

Learning Task 1: The Remembrance Day question

Education 525: Ethics and law

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Philip Kapoor, a grade six teacher at Stardust Elementary School, wanted his students to possess nuanced understandings of warfare and realize that each side retains fault. Mr. Kapoor told his students to be socially active and express the harms of war and the importance of pacifism. On November 11, 2018, the students controversially protested at a Remembrance Day ceremony to advocate for peaceful ways to resolve conflicts. An argument exists as to whether Mr. Kapoor's right to freedom of expression under Section 2(b) of the *Canadian Charter of Rights and Freedoms* is protected or if it should be infringed upon. By applying legal tests, particularly the *Oakes Test*, and case law, Mr. Kapoor was justified in exercising his right to freedom of expression. The extent of Mr. Kapoor's statements may have been misinterpreted by the students and the protest itself disturbed the Remembrance Day ceremony; however, his views did not disrupt the school's welcoming, safe environment, he acted within his duties as outlined in the *Education Act*, taught according to the Alberta Education Social Studies Curriculum, provided a voice for marginalized groups, and the students did not protest violently. It is concluded that Mr. Kapoor's right to Section 2(b) is protected.

Section 1 of the *Charter* grants important rights and freedoms for Canadians. Simultaneously, it also allows for infringement upon these rights if such a limit can be justified by the government to ensure a free, just society (*Charter of Rights and Freedoms*, 1982, s. 1). Section 2 outlines protected fundamental rights and freedoms of Canadians. The Remembrance Day problem concerns two of these fundamental rights: The freedom of "thought, belief, expression" and "freedom of peaceful assembly" (*Charter*, 1982, s. 2). The infringement upon these rights is determined through the *Oakes Test* (Ontario Justice Education Network, 2013). The *Test* has checkpoints starting with the legislation's objective and how the statute limits a

right and freedom; thenceforth, it assesses proportionality by evaluating its rationality, level of impairment upon the *Charter* and a balance of proportionality of the effects (OJEN, 2013). For Mr. Kapoor, the right and freedom being infringed upon includes his fundamental right to expression, and for the students, the right to freedom of peaceful assembly. For the first step in examining the objective, it must be rationalized that restricting Mr. Kapoor's lessons and the students' right to assembly is "pressing and substantial" and that society will benefit from the restriction of their rights (OJEN, 2013, p. 2). Proportionality of restricting Mr. Kapoor and his students must then be addressed through a lens of proportionality. The restriction of freedom must be "rationally connected to the law in question" (OJEN 2013, p. 3). It must be demonstrated that the restriction and forced apology for Mr. Kapoor does not cause unjust and excessive impairment to the fundamental rights. If it is determined that the impairment is excessive an alternative solution may be sought. In this test of proportionality, it may also be questioned whether the infringement of Mr. Kapoor's and the students' rights will preserve the rights of others. The final step in determining proportionality is the effect that the restriction will have on society and the law; this determination decides if the restriction is "proportional to the importance of that law's purpose. It also asks whether the benefits of the law are greater than any negative effects produced by a limitation on a right" (OJEN, 2013, p. 4).

In the pursuit of infringing upon Mr. Kapoor's right, although he did not participate in the protest, his expression still motivated the students to act disturbingly. Accordingly, Mr. Kapoor and his students will be assessed by the *Oakes Test*, as addressed above. Mr. Kapoor specifically told students their need "to be socially active and use their voices to say that war was an evil and no one should ever participate" (Donlevy, n.d., p. 1). Regardless of what Mr.

Kapoor meant, he stated himself that “no side is ever without fault” (Donlevy, n.d., p. 1) and his students interpreted his words to justify disrupting the ceremony. Section 2(c) and (d) of the *Charter* grants the right and freedom to peaceful assembly and the freedom of association. The students deliberately aimed to rival the ceremony and interrupted the peaceful assembly for the participants who may have interpreted this as a threat of violence, and nonetheless, had their right to peaceful assembly and association infringed upon. Although it can be argued that the students also had the right and freedom to assemble and associate, the way in which they assembled was not peaceful. Similar to the case of *T. (R.) v. Durham Catholic District School Board* (Wong, 2019), the bullying of a student off-site contributed to a poor climate and created fear for personal safety. The actions of the student in this case can be linked to the actions done by Mr. Kapoor’s students: These students went out of their way to disrupt the peace of the ceremony, which resulted in a poor environment for the ceremony’s attendees. From the disruption of peace, and thus, infringing on the ceremony participants’ right to Sections 2(c) and (d), it can be argued that Mr. Kapoor’s right to Section 2(b) should be infringed upon because of his role in motivating the students to act in an unpeaceful way. Any negative effects from this infringement can be outweighed by the law (OJEN, 2013) because it prevents any further disruption to the community, especially regarding a solemn time like Remembrance Day.

On the contrary, while perhaps ill-timed, Mr. Kapoor’s expression in the context of his grade six classroom is clearly protected under section 2(b) of the *Charter* and aligns with his scope of duties as a teacher as described in the *Education Act*. Consequently, any sanction against him in relation to this expression occurring as a result of departmental, district or school

policies, or individual supervisory decisions represents an inappropriate infringement of his fundamental rights as a Canadian. In this case, the *Oakes Test* provides a framework for analysis.

First, Mr. Kapoor's political statements in the context of his classroom clearly contained an expressive element, and consequently, any sanction of them constitutes an infringement of his 2(b) protections. Next, the method of expression does not remove this protection as it does not include any acts of, or incitements to, violence. The location of his expression, a public school classroom, does not remove the protection as it is not private property, and though some public property does remove 2(b) protections, this location does not as he had a lawful purpose to be there as a result of the scope of his duties as a teacher. Further, his presence there was not at odds with the underlying principles of freedom of expression of democracy, search for and attainment of truth and individual self-realization or self-fulfillment (Wong, 2019). In fact, by providing alternate perspectives to his students, he furthered those aims in his classroom in a fashion completely in line with the Alberta Education Social Studies Curriculum (Alberta Education, 2005, pp. 4-6). As noted in *Ross v. New Brunswick School District No. 15*, "By their conduct, teachers as 'medium' must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system" (para. 44). Lastly, the school board's decision to direct Mr. Kapoor to make an apology, and then suspend him for failing to do so, constitutes government action, in this case a supervisory decision informed to some unknown extent by various government policies, constitutes an infringement of his 2(b) protections.

Having established the existence of an infringement, one must consider whether that infringement constitutes an example of “reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society” (*Charter*, 1982, s. 1). The precise body of law prescribing the limitation to Mr. Kapoor’s expression in this case is not immediately clear. However, it can be inferred that they arise from the local policies implemented by school and board level administrators through their authorities under the *Education Act* (Education Act, 2012, para. 197(f)). These authorities appear to be “pressing and substantial”, as they enable such administrators to maintain the order necessary to effectively deliver appropriate instructional programming in an environment that is safe and welcoming for all students. However, neither Mr. Kapoor’s statements nor the actions of his students, who appeared to act on their own accord, disrupted any instruction or unduly impair the school’s safe and welcoming environment. In fact, by championing the causes of civilians impacted by war not traditionally recognized at Remembrance Day ceremonies, he helped to improve the environment for students belonging to groups often marginalized in our society. Consequently, the rational connection between the law in this case to the extent we can understand it, and its underlying purpose is not clear, and the infringement of Mr. Kapoor’s 2(b) rights is not justified.

Application of legal tests, specifically the *Oakes Test*, and case law determines that it is unlawful to infringe upon Philip Harpoor’s freedom of expression as protected under Section 2(b) of the *Charter*. Mr. Harpoor did not explicitly tell his students to protest at the Remembrance Day ceremony, but they did so on their own accord. The students may have disrupted the peace, but they did not invoke physical violence. Furthermore, an argument regarding possible motives and interpretations is subjective and not objective. Many factors

contributed to why Mr. Harpoor should retain his freedom of expression; however, the most significant reasoning rests in the *Oakes Test* against the infringement, which ultimately confirms Mr. Harpoor's protection.

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