

Part 2

**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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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 out 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 Kinzic 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 underlying 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 *Breedon*, 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 pp. 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 Superintendent 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.

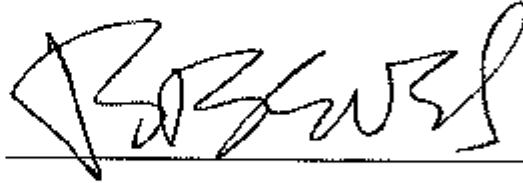
165. With regards to the issues in this grievance under the *Canadian Charter of Rights and Freedoms*, the grievance is allowed.

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.

A handwritten signature in black ink, appearing to read 'J. Steeves', written over a horizontal line.

John Steeves