canada's decision in *City of Montréal v. 2952-1366 Québec Inc., supra*, has changed the law since the B.C. Court of Appeal's decision in *BCPSEA v. BCTF, supra.* It says that this decision has established "an initial screening process to determine whether the means and the method of the proposed expression fall within the scope of section 2(b)." In light of that decision, the Employer maintains that the onus is on the Union

> ". . . to establish both (1) that an elementary school classroom is the kind of public property where freedom of expression is protected, (2) that the right to freedom of expression in an elementary school classroom includes freedom of expression while carrying out employment duties, and (3) that the method of expression (sending third party unapproved material to parents in their homes through their children) is a method of communication that is protected. These questions must be addressed following the analysis set out in the *Montréal* case . . . ."

In light of the *City of Montréal* decision, the Employer contends that the B.C. Court of Appeal's decision in *BCPSEA v. BCTF, supra*, and the decision of the Prince Edward Island Court of Appeal in *Morin* were wrong in that they did not analyze the historical functions of schools as forums to engage in free expression. If they had, it says, they would have concluded that "the mandate of a school system is to ensure a neutral and tolerant environment, where teachers are neutral facilitators, rather than one in which teachers exercise their rights to political expression." They are not locations where the public has general access and could expect to express themselves.

City of Montréal involved a club featuring female dancers which set up a loudspeaker on its premises that amplified the music and commentary accompanying the show inside to passers-by on the street outside. The club was charged under a city bylaw concerning noise. The issue arose whether the bylaw infringed on the club's freedom of expression and, if so, whether it was saved by Section 1 of the *Charter*.

During its consideration of the Section 2(b) issue, the majority revisited the three different approaches set out in *Committee for the Commonwealth of Canada v. Canada, supra*, for determining whether government-owned property was public or private in nature. This was done against the background of whether expression on a city's public streets were protected under Section 2(b) or not.

McLachlin, C.J.C., and Deschamps, J., gave judgment for the majority of the Court. They commented that:

> "Expressive activity may fall outside the scope of s. 2(b) protection because of how or where it is delivered. While all expressive *content* is worthy of protection (see *Irwin Toy*, at p. 969), the *method or location* of the expression may not be. For instance, this Court has found that violent expression is not protected by the *Canadian Charter: Irwin Toy*, at pp. 969-70. Violence is not excluded because of the message it conveys (no matter how hateful) but rather because the method by which the message is conveyed is not consonant with *Charter* protection.
>
> This cases raises the question of whether the *location* of the expression at issue causes the expression to be excluded from the scope of s. 2(b): see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, *per* Lamer C.J. Property may be private or public. Public property is government-owned. In this case, although the loudspeaker was located on the respondent's private property, the sound issued onto the street, a public space owned by the government. One aspect of free expression is the right to express oneself in certain public spaces. Thus, the public square and the speakers' corner have by tradition become places of protected expression. The question here is whether s. 2(b) of the *Canadian Charter* protects not only what the appellants were doing, but their right to do it *in the place where they were doing it*, namely a public street.
>
> Section 2(b) protection does not extend to all places. Private property, for example, will fall outside the protected sphere of s. 2(b) absent state-imposed limits on expression, since state action is necessary to implicate the *Canadian Charter*. Public property, however, may be more problematic since, by definition, it implicates the state. Two countervailing arguments, both

powerful, are pitted against each other where the issue is expression on public property.

The argument for s. 2(b) protection on all public property focuses on ownership. It says the critical distinction is between government-owned places and other places. The government as the owner of property controls it. It follows that restrictions on the use of public property for expressive purposes are 'government acts'. Therefore, it argued, the government is limiting the right to free expression guaranteed by s. 2(b) of the *Canadian Charter* and must justify this under s.1.

The argument against s. 2(b) protection on at least some government-owned property, by contrast, focuses on the distinction between public use of property and private use of property. Regardless of the fact that the government owns and hence controls its property, it is asserted, many government places are essentially private in use. Some areas of government-owned property have become recognized as public spaces in which the public has a right to express itself. But other areas, like private offices and diverse places of public business, have never been viewed as available spaces for public expression. It cannot have been the intention of the drafters of the *Canadian Charter*, the argument continues, to confer a *prima facie* right of free expression in these essentially private spaces and to cast the onus on the government to justify the exclusion of public expression from places that have always and unquestionably been off-limits to public expression and could not effectively function if they were open to the public.

In *Committee for the Commonwealth of Canada*, six of seven judges endorsed the second general approach, although they adopted different tests for determining whether the government-owned property at issue was public or private in nature. Lamer C.J., supported by Sopinka and Cory JJ., advocated a test based on whether the primary function of the space was compatible with free expression. McLachlin J., supported by La Forest and Gonthier JJ., proposed a test based on whether expression in the place at issue served the values underlying the s. 2(b) free speech guarantee. L'Heureux-Dubé J. opted for the first approach and went directly so s. 1.

In this case, as in *Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084, we are satisfied that on any of the tests proposed in *Committee for the Commonwealth of Canada*, the emission of noise onto a public street is protected by s. 2(b). The activity is

> expressive. The evidence does not establish that the method and location at issue here – a building-mounted amplifier emitting noise onto a public street – impede the function of city streets or fail to promote the values that underlie the free expression guarantee.
>
> This method of expression is not repugnant to the primary function of a public street, on the test of Lamer C.J. Streets provide means of passing and accessing adjoining buildings. They also serve as venues of public communication. However one defines their function, emitting noise produced by sound equipment onto public streets seems not in itself to interfere with it. If sound equipment were being used in a way that prevented people from using the street for passage or communication, the answer might be different: see, e.g., *MacMillan Bloedel Ltd. v. Simpson* (1994), 89 C.C.C. (3d) 217 (B.C.C.A.). However, the evidence here does not establish this.
>
> The method and location of the expression also arguably serve the values that underlie the guarantee of free expression, on the approach advocated by McLachlin J. Amplified emissions of noise from buildings onto a public street could further democratic discourse, truth finding and self-fulfillment. Again, if the evidence showed that the amplification inhibited passage and communication on the street, the situation might be different. The argument that the emissions of noise onto a public street in this case did not serve the values underlying the freedom of expression rests on its content, and cannot be considered in addressing the issue of whether the method or location of the expression itself is inimical to s. 2(b).
>
> Finally, on the analysis of L'Heureux-Dubé J. in *Committee for the Commonwealth of Canada*, the expressive content of the noise mandates the conclusion that it is protected by s. 2(b) and propels the analysis directly into s. 1, where justification is the issue.
>
> It follows that here, as in *Ramsden*, it is unnecessary to revisit the question of which of the divergent approaches to the issue of expression on public property should be adopted."
>
> (at paras. 60-70)

However, because the Court was requested to do so, McLachlin, C.J.C., and Deschamps, J., went on to clarify the test. In this regard, they commented that:

"We agree with the view of the majority in *Committee for the Commonwealth of Canada* that the application of s. 2(b) is not attracted by the mere fact of government ownership of the place in question. There must be a further enquiry to determine if this is the *type* of public property which attracts s. 2(b) protection.

Expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee. Violent expression, which falls outside the scope of s. 2(b) by reason of its method, provides a useful analogy. Violent expression may be a means of political expression and may serve to enhance the self-fulfillment of the perpetrator. However, it is not protected by s. 2(b) because violent means and methods undermine the values that s.2(b) seeks to protect. Violence prevents dialogue rather than fostering it. Violence prevents the self-fulfillment of the victim rather than enhancing it. And violence stands in the way of finding the truth rather than furthering it. Similarly, in determining what public spaces fall outside s. 2(b) protection, we must ask whether free expression in a given place undermines the values underlying s. 2(b).

We therefore propose the following test for the application of s. 2(b) to public property; it adopts a principled basis for method or location-based exclusion from s. 2(b) and combines elements of the tests of Lamer C.J. and McLachlin J. in *Committee for the Commonwealth of Canada*. The onus of satisfying this test rests on the claimant.

The basic question with respect to expression on government-owned property is whether the place is a public place where one would expect constitutional protection for free expression on the basis that expression in that place does not conflict with the purposes which s. 2(b) is intended to serve, namely (1) democratic discourse, (2) truth finding and (3) self-fulfillment. To answer this question, the following factors should be considered:

(a) the historical or actual function of the place; and

(b) whether other aspects of the place suggest that expression within it would undermine the values underlying free expression.

The historical function of a place for public discourse is an indicator that expression in that place is consistent with the

purposes of s. 2(b). In places where free expression has traditionally occurred, it is unlikely that protecting expression undermines the values underlying the freedom. As a result, where historical use for free expression is made out, the location of the expression as it relates to public property will be protected.

Actual function is also important. Is the space in fact essentially private, despite being government-owned, or is it public? Is the function of the space – the activity going on there – compatible with open public expression? Or is the activity one that requires privacy and limited access? Would an open right to intrude and present one's message by word or action be consistent with what is done in the space? Or would it hamper the activity? Many government functions, from cabinet meetings to minor clerical functions, require privacy. To extend a right of free expression to such venues might well undermine democracy and efficient governance.

Historical and actual functions serve as markers for places where free expression would have the effect of undermining the values underlying the freedom of expression. The ultimate question, however, will always be whether free expression in the place at issue would undermine the values the guarantee is designed to promote. Most cases will be resolved on the basis of historical or actual function. However, we cannot discount the possibility that other factors may be relevant. Changes in society and technology may affect the spaces where expression should be protected having regard to the values that underlie the guarantee. The proposed test reflects this, by permitting factors other than historical or actual function to be considered where relevant.

The markers of historical and actual functions will provide ready answers in most cases. However, we must accept that, on the difficult issue of whether free expression is protected in a given location, some imprecision is inevitable. As some scholars point out, the public-private divide cannot be precisely defined in a way that will provide an advance answer for all possible situations: see, e.g., R Moon, *The Constitutional Protection of Freedom of Expression* (2000), at pp. 148 *et seq*. This said, the historical and actual functions of a place is something that can be established by evidence. As courts rule on what types of spaces are inherently public, a central core of certainty may be expected to evolve with respect to when expression in a public place will undermine the values underlying the freedom of expression.

Another concern is whether the proposed test screens out expression which merits protection, on the one hand, or admits too much clearly unprotected expression on the other. Our jurisprudence requires broad protection at the s. 2(b) stage, on the understanding that governments can limit that protection if they can justify the limits under s. 1 of the *Canadian Charter*. The proposed test reflects this. However, it also reflects the reality that some places must remain outside the protected sphere of s. 2(b). People must know where they can and cannot express themselves and governments should not be required to justify every exclusion or regulation of expression under s. 1. As six of seven judges of this Court agreed in *Committee for the Commonwealth of Canada*, the test must provide a preliminary screening process. Otherwise, uncertainty will prevail and governments will be continually forced to justify restrictions which, viewed from the perspective of history and common sense, are entirely appropriate. Restricted access to many government-owned venues is part of our history and our constitutional tradition. The *Canadian Charter* was not intended to turn this state of affairs on its head.

A final concern is whether the proposed test is flexible enough to accommodate future developments. Changes in society will inevitably alter the specifics of the debate about the venues in which the guarantee of free expression will apply. Some say, for example, that the increasing privatization of government space will shift the debate to the private sector. Others say that the new spaces for communication created by electronic communication through the Internet will raise new questions on the issue of where the right to free speech applies. We do not suggest how the problems of the future will be answered. But it seems to us that a test that focuses on historical and actual functions as markers for public and private domains, adapted as necessary to accord with new situations and the values underlying the s. 2(b) guarantees, will be sufficiently flexible to meet the problems of the future.

Applying the approach we propose to the case at bar confirms the conclusion reached earlier under the three *Committee for the Commonwealth of Canada* tests that the expression at issue in this case falls within the protected sphere of s. 2(b) of the *Canadian Charter*. The content, as already noted, is expressive. Viewed from the perspective of locus, the expression falls within the public domain. Streets are clearly areas of public, as opposed to private, concourse, where expression of many varieties has long been accepted. There is nothing to suggest that to permit this

medium of expression would subvert the values of s. 2(b)."

(at paras. 71-81)

Ultimately, the Court concluded that the by-law infringed upon the club's freedom of expression, but that it was saved by Section 1 of the *Charter*.

On my reading of *City of Montréal*, the Supreme Court of Canada took the divergent approaches of Lamer, C.J.C., McLachlin, J., and L'Heureux-Dubé, in *Committee for the Commonwealth of Canada, supra*, and synthesized them into one test for determining whether expression on a particular piece of public property was protected by Section 2(b) of the *Charter* or not. In my view, *City of Montréal* did not so much change the law as the Employer asserts as clarify it by synthesizing or combining the different approaches into one test. One can see the approach of Lamer, C.J.C., reflected in the factor "the historical or actual function of the place" and whether it would conflict with the purposes Section 2(b) was designed to protect, i.e., democratic discourse, truth finding, and self-fulfillment. The approach of McLachlin, J., is reflected in the second factor "whether other aspects of the place suggest that expression within it would undermine the values underlying free expression." The overriding principle though is that "expressive activity should be excluded from the protective scope of s. 2(b) only if its method or location clearly undermines the values that underlie the guarantee" (at para. 72).

In *BCPSEA v. BCTF, supra*, the class size case, Huddart, J.A., considered both the approach of Lamer, C.J.C., and that of McLachlin J. *City of Montréal* was decided subsequent to *BCPSEA v. BCTF*. With respect to the approach of Lamer, C.J.C., she stated that:

> "For Lamer C.J.C., the question under s. 2(b) is whether the proposed expression is compatible with the principal function or intended purpose of the government property. On his approach, the question is whether teachers' discussion of their view of provincial education policies at parent-teacher interviews, handing out BCTF materials at those meetings, and hanging posters on school bulletin boards is compatible with the fundamental purpose of school properties or the effective operation of the school. In this regard, the view of the arbitrator chosen by the School Boards and the BCTF to resolve a workplace grievance merits considerable deference. He could see 'no incompatibility between the teachers' intended communications, on the one hand, and the principal function or purpose of a public school, on the other' (at para. 46). I agree. There is nothing in the stated facts to support any other finding."
>
> (at para. 22)

She then turned to the approach of McLachlin, J. She commented that

> "Under McLachlin J's approach, the question is whether the forum restriction on teachers' political expression is aimed at the content of the political expression and if not, whether 'the forum's relationship with the particular expressive activity invokes any of the values and principles underlying the guarantee' (at para. 299)."
>
> (at para. 23)

She next records the argument of BCPSEA:

> "The BCPSEA's first point is that neither a parent-teacher meeting nor a school bulletin board is an open forum 'where political messages of all sorts are traditionally tolerated': *Commonwealth*, McLachlin J. at para. 241. Neither are they a public place or a place of 'public debate' (at para. 249). Rather, they are resources used to fulfill the School Boards' mandate to provide public education services, about the use of which the School Boards are entitled to give directives, as they do about matters of curriculum and teachers' classroom appearance and conduct. They are places where 'the guarantee of freedom of expression has no place' (at para. 249). Its second point is that the School Boards' purpose in imposing limits on teachers' expression was not to restrict the content of expression through limiting the forums, but to prevent a school bulletin board or parent-teacher interview from being used for other than its proper purpose."
>
> (at para. 24)

She then agreed with Mr. Munroe that "the School Boards' purpose was to control a particular message teachers wished to convey" (at para. 25). Under McLachlin, J.'s approach, she need not have continued. However, she decided to look at the second aspect to that approach, but in these circumstances, she concluded that BCPSEA could only succeed in excluding its class size directives from the scope of the Section 2(b) protection "if teachers' political expression *in the workplace* is not constitutionally protected" (at para. 27). She ultimately decided that BCPSEA's argument could not succeed. She expressed her reasons this way:

> "The issue is whether expression at the 'location in question' is protected by s. 2(b). In neither *Keegstra* nor *Morin*, did the courts find teachers' expression of their personal views on public school property to be excluded from the protection of s. 2(b). The BCPSEA asserts the court in *Keegstra* did not consider the issue

> and *Morin* was wrongly decided. In the BCPSEA's submission, protecting teacher speech on school property is an overbroad reading of the guarantee.
>
> I do not agree. 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 bulleting 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)."
>
> (at paras. 33 and 34)

The first factor to be considered under the *City of Montréal* test is whether free expression in a public school would be inconsistent with the purposes Section 2(b) is designed to serve having in mind its historical or actual function. Both Mr. Munroe and the B.C. Court of Appeal found that there would be no incompatibility between teachers expressing concerns to parents about matters affecting their children's education and the actual function of the public school, i.e., providing children with an education. With respect to the second factor – are there other aspects of a public school that would suggest "that expression within it would undermine the values underlying free expression", I agree with the opinion of Huddart, J.A. that

> ". . . 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)."
>
> (at para. 34)

In my view, the administration of FSA tests to students in Grades 4 and 7 clearly concerns their education. Some teachers of those students have different views from those of the Ministry of Education and their employer school boards regarding the contribution of those tests to their students' education. In my view, discussions 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.

I agree with the conclusion of Huddart, J., that:

> "The School Boards cannot prevent teachers from expressing opinions just because they step onto school grounds. School

> grounds are public property where political expression must be valued and given its place."
>
> (at para. 65)

Public schools are not private locations like a government private office.

The Employer submits that I should not rely on the decision of the B.C. Court of Appeal in *BCPSEA v. BCTF* because the Court wrongly placed the onus of proof on BCPSEA when Huddart, J.A., stated that:

> "In my view, the BCPSEA can succeed in establishing the School Boards did not violate teachers' s. 2(b) rights only if it can exclude the proposed directives from the scope of the s. 2(b) guarantee. It can exclude the proposed directives from the scope of the guarantee only if teachers' political expression *in the workplace* is not constitutionally protected.
>
> (at para. 27)

It contends that the decision in *City of Montréal, supra* makes it clear that in this case, the burden is on the Union "to affirmatively establish, on a historical analysis, that teacher political speech is protected in schools in elementary classrooms during school time . . . ." It says that "there is no onus on the School District to establish that the speech in question was not protected – rather the onus was on the Union to establish that it was."

In my view, there is no difference between the decisions in *Committee for the Commonwealth of Canada, supra*, and the *City of Montréal, supra*, in terms of where the ultimate onus of proof lay, i.e., on the claimant seeking Section 2(b) protection to establish that the place in question was a public place where one would expect constitutional protection for free expression. I do not believe the decision in *City of Montréal* was changing the law in this area either.

When Huddart, J.A., made the comments referred to above concerning the burden of proof being on BCPSEA, she had already reviewed and agreed with Mr. Munroe's conclusions that public schools were places where freedom of expression should be protected under both the approach of Lamer, C.J.C., and that of McLachlin, J., in *Committee for the Commonwealth of Canada*. In these circumstances, I am of the view that what she was saying was that the burden of convincing the Court to a different view based on the fact that the expression was taking place *in the workplace* was on BCPSEA. I do not read her judgment as stating that she was reversing where the ultimate onus of proof lay, only stating that the party who asserts must prove. Additionally, it is to be remembered that she was dealing with an appeal from the Munroe Award and that BCPSEA was the appellant.

For these reasons, I am of the view that *BCPSEA v. BCTF* was not wrongly decided. Furthermore, on these matters of the general law, it is binding upon me. I note as well, as did Huddart, J.A., that the Supreme Court of Canada in *Keegstra* and the Prince Edward Island Court of Appeal in *Morin* also found public schools to be places where freedom of expression was constitutionally protected.

I am also of the view that the method of communication utilized in this case, i.e., sending the pamphlet expressing teacher concerns with the FSA tests home with students in a sealed envelope, is not repugnant to the functions of a public school or the values Section 2(b) is designed to serve. This method of communication is the one commonly used by teachers to communicate with parents about their children's education. The communication in this case does concern parents' children's education through the impact FSA tests will have on it. The students/children are not inappropriately involved in this discourse because the pamphlet is sent home in a sealed envelope to the parents. Parents are free to read it or not and if they do, to be persuaded by it or not. There is no wrongful intimidation or coercion. But for one exception which I will deal with later, there is no evidence that its distribution would impede the functions of the school or undermine the values underlying the free expression guarantee.

In summary, I am of the view that the Employer's refusal to permit its Grades 4 and 7 teachers to send home in a sealed envelope with their students the BCTF's pamphlet expressing concerns about FSA tests so that their parents could read it infringed upon those teachers' freedom of expression under Section 2(b) of the *Charter*. That pamphlet clearly conveyed meaning, i.e., teachers' opposition to such tests and why they were so opposed. The Employer argues that the handing of the sealed envelope to students in the class is not an expressive act. I do not agree. In my view, it is an important part of a single process that culminates in the communication of the teacher's concerns about FSA tests to the parents of those students, a process similar to mailing a letter. Further, in my view, neither the method of communication nor its location removed the protection provided to this communication under Section 2(b). The teachers followed their usual method for communicating with parents on matters relating to their children's education. They sought to prevent students from being exposed to their expression of concerns by placing the pamphlet in a sealed envelope addressed to the parent. Public schools are places where teachers' freedom of expression has been recognized and protected. See *BCPSEA v. BCTF, supra*, and *Morin v. P.E.I. Regional Administrative Unit No. 3 School Board, supra.*

Finally, I am satisfied that the effect of the Employer's actions, if not their purpose, was to limit their teachers' freedom of expression. The Employer submits that its purpose was not to restrict freedom of expression, but instead was to prevent its students from becoming involved in a political debate. It points out that it permitted its teachers to distribute the BCTF pamphlet directly to parents when they were present on school property. However, despite this submission and the B.C. Court of Appeal's decision in *BCPSEA v. BCTF, supra*, it continues to assert that public schools are not legitimate places for political expression, which evidences a concern about the content of the expression as much as how it was being communicated.

In any event, the Employer's refusal to allow its teachers to distribute the BCTF pamphlet to parents through this means did, in my view, have the effect of interfering with their freedom of expression. While they may have been able to inform parents of their concerns about the FSA tests through other means, the method of informing them through sending the material home with their children was probably the most effective in ensuring that all parents received the pamphlet. Further, the fact that teachers had other means of informing parents of their concerns available to them does not detract from the fact the Employer's actions in preventing teachers from communicating with parents in this manner did limit their ability to express their concerns about FSA tests to parents. See *Canadian Federation of Students v. Greater Vancouver Transportation Authority* [2006] B.C.J. No. 3042, 2006 BCAA 529, para. 130 per Prowse, J.A. Finally, I have already determined above that discussions between teachers and administrators, teachers and parents, and parents and administrators on matters pertaining to the education of children/students such as FSA tests do further the values of democratic discourse and truth finding which underlie the freedom of expression.

These conclusions bring me to the final question – is the limit the Employer has placed on its teachers using the school's internal mail delivery system, thereby preventing the delivery of the pamphlet on FSA tests to the parents of Grade 4 and Grade 7 parents through this means, saved by Section 1 of the *Charter*. Again, that provision

> ". . . guarantees the rights and freedoms set out in [the *Charter*] subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Is the Employer's restriction a "reasonable limit"? Can it be "demonstrably justified in a free and democratic society"?

In *City of Montréal v. 2952-1366 Québec Inc., supra*, McLachlin, C.J.C., and Deschamps, J., speaking for the majority stated that:

> "Under s. 1, the onus is on the City to show that the limit is directed at a pressing and substantial objective, and that the limit is proportionate in the sense of being rationally connected to the objective, impairing the right to freedom of expression in a reasonably minimal way, and having an effect in terms of curtailment of the right that is proportionate to the benefit sought: *R. v. Oakes*, [1986] 1 S.C.R. 103."
>
> (at para. 88)

The relevant portion of *R. v. Oakes, supra*, is quoted above in this Award in the judgment of Huddart, J.A., in *BCPSEA v. BCTF, supra*. She also commented that in applying the *Oakes* test, the context in which the government action has taken place should be considered, particularly the nature of the harm being addressed.

The first issue that must be considered is whether the Employer has established that there was a "pressing and substantial objective" that needed to be addressed through the restriction it imposed in this case. The Employer first of all says that Grade 4 and Grade 7 students should not be involved in carrying home political messages to their parents. While I agree that there is a political element to the pamphlet at issue in this case, its primary message, in my view, raises concerns about the impact of FSA tests on their children's education. Thus, the pamphlet deals with the type of subject matter that materials traditionally sent home with students commonly deal with, i.e., matters pertaining to students' education. Further, and in any event, the B.C. Court of Appeal in *BCPSEA v. BCTF, supra*, concluded that "school grounds are public property where political expression must be valued and given its place" (at para. 65). This conclusion included political expression by teachers.

The second aspect to the Employer's rationale is that Grade 4 and Grade 7 students should not be involved in this process carrying this type of information home to their parents. It might be argued as Ms. Airton did in her April 12, 2007 column in the "24 Hours" newspaper that doing so inserts the students into the policy discussion and causes them to feel "uncertain about two very important sets of people in their lives", i.e., their parents and their teachers, where the parents disagree with their teacher. While that might be the case, the Union in School District No. 5 (Southeast Kootenay) took the step of asking its member teachers who did decide to send the pamphlet home with students to place it in a sealed envelope addressed to the parent or guardian of the student. In my view, this step constitutes a reasonable attempt to address this concern.

For these reasons, I am of the view that neither of these aspects of the Employer's rationale constitutes a "pressing and substantial" concern which would justify the Employer's restriction in this case.

The third element to the Employer's restricting teachers from sending this pamphlet home with students is that it recommends parents withdraw their children from writing the FSA tests and that they do this by writing a letter to the school principal. A sample letter to the principal is provided in the pamphlet.

On the other hand, the Ministry of Education's guidelines for the FSA tests state that "all Grade 4 and Grade 7 students are expected to participate" with certain specified exceptions. The guidelines then state that:

> "Parents may request the principal to excuse a student in the event of a family emergency, a lengthy illness or other extenuating circumstances."

Family emergencies and lengthy illnesses are obviously serious matters. In my view, "other extenuating circumstances" would also have to be similarly serious matters before a principal could excuse a student from writing the FSA tests. In my view, such an interpretation of that phrase makes sense in the context of the Ministry's expectation

that "all Grade 4 and Grade 7 students" will participate in the tests with only certain specified exceptions. It also makes sense in light of the *ejusdem generis* rule to the effect that "a general phrase, such as 'or other causes' . . . takes its colour from the preceding specific words or phrases . . . ." See J. Willis, "Statute Interpretation in a Nutshell" (1938), 16 Can. Bar. Rev. 1, at 7 referred to in Brown and Beatty, *Canadian Labour Arbitration* (4th ed.) para. 4:2141.

Thus, excusing a Grade 4 or Grade 7 student from writing the FSA tests is no longer, if it ever was, a simple matter of the parent writing a letter to the principal. A case has to be made out. In this sense, I am of the view that the wording of the BCTF pamphlet that the Employer's Grade 7 teachers wanted to send out to parents is confusing and does not provide parents with the whole story. Without that full information, as we saw at Parkland and Laurier Middle Schools, parents simply sent the letters in and the result was confusion and conflict over students writing the tests, extending down to include even the students. Some were excused from writing simply because their parents wrote letters to the principal. This caused consternation amongst various students who had to write because their parents did not write such letters.

Having considered the matter, I am of the view that this confusion and conflict constituted a "pressing and substantial" concern that the Employer would have been justified in addressing in a reasonable way.

The Employer also argued that the pamphlet itself created confusion in the minds of parents because they would assume that any material coming home with their children would be from the Employer or the Ministry of Education. The confusion would then arise from the contents of the pamphlet because they were in opposition to what the Ministry and the Employer were doing in the sense that they were requiring the FSA tests to be written by all Grade 4 and Grade 7 students. I am not persuaded by this argument. The front page of the pamphlet has the BCTF's name and logo on it and its website is referred to inside the pamphlet. Those facts coupled with the content of the pamphlet would not, in my view, leave a reader of the pamphlet in any doubt as to who the source of the pamphlet was. Further, there is no evidence before me of any parents being confused or mistaken as to who the pamphlet was coming from.

Was the action the Employer took, i.e., forbidding its teachers from distributing the pamphlet at all through its schools' internal mail delivery system, rationally connected to addressing this "pressing and substantial" concern? Did it balance the interests of its teachers' freedom of expression with its concerns about the content of the pamphlet?

I am of the view that these questions must be answered in the negative. The Employer did not take a targeted approach to the pamphlet zeroing in on the items it felt were misleading or inaccurate. Instead, it refused to allow the teachers to use the schools' internal mail delivery system at all to send these pamphlets home to parents. It took this action because it believed that students should not be used to carry home political materials to their parents. As I have already determined, such a broad rationale

was not justified and infringed upon teachers' freedom of expression. There is a "pressing and substantial" concern regarding the pamphlet, but the Employer's reaction to it was overreaching and was not rationally connected to limiting that concern. Further, it did not balance its justifiable concerns in that respect with its teachers' freedom of expression interests.

The next and related issue is whether the limit imposed by the Employer on the teachers' freedom of expression impaired that right "in a reasonably minimal way". I am of the view that it did not.

Again, the Employer banned sending the pamphlet out in this fashion altogether. It did not adopt a more limited approach of targeting the offending pieces of the pamphlet that left the impression that parents could simply withdraw their children from the tests by writing a letter to the school's principal. Other school districts did adopt that more limited approach. See for example the amended pamphlets used in School District No. 41 (Burnaby) and School District No. 51 (Boundary), although those school boards did not allow teachers to send the amended pamphlets home to parents with children. See also School District No. 38 (Richmond) where the teachers' statement of concerns was sent home with students along with a letter from the district's Superintendent of Schools.

In all three cases, in my view, the resulting pamphlet was much more accurate about the possibility of a student being excused from writing the tests. In the Burnaby and Boundary pamphlets, the statement from the Ministry's guidelines concerning the grounds on which a parent could request that a principal could excuse her child from writing the tests was set out in the pamphlets. Then they went on to state that parents could "request that your child be excused from the FSAs." In Richmond, the effect of the Ministry's guidelines were summarized under the heading "can I withdraw my child from the FSA tests?". Then parents were told that they could "explore the option of having your child not write the FSAs."

In my view, the more limited approach reflected in these amended pamphlets addressed the "pressing and substantial" concern. Then permitting the pamphlet to be sent home with students for their parents to read as was done in School District No. 38 (Richmond) recognized the teachers' freedom of expression in matters related to the education of their students. I am of the view that this approach would impair the teachers' freedom of expression in a reasonably minimal way. The Employer's outright refusal to permit the pamphlet to be sent home in this fashion overreaches this "pressing and substantial" concern and infringes upon its teachers' freedom to express their concerns to parents about the FSA tests.

I will add though that if the Employer had requested that the Union amend the provisions of the pamphlet concerning parents requesting their children be excused from writing the tests so that they accurately reflected the Ministry's guidelines and the Union had refused, I am of the view that the Employer would have been justified in restricting teachers from distributing the pamphlet through its internal mail delivery system to

parents. That refusal would have meant that an absolute ban would have been the only way that the Employer could have addressed this "pressing and substantial" concern.

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

1. Teachers in School District No. 5 (Southeast Kootenay) have traditionally used a school's internal mail delivery system through the medium of students to communicate with parents on matters pertaining to their children's education.

2. The BCTF pamphlet "FSA testing can be harmful to students!" expresses teachers' concerns about the impact these tests have on students' education, and accordingly it conveys meaning.

3. Grade 4 and Grade 7 teachers in School District No. 5 (Southeast Kootenay) who wished to send this pamphlet home to parents of students in their classrooms were not claiming a positive right to access this internal mail delivery system. They have traditionally had access to it to communicate matters concerning their students' education. Instead, the Employer was seeking to restrict their access because of the content of the BCTF pamphlet and their use of students to deliver it.

4. Neither the method for nor the location of the teachers' expression of their concerns was such as to remove the teachers' expressions of concerns about FSA testing from the protection of Section 2(b) of the *Charter*.

5. The Employer's restriction preventing Grade 4 and Grade 7 teachers from sending these pamphlets home to parents in a sealed envelope had the effect of infringing upon their freedom of expression under Section 2(b) of the *Charter*.

6. The only "pressing and substantial" concern with respect to the pamphlet relates to its content pertaining to the withdrawal of children from writing the tests. The pamphlet is misleading because it does not provide the whole story with respect to that subject matter. The evidence in School District No. 5 (Southeast Kootenay) is that the pamphlet's misleading description of this process caused confusion and conflict within the schools concerned.

7. The fact that the pamphlet constitutes a political expression of opinion and that students are being used to deliver the pamphlet to their parents do not constitute "pressing and substantial" concerns. The B.C. Court of Appeal in *BCPSEA v. BCTF, supra*, has said that "school grounds are public property where political expression must be valued and given its place" (at para. 65). Placing the pamphlet in a sealed envelope addressed to their parents or

guardians insulates the students from being involved in the process, unless the parents decide to involve them.

8. By placing an absolute ban on teachers using its internal mail delivery system to communicate its concerns to parents about the FSA tests, the Employer did not impair its teachers' freedom of expression in a reasonably minimal way. Thus, the restriction placed on teachers' freedom of expression in this case is not saved by Section 1 of the *Charter*.

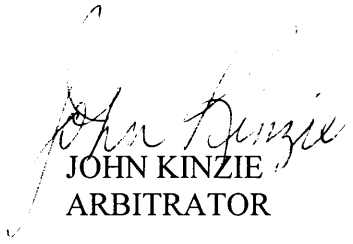
9. A reasonable and balanced solution for addressing the "pressing and substantial" concern the Employer had with the pamphlet would have required the Union to amend the pamphlet to more accurately address the circumstances in which a student could be excused from writing the tests. Such a restriction would have met the requirements to save the restriction under Section 1 of the *Charter*.

10. If the Employer had asked the Union to make those amendments and the Union had refused, the Employer would have been justified in preventing teachers from sending the pamphlet out through the school's internal mail delivery system.

In the result, the Union's grievance succeeds. I declare that the Employer's restriction on Grade 4 and Grade 7 teachers using a school's internal mail delivery system to send home with students for their parents to read the BCTF pamphlet opposing FSA testing violated the teachers' freedom of expression under Section 2(b) of the *Charter*. I further declare that the Employer has not made out a case that an absolute ban on sending this pamphlet out to parents using this means is a "reasonable" limit "demonstrably justified in a free and democratic society" within the meaning of Section 1 of the Charter. I direct the Employer not to interfere in this manner with its teachers' freedom of expression concerning FSA testing in the future.

I retain jurisdiction to deal with any difficulties that might arise in connection with the implementation of this Award.

Dated this 2nd day of May, 2008.



JOHN KINZIE
ARBITRATOR