IN THE MATTER OF AN ARBITRATION UNDER THE
***LABOUR RELATIONS CODE*, R.S.B.C. 1996**

BETWEEN:

BRITISH COLUMBIA PUBLIC SCHOOL EMPLOYERS' ASSOCIATION
(School District No. 34/Abbotsford)

(the "Employer")

AND:

BRITISH COLUMBIA TEACHERS' FEDERATION
(Abbotsford Teachers' Association)

(the "Union")

Re: Brenda Head Grievance
(Canadian Charter of Rights and Freedoms)

ARBITRATOR:	John Steeves
COUNSEL:	Keith Mitchell for the Employer
	John Rogers, Q.C. for the Union
DATE OF HEARING:	December 10 and 21, 2009
PLACE OF HEARING:	Abbotsford and Vancouver, B.C.
DATE OF DECISION:	March 3, 2010

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A. INTRODUCTION

1. This is a decision about whether a teacher, who is also a staff representative for the Union, can place a sign outside her classroom that says "Staff Representative".

2. The Union relies on the collective agreement between the parties as well as the *Canadian Charter of Rights and Freedoms* to support their position that a teacher may put a sign outside her classroom that says "Staff Representative". They seek a declaration that the sign is a legitimate and constitutionally protected form of expression under the *Charter of Rights and Freedoms* and is consistent with the collective agreement.

3. With regards to the collective agreement, the Union submits that the sign is innocuous, it provides information to people in the school and it reflects the pride

of people who are staff representatives for the Union. While the collective agreement permits the Union to have a bulletin board in each school it does not say that a sign, such as in this case, cannot be posted elsewhere. The sign in question is a legitimate one in the workplace because it does not impinge on the Employer's authority and it is not damaging to the Employer's reputation, according to the Union.

4. With regards to the *Canadian Charter of Rights and Freedoms*, the Union submits that the Employer's removal of the sign infringed upon the Grievor's freedom of expression under section 2(b) of the *Charter*. With regards to section 1 of the *Charter*, the Union submits that the Employer has not met the onus to demonstrate that the Employer's removal of the sign in question is justified in a free and democratic society.

5. The Employer submits that they were justified in removing the sign "Staff Representative" from outside the Grievor's classroom. They rely on the *School Act* (R.S.B.C. 1996, c. 412) where the principal has overall authority over a school's property including the right to make decisions about what should be on the walls of a school. With regards to the collective agreement, the Employer submits that there is a negotiated provision which gives the Union the right to post notices regarding activities of the Union and other information on a bulletin board in the staffroom of each school. However, this does not give the Union the right to post material anywhere else in the school and it does not confer on the Union any additional rights to those in the collective agreement.

6. With regards to the *Canadian Charter of Rights and Freedoms*, the Employer submits that there is no basis for finding a violation of the Grievor's freedom of expression. This is because the *Charter* does not guarantee the right of access to a particular platform for expression, or a particular means or form of expression. Further, the inside walls of a school are not an appropriate place where third parties can engage in expression involving the affairs of a union. A school wall or door is not a place where freedom of expression is traditionally practiced,

according to the Employer. Therefore, the Employer submits that the grievance should be dismissed. In the alternative, if there has been a violation of the freedom of expression, it is justified under section 1 of the *Charter*.

7. As can be seen, I am using "Employer" to describe the British Columbia Public School Employers' Association and School District No. 34 in Abbotsford B.C. I am aware that there are issues between the parties as to the definition of "employer". I use the term "Employer" for convenience simply to identify both the BCPSEA and School District No. 34/Abbotsford.

B. BACKGROUND

8. School District No. 34 operates a number of public schools in the area of Abbotsford, British Columbia. The Union represents teachers employed in those schools.

9. One of the schools operated by the Employer is the Abbotsford Traditional Middle School (ATMS). It was relocated to a new structure in September 2006, although this new structure was attached to an existing school. There are approximately 450 students attending grades 6 to 8 and approximately twenty teachers are employed at ATMS. There is a principal and a vice-principal, although the latter is shared with the school that is in the adjacent building.

10. The Grievor is Ms. Brenda Head and she is a teacher in the area of Learning Support Services at ATMS. She holds or has held a number of elected positions with the Union: Staff Representative, Professional Development Representative, Professional Development District Chair for three years and Health and Safety Representative.

11. In the late Summer and Fall of 2006 the Grievor was settling into her classroom in the new building for ATMS, along with her other colleagues. Her

classroom is on the second floor of ATMS, somewhat removed from the main traffic within the school.

12. Early in September 2006 the Grievor received a sign from the Union that said "Staff Representative". The Union describes this sign as small; its dimensions are about two by eight inches. The sign was presented at the hearing and it is thin plastic, mainly dark blue with white lettering and white border. The Grievor placed this sign on the wall outside her classroom, beside the door. She testified that she did this for two purposes. First, it provided information to people in the school about where she was located. For example, new teachers (teachers on call or teachers recalled from lay-off) would be able to see where the Staff Representative was located. According to the Grievor, she is not always in the staffroom where there is a Union bulletin board because she often takes her lunch in her classroom. As well, she has found that some teachers prefer to come directly to her rather than ask other people where she is located.

13. The second reason she put the sign outside her door is that she liked being a Staff Representative for the Union. Other staff representatives in other schools testified that they also put the same sign outside their classroom door to express their pride in their Union. One staff representative described the sign as her "bragging rights". The Grievor also testified that in the past she had posted information outside her classroom related to her responsibilities as the Professional Development Representative of the Union and as Health and Safety Representative. In the classroom itself she has materials related to these issues on or near her desk.

14. The evidence also included information about signage in other places at ATMS and in other schools, in hallways outside classrooms and in other places. For example there are signs indicating "General Office", "Learning Assistance", "Audio/Video Station #1", "Seminar 1", "Speech Therapist", and "Custodian". Some of these signs are handwritten (albeit neatly), some are large-font typed signs and others appear to be what might be described as professionally

manufactured signs. The "Staff Representative" sign in dispute is of the professionally manufactured variety.

15. In addition to signs outside classrooms there is a variety of other information on the walls outside classrooms, although the evidence is not that the walls are, or were, covered with material. Far from it. But, for example, a display about "Harry Potter Goes to the Olympics" was outside one room and this material was prepared by the teacher and students. Outside another classroom a teacher posted "with pride" her certification as a teacher in the international baccalaureate program. Other signs in ATMS included student photographs and sports awards on the walls in the hallway and information about a "sister school" in another city. From time to time there is also information posted by parents on a Parents Advisory Council (PAC) bulletin board such as eggs for sale and catering available for parents for a cost. I gather there have been inappropriate signs on the PAC board that have been removed in some schools.

C. EVENTS GIVING RISE TO THIS GRIEVANCE

16. In the Fall of 2006 Mr. George Keys was the District Principal Teacher Staffing for the Employer. His responsibilities included relations with principals throughout the Abbotsford School District and he reported to the Superintendant of Education for the Employer. He testified that he started this position in July 2006 but he did not have a strong human resources background. In order to address that perceived shortcoming, Keys approached the Secretary/Treasurer, of the School District, Mr. George Murray. The objective was to "set up a mentoring relationship" with Murray, as Keys put it in his evidence, because Murray had a human resources background. This developed into a series of meetings between Keys and Murray. Keys testified that the process they generally followed was that Murray would pose a question to Keys and get him to construct an answer. This was done in one meeting or sometimes a question would be discussed and Keys would do some preparation or research for discussion at a subsequent meeting.

17. On one occasion Murray had returned from a visit to ATMS and he had noticed the "Staff Representative" sign on the wall beside the door of the Grievor's classroom. Keys testified that Murray said to him, "Is the sign in the right place?" by way of starting a discussion. During and after this meeting and at the next meeting Keys and Murray discussed the collective agreement as well as the *School Act* to answer this question. Keys testified that he noted that the Union had the right to place a notice board in the staffroom of a school and he also noted that the *School Act* gave the principal of a school the responsibility for the physical plant of a school. He ultimately concluded that the "Staff Representative" sign outside the Grievor's classroom was "in the wrong spot", meaning that the information on the sign - the location of the staff representative - should have been communicated by means of the Union bulletin board in the staff room. Keys also testified that he did not visit the Grievor's classroom or actually see the sign at any time.

18. Keys then contacted the Vice Principal of ATMS and asked him if the sign described by Murray was in the school. The Vice Principal said he did not know and Keys testified that he (Keys) "didn't follow this up very much". He later contacted the principal of ATMS who at the time was Ms. Daljeet Ramma. According to the testimony of Keys, he asked Ramma whether she had given her permission for the sign to be placed on the wall outside the Grievor's classroom. He told her it was "her decision" about whether the sign should be allowed or not because that decision is within the authority of a principal as set out in the *School Act*. Keys also advised Ramma that there was a designated spot for "union information" on the bulletin board in the staffroom and, in his words, he "left it at that". Keys stated that he "pointed out" to Ramma her "rights as a principal" and "left her to make her own decision"; "I did not direct her or have the authority to direct her" to make the decision one way or another.

19. The conversations between Keys and Murray and Keys and Ramma took place through October 2006. Ramma's account of her conversation with Keys is essentially the same as his except she testified that Keys suggested she "contact

the teacher and resolve it". Ramma also apparently discussed the sign with her Vice Principal.

20. During this time the Grievor took a medical leave and was away from work beginning at the end of October 2006. On November 9 or 10, 2006 Ramma was at a conference and she telephoned the Grievor at home. Ramma explained to the Grievor that she had received a phone call from her Vice Principal saying "there was a concern about the 'Staff Representative' sign outside" the Grievor's door, according to the Grievor's testimony. In their testimony both Ramma and the Grievor agree that they decided together that Ramma could remove the "Staff Representative" sign from outside the Grievor's classroom. Therefore, the sign was removed without any direction from Ramma.

21. On November 15, 2006 Keys was attending a meeting with the Union at the Union office. In attendance was the then-President of the Union, Mr. Don Johannson, and Mr. Rick Guenther, the then-First Vice-President. The removal of the "Staff Representative" sign outside the Grievor's classroom was discussed, among other issues. A subsequent letter from the Union dated November 26, 2006 includes their account of the conversation,

> Mr. Don Johannson, President of the ADTA, and Mr. Rick Guenther, First Vice-President of the ADTA, met with Mr. Keys on November 15, 2006 to discuss this matter. In defense of the district's actions Mr. Keys referred to the principal's responsibility to supervise and manage all aspects of the school. In response to the question, "What is the problem with the sign?", Mr. Keys expressed a concern about the "ADTA presence in the school". Mr. Keys would not divulge the source of his awareness of the sign claiming that it was simply a question forwarded to him as one of the people that helps interpret the contract on behalf of schools.

22. In his evidence Keys stated that Johannson said to him at the November 15, 2006 meeting that he (Keys) "had no idea of the number of signs in schools". Keys agreed that might be the case and he resolved to find out. He testified that the reference in the Union's letter to "a concern about the 'ADTA presence in the

school' " was not an accurate account of what was said His evidence is that he said at the meeting that the Union had a bulletin board available to them in the staffroom and they did not have the right to place signs anywhere else in the school.

23. On or about November 17, 2006, Keys and Guenther exchanged emails about the sign issue. The version of these emails in evidence was in a merged format and I reproduce it below. For convenience, I have added the names of Keys and Guenther to identify who wrote each part of the message,

> (Guenther) Here is my understanding of the circumstances surrounding the "Staff Representative" sign situation. Please check it for accuracy and advise. Thanks. Rick
>
> (Guenther) The Abbotsford District Teachers' Association (ADTA) school Staff Representative, in Abbotsford Traditional Middle School (ATMS), attached a small, approximately 45 mm x 200 mm, commercially manufactured sign to her classroom/office door. The sign displays the two words, STAFF REPRESENTATIVE, signifying that she is an ADTA [Abbotsford District Teachers' association] union representative in that school.
>
> (Keys) I never saw the sign, I can't comment.
>
> (Guenther) Mr. Jason Parker, the Vice-Principal of ATMS, became aware of the sign and notified Mr. George Keys, District Principal for staffing. The district subsequently removed the sign.
>
> (Keys) Not quite. I was made aware of the possible existence of a sign through my role at the SBO [School Board Office] and when I was visiting the school on another matter, asked Jason Parker if there was a sign. He said he didn't know. He checked and told me there was. I asked him if he was aware of where the sign came from and said he didn't know. I asked him if the principal was aware of the sign, he said he didn't know. I told him I would call the principal since she was away at a conference.
>
> (Keys) I called the principal and left a message. She called back and replied that she didn't know about the sign. She told me she would look into it with a phone call to the teacher. She called me back at a later time.

> (Guenther) Mr. Don Johannson, President of the ADTA, and Mr. Rick Guenther, First Vice-President of the ADTA met with Mr. Keys on November 15, 2006 to discuss this matter. In defense of the district's actions Mr. Keys referred to the "principal's right to manage the school". In response to the question, "What is the problem with the sign?"
>
> (Keys) The reply was that the placement of signs (and any other printed materials) was the responsibility of the principal. The principal has a responsibility to supervise/manage all aspects of the school.
>
> (Guenther) Mr. Keys expressed a concern about the "ADTA presence in the school."
>
> (Keys) I did not express that concern. I did say that I understood that the ADTA had a specific bulletin board in the staffroom to post notices regarding activities and matters of the Association's concerns. Subsequent to our meeting I am aware this is covered under Article 1:14 and 1:14.1 of the C.A. [collective agreement]. My concern was the placement of a sign of any kind without the approval of the principal.
>
> (Guenther) Mr. Keys would not or could not divulge the identity of the person who first complained about the sign.
>
> (Keys) I did not say it was a result of a complaint but simply a question that was forwarded to me as one of the people that helps interpret the contract on behalf of schools.
>
> (Guenther) and he stated that he did not know the identity of the person who actually removed the sign.
>
> (Keys) I did not know at that time but have since found out it was removed by the principal after consultation with the staff rep.

24. Guenther testified that at this point the Union decided they needed to file a grievance and this was done on November 26, 2006. The grievance described the sign and some of the history including the conversation of November 15, 2006 discussed above. It also stated as follows,

> The Collective Agreement recognizes the ADTA as the union "for the administration of the Collective Agreement", recognizes the role of the school staff representative, grants the union the right to have

access to work sites, and grants the union the right to use school facilities. In removing the visible "ADTA presence in the school", the district interferes with the union's right to administer the Collective Agreement, fails to recognize the role of the school staff representative, and restricts both access to the work site and the right to use school facilities.

In accordance with Article 1:25 (Grievance Procedure) of the Collective Agreement the ADTA grieves that in removing the "Staff Representative" sign, the district violated the Collective Agreement including, but not limited to Articles 0:2.3 (Harmonious Relationship), 1:2 (Recognition of the Union), 1:11 (Association School Staff Representatives), 1:12 (Access to Work Site), and 1:13 (Use of School Facilities).

In addition, the district's actions violate the following articles of the Labour Relations Act.

Rights of employers and employees

4(1) Every employee is free to be a member of a trade union and to participate in its lawful activities.

Unfair labour practices

6(1) Except as otherwise provided in section 8, an employer or a person acting on behalf of an employer must not participate in or interfere with the formation, selection or administration of a trade union or contribute financial or other support to it.

The ADTA is seeking remedies including but not limited to the district's acknowledgement of the violations and replacement of the sign. We request a meeting with you, before December 11, 2006, in order to seek a resolution to this matter.

The Union did not proceed at this arbitration with the issues they raised under the *Labour Relations Code* in this grievance.

25. The Employer replied to the grievance in a letter dated December 8, 2006 and I reproduce that letter (without an introductory sentence),

The District has a great deal of concern about the assertions made in the grievance.

Firstly, the letter presented a partial quote by me that is misleading. Your letter states, "In response to the question, *What is the problem with the sign? Mr. Keys expressed a concern about the ADTA presence in the school.*" The partial quote is misleading because the follow up statement clarified the District's concern in terms of the ADTA's failure to follow appropriate process in the posting of the unauthorized sign. The building principal did not authorize the sign.

Secondly, the school has a Bulletin Board in the school for ADTA notices in compliance with the Collective Agreement (C.A.) Article 1:14 Bulletin Boards. Under 1:14:1 *The Association shall have the right to post notices regarding its activities and matters of Association concern on a bulletin board provided in a staff room in each school building.* The sign in question was not on the ADTA bulletin board.

Thirdly, the ADTA refers to C.A. Articles; 0:2.3 (Harmonious Relationship), 1:2 (Recognition of the Union), 1:11 (Association School Representatives), 1:12 (Access to Work Site), and 1:13 (Use of School Facilities). After careful review of each of these articles, the removal of the unauthorized sign does not place the District out of compliance with the Collective Agreement.

Lastly, the ADTA claims the removal of the unauthorized sign violates two articles of the Labour Relations Act, (i) rights of employers and employees, and (ii) unfair labour practices. The presence of the Bulletin Board recognizes the trade union, provides every employee access to information related to the trade union, and an avenue for the administration of the trade union.

In the view of the District, the ADTA is grieving the right of the District to manage the operation of the school. The posting of signs within a school falls under management rights articulated in the School Act, its Regulations, Orders in Council, the policies of the Board:

> <u>School Act – Management of School Property</u>
>
> *74(1) A board is responsible for the management of the schools in its school district and for the custody, maintenance and safekeeping of all property owned or leased by the board.*
>
> *74(2) a board must ensure that a principal, vice principal or director of instruction is responsible for each school in its District.*
>
> <u>School Act – Power and Capacity</u>

85(1) For the purposes of carrying out its powers, functions and duties under this Act and the regulations, a board has the power and capacity of a natural person of full capacity.

85(2)(c) to make rules (iv) respecting the establishment, operation, administration and management of schools operated by the Board.

School Regulations – Powers and duties of Principals

5(6) the principal or, if so authorized by the principal, the vice principal of a school shall: (a) perform the supervisory, management and duties required or assigned by the board.

Order in Council 1280/89 – Mandate for the School System
Part C – Duties, Rights and Responsibilities (School Principals)

School Principals have the right to exercise professional judgment in managing the school in accordance with specified duties and powers.

School District No. 34 (Abbotsford) Policies and Procedures

2:40 Authority of School Principals

Principals are authorized to issue regulations governing the internal operations of their schools.

In conclusion, the District recognizes the role of the union and places a high value on its positive relationship with the ADTA, but after careful consideration, we are denying this grievance.

26. By the end of November 2006 the Grievor had returned to work from her medical leave. As above, the "Staff Representative" sign had been removed as a result of an agreement between the Grievor and Ramma, the Principal, earlier that month. The Grievor testified that some time after her return to work she put the sign back up outside her classroom. She told Ramma she had done so and, according to the Grievor's testimony, Ramma did not object. The Grievor also continued to provide professional development and health and safety material to teachers, including having the materials available in her classroom.

27. Ramma testified that she could not recall the date but she remembered the Grievor telling her that the Union said she could keep the sign up. The Grievor's idea at the time was that the sign could stay up while the grievance was proceeding. Ramma discussed this with Keys. Keys confirmed this discussion in his evidence and that he advised Ramma that there was a "work now and grieve later" rule and this meant that the sign had to come down pending resolution of the grievance.

28. On or about March 6, 2007, Ramma sent an email to the Grievor stating, "this is a directive for you to remove the 'Staff Representative' signage from the front of your classroom door and your desk. Thank you in advance, Dal." On or about the same date the Grievor replied to Ramma, "Well, it is in writing. I am assuming this came from over Dal's [Ramma's] head." At least part of this message was directed at Johannson and Guenther who were copied by the Grievor. The sign was removed.

29. In April 2007 Keys decided to do something in response to the comment by Johannson at the November 15, 2006 meeting with the Union that Keys did not know the extent of signage in the schools. On April 25, 2007 he wrote the following email to "All Principals",

> Dear Colleagues,
>
> Last November, the ADTA launched a "Union Rights" grievance after a staff rep was told to remove their "Staff Rep" sign posted in a classroom. This is not the forum to fully discuss the grievance but at today's meeting the ADTA brought it to the District's attention that there may be other "Staff Rep" signs posted in schools. The School Act is clear in stating that the building principal is responsible for all signage within a school. Please ensure that there are no other "Staff Rep" signs posted in any place other than the staff room ADTA Bulletin Board.
>
> Article 1:14 of the Collective Agreement provides clear guidance as to where ADTA notices and information are to be posted – <u>on the dedicated Staff Room ADTA Bulletin Board.</u>

[emphasis in original].

30. The evidence is that some principals complied with the email of April 25, 2007. In cross-examination, Keys agreed that some principals told teachers to remove signs and, in light of his email to Principals, he was not surprised that they gave that direction to teachers. However, some principals did not follow Keys' email of April 25, 2007 and Keys testified that he was not surprised with that result either. This was because Keys believed his role was to provide information and to "tell them [principals] what I believe to be correct but I did not have any supervisory capacity ... it was pretty difficult to tell them".

31. The evidence includes information about the situation in other schools with regards to the use of "Staff Representative" signs. According to Keys there were six schools where these signs went up but he allowed there might be some inaccuracy in this number. The Union provided evidence through its witnesses that, in at least three schools, staff representatives were not told to remove their signs and they remained in place. In two other schools the signs were removed. In the case of one school a principal came to look at the sign and was shown it by the staff representative. The principal commented "That's it?" and walked away without any comment or direction to remove the sign.

32. As above, the resolution of the grievance in this case involves two broad issues: is the posting of the sign a protected form of expression under section 2(b) of the *Canadian Charter of Rights and Freedoms*? In the event the answer to the first question is yes then a second issue arises: is the posting of the sign justified in a free and democratic society under section 1 of the *Charter*? Finally, separate from the *Charter* issues, is there support in the collective agreement for the Grievor to post the "Staff Representative" sign outside her classroom?

33. I will deal with these issues in turn.

D. THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

34. As a starting point I note that the parties agree that the *Canadian Charter of Rights and Freedoms* applies to school districts. This is consistent with previous authorities including *British Columbia Public School Employers' Assn. (School District No. 5/Southeast Kootenay) v. British Columbia Teachers' Federation (Cranbrook/Fernie District Teachers' Associations),* [2001] B.C.A.A.A. No. 43 (Kinzie) (the "Kinzie Award"). (See also, *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation,* [2004] B.C.C.A.A.A. No. 82 (Munroe) (the "Munroe Award"); appeal denied, *British Columbia Public School Employers' Assn. v. British Columbia Teachers' Federation* (2005), 141 L.A.C. (4th) 385 (BCCA); leave to appeal to Supreme Court of Canada denied, October 3, 2005, Court File No. 31162).

35. As well, the Employer accepts that individual teachers have certain *Charter* rights of free expression including, in appropriate circumstances and subject to section 1 of the *Charter*, rights of expression on the Employer's property. However, the Employer does not accept that teachers have the right to use the specific property in this case - walls outside a classroom - "as a forum for promulgating their message". The Union asserts the exercise of *Charter* rights and freedoms for teachers while employed as teachers, including the freedom to post the sign in dispute.

36. With these preliminary points in mind, I begin with a general discussion of freedom of expression and the development of the case law under the *Charter* and it applies to the issues in this grievance. As will be seen, the authorities discussed are relied on by one or both parties for various issues and I review those issues in separate sections.

(a) Section 2(b) of the *Charter*: Freedom of Expression

37. I begin by setting out section 2(b) of the *Charter*,

> 2. Everyone has the following fundamental freedoms:
>
> ...
>
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media communication.

Considering the grievance in this case in light of that provision, the Union submits that the removal of the "Staff Representative" sign from the wall outside the Grievor's classroom was a violation of the Grievor's freedom of expression in section 2(b). Further, that the violation was not justified under section 1 of the *Charter*. The Employer submits that there was no violation of section 2(b) at all and, therefore, there is no need to consider section 1. However, if there was a violation of freedom of expression under the *Charter*, then it was justified under section 1. Any consideration of section 1 of the *Charter* is discussed below.

38. The Supreme Court of Canada has identified the significance of freedom of expression under section 2(b) of the *Charter* in broad terms in the context of labour relations in an early decision involving picketing, "... Freedom of expression is not ... a creature of the *Charter*. It is one of the fundamental concepts that has formed the basis for the historical development of the political, social and educational institutions of western society". Further, "... even before the *Charter* became law, 'Canadian judges have always placed a high value on freedom of expression as an element of parliamentary democracy' " (*Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery*, [1986] 2 S.C.R. 573, paragraphs 12, 16; citing Peter Hogg, *Constitutional Law in Canada*, (2nd ed. 1985), at page 713). Examples of this history include *Boucher v. The King*, [1951] S.C.R. 265 and *Switzman v. Elbling*, [1957] S.C.R. 285).

39. In another case, following *Dolphin Delivery,* the Supreme Court of Canada decided that peaceful picketing at secondary locations of an employer was protected expression under the *Charter.* The court applied a "wrongful action model" to balance the interests at stake and focus on the character and effects of the activity as opposed to the location. The values that are promoted by free expression include self-fulfilment, participation in social and political decision-making, and the communal exchange of ideas. As well, freedom of expression,

> 32. ... allows a person to speak not only for the sake of expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment.
>
> *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.,* [2002] 1 S.C.R. 156.

40. In *Pepsi-Cola* the court also noted the specific application of these values to labour relations and characterized freedom of expression in a labour relations' context as "labour speech",

> 35. Free expression in the labour context benefits not only individual workers and unions, but also society as a whole. .... As part of the free flow of ideas which is an integral part of any democracy, the free flow of expression by unions and their members in a labour dispute brings the debate on labour conditions into the public realm.
>
> ...
>
> 69. ... [L]abour speech engages the core values of freedom of expression, and is fundamental not only to the identity and self-worth of individual workers and the strength of their collective effort, but also to the functioning of a democratic society. Restrictions on any form of expression, and particularly expression of this gravity, should not be lightly countenanced.
>
> *Pepsi, supra.*

41. The next decision of interest is *Irwin Toy Ltd. v. Québec (Attorney General)*, [1989] 1 S.C.R. 927 and it is significant because it sets out an approach to freedom of expression that has been followed in subsequent decisions. In that case, the Supreme Court of Canada considered whether provincial consumer protection legislation violated the freedom of expression of Irwin Toy Ltd. when it sought to advertise its products to children. Among other things, a majority of the court decided that two provisions of the legislation infringed section 2(b) of the *Charter* because they prohibited particular expression in the name of protecting children. However, the court concluded that the same provisions were nonetheless a justified and reasonable limit on expression under section 1 of the *Charter.*

42. In what might be called the *Irwin Toy* test, the court set out the framework for analyzing issues of freedom of expression. The court noted that expression has both a form and content and "... the two can be inextricably connected" (paragraph 41). They cited American, European as well as Canadian precedent for the proposition that free expression is, for example, a "little less vital to man's mind and spirit than breathing is to his physical existence" (paragraph 41, citing *Switzman, supra,* at page 306). This applies to information or ideas that offend or shock any sector of the population as well as to ideas and information that are favourably received by the population. From this the court concluded,

> 41. ... We cannot, then, exclude human activity from the scope of guaranteed free expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee. Of course, while most human activity combines expressive and physical elements, some human activity is purely physical and does not convey or attempt to convey meaning. It might be difficult to characterize certain day-to-day tasks, like parking a car, as having expressive content. To bring such activity within the protected sphere, the plaintiff would have to show that it was performed to convey a meaning. For example, an unmarried person might, as part of a public protest, park in a zone reserved for spouses of government employees in order to express dissatisfaction or outrage at the chosen method of allocating a limited resource. If

> that person could demonstrate that his activity did in fact have expressive content, he would, at this stage, be within the protected sphere and the section 2(b) challenge would proceed.
>
> *Irwin Toy, supra.*

43. While freedom of expression can be conveyed through "an infinite variety of forms of expressions" (paragraph 42) there are important limits on it. For example, violent expression is not protected because "freedom of expression ensures that we can convey our thoughts and feelings in non-violent ways without censure" (paragraph 42). Criminal law may have a role in the case of violence. Similarly, the court has held that there are protections under tort and contract that protect against such things as intimidation and inducing breach of contract (*Pepsi-Cola, supra,* paragraph 105).

44. From this general discussion of the "broad, inclusive approach to the protected sphere of free expression" (paragraph 43) the court then identified specific questions to be addressed. The first is: does the expression (in the case of *Irwin Toy,* advertising) have "expressive content" and "convey a meaning". The case of *Ford v. Québec (Attorney General),* [1988] 2 S.C.R. 712 was relied on for the proposition that "rights and freedoms guaranteed in the *Charter* should be given a large and liberal interpretation" (paragraph 45; citing *Ford* at pages 766-67). In the case of restrictions on advertising in *Ford,* the court held that "surely" the advertising intended to convey a meaning and could not be excluded as having no expressive content.

45. The next step in the inquiry was to "ask whether the purpose or effect of the government action in question was to restrict freedom of expression" (paragraph 45). I pause to note that the court in *Irwin Toy* pointed out that the inquiry into whether there is a violation of the guarantee of freedom of expression can end at the first stage (whether the expression in dispute conveys a meaning) as was the case in *Ford, supra.*

46. Both purpose and effect are relevant to determining constitutionality and "either an unconstitutional purpose or effect can invalidate legislation" (paragraph 47; citing *R. v. Big M Drug Mart Ltd.,* [1985] 1 S.C.R. 295, at page 331). It appears that purpose is to be considered first because if government action fails the purpose test, "there is no need to consider further its effects, since it has already been demonstrated to be invalid" (*Big M Drug Mart, supra,* page 332).

47. With regards to the purposive part of the analysis in *Irwin Toy* the court cautioned about "drifting between either of two extremes". On the one hand it may be that, objectively, one aspect of a government purpose will be to "virtually always ... restrict expression". The other extreme is that, subjectively, government can "almost always claim its subjective purpose was to address some real or purported social need, not to restrict expression" (paragraph 48). And,

> 49. If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression. Archibald Cox has described the distinction as follows (*Freedom of Expression* (1981), at pp. 59-60):
>
>> The bold line...between restrictions upon publication and regulation of the time, place or manner of expression tied to content, on the one hand, and regulation of time, place, or manner of expression regardless of content, on the other hand, reflects the difference between the state's usually impermissible effort to suppress "harmful" information, ideas, or emotions and the state's often justifiable desire to secure other interests against interference from the noise and the physical intrusions that accompany speech, regardless of the information, ideas, or emotions expressed.

> Thus, for example, a rule against handing out pamphlets is a restriction on a manner of expression and is "tied to content", even if that restriction purports to control litter. The rule aims to control access by others to a meaning being conveyed as well as to control the ability of the pamphleteer to convey a meaning. To restrict this form of expression, handing out pamphlets, entails restricting its content. By contrast, a rule against littering is not a restriction "tied to content". It aims to control the physical consequences of certain conduct regardless of whether that conduct attempts to convey meaning. To restrict littering as a "manner of expression" need not lead inexorably to restricting a content. Of course, rules can be framed to appear neutral as to content even if their true purpose is to control attempts to convey a meaning. For example, in *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, a municipal by-law forbidding distribution of pamphlets without prior authorization from the Chief of Police was a colourable attempt to restrict expression.
>
> *Irwin Toy, supra.*

48. With regards to the effect of government action, the burden is on the plaintiff (the Union in this case) to show that the government action (the Employer's action in this case) restricted freedom of expression. This requires the application of the "principles and values underlying the freedom" and these were summarized by the court as follows,

> 53. ... (1) seeking and attaining the truth is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. In showing that the effect of the government's action was to restrict her free expression, a plaintiff must demonstrate that her activity promotes at least one of these principles. It is not enough that shouting, for example, has an expressive element. If the plaintiff challenges the effect of government action to control noise, presuming that action to have a purpose neutral as to expression, she must show that her aim was to convey a meaning reflective of the principles underlying freedom of expression. The precise and complete articulation of what kinds of activity promote these principles is, of course, a matter for judicial appreciation to be developed on a case by case basis. But 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.

Irwin Toy, supra.

49. In a subsequent decision (*Ramsden v. Peterborough (City)*, [1993] 2 S.C.R. 1084) the Supreme Court of Canada considered whether a municipal by-law that prohibited all postering on public property violated freedom of expression under section 2(d) of the *Charter*. The plaintiff was a musician who was charged under the by-law for posting advertisements for his band on hydro poles. The court found that there was a violation of section 2(b) of the *Charter* and the by-law was not saved under section 1 because a complete ban did not restrict expression as little as is reasonably possible.

50. In *Ramsden* the court applied the analysis from the *Irwin Toy, supra,* decision. With regards to whether the posting of advertisements for a musical group conveyed or attempted to convey a meaning, the court had little difficulty in finding there was expressive activity (and the point was conceded). The meaning was of "a coming musical performance" and postering has "historically been an effective and relatively inexpensive means of communication ... Posters have communicated political, cultural and social information for centuries". In *Ford, supra,* the court held that a law requiring public signs and posters only to be in French violated section 2(b) and, "Implicitly this decision held that public signs and posters are a form of expression ... Regardless of whether the posters ... constitute advertising, political speech or art, it is clear that they convey a meaning" (paragraph 20).

51. The second question considered in *Ramsden*, again applying the *Irwin Toy* analysis, was whether postering on public property was protected by section 2(b) of the *Charter*. In *Ramsden*, the judgment in *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139 was relied on for three different approaches to when property is public (in *Committee for the Commonwealth of Canada* a ban on political pamphleting at an airport was found to be a limitation

on freedom of expression, and not justified under section 1 of the *Charter*). The first approach in *Committee for the Commonwealth of Canada* was that of L'Heureux-Dubé J.; all restrictions on expressive activity on public property violate section 2(b) and must be justified under section 1. This is obviously a very broad reading of the protection of freedom of expression under section 2(b). The second approach of Lamer C.J. required a balancing of the expressive activity with the effective and safe operation of public services. The third approach in *Commonwealth of Canada* was that of McLachlin J., who posed the issue as being whether the expressive activity furthers any of the values underlying section 2(b) of the *Charter*. The court in *Ramsden* found that postering on public property was protected by section 2(b) under all three approaches (paragraph 28).

52. With regards to the purpose of the by-law in dispute, the court in *Ramsden* found that it was aimed to control the public consequences of certain conduct, and that this was "meritorious" and not a violation of section 2(b) (paragraph 38). However, the effect of the by-law was to limit expression because an "absolute prohibition of postering on public property prevents the communication of political, cultural and artistic messages" (paragraph 39).

53. In another case, *Montréal (City) v. 2952-1366 Québec Inc.*, [2005] S.C.J. No. 63, the facts were that a night club placed speakers outside its entrance so that passers-by could hear the sound of the show coming from inside the club. The club was convicted under a by-law that prohibited "noise produced by sound equipment, whether it is inside a building or installed or used outside ...". The club owner challenged the by-law as being a violation of his freedom of expression under section 2(b) of the *Charter* and had some success in the courts below. However, a majority of the Supreme Court of Canada ultimately declared the by-law to be valid under section 1, among other conclusions. This is also discussed in more detail below.

54. The court applied the *Irwin Toy* analysis once again, although with the clarification discussed below. They concluded that noise from a loudspeaker has expressive content, even though it was not valuable and it may have even been offensive; "Expressive activity is not excluded from the scope of the guarantee of because of its particular message". Further, subject to issues of method or location, "all expressive activity is presumptively protected" by section 2(b) of the *Charter* (paragraph 58). On this basis a *prima facie* case for section 2(b) protection was established.

55. With regards to the location of the expressive activity, the court noted that the speakers were on private property but the sound issued onto the street, a public space owned by the government. Therefore, the question was "whether section 2(b) of the *Canadian Charter* protects not only what the Appellants [the owners of the club] were doing, but their right to do it *in the place where they were doing it*, namely a public street" (emphasis in original, paragraph 61). After noting the arguments for and against this question, the court concluded, as they did in *Ramsden, supra,* that on any of the tests proposed in the *Committee for the Commonwealth of Canada, supra,* decision, the emission of noise into a public street was protected under section 2(b) (paragraph 61).

56. The court did not think it was necessary to revisit the question of which of the "divergent approaches" in *Committee for the Commonwealth of Canada* should be adopted. Nonetheless, they stated that "... since we are requested to clarify the test .." they provided their "views". I cite the court's judgment below but, in summary, they concluded that expression is not protected "... 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." Further the "basic question" is whether the place is a public place where "one would expect constitution 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". Those purposes are democratic discourse, truth finding an self-

fulfillment. Finally, historical or actual functions are to be considered as well as whether other aspects of the place suggest that expression there would undermine the values underlying freedom of expression (paragraphs 71, 74).

(b) Freedom of Expression in the education context

57. I next turn to two decisions, in chronological order, that have considered the issue of freedom of expression under section 2(b) of the *Charter* in the context of education in B.C.

58. The first is the Munroe Award, *supra*. The facts of the case were agreed between the parties and they involved directions to teachers that they were "not to post certain material on teacher bulletin boards located in areas within the school where students and their parents have access". Further, teachers were "not to distribute certain documents to parents either during parent-teacher interviews or otherwise on school property" (paragraph 3). The information that teachers wished to communicate included information arguing for smaller class sizes, information critical of the education policies of the government of the day and information seeking support for "improved learning conditions for students" (paragraphs 8-9). Specific and detailed "Alleged Actions" were made by teachers against ten school boards in British Columbia and these formed part of the agreed facts.

59. Arbitrator Munroe found the restrictions on teachers in the agreed facts were a violation of the freedom of expression of teachers under section 2(b) of the *Charter* and the restrictions on that freedom could not be justified under section 1 of the *Charter*. He concluded,

> 39. Clearly, the teachers' actions or intended actions were within the sphere of conduct protected by Section 2(b) of the *Charter* - the freedom of expression. The bulletins or flyers, the "cards" and any ensuing discussion with parents about class size or class composition

> or other learning conditions, either as collective bargaining matters or in the context of the provincial government's legislative intervention, were attempts to convey meaning and thus have expressive content ...
>
> Munroe Award, *supra.*

60. He then addressed two arguments raised by the B.C. Public School Employers' Association (BCPSEA). The first was whether the teachers' assertion of a violation under section 2(b) of the *Charter* passed the second step in *Irwin Toy, supra.* That second step is the requirement to show that the purpose or effect of the actions by BCPSEA was to restrict freedom of expression. On this point the arbitrator concluded,

> 42. Here, the Board's purpose was clearly "to restrict the content of expression by singling out particular meanings that are not to be conveyed", and likewise "to control the ability of the (teachers) conveying the meaning to do so" [citing *Irwin Toy,* at paragraph 49]. The content of expression sought to be restricted was the teachers' views on class size, class composition, etc. - issues which at the material times were in the public forefront. The control on the teachers' ability to convey meaning was to prohibit them from posting flyers on teachers' bulletin boards where parents or students might see them; and to prohibit the dissemination of information on those subjects, or any discussion thereof, during regular parent-teacher interviews. It is true that the restriction, limitation or prohibition was as to time and place; however, the restriction, limitation or prohibition as to time and place was tied to content.
>
> Munroe Award, *supra.*

61. The second issue raised by BCPSEA was described as a "property rights" one. BCPSEA's position was that freedom of expression was not engaged at all because they owned the property of the schools. It may be recalled from the discussion above that this issue arose in the *Committee for the Commonwealth of Canada, supra,* decision and there were three approaches in that decision to the issue. Arbitrator Munroe discussed two of these approaches, those of Lamer C.J. and McLachlan J. (now C.J.). He concluded,

> 46. If one were to adopt the approach taken by Lamer C.J., I 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. Similarly, if one were to adopt the approach taken by McLachlin J. (now C.J.), I think the "values and interests at stake" favour the benefit of protection under Section 2(b) of the *Charter*; and I repeat my earlier observation that, clearly, the School Boards' purpose in the instant matter was to restrict the content of expression and to control the ability of the teachers to convey expressive meaning.
>
> Munroe Award, *supra.*

62. The arbitrator also adopted the analyses and conclusions in *Keegstra, supra,* and *Morin, supra,*

> 49. I reach the same conclusion here. 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 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 BCPSEA and the BCTF [B.C. Teachers' Federation], and ultimately in the context of the provincial government's legislative intervention in collective bargaining, but that is simply to state the context in which the communication was intended to occur and in which the School Boards' prohibition was promulgated; it does not provide a justification for concluding that Section 2(b) of the *Charter* was not engaged at all. In my view, based on the authorities, if the School Boards' prohibition can be justified, it is not by the diminution of the meaning of freedom of expression in Section 2(b) of the *Charter*, but rather under Section 1: 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".
>
> Munroe Award, *supra.*

63. The Munroe Award was appealed by BCPSEA to the Court of Appeal for British Columbia, pursuant to section 100 of the *Labour Relations Code* (*British Columbia Public School Employers' Association*, BCCA, *supra).* The appeal was unsuccessful with a majority of the panel stating, "Except in the rarest of cases,

public bodies should be required to justify any restriction they place on political expression" and, in this case, the "impugned directives violated the teachers' right to free expression under s. 2(b)" (paragraphs 37, 38). There is further discussion below of this decision.

64. The second decision from British Columbia is the Kinzie Award, *supra*. The facts of that case were that the union, a local of the B.C. Teachers' Federation, wanted to send students in Grades 4 and 7 home with a pamphlet prepared by the BCTF that opposed the use of Foundation Skills Assessment (FSA) tests in schools (only students in Grades 4 and 7 were subject to the tests). The idea was to send it in a sealed envelope that also included a form letter that parents could complete and send to the principal of their children's school. The form letter asked that the parents' child be excused from writing the tests.

65. The union in that case asserted their right to freedom of expression under the *Charter* and relied very much on the Munroe Award, discussed above. The Employer submitted that the teachers' actions did not engage section 2(b) of the *Charter* at all. This was because the union was seeking to access the employer's internal mail system that is used for communicating with parents; that system is for communicating matters of educational interest and it should not be used as a vehicle for communicating information of a political nature. That is, there was no constitutional right of access to a forum or a means of communication. Alternatively, if freedom of expression was engaged, the employer submitted that the union's grievance must still be dismissed because the method and location are not consonant with protection under the *Charter*.

66. In the end, Arbitrator Kinzie allowed the union's grievance. He reviewed the Munroe Award in some detail, including the Court of Appeal decision, as well as *Irwin Toy, supra,* and the *Committee for the Commonwealth of Canada, supra,* and *Keegstra, supra,* decisions. The Employer submitted that the Supreme Court of Canada changed the law in the *Montréal, supra,* decision from what it was in *Committee for the Commonwealth of Canada.* But the arbitrator

concluded that what the court did was "clarify it by synthesizing or combining the different approaches [in *Committee for the Commonwealth of Canada*] into one test" (paragraph 94). By way of summary on the issue of expressive content the arbitrator stated as follows,

> 107. 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.*
>
> Kinzie Award, *supra*.

67. This is an opportune place to address the parties' different interpretations of the Munroe and Kinzie Awards. To the Union, the Munroe Award in particular is strong support for their position in this grievance. The Kinzie Award is relied on by the Union because it is said to be consistent with the Munroe Award. However, the Employer emphasizes that neither award should be read beyond the facts of each case.

68. In the Munroe Award the Statement of Case included the statement that teachers were told by their employer "not to post certain material on *teacher bulletin boards located in areas within the school where students and their*

parents would have access" (paragraph 13, emphasis added; also paragraph 49). The Employer in the grievance before me focuses on the reference to "bulletin boards" because, as above, the collective agreement includes the right for the Union to have a bulletin board in the staff room. Their submission is that the Munroe Award involved information that was only posted on bulletin boards in staff rooms. On the other hand, the Union urges me to focus on the reference to information that was "... located in areas within the school where students and their parents would have access". On this view, the Munroe Award protected expression in areas of the school other than the staff room where students and parents would be exposed to it. Therefore, according to the Union, this supports protecting expression in hallways of schools where students and parents also have access.

69. It appears that the evidence in the Munroe Award was put in by a Statement of Case and no evidence was called. In any event, I do not have access to the record before the arbitrator. The award itself describes a number of different fact situations in a number of different school districts (see paragraph 12). I conclude that the evidence in the Munroe Award included some expression that was outside staff rooms and to which students and parents had access. This seems self-evident from the award itself and I note references to the facts in specific school districts that support this conclusion. For example, in one district, teachers wanted to "post information [about "loss of services"] in the front hall of the school for parents to read" (sub-paragraph 29 of paragraph 12; also sub-paragraphs 12 and 20). However, I cannot find that the Munroe Award specifically approved the type and location of expression that is in the grievance in this case. All that can be said is that the Munroe Award provides some support for the Union's position in this grievance. It, and the Kinzie Award, also demonstrate that freedom of expression does have a place in public schools and teachers have a right to exercise that freedom when they are employed as teachers.

70. I next proceed to discuss the facts of this grievance with the above discussion of the authorities in mind.

(c) The sign

71. As above, the sign in dispute in this grievance is a plastic one that says "Staff Representative" in white lettering on a dark blue background. It is about two by eight inches in dimension and, therefore, I agree with the Union it is small.

72. The sign was placed outside the Grievor's classroom door. Because it was removed, the evidence does not include a picture of the specific context. However, photographs of other classrooms were in evidence and, subject to the authority of the principal of the school, these other "Staff Representative" signs are also objectionable, according to the Employer. Some principals, however, do not agree and the signs have not been removed in some schools.

73. The other signs, for example, include one where "Staff Representative" is included in a larger sign outside a classroom that also has the name of the teacher, the room number and "Division 3". Signs in the same large format (but without "Staff Representative") included ones for "General Office", "Learning Assistance"; "Speech Therapist" and "Custodian". Like the large format sign that includes "Staff Representative", these signs include the room number and name of the person in the room.

74. At another classroom, in another school (in the same school district), the sign is at the top corner of the frame of a classroom door, outside the classroom. On the same narrow frame at the top of the door is the room number and the name of the teacher, both in a larger font size than the "Staff Representative" sign. On the classroom door itself is a large poster about William Shakespeare and two smaller posters, "Bienvenue a tous" and "Souriez et entrez". Beside the door are a number of mostly newspaper articles on topics such as "A taste of French colonial India", "The world's her oyster" and "A francophone presence for the games".

Other signage on the walls outside the doors of classrooms includes signage about sports events, student photographs, information about a "sister school" and signs such as: "Audio/Video Station #1"; a table of elements for chemistry; a poster about "Don't just count the days, make the days count" and a poster about "Harry Potter goes to the Olympics". One teacher testified that she posted outside her classroom her certification as a teacher in the international baccalaureate program, also with "pride".

75. Overall, the evidence is that the walls in the schools are as one might expect in a typical school; various things are posted on the walls for information as well as other purposes such as showing pride by students and/or by teachers in various activities. The "Staff Representative" sign does not stand out particularly from other signs and posters on the walls and doors; indeed, it is smaller than most others. If it is relevant, its production values are at least equal to the other signs and in some cases, such as handwritten signs or faded newspaper articles, it is superior. There is no suggestion or evidence that the sign is violent in meaning or otherwise, and nor is there any suggestion or evidence that it involves tortious conduct. There is no evidence that anyone (including parents or students or other teachers) other than the principal at ATMS and District Principal (who did not see it), objected to its presence. Evidence of that kind may be relevant, although constitutional issues are not decided by polling techniques or public opinion. Finally, there was no evidence from other principals in other schools except that some complied with Keys' direction to remove the signs (pending the resolution of this grievance) and others did not.

76. I recognize that, at one level, the issue in this case may be seen as a relatively simple one: communication about the location of a staff representative. And the evidence is that one purpose of placing the sign in the hallway was to convey that information. I do not read the authorities to mean that the expression of innocuous information or normal physical activity is protected by the *Charter*. For example, the Supreme Court of Canada described it as difficult to find protected expression in, for example, the activity of parking a car. However,

some caution in this area is required because the court also pointed out that parking a car may involve protected expression when it involves a protest over who gets access to limited parking spaces. This is because human activity cannot be excluded from "the scope of freedom of expression on the basis of the content or meaning being conveyed. Indeed, if the activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee" (*Irwin Toy, supra,* paragraph 41).

77. It is, therefore, necessary to consider the sign in this case in the context of the criteria or test set out in *Irwin Toy, supra.* As above, these criteria are: whether the sign has expressive content and whether the actions of the Employer, by purpose or effect, infringed that expression.

78. In previous cases, the courts have set our broad protection for freedoms under the *Charter.* For example, the Supreme Court of Canada has said that "Our jurisprudence requires broad protection at the s. 2(b) stage, on the understanding that governments can limit that protection if they can justify limits under s. 1 of the *Canadian Charter*" (*Montréal,* paragraph 79). Then there is the statement by the Court of Appeal of British Columbia that, "Except in the rarest of cases, public bodies [a school] should be required to justify any restriction they place on political expression", *British Columbia Public School Employers' Association, supra,* BCCA, paragraph 37. Finally, there is the statement in *Pepsi-Cola, supra*, that "Labour speech engages the core values of freedom of expression" and any restrictions on it "... should not be lightly countenanced" (paragraph 69).

79. It may also be of interest to note that the following have been accepted as examples of protected expression: commercial expression (*Ford, supra, Irwin Toy, supra),* posters about the performance of a musical band (*Ramsden, supra),* sound from inside a night club through speakers onto a public street (*Montréal, supra),* distribution of political pamphlets at an airport (*Committee for the Commonwealth of Canada, supra*) as well as teachers' actions to protest

education policies such as class sizes and province-wide skills testing (Munroe Award, *supra*; Kinzie Award, *supra).*

(d) Is section 2(b) of the *Charter* engaged?

80.I am urged by the Employer to find that this grievance should not proceed under section 2(b) of the *Charter* at all because the circumstances do not meet the established requirements for protection of expression under section 2(b) of the *Charter*. Two issues are raised by the Employer. First, they submit that the Union is seeking access to a particular platform - the wall of a school hallway - for expression. The Employer also says that the Union seeks to use the walls of a middle school as a place to engage in free expression respecting union affairs. According to the Employer, the authorities do not support either of these positions as legitimate exercises of freedom of expression.

81. The Employer's first point is that the grievance is "misconceived" and "fails at the outset" because it seeks "access to a particular means of expression" that is not available to them under the *Charter*. That is, "there is no constitutional right of access to a forum or a means of communication". According to the submission of the Employer, the Union is claiming that the Employer is "obliged to provide them a forum (the wall at ATMS) to convey their message" but this is inconsistent with longstanding authority from the Supreme Court of Canada.

82.The decision in *Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995 is the starting point for the Employer's submission. In that case Mr. Haig had moved from Quebec to Ontario and lost his residency status in Quebec. Then two referenda were planned for the country, one in Quebec pursuant to provincial legislation, and another in the rest of Canada, pursuant to federal legislation. Mr. Haig's concern was that he was not permitted to vote in the Quebec referendum because he had lost his residency status in that province and he challenged both statutes under sections 3, 2(b) and 15 of the *Charter*. A majority of the Supreme

Court of Canada held that both the federal and provincial statutes regulating the referenda were constitutionally valid.

83. L'Heureux-Dubé, writing for the majority, summarized the position of Mr. Haig as being that his constitutionally protected freedom of expression was violated because he could not participate in the Quebec referendum. Consequently, he was asking the court to find that the actual casting of a ballot in a referendum is protected expression. She put Mr. Haig`s position in the following terms: he was asserting that "s. 2(b) of the *Charter* mandates not only immunity from state interference, but also an affirmative role on the part of the state in providing this specific means of expression" (paragraph 67).

84. The court rejected this approach to expression under the *Charter* as follows,

> 72. It has not yet been decided that, in circumstances such as the present ones, a government has a constitutional obligation under s. 2(b) of the *Charter* to provide a particular platform to facilitate the exercise of freedom of expression. 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.
>
> ...
>
> 83. ... 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.
>
> *Haig, supra.*

85. According to the Employer in the grievance before me, in *Haig* the court "established a principle that generally speaking, the government is under no

obligation to fund or provide a specific platform of expression to an individual or group". Again, the "specific platform" here is a wall in a school hallway.

86. In my view there are some difficulties with the Employer's position on this point. First, as acknowledged by the Employer, the court in *Haig* stated that the language of negative and positive entitlements should not be used in a "dogmatic fashion". There might be circumstances "leading a court to conclude that positive governmental action is needed" (paragraphs 78-80). This qualification was repeated in *Native Women's Association of Canada v. Canada*, [1994] 3 S.C.R. 627. And, in fact, circumstances subsequently arose when this qualification was applied. This was the case of *Dunmore v. Ontario (Attorney General)*, 2001 SCC 94, where the court concluded that freedom of association in section 2(d) of the *Charter* imposed a positive obligation on the state to extend protective legislation to agricultural workers who were excluded from the existing labour relations statute.

87. I also note that a similar argument was made by the employers in the Kinzie Award and was unsuccessful. The employer in that case relied on *Baier v. Alberta*, 2007 SCC 31, as does the Employer in this case. In *Baier* the Supreme Court of Canada considered provincial legislation that required employees of a school board who wanted to run for election as a school trustee to any school board in the province to take a leave of absence. As well, if the candidate was elected, the person had to resign his/her employment position with the school board. The court found, among other things, that these restrictions did not violate the guarantee of expression under section 2(b) of the *Charter* because the plaintiff sought the exercise of a positive right, namely "access to the statutory platform of school trustee candidacy and school trusteeship" (paragraph 36).

88. It may be recalled that the facts in the case before Arbitrator Kinzie involved the union's assertion that it was a violation of their freedom of expression for the employer to prohibit teachers from sending home information about skills assessment tests. The employer in that case submitted that the union was

"actually contending ... that the Employer is obliged to provide its teachers with a forum ... to convey their message" and the union was "not entitled to such a positive right" (paragraph 78).

89.Arbitrator Kinzie concluded that the issue of whether the union in the case before him was seeking a positive right was a "critical" question (paragraph 81). He concluded that "teachers have traditionally used [the] internal mail system to communicate with parents on matters pertaining to the education of their children" (paragraph 84). That is, this was not a case of a claim of positive entitlement to government action because the employer restricted this medium of expression.

90.In the grievance before me, the Union and the Grievor seek to place a "Staff Representative" sign on a doorway or wall in a school. As I understand it, they do not seek a new location within the school for their expressive activity; they seek to place the sign on an existing wall, they do not seek to expand posting of signs to other walls or places in the school. To paraphrase the decision in *Baier, supra,* the Union does not claim a positive entitlement to action from the Employer but simply the right to be free from interference from the Employer (paragraph 30).

91. The decision in *Native Women's Association, supra,* is also relied on by the Employer. In that case the court did not agree that government denial of funding for an aboriginal women's group (so they could provide an aboriginal women's perspective in constitutional discussions) was a violation of the group's freedom of expression under the *Charter* (and nor was it a violation of section 15 of the *Charter*). According to the Employer in this grievance in *Native Women's Association* the Supreme court of Canada rejected the argument that government had "an obligation to provide a forum for expression equal to that of other groups". Therefore, if the Union's claim of freedom of expression in this grievance is upheld, the Employer will be obliged to "provide a forum to other groups, including the teachers' union and the principals' association".

92. In my view, the first answer to this concern is that *Native Women's Association* decision does not stand for that proposition. The principle of that decision with respect to expression is that the government does not have a positive obligation to fund competing interests. As above, the Supreme Court of Canada has qualified this statement by saying it should not be applied dogmatically and, in fact, the court in *Dunmore, supra,* concluded a positive obligation on government arose in the circumstances of that case. Furthermore, it is well established that teachers, like other public servants, are not excluded by their employment status from the guarantee of freedom of expression (*British Columbia Public School Employers' Association, supra,* BCCA, at paragraph 29). For example, as set out in the Munroe and Kinzie Awards, teachers have the freedom to express their views directly to parents about class sizes and skills assessment tests. Therefore, whether the specific situations of other groups or individuals give rise to protected expression will have to be considered in the circumstances of those cases. I address this further under the section 1 analysis, below.

93. The Employer makes another, alternate submission that, if accepted, would prevent this grievance from proceeding past the section 2(b) stage of inquiry. This is that section 2(b) of the *Charter* is not engaged in the circumstances of this case because the walls of a middle school are not a place where "third parties" engage in free expression with regards to union affairs. The facts of this case do not involve a restriction on freedom of expression; instead there is a restriction on the means and location of "what is essentially commercial or business expression without permission being given for it". Relying on *Montréal, supra,* the Employer urges me to distinguish between locations where expression has been protected and the location at issue in this grievance, the hallway of a school. The Union has no right to use the hallway of a school as a medium for their expressive activity, according to the Employer. The thrust of this submission is that the hallway of a school is not a public venue where an expression such as "Staff Representative" is protected.

94. It will be recalled that the issue of the application of freedom of expression to public versus private property arose in *Montréal, supra,* because a night club tried unsuccessfully to use the *Charter* to protect their efforts to reproduce the activities inside the club through speakers on the street outside. The Supreme Court of Canada noted the three "divergent approaches" in *Committee for the Commonwealth of Canada, supra.* The first approach was that all restrictions on expressive activity violate section 2(b) and must be justified under section 1. Second, there has to be a balancing of the expressive activity with the effective and safe operation of public services. The third test was whether the expressive activity furthers any of the values underling section 2(b). In *Montréal,* the court found there was protected expression under section 2(b) of the *Charter* under each of these tests (but, ultimately, restrictions on it were justified under section 1).

95. I note that in the Munroe Award the arbitrator applied two of the approaches from *Committee for the Commonwealth of Canada.* On the first test he found "... no incompatibility between the teachers' intended communications, on the one hand, and the principal function or purpose of a public school, on the other." With regards to the second test, the arbitrator found that "... the 'values and interests at stake' [citing *Montréal*] favour the benefit of protection under Section 2(b) of the *Charter*". He noted that the School Board's purpose "was to restrict the content of expression and to control the ability of the teachers to convey expressive meaning" (paragraph 46). On appeal the Court of Appeal took essentially the same view (*British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, supra,* BCCA, paragraph 34).

96. The *Montréal* decision was issued after the Munroe Award and the appeal decision of that award. Although the court in *Montréal* applied the three approaches in *Committee for the Commonwealth of Canada* they also sought to clarify those approaches since those approaches were "divergent". The court commented as follows,

71. 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.

...

74. 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

75. 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.

76. 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.

Montréal, supra.

97. Again, the Employer in the grievance in this case submits that the hallway of a school is not a public place where expressive activity such as the "Staff Representative" sign should be protected. One response to this is that there is no private property involved in the grievance in this case; the ATMS is publicly owned and operated through the local school district. Therefore, it is difficult to characterize a public school like ATMS as "essentially private" as that phrase is used in *Montréal*. Nor is there a mix of public and private property such as in *Montréal*. It is true that a school does not and should not have the same public access as, for example, a street corner so "public" is not always used in a literal or precise sense. But, as the Court of Appeal stated, "School grounds are public property where public expression must be valued and given its place" (*British Columbia Public School Employers' Association, supra*, BCCA, paragraph 65).

98. With regards to historical and actual use of the school hallway at ATMS, the sign itself was not put up until recently, sometime in the summer of 2006. However, the space would seem to be "compatible with open public expression" as in *Montréal* and, indeed, teachers have participated in protected expression as part of parent-teacher interviews and in other forms of expression. Finally, I am unable to find that the expressive activity reflected in the sign undermines the values underlying free expression.

99. In a recent decision the British Columbia Court of Appeal applied the *Irwin Toy* and *Montréal* decisions; this is the judgment in *R. v. Breedon,* [2009] B.C.J. No. 2106. The Employer also relies on this decision for the submission that the "Staff Representative" sign has no place in the hallways of schools. The facts in *Breedon* involved a person (a former firefighter) who entered the lobby of a courthouse, the foyer of a municipal hall and the reception area of a fire station, at different times, wearing sandwich board signs that suggested corruption or misconduct by unions or government. Some people at these locations testified they felt threatened by the activities of this person and some wondered about his mental state. When he attended at the fire station he was carrying on his belt a multi-tool that included a knife. The person carrying the signs was asked to leave

the three locations and he argued that these requests infringed his freedom of expression under section 2(b) of the *Charter*. At trial this position was not successful and his appeal was also unsuccessful.

100. The Court of Appeal reviewed the *Irwin Toy, Ramsden, Committee for the Commonwealth of Canada* and *Montréal* decisions and others including *Greater Vancouver Transportation Authority v. Canadian Federation of Students - British Columbia Component*, 2006 SCC 31. The facts of the *Canadian Federation of Students* decision involved advertising on buses. The plaintiff wanted to put political advertisements on buses but the operator of the buses refused to publish the advertisements because they had a policy that prohibited political advertising and advertising "likely to cause offence to any person or group of persons or create controversy". The Supreme Court of Canada held, among other things, that the bus operator had violated the freedom of expression of the Canadian Federation of Students. In *Canadian Federation of Students* they posed the following analytical issue,

> 42. The question is whether the historical or actual function or other aspects of the space are incompatible with expression or suggest that expression within it would undermine the values underlying free expression. One way to answer this question is to look at past or present practice. This can help identify any incidental function that may have developed in relation to certain government property. Such was the case in the locations at issue in *Committee for the Commonwealth, Ramsden* and *City of Montréal,* where the Court found expressive activities in question to be protected by s. 2(b). While it is true that buses have not been used as spaces for this type of expressive activity for as long as city streets, utility poles and town squares, there is some history of their being so used, and they are in fact being used for it at present. As a result, not only is there some history of use of this property as a space for public expression, but there is actual use - both of which indicate that the expressive activity in question neither impedes the primary function of the bus as a vehicle for public transportation nor, more importantly, undermines the values underlying freedom of expression.
>
> (*Canadian Federation of Students, supra*; cited at paragraph 15 of *Breeden, supra*).

101. Returning to *Breeden,* the Court of Appeal applied this approach and focused on the location of the activity in question including "historic use of the area where the activity is occurring and whether the activity in question interferes with the proper functioning of the facility" (paragraph 19). With regards to the fire station, the court concluded that the "premises are clearly not amenable to or suitable for such activities and if the appellant does not acknowledge this in argument, he but faintly submits to anything to the contrary" (paragraph 20).

102. Similarly, a municipal hall is utilized from time to time for public hearings and debate but this does not extend to the foyer area of the hall where the appellant appeared with his sign. And, while courthouses have a role to play in the rule of law, there was no support for the proposition that advertising or political debate has historically occurred in the public areas of the courthouse; "At bottom, the appellant seeks to engage in a polemical or political type of protest to further his aims or objects. That is wholly at odds with the historic function and operation of court premises which are dedicated to the resolution of disputes between parties by legal process" (paragraph 22). Further, and more generally,

> 31. It is important to draw a distinction between on the one hand considering the content or meaning of expression being conveyed, and on the other hand recognizing that a particular type of expression is inconsistent with the function of a place. Expression has been given an extremely broad meaning in the s. 2(b) jurisprudence, covering all activity that conveys or attempts to convey meaning. Clearly in no location will all expression be inconsistent with that location's proper functioning. It is therefore necessary to consider at the s. 2(b) winnowing stage whether the particular type of expression, without regard to its content, is inconsistent with the function of the location.
>
> *Breedon, supra.*

103. The Employer urges me to find, as part of the "winnowing stage", that the hallway of a school should be treated in the same way as the municipal hall foyer,

court house and fire hall in *Breedon*. I begin by noting that material from the Union related to professional development and health and safety has been available in the halls of ATMS in the past and, as of the hearing in December 2009, it continues to be available to teachers in the Grievor's classroom. To this extent there is an accepted pattern of exchanging information between the Staff Representative and others, in the hallways and classroom. As well, the evidence is that a small number of principals in the Abbotsford School District are indifferent or do not agree with the removal of the "Staff Representative" signs in their schools. This suggests a level of acceptance or acquiescence in the use of hallways in schools for the sign, unlike at the three venues in *Breedon*.

104. I also note that expression in schools has been given protection in previous decisions. In the Munroe Award, teachers were permitted to express to parents during teacher-parent interviews their concerns about class sizes and were permitted to hand out related information to parents. Similarly, in the Kinzie Award teachers were permitted to send information home with students to encourage parents to protest province-wide skills testing. As I read those awards, there was no evidence that parent teacher interviews or information given to children for their parents was part of the historical use of those mediums to express disagreement with government education policies. What seems to have occurred is that teachers adapted an existing medium to express their views. In the grievance in this case the Grievor is using the existing medium of a school hallway, (that is already used to express other information) to express symbolic and minimal support for their union. Put another way, it is not the case that the Union seeks to express their views on the walls of a school where there has historically been no expression.

105. Returning to *Breedon*, I note it came out after the Munroe and Kinzie awards and the Employer has asked that I consider whether *Breedon* has changed the law. I think not. In my view, a criminal proceeding involving the potential of harm to the public is quite a different matter than the circumstances of the Munroe and Kinzie Awards and the facts of this grievance. As well, the

finding that a municipal foyer, court house or fire hall are not places for the historical expression of protest against the government stands on its own and it is not inconsistent with a finding that teachers can express their views in parent teacher interviews by sending information home with students or express pride in the Union with a small sign. In sum, I am unable to find that the Munroe Award (including the Court of Appeal decision) and Kinzie Award are wrong.

(e) Does the sign contain expressive content?

106. Does a sign placed outside a school classroom by a teacher that says "Staff Representative" have expressive content?

107. There is no dispute that "Staff Representative" is a reference to a representative for the Union, and, therefore, some discussion of this position is useful. A Staff Representative is elected by members of the Union within a school and the position is specifically addressed in the collective agreement between the parties as follows,

> 1:11 Association School Staff Representatives
>
> 1:11.1 Association school staff representatives may convene staff meetings in the school to conduct Association business. Regular instruction will not be impeded by these meetings.
>
> 1:11.2 The Association shall supply the Superintendent of Schools/CEO with a list of names of the Association school staff representatives by October 15th of each year and shall advise the Superintendent of Schools/CEO, in writing, of changes to the list.

108. A Staff Representative has a number of duties including planning for professional development training and working for the health and safety of teachers. Materials related to these two duties are provided by the Staff Representative to other teachers and the evidence is that those materials are openly displayed in the classroom of the Staff Representative. There is no evidence the Employer objects to these materials being available in the classroom

and they continue to be displayed even in the absence of the disputed sign. In addition a Staff Representative is involved in the administration of the collective agreement within the school and deals with the principal from time to time when representing her fellow teachers and the Union. Further, as set out in Article 1:11.1, a Staff Representative convenes meetings of teachers from time to time in her school to conduct the business of the Union. Some activities of a Staff Representative extend beyond the specific school; for example, the Grievor in this case chaired the Professional Development Committee in her school district.

109. The submissions in this case also included discussion about the constitutional status of trade unions and collective bargaining, primarily in the context of freedom of association under section 2(d) of the *Charter.* I will briefly review these since they provide general context for the role of a representative of the Union. They are decisions under the protection for the freedom of association in section 2(d) of the *Charter* rather than freedom of expression under section 2(b), but the *Charter* must be construed as a system and each section of the *Charter* must be interpreted in relation to the others (*Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia* [2007] SCC 27, paragraph 80, citing various authorities).

110. In *Dunmore, supra,* the Supreme Court of Canada discussed freedom of association under section 2(d) of the *Charter* in the context of individual and collective rights. They stated that the law must recognize that certain activities of a trade union, including making collective representations to an employer, may be central to freedom of association (paragraph 17). Further,

> 37. ... As recently as *Delisle* [*Delisle v. Canada (Deputy Attorney General),* [1999] 2 S.C.R. 989] L'Heureux-Dubé J. noted that the "right to freedom of association must take into account the nature and importance of *labour* associations as institutions that work for the betterment of working conditions and the protection of the dignity and collective interests of workers in a fundamental aspect of their lives: employment" (para. 6 [of *Delisle,* emphasis in original]). ... the importance of trade union freedoms is widely recognized in

> international covenants, as is the freedom to work generally. In my view, judicial recognition of these freedoms strengthens the case for their positive protection. It suggests that trade union freedoms lie at the core of the *Charter*, ...
>
> *Dunmore, supra.*

111. The court also agreed with the statement that the contribution of unions to society amount to "an important subsystem in a democratic market-economy system" (paragraph 38; citing K. Sugeno, "Unions as social institutions in democratic market economies" (1994), 133 *Int'l Lab Rev* 511, at page 519). As well, "It is widely accepted that labour relations laws function not only to provide a forum for airing specific grievances, but for fostering dialogue in an otherwise adversarial workplace. As P. Weiler has written, unionization introduces a form of political democracy into the workplace, subjecting employer and employee alike to the "rule of law" (see *Reconcilable Differences: New Directions in Canadian Labour Law* (1980), at pap. 31-32" (*Dunmore, supra,* paragraph 46). This is codified in broad terms in section 4(1) of the *Labour Relations Code* which states that "Every employee is free to be a member of a trade union and to participate in its lawful activities".

112. A more recent decision has discussed the role of collective bargaining in labour relations and found that freedom of expression includes the right to a general process of collective bargaining, rather than any outcome of bargaining, and section 2(d) of the *Charter* includes protection against substantial interference with that right (*Health Services, supra,* at paragraphs 91-92). Part of the court's reasoning was agreement with the statement that "Collective bargaining is the procedure through which the views of the workers are made known, *expressed through representatives chosen by them,* not through representatives selected or nominated or approved by employers" (paragraph 29; citing B. Laskin, "Collective Bargaining in Canada: In Peace and War" (1941), 2:3 *Food for Thought,* at page 8; emphasis added; see also paragraphs 57, 80-83).

113. In my view it can reasonably be stated that the "Staff Representative" sign conveys the following information: this is the room where the Staff Representative for the Union, as that position is described generally in the authorities above, is located. This goes beyond the communication of innocuous information and expresses, in a measured way, the pride of the Grievor and other Staff Representatives in their responsibility to represent their members. This is consistent with activity that is protected under section 2(b) of the *Charter*. As the Supreme Court of Canada has stated, freedom of expression promotes political decision-making and it "... allows a person to speak not only for the expression itself, but also to advocate change, attempting to persuade others in the hope of improving one's life and perhaps the wider social, political, and economic environment" (*Pepsi-Cola, supra,* paragraph 32). On this basis, I conclude that the "Staff Representative" sign contains expressive content. This content goes beyond the two words on the sign and its form. The size of the sign is broadly relevant at this stage but not determinative since one can easily imagine single words that have expressive content; "God" is an obvious one.

114. I acknowledge that this is a different expressive content than protests by teachers about class sizes or province-wide skills assessments. Those campaigns were more directly aimed at education and the freedom of teachers to express their views about certain aspects of education policy. But it seems to me that what is an educational purpose is a complex and multifaceted issue. The Employer submits that a teacher does not have the right to use the walls of a school for any purpose other than furthering the education and educational interests of the students. But, as evidenced in the many themes included in the materials on the hallways of schools, education has many aspects. From the point of view of the *Charter*, the authorities do not say that all participation in the political decision-making process is excluded from protected expression in an educational context. In my view, one of the many aspects of the education system is that there is a Staff Representative who represents teachers and the Union (and I discuss the legal aspects of this above and below). Some expression relating to political decision-making will undoubtedly be inappropriate in a public school

(under section 1 of the *Charter* or perhaps under section 2(b) itself). However, I conclude that the "Staff Representative" sign in this grievance embodies protected expression because it reflects, in a modest way, the Grievor's identity as a representative of the Union and its members.

(f) Purpose and effect

115. I continue with the approach in *Irwin Toy, supra,* and proceed to consider the purpose and effect of the decision by the Employer to remove the sign in dispute. If there is a valid purpose to the sign then the grievance must fail even though the sign contains expressive content under freedom of expression. Similarly, if the effect of the removal does not restrict freedom of expression then the grievance must also fail. These are matters to be resolved within section 2 of the *Charter*, rather than section 1.

116. In *Irwin Toy* the court provided a useful summary of the approach to assessing the purpose of government action,

> 51. In sum, the characterization of government purpose must proceed from the standpoint of the guarantee in issue. With regard to freedom of purpose, 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 behaviour of others, or does it consist, rather, only in the direct physical result of the activity.
>
> *Irwin Toy, supra.*

117. With regards to the evidence of purpose in this grievance, a first justification for the Employer's decision to remove the sign is in its letter of December 6, 2006. There it states that the principal "did not authorize the sign"

and the Union did not "follow appropriate process" in seeking to post the sign. However, there is no evidence that the other signs and posters on the walls and doorways were authorized by the principal. As well, I note the same letter points to law and policy to the effect that a school district or principal can make "rules" or "regulations" about the "internal operations" of schools. I accept that a principal can make policy about signage in schools but there is no evidence of policy, rules or regulations applicable to signage in this case. Therefore, I am unable to find that the purpose behind the removal of the sign (as expressed in the Employer's letter of December 6, 2006) was a consistent application of discretion or policy.

118. The Employer also relies on a provision in the collective agreement between these parties that permits the Union to have its own bulletin board in the staff room. That provision is as follows,

> Bulletin Boards
>
> 1:14.1 The Association shall have the right to post notices regarding its activities and matters of Association concern on a bulletin board provided in a staff room in each school building.

119. According to the Employer the Union has negotiated in Article 1:14.1 the right to place information, such as the location of its Staff Representative, on their bulletin board in the staff room. This means that they do not have the legal right to other places in the school for this information, such as the outside of classrooms. However, this aspect of the grievance involves a constitutional issue and I do not think the parties can contract out of the rights and freedoms of the *Charter* through their collective agreement.

120. Since it arose in the evidence, I might also add that I find there is no support for a conclusion that the principal of ATMS or Keys, the District Principal for the Employer, were acting with an anti-union animus or purpose. For example, with

regards to Keys, there is his evidence that, when he was a teacher, he had "proudly" walked on picket lines on three occasions.

121. Looking more broadly at the Employer's purpose in the context of the authorities, I note that the authority and responsibilities of a school principal. Section 85(2)(c)(iv)(A) of the *School Act* states that a school board may "... make rules ... respecting the establishment, operation, administration and management of ... schools operated by the board and educational programs provided by the board, ...". Section 5 of the *School Regulations* states that a principal is "responsible for administering and supervising the school ...". As set out, in the Employer's letter of December 8, 2006, Order in Council 1280/89 of the Lieutenant Governor in Council states that, "School Principals have the right to exercise professional judgment in managing the school in accordance with specified duties and powers". Finally, section 2.40 of the policies of School District 34 (Abbotsford) states that "Principals are authorized to issue regulations governing the internal operations of their schools".

122. I take from these provisions that a school principal, such as the one at ATMS, has the general and necessary responsibility to supervise the operations of a school. Included in this authority is the responsibility to ensure that school hallways are safe and otherwise appropriate for education purposes. Stated this broadly, I do not believe these statements are controversial. The evidence is that the principal of ATMS was acting within these bounds and I conclude that, to paraphrase *Irwin Toy, supra,* the principal at ATMS was attempting to control the physical consequences of putting materials in the hallways of the school (paragraph 51) when she removed the "Staff Representative" sign outside the Grievor's classroom. In my view, this is not a purpose that trenches on freedom of expression.

123. With regards to the effect of the decision to remove the sign I return to *Irwin Toy* and the direction there that the application of the "principles and values underlying the freedom" is to be considered. The Grievor and the Union

must demonstrate that expression as reflected in the sign "Staff Representative" promotes at least one of these values (paragraph 53).

124. The values underlying section 2(b) of the *Charter* include self-fulfillment, participation in social and political decision-making, and the communal exchange of ideas (*Pepsi-Cola, supra,* paragraph 32). These values were similarly described, albeit in more detail, in *Irwin Toy, supra,* as

> 53. ... (1) seeking and maintaining the truth, is an inherently good activity; (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming environment not only for the sake of those who convey a meaning, but also for the sake of those to whom it is conveyed. ...
>
> *Irwin Toy, supra.*

For completeness, I note that the Supreme Court of Canada has said that the values underlying freedom of association, under section 2 (d) of the *Charter,* include human dignity, equality, respect for autonomy and the enhancement of democracy (*Health Services, supra,* paragraph 81).

125. It is of some significance that collective bargaining is "expressed through representatives" of trade unions (*Health Services, supra,* paragraph 29) and I conclude that the Staff Representative in this case is that kind of representative. She is elected by members of the Union and she represents those members and the Union in dealings with the Employer, including matters affecting the collective agreement. Her role, in broad terms, includes participating in dialogue in the workplace as a form of political democracy that is at times adversarial and this dialogue is part of maintaining the "rule of law" in the workplace (*Dunmore, supra,* paragraph 46; citing Paul Weiler, *supra*). It follows that a person elected as a Staff Representative is participating in political decision-making; she is engaged in advocating for the interests of her members in order to advocate the "... betterment of working conditions and the protection of the dignity and

collective interests ... " of her members (*Dunmore, supra,* paragraph 37). That is, her activities are consistent with at least one of the values underlying freedom of expression, political decision-making.

126. I note that it was only the "Staff Representative" sign that was removed by the principal and all other signs, posters etc. remained on the walls. Therefore, it cannot be said that the effect of the Employer's decision was to communicate a general policy or decision about what should or should not be on school walls. Only the sign identified with the Union was removed and, therefore, it is difficult to see the effect of the decision as being neutral. Instead, the effect is to create a perception that representatives of the Union and the Union itself are excluded from the school. The submission of the Employer in this arbitration is that the sign has no place in a school because, among other things, a school is not the type of property that attracts protection under section 2(b) of the *Charter*. I have discussed that issue above and found against the Employer.

127. This perception is also not consistent with the fact that teachers in the school are members of the Union and some, such as the Grievor, are elected representatives of the Union with rights under the collective agreement. Further, the legal structure of the education system includes the Union and the Employer in some significant ways. For example, the *Public Education Labour Relations Act* (R.S.B.C. 1996, c. 282) defines the employer bargaining agent, the employee bargaining agent and the bargaining unit itself. Specifically, the B.C. Teachers' Federation is "deemed" to be the certified bargaining agent (sections 4-6). It is true that things like class sizes cannot be bargained (although the class size provisions of the *School Act* can be grieved) but it is also true that teachers' opposition to class size decisions of the government have been held to be a legitimate and protected form of expression. The point is not whether the Union is or is not a full participant in education policy but whether it is protected expression to identify the Union in the school at all.

128. In summary, I find that the "Staff Representative" sign that was outside the Grievor's classroom has expressive content. The purpose behind removing the sign was an appropriate one since it was aimed at managing school property. However, the effect of the removal did not reflect a neutral objective and it created an inaccurate perception that the Staff Representative and the Union itself were excluded from the school. This is matter affecting the identity of the Grievor as a representative of the Union and its members. For these reasons, I find the removal of the sign was a violation of the Grievor's freedom of expression under section 2(b) of the *Charter*.

(g) Section 1 of the *Charter*

129. I have found above that the removal by the Employer of the "Staff Representative" sign was a violation of the Grievor's freedom of expression under section 2(b) of the *Charter*. I am next required to consider section 1 of the *Charter* and I set out that provision as follows,

> 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Employer does not agree that the facts of this support a conclusion that there was a limitation on the Grievor's Freedom of expression but, if there was a limitation, the Employer submits it was justified under section 1. Therefore, the grievance must be denied. On the other hand, the Union submits that there was a limitation on the Grievor's protected expression that cannot be justified under section 1 and, therefore, the grievance succeeds.

130. By way of some introductory comments on section 1, as the Employer points out, there is no absolute freedom of expression under the *Charter* because a finding of a limitation on that freedom is subject to a section 1 analysis. That is, a limitation on freedom of expression may, as a result of the section 1 analysis, be

justified. As well, the Employer accepts that their directive to remove the sign was "prescribed by law" for the purposes of section 1. This was also the conclusion in the Munroe Award (paragraphs 39-45). Finally, the onus of proving that the infringement on freedom of expression in this case was justified lies with the Employer.

131. In *R. v. Oakes*, [1986] 1 S.C.R. 103 the framework for analyzing issues under section 1 of the *Charter* is set out. Two "central criteria" must be satisfied to establish that a limit is reasonable and demonstrably justified in a free and democratic society. First, the objective that a limitation is designed to serve must be of "sufficient importance to warrant overriding a constitutionally protected right or freedom" (paragraph 69, citing *R. v. Big M Drug Mart Ltd., supra,* at page 352). If this first test is met then the party invoking section 1 (the Employer in this case) must then,

> 70. ... show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test" (*R. v. Big M Drug Mart Ltd., supra,* at p. 352). Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, if rationally connected to the objective in this first sense, should impair "as little as possible" the right and freedom in question: *Big M Drug Mart Ltd, supra,* at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified is of "sufficient importance".
>
> *Oakes, supra*, emphasis in original.

132. The Employer raises another issue discussed in the authorities and urges me to find that the sign in dispute was "commercial signage" and it did not involve political speech. The legal consequence of that submission would be that commercial expression is entitled to a lower degree of protection. The corollary

is that greater weight should be given to limitations on commercial expression than for political or other expression.

133. This has been described as a contextual "approach" and it is discussed in *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326. With regards to the value of a contextual approach Wilson J. stated that it, " recognizes that a particular right or freedom may have a different value depending on the context" (*Edmonton Journal, supra,* paragraph 51). The *Edmonton Journal* decision was cited in a subsequent decision of the Supreme Court of Canada, *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232. The court considered whether a ban on advertising by dentists was contrary to section 2(b) of the *Charter*; the result was a finding that the ban was an infringement of expression and it was not justified under section 1 because it was overly broad. The court commented that violations of commercial expression involved loss of profit and " ... restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b)" because there was no "loss of opportunity to participate in the political process" (paragraph 29). However, ultimately the court decided that it would be "inadvisable to create a special and standardized test for restrictions on commercial expression ..." (paragraph 31).

134. In contrast, there are references in other cases that, for example, political expression is "... deserving of a high level of constitutional protection" (*British Columbia Public School Employers' Association, supra,* BCCA, paragraph 51; citing *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at paragraph 89; and *RJR MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; see also, *Oakes, supra,* at paragraph 71). These comments do not speak to commercial expression specifically but they at least suggest that a high level of protection is required for political expression.

135. Regardless of whether there are differing levels of scrutiny to justify rights and freedoms, there is also a question about whether the "Staff Representative" sign is commercial expression. For example, in December 2006 the Employer

did not justify the removal of the "Staff Representative" sign because it was commercial expression. The reason it was removed, according to the Employer's letter of December 8, 2006, was because the Grievor did not follow "appropriate process", the principal did not authorize the sign and the Union had to use the bulletin board in the staff room. However, as discussed above, there is no evidence of such a process or that other signs and posters in the school were authorized. As well, the existence of a contractual right to a bulletin board cannot supersede a constitutional right or freedom.

136. Finally, in my view, there is some difficulty finding that the "Staff Representative" sign is "commercial" expression in the same way as, for example, advertisements to sell eggs. These kind of advertisements have appeared on bulletin boards for Parent Advisory Committees and have been removed by principals. In my view, for the reasons given above, the sign had expressive content related to the role of a Staff Representative in the work of the Union. The effect of the removal of the sign created a "loss of opportunity to participate in the political process" for the Grievor, to adopt that phrase from *Rocket, supra* (paragraph 29).

137. I next turn to consideration of the specific criteria under section 1 of the *Charter* as set out in *Oakes, supra,* and the facts of this case.

138. The first criterion is whether the Employer's objective in removing the "Staff Representative" sign is of "sufficient importance" to warrant limiting or overriding the Grievor's freedom to express her identity as a Union representative. As the Supreme Court of Canada put it,

> 70. ... The standard must be high in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection. It is necessary, at a minimum, that an objective relate to concerns which are pressing and substantial in a free and democratic society before it can be characterized as sufficiently important.

Oakes, supra.

139. I accept that the Employer's overall objective in removing the sign was an exercise of the principal's authority under the *School Act* to manage school property. Further a principal's general responsibility for the management of school property is not trivial; it is a legitimate and necessary one for the operation of a public school. Put in those broad terms, I agree with the Employer that they have met the first test in *Oakes*.

140. The British Columbia Court of Appeal has said that other "contextual" factors should be considered when applying the *Oakes* test at this stage. These factors "... speak to the degree of deference to be accorded ..." to a government action. Four such factors are identified: "... the nature of the harm and the inability to measure it; the vulnerability of the group; that group's subjective fears and apprehension of harm; and the nature of the infringed activity" (*British Columbia School Employers' Association, supra,* BCCA, paragraphs 47-48; citing *Kempling v. British Columbia College of Teachers,* 2005 BCCA 327, at paragraph 74; also, *Harper v. Canada (Attorney General),* [2004] 1 S.C.R. 827, at paragraphs 90-91). With regards to the second contextual factor I am inclined to believe that teachers and their union do not suffer from great vulnerability when compared with, for example, farm workers but there was no evidence on that point. Nor is there any evidence about the subjective fears of teachers, the third factor.

141. Looking at the first contextual factor, I am unable to find that the "Staff Representative" sign brings much if any harm to the school or society in general. Once again, it is a small sign, smaller than the other signs and posters on the walls and quite unobtrusive. Its significance lies in its modest and symbolic representation of the Union, a form of expression that is significant from a constitutional point of view because it reflects the Grievor's participation in activities related to political decision-making. It is not aggressive or strident in tone or presentation. It is not something that interferes with the education of

students in any direct or indirect way and it cannot reasonably be said that the sign in dispute is otherwise distracting to students, teachers or parents or others. Therefore, I have some difficulty concluding that there is any risk that " ... the public's confidence in the school system" or the open and supportive culture of ATMS is somehow undermined (*British Columbia School Employers' Association, supra,* BCCA, paragraphs 49).

142. With regards to the nature of the infringed activity, the fourth contextual factor, the Court of Appeal pointed out that political expression and participation in the democratic process are at the core of the protection in section 2 (b) of the *Charter*. An infringement of such an expression will be more difficult to justify and arguments that seek to do so "... must be subjected to a 'searching degree of scrutiny' ..." and, again, political expression is "deserving of a high level of constitutional protection" (*British Columbia School Employers' Association, supra,* BCCA, paragraph 51). On the other hand, the court also stated that some deference is owed to the judgment of school boards because they are elected by members of the community to operate schools. They are still required to provide "some reasonably compelling proof" that the measures they took are justifiable but they "should not be held to the highest standard" (*British Columbia School Employers' Association, supra,* BCCA, paragraphs 52-53).

143. I have found above that the expressive content of the "Staff Representative" sign involves expression about pride and support for the Union and it reflects the status of the Grievor as a union representative who participates in the dialogue of the workplace, in the context of the collective agreement and legislation. This is a form of political democracy and it requires a high level of protection. The interest of the school board in protecting its property and ensuring that a school is suitable for the broad purposes of education of students is, as discussed, a valid one. However, I am unable to find a conflict between these two interests by the presence of the sign in ATMS.

144. I next turn to the second part of the section 1 analysis in *Oakes*: whether the means chosen by the Employer are reasonable and demonstrably justified. This involves a proportionality test to balance the interests of society with the interests of the Grievor and the Union. As above, the proportionality test has three elements: the measures taken by the Employer must be carefully designed to achieve the objective in question and must not be arbitrary, unfair or based on irrational considerations; second, the right or freedom should be impaired as little as possible; and, third, there must be proportionality between the effects of the restriction and the objective relied on by the Employer to make the restriction.

145. As general context for the proportionality issue I accept that the Employer is properly concerned about the management of school property and ensuring that the use of their property is directed at the important work of educating students. I also agree with the Employer that neither a teacher or the Union has the right, constitutional or otherwise, to post any material they like on school property. Implicit in this is that there are undoubtedly signs about the affairs of the Union that are inappropriate for a school hallway, as judged by the principal (and subject to the grievance procedure). Moreover, there may be cases where discipline is an appropriate response by the Employer for communications by teachers that are beyond the realm of protected expression (again, subject to the grievance procedure).

146. A related matter is that the Employer is entitled to make policies and rules about what signs and posters can and cannot be put on school property. Of course they are not required to have a policy, but it would be a logical place to look for issues of proportionality to be addressed, including an indication of what is considered appropriate expression in a middle school and what forms of expression are more important than others. This assumes, of course, that the context for any policy or rule includes the *School Act*, and the collective agreement. Policy must also be made in the context of the *Charter* since teachers have some freedom of expression while working as teachers in schools. As the

Court of Appeal stated, "... 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" (*British Columbia School Employers' Association, supra,* BCCA, paragraph 65).

147. In any event, in this case, there is no policy or other guideline from the Employer about what information is considered appropriate to be on school walls. Indeed, the evidence is that teachers generally decide for themselves, with some broad superintending by principals when they walk the halls of a school. The decision to remove the sign began with a mentoring discussion between Keys, the District Principal, and Murray, the Superintendant of Education, and proceeded to an informal discussion between Keys and the vice principal at ATMS. Ultimately, the principal of ATMS decided that the sign had to come down. This is an understandable series of exchanges but I cannot find it reflects a decision that was carefully designed to achieve the objective in question. Indeed, the objective itself is unclear since it was initially presented as being contrary to the "appropriate process" and the principal had not authorized the sign. Again, there is no evidence of a process and no evidence that other material on the wall was subject to a process or otherwise authorized, except perhaps indirectly by the principal walking the halls of the school. Therefore, the evidence is not that the limitation on the Grievor's freedom of expression was carefully designed to achieve the objective in question. In these circumstances there is also an element of arbitrariness inasmuch as it was only the "Staff Representative" sign that was removed.

148. The second part of the proportionality test is whether the Employer's removal of the sign impaired as little as possible the Grievor's protected expression. I have considered Article 1:14.1 of the collective agreement as it may be applicable to this part of the section 1 analysis. It may be recalled that this provision permits the Union to have a bulletin board in the staff room of each school "... to post notices regarding its activities and matters of [Union] concern

...". The Employer submits that this bulletin board is a more appropriate place for information about the location of Staff Representatives in schools.

149. I have found above that a contractual provision such as this cannot be used to supersede or override constitutionally protected freedom of expression under section 2(b) of the *Charter*. Indeed, if there is a conflict between a contractual provision and the *Charter* (which here, there is not), the reverse is the case. With regards to the section 1 analysis in this case, I conclude a similar result is necessary. As well, assuming that the staff room bulletin board is an alternative to the hallway of the school for identifying the location of the Staff Representative, it seems to me that this addresses only the information contained in the sign. It allows members of the Union to know where the representative is located but it significantly minimizes the expressive content of the sign. The effect that the Union is excluded from the public presentation of a public school would remain. This is a significant rather than minimal impairment of the protected expression and, balanced with the minimal impact the sign has on the operation and openness of ATMS, I am not persuaded that the expressive content should be limited in this way.

150. The third part of the proportionality test is between the effects of the limitation on the Grievor's protected expression and the objective relied on by the Employer to justify the limitation. Since there is no apparent balance between the presence of the "Staff Representative" sign and the Employer's removal of the sign there is little to be said about this issue.

151. In light of these conclusions, I conclude that the Employer's decision to remove the "Staff Representative" sign cannot be reasonably and demonstrably justified.

E. THE COLLECTIVE AGREEMENT

152. The Union submits that the Employer's removal of the "Staff Representative" sign from outside the Grievor's classroom was contrary to the collective agreement. The specific provisions put at issue by the Union are contained in their grievance of November 22, 2006. This is separate from the Union`s reliance on the *Canadian Charter of Rights and Freedoms.*

153. The Union relies on Article 0:2.3 of the collective agreement which is part of the preamble of that document. It states that "... both parties desire to maintain an harmonious relationship and believe the expeditious settlement of disputes will facilitate this aim". I am not confident that a rights grievance can be based on the preamble of an agreement. In any event, I am not persuaded this very broad language can be used to support the grievance. Presumably, any dispute may affect the "harmonious relationship" between the parties but the objective is to "maintain" that kind of relationship rather than prevent all disputes.

154. Article 1:2 is also relied on by the Union. This is titled "Recognition of the Union" and, in summary, it states that the Employer recognizes the Union as the sole bargaining agent for the "negotiation and administration" of the terms and conditions of employment for employees in the bargaining unit. It also states that the Union recognizes the BCPSEA as the accredited bargaining agent for every school board in B.C. Unlike Article 0:2.3 this is a provision of the agreement and it clearly is of some significance for the bargaining relationship between the parties, perhaps considerable significance. However, I am unable to find that it has direct application to the dispute in this grievance since the Union's status as exclusive bargaining agent is not at issue. I have found above that the effect of the removal of the "Staff Representative" sign by the Employer is to make the sign a symbol for the existence of the representative and the Union

itself. However, that is a matter of applying the *Charter* rather than the provisions of the collective agreement.

155. Three other provisions are relied on by the Union in support of its grievance. Article 1:11 states that Staff Representatives "may convene staff meetings in the school" to conduct Union business and Article 1:12 states that representatives of the Union "shall have access to each work site during working hours and will inform the school office upon entering the school". Article 1:13 states that the Union has "the right to use school facilities", with some qualifications about time and booking procedures. As with the above provisions, I am unable to find in these articles a right for the Union to place a "Staff Representative" sign outside a classroom. For example, the right to use school facilities is qualified in Article 1:13 itself and it is qualified by a number of other considerations such as the *School Act*. I do not agree with the Union that the right to use school facilities necessarily includes the right to post signs in school hallways.

156. Finally, the Union relies on arbitral and labour board jurisprudence and it is submitted this jurisprudence protects the posting of the sign in dispute. The Union's submission is that management rights do not include the right to issue directives which unreasonably limit the right of the Union and its members to freedom of expression, especially on Union issues. What is required, according to the Union, is a balancing of the interests of the Employer and those of the Union.

157. Three awards are relied on by the Union for the proposition that an employer must demonstrate that an employer's interest cannot override the statutory protection that "Every employee is free to be a member of a trade union and to participate in its lawful activities" in section 4(1) of the *Labour Relations Code*. The only time an employer's interest would prevail would be if it is a "superior interest" (*Overwaitea Food Group Limited Partnership v. United Food and Commercial Workers, Local 1518,* [2006] B.C.C.A.A.A. No. 106 (Larson), at

paragraph 20; appeal denied, *Overwaitea Food Group, a Division of Great Pacific Industries Inc. (Re)* [2006] B.C.L.R.B. No. 193).

158. The awards relied on by the Union are the so-called "button" cases where arbitrators and others have held that buttons on clothing of employees are permissible in some cases (*Overwaitea, supra;* see also, *White Spot Ltd. v. Canadian Assn. of Industrial, Mechanical and Allied Workers' Union, Local 112,* [1991] B.C.C.A.A.A. No. 137 (McPhillips); *Quan v. Canada (Treasury Board) (F.C.A.),* [1990] F.C.J. No. 148). In *Quan* the Federal Court of Appeal agreed with the statement that wearing a " ... 'union button' during working hours constitutes the legitimate expression of one's views on union matters and, although not an absolute right, ought to be curtailed only in cases where the employer can demonstrate a detrimental effect on its capacity to manage or on its reputation" (citing *Canada (Attorney General) v. Bodkin,* [1990] 2 F.C. 191).

159. In my view the "union button" cases are of limited assistance in deciding whether the sign in dispute in this grievance can be removed by the Employer. The primary distinction is that the property in question is the property of the Employer and not the person of an employee. An employee, in the circumstances of the above cases, is entitled to use his/her person to exercise freedom of expression under the *Labour Relations Code.* However, the Employer, acting pursuant to the *School Act* and acting consistent with arbitral jurisprudence, is likewise entitled to make reasonable rules about the use of its property (*National Steel Car Ltd. and U.S.W.A., Loc. 7135 (Re)* (1998), 76 L.A.C. (4th) 176 (Craven), at page 202). In the absence of rules or policy it is also entitled to maintain the integrity of its property (*Union of Bank Employees, Local 2104, (CLC) v. Canadian Imperial Bank of Commerce* (1985), 10 CLRBR (NS) 182, page 15 QL).

160. It is true, as the Union states, that the "Staff Representative" sign does not deface the walls of ATMS, as judged by comparison with other material on the walls. As well, the Employer's rights in this area are, of course, subject to the collective agreement and other constraints including a reasonableness standard.

But, as above, I am unable to find that the agreement in this case prevents the Employer from removing the sign. Indeed, Article 1:14 permits the Union a bulletin board in the staff room for "... its activities and matters of [Union] concern ...". This suggests that the Employer retains its management rights to regulate the other parts of the school property. Finally, management rights are not entirely extinguished even when a union has a contractual right to a bulletin board so that an employer may remove signs from the board that are, for example, grossly disrespectful of supervisors (*Metropolitan Authority* (1992), 27 L.A.C. (4th) 36 (Cromwell)).

161. For these reasons I conclude that the Employer`s removal of the "Staff Representative" sign did not violate the collective agreement or related jurisprudence. The situation in the context of a constitutional document like the *Charter* is different, as discussed above.

F. SUMMARY AND CONCLUSIONS

162. The "Staff Representative" sign, placed outside the Grievor's classroom, was small and unobtrusive. It reflected her responsibilities to represent her members and the Union in various dealings with the Employer. The Union is a significant part of bringing democratic decision-making process to the workplace, as recognized by previous decisions of the Supreme Court of Canada. The sign represented the pride the Grievor and other staff representatives felt in being elected to that position and in representing the Union and its members. Therefore, it has expressive content.

163. The principal removed the sign consistent with her authority to manage the operations of the school. That was a valid purpose. However, the effect of the removal was to create a perception that the Staff Representative and the Union were excluded from the school. This perception is not consistent with the fact that teachers in the school are members of the Union and that the Union (and the Employer) obtain their legal status through legislation. The effect is to make the

sign a symbol for the existence of the Union itself. In light of the expressive content of the sign and this effect, there is a violation of section 2(b) of the *Charter*.

164. With regards to section 1 of the *Charter*, the broad objective of the Employer when the "Staff Representative" sign was removed was to manage the school property. This is a valid objective. However, the sign does not interfere in any apparent way with the operation of the school or the education of students. Also, only the sign in dispute was removed and not any other material on the school wall so it cannot be said that there was a neutral decision to remove the sign. There is no policy or procedure in place that would assist in assessing the proportionality of the Employer's decision. Overall, the Employer has not demonstrated that the removal of the sign was reasonably and demonstrably justified.

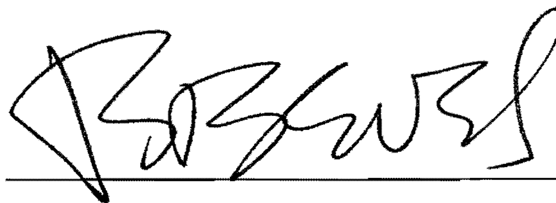
165. With regards to the issues in this grievance under the *Canadian Charter of Rights and Freedoms,* the grievance is allowed.

166. Finally, the Union submits that the removal of the "Staff Representative" sign was contrary to the collective agreement and other cases of union expression pursuant to section 4(1) of the *Labour Relations Code*. However, the provisions in the collective agreement relied on by the Union do not support the posting of the sign outside the Grievor's classroom. As well, as a matter under the collective agreement, the Employer is entitled to maintain the integrity of school property.

167. With regards to the issues in this grievance under the collective agreement, the grievance is denied.

It is so awarded.

Dated at the City of Vancouver in the Province of British Columbia this 3rd day of March, 2010.



John Steeves