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Teacher Freedom of Expression

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The Putting Students First Act (the “Act”), which was proclaimed in force effective September 12, 2012, (with the exception of section 20, which still remains to be proclaimed) has created uncertainty for school board administrations.

The Act, which imposes a collective agreement framework, of sorts, and prohibits unions in the publicly funded educational system from striking for the two year term of their agreements, was met with great displeasure by several unions. The expression of that displeasure has been different across the province, which has made planning for school boards and their principals difficult. Managing a school in a period of labour unrest in the education sector in Ontario is a new experience for many school principals. In addition to being a new experience, the circumstances of this current period of unrest has created unique challenges because the actions taken by teachers have, in some cases, been different from school to school within the same school board, making consistent school board-wide responses challenging to identify and implement, if appropriate.

It is within this environment that we thought it might be valuable to review a case that has examined the right to freedom of expression that teachers have in a school. Several cases regarding this issue come from British Columbia, where teacher unrest has become common in the last decade. The most recent arbitral decision from B.C. decided in October 2011, reviewed the many teacher expression cases that B.C. has generated in the last 10 years and considered the decision of a school board to prevent teachers from wearing buttons and posting materials on classroom doors and bulletin boards.

The buttons and materials were part of the “When Will They Learn” political campaign launched by the B.C. Teachers’ Federation (the “BCTF”), which ran both prior to the municipal elections and again before the provincial elections. The three main messages were: “When Will They Learn, special needs neglected”; “When Will They Learn, 177 schools closed”; and “When Will They Learn, 10,000 overcrowded classes”. The buttons simply said “When Will They Learn”.

Direction was given by the school board that posters could be posted in staff rooms, but not in classrooms or hallways. Buttons were not to be worn by teachers. Those teachers who did not follow the direction were spoken to by administration and complied with the direction, but a grievance followed alleging that the direction
As indicated, the arbitrator reviewed the arbitral case law in B.C. addressing the issue of teacher expression rights. The first case reviewed dealt with posting materials on bulletin boards where students and parents might see them, a direction being given to teachers not to discuss class-size and collective bargaining issues during parent-teacher meetings and directing teachers not to provide documents to parents that were received from BCTF related to these issues. The grievance was upheld and the B.C. Court of Appeal upheld the arbitrator’s award. The arbitrator indicated that teachers could have discussions with parents about class-size and class composition specific to their students’ circumstances. As well, the arbitrator held that the BCTF materials could be provided to parents during the parent-teacher interview. Further, the Court of Appeal found that discussion and posting of materials regarding these issues would enhance public confidence in education.

In another reviewed case, the issue involved teachers sending students home with pamphlets in sealed envelopes regarding concerns about the Foundation Skills Assessment, an assessment introduced by the Ministry of Education. The arbitrator hearing the grievance found that expression by some teachers having a different view than the Ministry of Education regarding the value of the assessments was an educational matter, and that those teachers should not be prohibited from forwarding pamphlets in sealed envelopes expressing their views to parents.

In the present case, the school board identified five reasons for banning the buttons and posters from all areas except the staff lounge. The five reasons cited by the school board were based on the position that schools must be seen to be politically neutral and must protect students from partisan political messages. In the opinion of the union, the materials were not partisan and the prohibition by the school board was not so pressing and substantial, so as to outweigh the limit on teachers’ freedom of expression.

In addition, the school board argued that two contextual factors should be considered, first the nature of the harm and the inability to measure it and second the vulnerability of the group being protected. The school board also cited a passage from a previously decided grievance appealed to the B.C. Court of Appeal, in which the B.C. Court of Appeal, when considering the decision made by a school board to restrict teacher expression in schools, stated that “some deference is owed to the School Board’s judgement because they are elected by members of the community they serve to operate in public schools.”

The arbitrator found that the vulnerability of children should be given the most weight in this case and concluded that “insulating students from political messages in the classroom is a pressing and substantial objective.” The arbitrator found that, while the buttons and posters were directed at parents, the means chosen by teachers to express the messages involved children more than their parents because the buttons were worn while dealing with children and the posters, which were on classroom doors and outside of classrooms were similarly, “unlikely to reach many parents compared to the number of students who would see them. In other words, the impairment on expression directed at parents was minimal. The deleterious effects of the restriction on teachers’ expression were proportional to the salutary effects of the insulation of the students.”

The arbitrator held that the materials were political, although not partisan, but nevertheless, that teachers could not introduce the materials in printed form to be worn on garments or to be posted on walls or doors adjacent to classrooms.

This case and its review of contemporary arbitral decisions regarding teacher freedom of expression assists in identifying some issues to be considered if such a situation arises at a specific school. Who is the intended audience? Does the form of expression reach that audience without involving students or by minimally involving students? Is the expression about educational matters? Is the expression political? Is the expression partisan? The form the communication takes, as well as the message, is important in determining its appropriateness in a school environment.

The insulation of students from political messages is a pressing and substantial objective that must be balanced with teachers’ rights to freedom of expression. This Fall there will likely be Ontario school boards and school principals who will have to balance those competing rights.
When interpreting what qualifies as the “advice or recommendations of a public servant”, which do not have to be released, compared to factual information or empirical reports which do, the Court of Appeal clarified that this exception was designed to protect the decision-making process within public institutions. Therefore, where the content of the records in question relates to a suggested course of action and pertain to a decision that will ultimately be made, the exception can be applied.

The Court found that the adjudicator for the Information and Privacy Commissioner erred in holding that to have the right to refuse disclosure, the records relating to a course of action must be communicated directly to the final decision-maker, or that the author must recommend a single course of action. The Court held that a recommendation may suggest a preferred course of action, but “advice is also protected which may be no more than material that permits the drawing of inferences with respect to a suggested course of action …”

As subsection 7(1) of the Municipal Freedom of Information and Protection of Privacy Act (MFIPPA) provides for the same exception as subsection 13(1) of FIPPA, this should reassure school board and municipal staff that they may continue to produce private advice and recommendations as part of a protected deliberative process.

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