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Article

***207** The Teacher in Dissent: Freedom of Expression and the Classroom

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A number of prominent cases have considered teachers' ability to express themselves outside of the classroom. However, the classroom, as is the school system itself, is also a forum for expression. This article reviews a number of cases that consider what role a teacher's freedom of expression plays within the education system. Basic principles underlying section 2(b) of the Charter *and their application to teachers are considered. The cases illustrate that, when expression takes place in an educational context,* Charter *principles can be difficult to apply. To some extent, the difficulty may arise from the fact that the power structures found within the education system are more complex and multi-faceted than the simple model of state power found in some other* Charter *cases. At this point in the development of the jurisprudence in this area, a number of questions remain open for debate. However, it is clear that courts and other decision makers will attempt to balance the rights of teachers against the needs of students, and the objectives of the education system as a whole.*

***208 1. INTRODUCTION**

The legal system, like the education system, is in many ways an embodiment of our common social values. Those values may be age-old traditions, or they may be newly-developed in response to changing social circumstances. Ultimately the law serves us best when it aligns with the core values of citizens in a liberal democracy.

When values change, the legal system, again like the education system, is called upon to respond. From one perspective, you could say that the legal system serves as a repository for social conflict and clashes of values. A more optimistic view is that the legal system serves as a means to manage and resolve conflicting or disparate values.

If the law is a means of managing changes to our value systems, an "agent of change," then, in modern times, the *Charter of Rights and Freedoms* is perhaps its most useful tool towards that end. With the dawn of the *Charter* more than twenty years ago, Canada reached a new era in its legal history, one where the law *itself*, rather than any particular government, takes a lead role in resolving important social issues. Lawyers who have practised far longer than myself describe a "*Charter* revolution," where judges feel newly empowered to use their decision-making to achieve social change. Lawyers of my generation, who have never really known "the law" without the *Charter*, are trained from the start to incorporate "*Charter* values" into every kind of legal analysis.

In this article, I explore the intersection of legal change and educational change, by analyzing a series of

Charter cases dealing with freedom of expression within the education system. Specifically, I look at four cases on the issue of teachers' rights of free expression within the education system. I suggest that these cases represent somewhat of a departure from the conventional “state versus citizen” model of freedom of expression cases, and involve a more delicate balancing of various interests within the education system.

I have used the title “The Teacher in Dissent,” not to express a sense of conflict, but simply to recognize the reality reflected in the cases. Teachers themselves have an interest in the education system, and sometimes an interest which diverges from the interests of other players. In these cases, the *Charter* provides a means for balancing those interests, ***209** and perhaps for coming to a new understanding of the roles of the various players.

2. FREEDOM OF EXPRESSION AND THE *CHARTER*

The right to freedom of expression is found in s. 2 (b) of the *Canadian Charter of Rights and Freedoms*:

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

Section 2 (b) is one of the most frequently litigated sections of the *Charter*, along with sections 15 (equality rights) and 7 (life, liberty, and security of the person). This is likely due to two factors: the wide scope of activities protected by s. 2 (b), and the fundamental importance of this right in a liberal democracy.

Indeed, in one of the Supreme Court of Canada's leading cases on s. 2 (b), free speech has been called the “pivotal freedom on which all others depend.” [FN1] McLachlin J. described three traditional justifications for the importance of freedom of expression in a liberal democracy: first, “the value of seeking and attaining truth” -- the idea that free expression is necessary to ensure that the right kind of ideas emerge and dominate in the “marketplace of ideas”; second, “the value of participation in social and political decision-making”-- the idea that democracy itself, both as a political and a social principle, can flourish only through the unrestrained exchange of ideas among citizens; and third, “individual self-fulfillment and human flourishing” -- the idea that free expression has an intrinsic worth to the citizen in her individual quest for satisfaction in life, by exposing her to the widest possible range of viewpoints. [FN2] Each of these key values justifies a vehement protection of freedom of expression, and courts refer back to them when deciding s. 2 (b) cases.

*210 (a) Structure of a Section 2 (b) Case

Through more than twenty years of precedents, *Charter* cases have developed their own form and structure. It is helpful to review that structure briefly before going on to discuss the specific *Charter* cases that are important to the teacher context.

(i) *The Right*

A fundamental first step in every *Charter* case is to identify the activity in question and determine whether or not it fits within the scope of activity protected by the relevant *Charter* provision.

Section 2 (b) protects “thought, belief, opinion and expression.” Of these concepts, the most meaningful is “expression”; it is rare for the state to attempt to interfere with a citizen's thoughts, beliefs, or opinions *per se*. The concept of “expression” has been given a very wide interpretation by the Supreme Court of Canada. Expression includes both form and content; any attempt to convey meaning will fall within the scope of s. 2 (b). Moreover, freedom of expression protects the interests of both the speaker *and* the recipient of the message, and s. 2 (b) includes the right to receive and possess expressive materials created by others. [FN3]

As a result of this wide scope, courts have recognized a broad range of activity as protected under s. 2 (b), including controversial activity such as hate speech, [FN4] exotic dancing, [FN5] and the possession of child pornography. [FN6] The only real limitation that the Supreme Court has placed on the scope of s. 2 (b) is that the *Charter* cannot be invoked to protect a right to commit acts of violence. However, that limitation is engaged only where a direct act of physical violence is used as a means of expression; even threats of physical violence are protected by s. 2 (b). [FN7]

(ii) *The Impugned Act*

The next stage of the *Charter* analysis involves a determination of whether the action complained of (the “impugned act”) actually violates ***211** the *Charter* right by interfering with the protected activity identified in the first stage.

The impugned act can amount to a *Charter* violation only if it is an action by “government”:

> 32. (1) This *Charter* applies
>
> a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
>
> b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

This limitation, occasionally misunderstood or overlooked by laypeople, derives from the fact that the *Charter* is a constitutional document. Its purpose is to set the rules and limitations of government activity. The interaction of citizens with each other is not governed by constitutional law, but by statutory and common law.

In the context of the *Charter*, “government” has been taken to mean more than simply the legislative branch of government. The actions of a wide range of administrative officials, municipal councils, Crown corporations, and government-funded and -controlled institutions like hospitals and universities can be bound by the *Charter* (though not necessarily in every facet of their activities.)

Likewise, the “impugned act” is not limited to legislative action. Though laws and regulations can violate the *Charter*, so can more general policies, patterns of conduct, and day-to-day administrative decisions. Any exercise of governmental power and authority could be subject to *Charter* scrutiny.

In freedom of expression cases, “impugned acts” which have been found to violate s. 2 (b) include *Criminal Code* provisions about obscenity, [FN8] municipal by-laws prohibiting billboard advertisements, [FN9] and the administrative action of border guards in detaining sexually explicit materials in the customs office. [FN10]

The impugned act violates the *Charter*-protected right if its purpose is to interfere with freedom of expres-

sion, or if its effect is to do so. If the governmental purpose is to control or restrain expression on the basis of ***212** its content, then it is clearly a violation of s. 2 (b). However, even "content-neutral" attempts to regulate expression can violate the *Charter* where the effect of the action restricts an attempt to convey meaning. [FN11] As with the definition of the right itself, the courts at this stage cast a wide net and are willing to find violations of s. 2 (b) in a broad range of circumstances.

It is also important to note that there is a growing recognition of the influence of "*Charter* values." Even in cases that do not involve government restrictions on expression, judges are still influenced by *Charter* values, such as freedom of expression, in making decisions. Thus, a similar analysis has been incorporated in common law cases involving, for example, publication bans in criminal trials [FN12] or injunctions against picketers in labour disputes, [FN13] even though these cases do not involve government actions.

(iii) *The Justification*

The analysis does not end once it has been determined that s. 2 (b) was breached. The decision-maker must go on to ask whether that breach can be justified by reference to the principles of s. 1 of the *Charter*:

> 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 presence of s. 1 sets the Canadian *Charter* apart from the American Bill of Rights in its protection of free speech. The American First Amendment contains a strong statement of rights, but no means of justification such as that found in s. 1 of the *Charter*. As a result, American courts have had to be selective as to what kinds of expression really amount to "speech" within the meaning of the First Amendment. Canadian courts, in contrast, have given a broad interpretation to "expression," knowing that any necessary limitations can be accomplished through the mechanism of s. 1.

***213** The Supreme Court of Canada has developed [FN14] a methodical test for applying the principles of s. 1. I do not propose to undergo a detailed review of s. 1 jurisprudence, but the basic principles of the justification process are easily summarized:

> • *Is the impugned act a "limit prescribed by law"*? The Supreme Court uses this branch of the test rarely, as a means of overturning legislative action which is so vague and meaningless as to not amount to "law" at all.
>
> • *What is the purpose of the impugned act? Does it amount to a "pressing and substantial concern" that is justified in a "free and democratic society"?* While, as stated above, the "purpose and effect" of the action are relevant to deciding whether a breach has occurred, a much more substantial analysis of purpose is undertaken at this stage. This is a key part of the s. 1 analysis; the remaining portions of the test refer back to this statement of purpose. The courts recognize that most government actions have a variety of purposes, some stated and some unstated, making the analysis more complicated.
>
> • *Is the impugned act rationally connected to this purpose*? This stage of the analysis allows the court to assess the utility of the governmental action; sometimes the goal of the action is sound, but the *Charter* breach does nothing to actually further the goal.

• *Does the impugned act minimally impair the Charter right*? The government must be careful not to be overly broad in its reach, and not to impact the *Charter* right to a greater extent than is necessary to achieve the legislative purpose. The court will give some deference to the state at this stage, recognizing that there is no absolute obligation to choose the least intrusive option. Still, the court will look at what other options are available to the government, in order to ensure that the impact on citizens' rights is carefully circumscribed.

• *Are the negative effects of the impugned act proportional to the objective?* Where the impugned act has a severe impact on the rights of citizens, the court must satisfy itself that the government's objective is significant enough to justify that degree of impact. ***214** The beneficial effects of breaching the *Charter* must outweigh the negative effects of the breach.

There is an important point to be made here about proof and process. The burden of showing that a right has been violated falls to the person making that claim. That is, if I am claiming that the state has violated my freedom of expression, it is up to me to show that my actions are protected by s. 2 (b), and that the impugned act breaches s. 2 (b). However, once a breach is established, the burden of justifying the breach falls to the state. It is up to the government actor to convince the court that it has met the requirements contemplated by s. 1 of the *Charter*. If that is not demonstrated, the court will find that a *Charter* violation has occurred. This "shifting" of the burden onto the government plays a significant role in the outcome of many *Charter* cases.

(b) The State Versus Individual Model

Section 2 is the only section in the *Charter of Rights and Freedoms* that describes "freedoms" rather than "rights." In the end, perhaps it comes down to a matter of semantics; the difference between "rights" and "freedoms" has not significantly affected the way the *Charter* has been interpreted.

However, the concept of "freedom" illustrates the way that we traditionally conceive of s. 2 (b)--as a protection of the individual against interference from the state. I suggest that this is the classical model that lawyers and lay people alike use to conceptualize "free speech." The classical concept of freedom of expression is born out of a civil liberties impulse, the individual resisting interference from the oppressive hand of the state. The state seeks to silence the views of the rebellious and unpopular, and the individual fights back in defence of her own rights, and for the good of society as a whole.

A large number of noteworthy s. 2 (b) cases fit neatly into this "state versus individual" model. Hate speech cases like *Keegstra*, [FN15] for example, are classic civil liberties cases. While ultimately the Supreme Court upheld the hate speech legislation, the case is imbued with the rhetoric of the unpopular views of the minority being quashed by an overly intrusive government.

Little Sisters Book & Art Emporium [FN16] is another case that illustrates this model. In this case, a small gay and lesbian bookstore argued vehemently***215** (and the Supreme Court accepted) that its shipments were being arbitrarily detained at Customs because of the prudish and discriminatory views of government officials. The bookstore, and the gay and lesbian community in general, appear in the case as victims of state interference; section 2 (b) steps in to protect this vulnerable minority from state tyranny.

Certainly, there are also significant cases that do not fit as neatly into the "state versus individual" model. My intention in emphasizing this model is not to create a straw man. I am simply contending that this model is

consistent with the first- blush reactions of both lawyers and laypeople when they think about freedom of expression. The simple concept of a “state versus individual” power structure influences the way we perceive the *Charter* as a whole. In fact, the workings of s. 2 (b) can be a great deal more complex than the simple state versus individual model. One of my intentions in this article is to illustrate, using the educational context, that s. 2 (b) can be used as a means of balancing a number of competing interests, and accommodating power structures more complex than the state versus the individual.

(c) Freedom of Expression and the Education System

Turning to the specific context of the education system, it quickly becomes clear that some of the basic concepts of freedom of expression must be adapted somewhat to make sense in the classroom context. First, the simplified notion of a “state versus individual” power structure does not necessarily translate well in the educational context. Though public education is clearly an exercise of governmental power, that power manifests itself in relationships among a large number of stakeholders. Some of the interested parties who participate in the education system include:

- Provincial departments of education
- School Boards
- School Administrators (principals, vice principals)
- Teachers
- Teachers' organizations
- Teachers' professional regulating bodies
- Students
- Parents
- Organizations representing the interests of students and parents.

This is not a comprehensive list, and the list of stakeholders may change somewhat across different jurisdictions. If one were to try to diagram the power structure among these various entities, it would quickly ***216** become clear that it is much more complex than simply the state exercising power over the individual. The diagram might differ according to the perspective of each participant, and would certainly change based on the specifics of any given situation. A teacher in the classroom, for example, is exercising a form of state power over her students; but the same teacher is subject to state power at the hands of the school board at the point of discipline, or the professional regulatory body at the point of certification. The teacher, school board, and department of education all collaborate to create a government-mandated educational program which is imposed on students in the classroom environment.

It becomes clear in the cases reviewed herein that freedom of expression can appear at a number of junctures in this complex power structure. A student may argue a right to free expression in his classroom activities, or a right as the recipient of free expression by other students and the teacher. Teachers argue that they have the right

to free speech in their personal and professional lives. A teacher may claim the right to freely express herself in the classroom; on the other hand, a student may argue that being exposed to the teacher's unique views compromises the students' right to receive other forms of expression.

In the educational context, freedom of expression becomes less a matter of protecting against the oppressive hand of the state, and more a matter of balancing these competing interests. Section 2 (b) can be used as a tool for determining who participates in the power structure, and to what extent.

Another, related difference lies in the nature of education itself. In some other facets of life, the expression of ideas is perhaps a valuable activity, or a meaningful distraction. Education, however, is entirely about the expression of ideas; ideas are its *raison d'être*. It becomes somewhat difficult to talk about protecting the right to convey meaning within a system that in and of itself amounts to an attempt to convey meaning.

Moreover, the education system inherently privileges some ideas over others. Even setting aside the values-laden exercise of determining what students *should* be taught, there simply are practical constraints on what students *can* be taught over the course of twelve years of public instruction. There is not enough room in the system for the conveyance of all valuable ideas. Thus, the process of education necessarily involves some limitations on free expression; the system could not survive otherwise.

Perhaps this is best reflected through John Stuart Mill's metaphor of the “marketplace of ideas,” invoked in many s. 2 (b) cases. The *Charter* protects the rights of citizens to participate fully in this marketplace of ideas. However, the education system inherently involves state control ***217** over the flow of ideas. It is less a free market, and more a controlled economy of ideas. The values contained in the s. 2 (b) analysis must be adapted to reflect this reality.

In a series of articles published in 1998 and 1999, [FN17] Paul T. Clarke has explored in great detail what the concepts of freedom of expression mean within the education system, and particularly, the protections given to the free speech of teachers. Clarke recognizes that free speech for teachers is valuable to the education system, and should be protected. At the same time, he also delineates some of the inherent limits to the realistic ability of teachers to express themselves freely, including the need to cover the set curriculum within the allotted time, the need to convey the values reflected in the curriculum itself, and the teacher's duty to serve as a role model in addition to an educator.

Clarke makes the point that employment law principles already contemplate protection of a teacher's freedom of expression by recognizing (for example) that teachers have a great deal of discretion over how to teach the set curriculum. He speculates that the *Charter* in and of itself may not expand the already-existing protections of teachers' free speech.

Clarke identifies two key questions as to the applicability of free speech rights to teachers. First, do teachers have a protected right of “academic freedom”--a right to raise new and controversial ideas in an effort to stimulate thought and further the pursuit of truth? Clarke notes that such a right is commonly accepted in the university context, but at the time of his writing, had not been recognized in the public school context. Secondly, do teachers have a right to speak out critically against their employers? In answer to each of these questions, Clarke responds with a qualified “yes”; teachers do have a right to free speech in each of those contexts, subject to certain important limits. However, as noted above, he sees those rights as protected by employment law principles, without the need for specific *Charter*-protections.

Those two key questions have become front and centre in a number of cases decided since Clarke's articles. In some ways, the analysis I offer in this article can be seen as checking back in on the themes raised by Clarke some time ago.

***218 3. CASES INVOLVING FREEDOM OF EXPRESSION FOR TEACHERS**

Probably still the best-known case involving a teacher's freedom of expression is *Attis v. New Brunswick District No. 15 Board of Education*, [FN18] the facts of which are almost notoriously known within the field of education law. In *Ross*, the Supreme Court of Canada was dealing with a case of a virulently anti-Semitic teacher who made his views publicly known, while keeping them out of the classroom itself. The Court found that substantial discipline against Ross was called for, because to some extent a teacher has a duty to serve as a role model. A teacher can never fully remove the “teacher hat” and speak in public on the same terms as an ordinary citizen.

Although this case continues to be of fundamental importance, [FN19] I do not propose to include it in the review I undertake in this article. The case deals with a teacher and the school system, but the expression in that case took place outside the education system itself. *Ross* concerns the question of what teachers can say outside the classroom; my focus will be on the free speech rights of teachers *within* the education system itself.

I have chosen four cases that I believe deal more directly with this issue. I see these as leading cases on the applicability of s. 2 (b) to teachers' actions within the school system. I note that the cases arise from different jurisdictions across the country (Prince Edward Island, Ontario, Alberta, and British Columbia) and from different judicial contexts (two are court decisions, one is an arbitrator's award, and one is a decision of the Ontario Labour Relations Board). However, the cases seem to contain common themes and principles.

219 (a)** ***Morin v. Prince Edward Island Regional Administrative Unit No. 3 [FN20]

This is a fairly well-known case which received a good deal of attention when it was first decided. Richard Morin was a junior high school Language Arts teacher. He showed a ninth grade class a television documentary entitled “Thy Kingdom Come, Thy Will Be Done.” The video explored the influence of Christian fundamentalism on American politics. Morin intended to incorporate this video into a class project on the theme of “What Religion Means to Different People.” The video itself was seen as critical of fundamentalist Christianity, and upset some students and parents.

In response, the principal of the school forbade Morin from showing the video again, and called an end to the “What Religion Means to Different People” project. The issue went before the Curriculum Committee, who determined that the subject matter was appropriate in terms of fitting into the set curriculum, and appropriate for the level of critical thinking skills of grade nine students. However, the Committee was critical of the amount of preparation and forethought Morin put into the project, and his possible failure to adequately account for the expectations and values of his students and their parents. Ultimately, the project did not go ahead; Morin took some sick time after the controversy, and then was granted a temporary leave of absence. He was not rehired for the following school year.

Morin brought an action against the school board claiming, among other things, that the actions of the principal were in violation of his rights under s. 2 (b). The trial judge found that, although Morin's actions were ex-

pressive activity within the meaning of s. 2 (b), the purpose of the restriction was not to infringe on his rights, but to preserve an effective learning environment. This conclusion was overturned by a 2-1 decision of the Court of Appeal, and Morin was ultimately awarded damages of $75,000 for the violation of his rights. [FN21]

The majority and the dissent in the decision split directly over the issues of whether the impugned act violated Morin's right to free expression and whether the *Charter* protects a teacher's "academic freedom." ***220** Thus, this case contains a very detailed analysis of the implications of s. 2 (b) for the teacher in the classroom. However, the case cannot be seen as the final word on the issue, because of the way it was argued. The school board did not put forward any argument that, if s. 2 (b) was breached, the breach was justified under s. 1 of the *Charter*. Because the burden of proving the justification under s. 1 falls to the state, the Court was unable to consider the issue of justification on the facts of the *Morin* case. In a sense, this increases the theoretical value of the discussion in the case; it is a pure discussion of whether s. 2 (b) was breached. However, it will fall to other cases to determine the interesting issues which are bound to arise in the s. 1 analysis.

An important point is that even the dissenting judge accepted that Morin's activity in showing the video to his class was "expression" protected by s. 2 (b); indeed, the school board appears to have conceded that point. [FN22] The dissenting judge, however, like the trial judge, found that neither the purpose nor the effect of the principal's actions infringed Morin's freedom of expression. Morin remained free to explore and express views about religion outside of the classroom. However, within the classroom, the teacher confronts a captive audience of limited age and maturity. The teacher's ultimate role is to deliver a curriculum which has been set by the province and the administration. The very act of teaching does not involve an exercise of free expression, but an expression which is inherently controlled in its content.

The dissent, however, does give some recognition to the concept of "academic freedom" in the public school system:

> The most meaningful legacy one generation can leave to another is that of well-informed and critically-thinking young people who will shape the direction of society for the next generation. By enhancing the education system our young people are given the opportunity to become well-informed and free-thinking adults. A school serves as a communication center for a whole range of values and aspirations for our society .... Teachers are the medium by which much empirical knowledge is transmitted to the students, and they are the facilitators who by the use of diverse teaching methods and aids, cause students to develop the skills so crucial to their complete development as productive citizens in our society .... Theoretically at least, the free exchange of ideas in public schools would seem central to learning. [FN23]

But, the dissent goes on to state that any such freedom must be practically limited by the pre-established boundaries of the curriculum:

> ***221** A public school, at the junior high level, is not a marketplace for ideas where everyone has the right to freely and openly debate all issues in the same manner that each citizen has the right to do so in the public square. The exchange of ideas in a school takes place within the curriculum. This necessarily dictates that certain restrictions may be placed on the parameters and scope of the ideas that are to be exchanged. [FN24]

Most significantly, the dissenting opinion rejects the notion that academic freedom, to the extent that it exists, is a value protected under s. 2 (b) of the *Charter*. Issues of academic freedom are reflected in employment law principles, but have no place in a *Charter* analysis:

> Academic freedom (free expression in the classroom of the public school system) does not equate with freedom of expression protected under s. 2 (b). Debate and differences will, no doubt, frequently arise between teachers and their supervisory personnel as to whether particular material or teaching method is within the curriculum. Debate and differences will no doubt frequently arise as to whether the exchange of ideas which is taking place in a public school at the junior high level is within the curriculum. Supervisory personnel may find it necessary from time to time to restrict teachers in the material they use and the teaching methods they employ even though the teacher possesses a bona fide intention to work within the curriculum. This does not mean that each time such a restriction is imposed, the teacher's constitutionally protected right to freedom of expression has been violated and the school board is placed in the position of having to justify its action under s. 1 of the *Charter*. If this were so, the court would become, in effect, the school board of the province; a role it should eschew. [FN25]

The majority decision found that a teacher's freedom of expression within the classroom fits squarely under the protection of s. 2 (b):

> The appellant produced case law and made extensive arguments about the need, in a democratic society, to protect teachers' freedom to teach in a manner that stimulates and encourages the exchange of opinions and ideas. Such values are inherently within the rationale behind the Supreme Court's liberal approach to the interpretation of the *Charter*'s scope of protected speech .... [FN26]

Furthermore, the majority couched this right in language of academic freedom, a principle which it found to be recognized in American case law on the issue of teachers' free speech. [FN27] The right was characterized in the following terms:

> ***222** What is being dealt with in this case is the freedom of teachers to carry out their mandate in a free and democratic society without fear that a whiff of controversy could spell the end of their careers - or result in suspension or other punishment. Is education not well served by a stimulating debate, discussion of different points of view, exposure to different perspectives? Should not teachers be encouraged to challenge their students, to raise topical issues, rather than be intimidated from raising anything that might be controversial? [FN28]

The majority also found that a teacher's freedom of expression protected the rights of both teachers *and* students:

> If part of the value behind freedom of expression as set out in s. 2 (b) includes a consideration of the importance of that expression to those who are the recipients of the content (see: Irwin Toy), then the school context raises special issues. This becomes partially a right of students in a democratic society to have access to free expression by their teachers - encouraging diversity, critical thinking and vigorous debate. [FN29]

Recall that, whereas the principal sought to ban the project outright, the Curriculum Committee simply attempted to place restrictions on Morin's preparation and presentation of the project. However, even these restrictions were seen by the majority as infringing s. 2 (b), because their purpose and effect were to exert control over the content of the expression. [FN30] Again, such restrictions may have a place when it comes to justifying the breach of the *Charter*; but that analysis would take place under s. 1, and the court was prevented from undertaking that aspect of the analysis.

This case touches on a number of important points about the role of freedom of expression in the public school classroom. Most significantly, it affirms that “academic freedom” for teachers is a value protected under s. 2 (b) of the *Charter*. In so doing, the case illustrates my earlier point about the complex nature of power struc-

tures in the education system. The majority envisions the teacher, together with the students, as subject to the somewhat arbitrary exercise of state power in this scenario. The dissent, on the other hand, sees the teacher as *a part of* the exercise of state power over students through the development and delivery of curriculum. This factor, as much as any other, may explain the different philosophical positions reflected in the two judgments.

223 (b)** ***Elementary Teachers' Federation of Ontario v. Hamilton-Wentworth District School Board [FN31]

This decision of the Ontario Labour Relations Board involves facts that are somewhat similar to those in *Morin*. The issue engaged is still the teacher's rights of expression within the classroom. However, in this case the expression involved was not so much the content of the educational message, but other unrelated messages that were conveyed in the classroom environment.

Headed into a particularly messy strike vote in 2000, the Elementary Teachers' Federation of Ontario produced buttons for members to wear carrying the slogan “Fair Deal or No Deal.” Federation members across the province wore these buttons both inside and outside of their classrooms, as a sign of solidarity.

In response, the Hamilton-Wentworth District School Board adopted a policy that “political messages must not be displayed in our classrooms,” and included collective bargaining issues within the definition of “political”. The policy was to be enforced by disciplinary consequences (though the evidence showed that only one teacher had been disciplined as a result of the policy, and that was merely a verbal warning.)

The Federation complained to the Labour Relations Board that the school board's policy interfered with its statutory right to fully represent its members, an unfair labour practice. In the context of that argument, the Federation also argued that the school board's policy violated the teachers' s. 2 (b) rights. In substance, the argument was more of a “*Charter* values” argument: the Board ought to take freedom of expression into account when deciding the unfair labour practice allegation. However, the same kinds of arguments raised in *Morin* were also raised in this case.

In defence, the school board claimed that its policy was simply a manifestation of managerial interests in the classroom environment, and did not infringe on teachers' right to freedom of expression in its purpose or effect. The employer claimed that introducing the collective bargaining message into the classroom was disruptive of the learning environment. Furthermore, the employer argued that limitations on freedom of expression were inherent in the context of the elementary school classroom, where the audience was impressionable children.

The Labour Relations Board upheld the Federation's complaint, and also declared that the teachers' freedom of expression was unduly infringed. The Board recognized that teachers hold a position of power over a captive audience, and must be sensitive and careful in their use of that power. However, conveying political messages did not inherently conflict ***224** with the sensitive exercise of that power. In fact, the school board had a practice of at least tolerating buttons containing certain political messages, such as “No child is born homophobic” or “Poverty is violence.” It was only when the political message hit close to home that the employer chose to act.

Though not as explicitly as the majority in *Morin*, the Board also seemed to accept to some extent the principle of academic freedom. It recognized that exposure to controversial ideas can be beneficial even to young students and that

> students -- even young students -- should not be insulated from issues which surround them, and

> which might have a significant impact upon them (as in this case they did, when the teachers were locked out of their schools by the employer). Children cannot, nor should they, be shielded entirely from all outside controversy, particularly when that controversy has a bearing upon them .... The employer has tolerated the use of more overtly political buttons than the one at issue in this case and there is nothing to suggest that those buttons, like the one in this case, caused any operational difficulty for the employer. The employer has accepted that children can be exposed to some level of political controversy, without their learning being disturbed. [FN32]

The Board found that the school board's argument that the buttons would create a disruption to the educational environment was entirely speculative. There was no evidence to suggest any disruption. To the extent that students initiated any discussion of the collective bargaining issue, the evidence was that teachers had handled the situation professionally, explaining the bargaining process without discussing the content of the dispute or criticizing the employer.

To some extent, then, this case answers affirmatively both questions arising from Clarke's series of articles. First, the Board made some limited recognition of the right of "academic freedom." Secondly, the Board clearly accepted that teachers have a *Charter*-protected right to openly oppose their employer, even when those views are brought into the classroom.

(c) *British Columbia Public School Employers' Assn. v. B.C.T.F.* [FN33]

This case also involves a power struggle between teachers and their employer. However, the expression involved here is one more step removed from the "teaching moment"; rather than expressing views to ***225** students in the classroom, the teachers in this case expressed views to parents in the context of parent-teacher meetings.

The BCTF was embroiled in a conflict with the provincial government about fiscal cutbacks which have led to reforms in the education system. The Federation developed a plan to "help teachers inform parents about the specific educational losses that have taken place." The most controversial aspect of this plan involved creating "Reports to Parents," documents outlining how government cutbacks had resulted in larger class sizes and a loss of resource teachers within the system. Teachers were encouraged to individualize these documents to the situation in their own classroom and school, and distribute them to parents during parent-teacher meetings.

The response varied from school board to school board, but essentially the boards took a variety of actions to prevent teachers from communicating with parents in a manner critical of the government cutbacks. The Federation grieved, and the parties agreed to put a "stated case" before an arbitrator, asking for a determination of principles that might then be applied to the facts of any given case. The Federation claimed that the school boards' actions violated the teachers' rights under s. 2 (b) of the *Charter*.

One interesting preliminary aspect of the case is that the arbitrator thoroughly considered the question of whether or not school boards are actually "government" actors, bound by the *Charter*. There was, and continues to be, very little direct jurisprudence on this issue; Clarke in his articles accepts that school boards will be bound by the *Charter* without seriously questioning the issue. [FN34] Arbitrator Munroe decided that school boards are bound by the *Charter*, at least given the specific structures in place in British Columbia. [FN35] When the case went to the British Columbia Court of Appeal, both the majority [FN36] and the dissent [FN37] agreed that school boards were bound by the *Charter*. Although this seems instinctively to be the right conclusion, note that the question may still be open for debate in other jurisdictions.

Having established that the *Charter* did apply, the arbitrator determined that the teachers' freedom of expression had been violated in a manner that was not justified under s. 1. The teachers' activity fell within s. 2 (b) because the content and purpose of the materials conveyed meaning***226** about an important political issue. The school boards claimed that the right was only minimally infringed because the only restrictions were within the environment of the school and parent-teacher meetings. Moreover, the school boards argued that the teachers' actions interfered with the operations of the school system and undermined public confidence in education.

The arbitrator rejected the employers' attempt to justify the infringement. There was no evidence that there had been any actual disruption to the system; no instructional time was lost, and no disturbance was created in the classroom. Significantly, the arbitrator adopted the reasons of the majority in *Morin*, including the recognition of the value of academic freedom, and went on to consider the s. 1 aspect of the analysis (albeit in a slightly different context.)

The arbitrator's decision was upheld by a majority of the British Columbia Court of Appeal, in a 2-1 decision. As in *Morin*, the differences between the majority and dissenting opinions in this case illustrate some of the difficulties of grappling with freedom of expression in the classroom.

The majority rejected the school boards' argument that the *Charter* simply did not protect teachers' speech on school property, and found that the teachers' attempt to discuss these political issues furthered the goals of s. 2 (b). This aspect of the case affirms the general principle that *Charter* protection under s. 2 (b) is very broad, and that public bodies should have to justify any restriction on political expression under a s. 1 analysis.

With respect to the s. 1 analysis, the majority recognized that the teachers' political expression in parent-teacher meetings could have the effect of undermining public confidence in the education system, a legitimate concern for the school board. However, the absolute ban attempted by the boards failed the “minimal impairment” aspect of the test. A parent-teacher interview was an appropriate place for the discussion of the student's need, including the general need for resources for public schools.

The school boards' concerns could have been met by ensuring that interviews were “not dominated” by discussion of resources and class sizes in a way that compromised the other goals of the parent-teacher meeting. If problems arose, the school board would be justified in responding to parents' concerns, and in extreme cases, a professional complaint against the teacher might be appropriate. [FN38] Although the majority ***227** clearly accepted that some limits to the discussion are defensible, the decision overall gave strong recognition to the teachers' s. 2 (b) rights.

The majority also agreed with *Morin*, though unlike the arbitrator, it did not specifically adopt the portions of *Morin* dealing with academic freedom in the classroom (which was not strictly the issue in the British Columbia case). The majority's comments affirmed the teacher's right to free expression, but were silent as to how it applies inside the classroom.

The dissenting opinion of Lowry J.A. reached conclusions similar to those of the dissent in *Morin*, but for somewhat different reasons. Most importantly, the dissent agreed with the majority that the teachers' expression was protected by s. 2 (b), and that the actions of the school boards violated that freedom. Unlike in *Morin*, then, the dissent in this case focused on the s. 1 justification analysis (an option which, as noted above, was not open to the dissent in *Morin*). Lowry J.A. introduced the discussion as follows:

> Shortly put, there is, in my respectful view, simply no place for the use of our public schools as a

platform for teachers to advance political agendas. [FN39]

Lowry J.A. did recognize a teachers' freedom of expression, even within the school system, but only in a limited sense. The over-arching limitation, in his view, is the obligation on teachers to remain “neutral facilitators”:

> Teachers play a vitally important role in our society as those with the primary responsibility for educating our young people. As educators, it is their job not only to impart information to students, but to create an environment in which students feel free to discuss and analyze ideas. To create this environment, teachers must be in a position to act as neutral facilitators for the sharing of ideas. By posting political material on bulletin boards that are accessible to students, teachers communicate to the student body that they have closed ranks on a particular political viewpoint .... When teachers collectively use school property to espouse or advocate for a particular political agenda, an open and supportive environment conducive to the sharing of ideas is undermined.
>
> This is not to say that teachers need to be apolitical when they are teaching or when they are in the school environment. Holding and expressing political opinions does not necessarily undermine a teacher's ability to be a neutral facilitator. Teachers can express their views, while still making it clear to students that other points of view are not only legitimate, but welcome. However, when teachers post material within the school espousing a particular political position, they collectively place themselves in the role of advocates for a political agenda, and in doing so compromise their position as neutral facilitators. These actions ***228** are inconsistent with the maintenance of an open and supportive education environment. [FN40]

Lowry J.A. also accepted the argument that a teacher's position as a role model, together with the vulnerability of students, justified limiting the free expression of political views:

> Teachers are role models and authority figures for young people. As a result, young students are not in a good position to challenge the perspectives and points of view taken by their teachers. For this reason, teachers must be particularly careful not to impose their political views on their students ....
>
> Citizens of this province have a collective social responsibility to educate their children in a manner that best situates them to become healthy and functioning members of society. To achieve this goal it is of utmost importance to ensure that students are not only exposed to different ideas and perspectives, but are supported in their investigation and analysis of those perspectives. If teachers are permitted to use public schools as forums to advance particular political agendas, they will undermine an open and supportive education environment and ultimately that will detract from the fundamental objective of the school system. [FN41]

As in *Morin*, the differences between the majority and dissent in this case arose in part from a different perception of the power structure involved. The arbitrator and the majority of the Court of Appeal focused on the teachers as the “victims” of state action, and sought a solution which vindicated their rights against the state. From the perspective of the dissent, teachers are a part of the state; the teachers' individual rights must be limited in order to protect students' right to a well-rounded education. The majority and minority both attempted to resolve the various conflicting rights, but the resolution was influenced by their differing senses of where the power lay.

(d) *Baier v. Alberta* [FN42]

The final case I include in this analysis is a recent case confirming the right of teachers to run for office as a

school board trustee. This case is quite distinct on its facts from the other three, in that it does not discuss the classroom environment at all. However, it is relevant to this analysis because the claimant used s. 2 (b) as a tool to achieve the right to take part in the control of the education system.

***229** The case involved Alberta legislation which attempted to eliminate the ability of school board employees to run for office as school board trustees. The new amendments would have forced teachers (and other board employees) to take a leave of absence while running for office, and to resign their employment on attaining office. Significantly, the restriction prevented teachers from running in any jurisdiction in Alberta, and not just the board by which they were employed.

The claimants were three teachers who were already sitting as school trustees, and one who intended to run. The Province claimed that the legislation was necessary to avoid conflicts of interest, and that it minimally impaired teachers' rights because it allowed them to run and hold office -- just not while employed as teachers. Moreover, the teachers were not prevented from participating in the political process in any other way.

The Court found a s. 2 (b) violation, which was not saved under s.1. The act of running for office is inherently expressive, and is close to the core political values protected by s. 2 (b). The purpose and effect of the legislation were to prevent political participation by teachers and school board employees; the requirement of a leave of absence and resignation made holding office practically impossible. The Province had not *proven* the existence of a pressing and substantial concern to be addressed. Although it had presented anecdotal evidence of conflicts of interest occurring, it had not provided the Court with any means to assess the significance of the problem. In contrast, the teachers' evidence indicated that conflicts of interest occurred fairly infrequently and did not disrupt the operations of the school boards.

This case really involves teachers in their capacity as board employees, rather than as teachers *per se*. Still, it stands for the important principle that freedom of expression includes the rights of teachers to participate in the decision-making process that sets the priorities for the education system.

4. SOME PRINCIPLES AND THEMES

The reviewed cases clarify some questions about the role of freedom of expression in the education system, and perhaps leave other questions unclear. Before concluding, I intend to draw together a number of themes and lessons which can be taken from the cases.

First and foremost, it is clear from the cases that teachers do have a right to freedom of expression within the school system. Such freedom definitely includes the right to take positions contrary to and critical of ***230** the employer, and it may go so far as to recognize a form of “academic freedom,” protecting teachers' control over the kinds of ideas they choose to introduce into the classroom.

Related to the first point, decision makers also seem ready to find that teachers' freedom of expression is infringed by the actions of school boards. School boards will likely be considered bound by the *Charter*. Although boards have argued that their attempts to control the learning environment do not have the purpose or effect of interfering with freedom of expression, this argument has not been met with much success to date. Boards may have a legitimate argument that they must control the learning environment; but such arguments are to be raised at the justification stage under s. 1. These arguments will not be convincing at the earlier stage; claiming that freedom of expression has not been interfered with at all is not apt to evoke a sympathetic response.

Also, school boards (and other governmental actors in the education field) will have to take seriously their obligation to prove that interference with free speech is necessary to address some pressing and substantial harm. In all four of the cases cited, the decision makers commented that there was insufficient evidence of the nature and significance of the harm being addressed. [FN43] In each case, the boards (and in *Baier*, the province) seemed to rely on anecdotal or speculative evidence to describe the harm being addressed. This approach simply will not suffice to establish a justification argument under s. 1.

Although the jurisprudence still lacks a thorough analysis as to how the principles of s. 1 will play out in the classroom context, it can be expected that school boards will rely on the arguments that students comprise a captive and vulnerable audience; that the state has a legitimate and unavoidable role in setting curriculum; and that granting too much autonomy to the teacher gives rise to potential disruptions to the learning environment, which ultimately harm students.

These cases, directly or indirectly, add some clarification to the nature of teaching itself. The recognition of a teacher's *Charter* rights in the school and in the classroom seems to bolster the idea that teaching is a profession, rather than simply a job. The decision makers in these cases recognized that teachers are entrusted with a captive and impressionable audience, and yet they were still willing to entrust the teacher with some degree of personal control over the subject being taught. This level of trust is consistent with the notion of a professional. As well, the recognition***231** of the degree of independent control exercised by a teacher within the classroom is relevant to other potentially significant questions in education law, such as the ownership of copyright in materials produced by the teacher. [FN44]

5. CONCLUSION

Law and education are each a means of managing changes and conflicts in social values. The *Charter* is perhaps the most valuable tool by which the law achieves this goal. In the context of the education system, the protection of freedom of expression in s. 2 (b) has been extended to teachers both inside and outside the classroom. Under the umbrella of s. 2 (b), teachers have been recognized as having a right to some degree of control over the content of their lessons, a right to bring their political and labour power struggles into the classroom, and a right to participate in the decision-making process in the education system by running for elected positions. Though the freedoms protected by s. 2 (b) will be subject to certain limits, the cases have made it clear that the school board and the province will have to provide a strong argument to justify infringing on teachers' free speech.

The education system is better seen as a balance of interests than as a state versus individual model of power. In these cases, the *Charter* has been used to affect the balance of power within the education system, and to carve out a clear and protected role for the interests of teachers in the system. Teachers and teacher organizations have begun to see that the *Charter* has the power not just to protect them from state oppression, but to affirm and defend their interests in the education system.

[FNa1]. The author is an associate with the Labour and Employment Law group of Cox Hanson O'Reilly Matheson, practising out of the firm's Halifax office. His research and analysis draw on his experience representing the Nova Scotia Teachers' Union. The author would like to thank the staff of the NSTU, and his colleagues at Cox Hanson O'Reilly Matheson, for their insights into this topic. This article was first presented as a paper for

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[FN1]. *R. v. Keegstra*, [1990] 3 S.C.R. 697, 1990 CarswellAlta 192, 1990 CarswellAlta 661 (S.C.C.), McLachlin J. (dissenting) at para. 171. *Keegstra* involved a teacher who perpetuated racist views in the classroom and was prosecuted criminally for hate speech. The Supreme Court of Canada upheld the hate speech laws against a s. 2 (b) challenge in that case, though the case was not specifically analyzed in the education context. McLachlin J. (as she then was) did not agree with the majority on the results of the case, but her overall comments about freedom of expression have been generally treated as the Court's most significant statement of principle on the subject.

[FN2]. These are summarized *ibid*. at para. 181.

[FN3]. *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 CarswellBC 82, 2001 CarswellBC 83 (S.C.C.) at para. 25.

[FN4]. Above, note 1.

[FN5]. *R. v. Mara*, [1997] 2 S.C.R. 630, 1997 CarswellOnt 1983, 1997 CarswellOnt 1984 (S.C.C.).

[FN6]. Above, note 3.

[FN7]. Above, note 1 at para. 35-38.

[FN8]. *R. v. Butler*, [1992] 1 S.C.R. 452, 1992 CarswellMan 100, 1992 CarswellMan 220 (S.C.C.), reconsideration refused [1993] 2 W.W.R. lxi (S.C.C.).

[FN9]. *Guignard c. St-Hyacinthe (Ville)*, [2002] 1 S.C.R. 472, 2002 CarswellQue 140, 2002 CarswellQue 141 (S.C.C.).

[FN10]. *Little Sisters Book & Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 CarswellBC 2442, 2000 CarswellBC 2452 (S.C.C.).

[FN11]. *Irwin Toy Ltd. c. Québec (Procureur general)*, [1989] 1 S.C.R. 927, 1989 CarswellQue 115F, 1989 CarswellQue 115 (S.C.C.) at para. 47-53. This case dealt with Quebec legislation limiting advertisements aimed at children; the Court found that the restrictions violated s. 2 (b), but that the violation was justified.

[FN12]. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, 1994 CarswellOnt 112, 1994 CarswellOnt 1168 (S.C.C.).

[FN13]. *Pepsi-Cola Canada Beverages (West) Ltd. v. R.W.D.S.U., Local 558*, [2002] 1 S.C.R. 156, 2002 CarswellSask 22, 2002 CarswellSask 23 (S.C.C.).

[FN14]. In the often-cited decision in *R. v. Oakes*, [1986] 1 S.C.R. 103, 1986 CarswellOnt 95, 1986 CarswellOnt 1001 (S.C.C.). The test summarized herein, which has been refined somewhat since *Oakes*, is generally referred to as the “*Oakes* test.”

[FN15]. Above, note 1.

[FN16]. Above, note 10.

[FN17]. P. Clarke, “Canadian Public School Teachers and Free Speech: Part I--An Introduction” (1998) 8 *E.L.J.* 297; P. Clarke, “Canadian Public School Teachers and Free Speech: Part II -- An Employment Law Analysis” (1999) 9 *E.L.J.* 43; P. Clarke, “Canadian Public School Teachers and Free Speech: Part III -- Constitutional Law Analysis” (1999) 9 *E.L.J.* 315.

[FN18]. (sub nom. *Ross v. New Brunswick School District No. 15*) [1996] 1 S.C.R. 825, 1996 CarswellNB 125, 1996 CarswellNB 125F (S.C.C.) [hereinafter “*Ross*”].

[FN19]. The implications of *Ross* continue to be highly relevant to teachers, and are still controversial. The ongoing case of British Columbia teacher Christopher Kempling, who was suspended for publishing anti-homosexual opinions in local media, continues to test the limits of the principles espoused in *Ross*; see *Kempling v. College of Teachers (British Columbia)*, 2004 BCCA 535, 2004 CarswellBC 2251 (B.C. C.A. [In Chambers]).

[FN20]. (2002), 213 D.L.R. (4th) 17, 2002 CarswellPEI 36 (P.E.I. C.A.), leave to appeal refused (2003), 2003 CarswellPEI 90, 2003 CarswellPEI 91 (S.C.C.).

[FN21]. Damages were originally set at $15,000 in a subsequent trial-level decision: *Morin v. Prince Edward Island Regional Administrative Unit No. 3* (2004), 233 Nfld. & P.E.I.R. 271, 2004 CarswellPEI 2 (P.E.I. T.D.). That damages award was increased to $75,000 on appeal: (2005), 254 D.L.R. (4th) 410, 2005 CarswellPEI 43 (P.E.I. C.A.). The appeal court found that the original damages “did not, in a meaningful way, vindicate the rights and freedoms of the appellant.”

[FN22]. Above, note 20 at para. 221.

[FN23]. *Ibid*. at para. 231-232.

[FN24]. *Ibid.* at para. 232.

[FN25]. *Ibid.* at para. 242.

[FN26]. *Ibid.* at para. 75.

[FN27]. *Ibid.* at para.63. The majority chose to recognize a line of American cases which stand for this principle; in reality, the overall American jurisprudence is somewhat divided on the issue.

[FN28]. Above, note 20 at para. 96.

[FN29]. *Ibid.* at para. 67.

[FN30]. *Ibid.* at para. 100.

[FN31]. (2002), [2002] O.L.R.D. No. 2676, 2002 CarswellOnt 3402 (Ont. L.R.B.).

[FN32]. *Ibid.* at para. 49.

[FN33]. (2004), 129 L.A.C. (4th) 245, 2004 CarswellBC 2901 (B.C. Arb. Bd.), affirmed 2005 BCCA 393, 2005 CarswellBC 1853 (B.C. C.A.).

[FN34]. P. Clarke, “Canadian Public School Teachers and Free Speech: Part III--Constitutional Law Analysis” (1999) 9 *E.L.J.* 315 at 320.

[FN35]. Above, note 33 at 257-266 [L.A.C.].

[FN36]. Above, note 33 at para. 19 (B.C. C.A.).

[FN37]. *Ibid.* at para. 72.

[FN38]. *Ibid.* at para. 67.

[FN39]. *Ibid.* at para. 72.

[FN40]. *Ibid.* at para. 83-84.

[FN41]. *Ibid*. at para. 92, 101.

[FN42]. 2004 ABQB 669, 2004 CarswellAlta 1173 (Alta. Q.B.).

[FN43]. In *Morin*, that evidence may well have been available had the school board chosen to mount a s. 1 case.

[FN44]. See, for example, the debate between the author and Rod Dolmage and Paul Clarke in two articles on this topic: R. Dolmage and P. Clarke, “Copyright Ownership of Teacher-prepared Teaching Materials: An Examination of Issues in the Contemporary Context” (2000-01) 11 *E.L.J.* 321; K. Kindred, “Copyright Ownership of Teacher-prepared Teaching Materials: A Response to Dolmage and Clarke” (2003-04) 13 *E.L.J.* 299. Each side in this debate recognizes that the degree of control exercised by the teacher and school board over the classroom is relevant to the determination of this question.
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