THE JUDICIAL CONSTRUCTION OF THE ROLE OF THE TEACHER

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ABSTRACT. This paper examines the evolving Canadian jurisprudence at the appellate court level to outline the emerging definition – what is termed the "judicial construction" – of the role of the teacher. "Judicial construction" is a phrase intended to capture the attribution by judges of the social and educational significance of teachers. It is a phrase that recognizes the interpretative role of judges in adjudicating legal situations involving teachers and the importance ascribed to teachers by judges. In this context, the focus is on issues of teacher misconduct outside the classroom and during off-duty hours. The paper deals with only those cases in which questionable, but otherwise legal behaviour, are explored. It undertakes a detailed look at two recent Supreme Court of Canada decisions concerning alleged teacher misconduct, in the form of discrimination, to outline the evidentiary tests that must be satisfied to establish misconduct. Although this entails a discussion of competing constitutional rights, an extensive analysis of these rights and freedoms is left to future work.

LA CONSTRUCTION JURIDIQUE DU RÔLE DES ENSEIGNANTS

RÉSUMÉ. Cet article examine la jurisprudence canadienne d'évolution au niveau de la Cour d'appel pour souligner la définition émergeante, de ce qui se nomme la « construction judiciaire » du rôle de l'enseignant. Dans ce contexte, l'attention est mise sur les cas d'enseignants qui se conduisent de façon inappropriée en dehors de la salle de classe et pendant leurs congés. Cet article traite seulement de ces cas questionnables mais aussi de ceux où le comportement légal est à explorer. Il regarde dans le détail deux cas de mauvaises conduites d'enseignants, sous la forme de discrimination, où la Cour suprême du Canada a pris des décisions, et souligne les tests probatoires qui doivent être établies pour parler d'inconduite. Bien que cela nécessite un discussion à propos des droits constitutionnels en jeu et une analyse intense de ces droits et libertés qu'il reste pour un travail futur.

Recent years have witnessed a great deal of litigation dealing with the conduct of teachers both inside and outside the classroom. In these instances, the debate has focused on a number of central issues that have caused a great

deal of controversy in the educational environment. The first issue involves the lack of a clear definition of *misconduct* in provincial statutes governing the teaching profession. This deficiency has allowed judicial decision makers in different parts of the country to apply their personal definition of the role of the teacher to justify their view of the impugned conduct before them at any particular time. The second issue is the problem of alleged teacher misconduct occurring outside school property and during off school hours. In such cases, basic rights and freedoms often conflict and must be properly balanced to prevent a result that offends the very substance of democracy. The third issue concerns the type of evidence that judicial bodies have deemed appropriate to rely upon to make a finding of misconduct. Decision makers have applied a number of tests, sometimes with conflicting results, that have yielded a finding of misconduct in some cases and not in others.

This paper examines the evolving Canadian jurisprudence at the appellate court level to outline the emerging definition – what we term the "judicial construction" – of the role of the teacher. "Judicial construction" is a phrase intended to capture the attribution by judges of the social and educational significance of teachers. It is a phrase that recognizes the interpretative role of judges in adjudicating legal situations involving teachers and the importance ascribed to teachers by judges. In this context, the focus is on issues of teacher misconduct outside the classroom and during off-duty hours. While in some cases the alleged misconduct seems obvious especially when dealing with criminal or quasi-criminal behaviour, in other cases the impugned actions of teachers are not illegal *per se*, but can be perceived to fall below a basic level of social acceptance. This paper does not deal with obviously grievous offences that would naturally be classified as misconduct. Only those cases dealing with questionable, but otherwise legal behaviour, are explored. Finally, this paper takes a detailed look at two recent Supreme Court of Canada decisions concerning alleged teacher misconduct, in the form of discrimination, to outline the evidentiary tests that must be satisfied to establish misconduct. Although this entails a discussion of competing constitutional rights, an extensive analysis of these rights and freedoms is left to future work.

Definition of misconduct governing the teaching profession: The example of Ontario

In determining the adequacy of provincial statutory definitions of *teacher misconduct*, this paper uses the *Ontario College of Teachers Act, 1996*[1] as an example. This statute governs all disciplinary actions relating to issues of misconduct in the province of Ontario. Subsection 30(2) states:

> A member may be found guilty of professional misconduct by the Discipline Committee, after a hearing, if the member has been guilty in the opinion of the Committee, of professional misconduct as defined in the regulations.

Section 1 of the Regulations[2] provides a list of twenty-seven types of behaviour that constitute teacher misconduct. Although the list gives the appearance of being highly inclusive, many of the headings are vague and ambiguous, and open to interpretation. This lack of clarity and precision is apparent in those items closely connected to the type of misconduct that is the focus of this paper. Items 18 and 19 of section 1 state:

> 1. The following acts are defined as professional misconduct for the purposes of subsection 30(2) of the Act:
>
> 18. An act or omission that, having regard to all the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional.
>
> 19. Conduct unbecoming a member.

Since criminal behaviour is listed separately from these particular sections, it is clear that the behaviour herein described includes actions that are inappropriate, but not necessarily criminal. It is, however, apparent from the wording of these items that they offer no general guidelines to determine the type of behaviour that falls under the headings of disgraceful, dishonourable, unprofessional, or unbecoming. This leaves it open for decision makers to apply their own interpretation of the legislation in the circumstances of each particular case. The result can be troublesome, since different decision makers may have different notions of what constitutes the type of behaviour deemed to be misconduct. At the same time, members of the profession are left to guess when their behaviour will attract a disciplinary hearing.

The sections dealing with misconduct do not set any temporal or spatial limits applicable to the impugned actions. There is no mention of where and when this behaviour needs to take place in order to qualify as misconduct, and be heard by the Discipline Committee. Arguably, this Act gives the Ontario College of Teachers the jurisdiction to hold hearings and discipline members for actions occurring off-duty and off-school property, as long as they are deemed to be types of offensive behaviour for the purpose of the Act. This reasoning has been the subject of a great deal of litigation in the appellate courts of Canada.

Judicial definition of teacher misconduct and the role of the teacher

Since the advent of the Canadian *Charter of Rights and Freedoms*,[3] the Supreme Court of Canada and some Provincial Courts of Appeal have been called upon to determine whether certain types of teacher behaviour amount to misconduct, and should therefore warrant disciplinary action against those involved. This task has proved to be somewhat difficult when applied to cases of alleged misconduct occurring outside the classroom, or outside the school environment and during a teacher's own time.

Case law has made it abundantly clear that a teacher remains a teacher even after school hours, during his/her private time. There are certain types of behaviour in which teachers cannot engage in any place and at any time of the day, even during off-school hours. Teaching is a highly public and normative occupation (Piddocke, Magsino, & Manley-Casimir, 1998) and as a result, teachers are always legally considered to be on duty to some extent (Dickinson, 2003). The British Columbia Court of Appeal has made it patently clear that a teacher cannot decide to remove her teacher's hat and speak as a parent to criticize another teacher and some educational policy during a school meeting at her children's school.[4] Teachers cannot publish nude pictures of themselves, or of their spouse, in adult magazines available to the public.[5] The Supreme Court of Canada has held that a teacher cannot make discriminatory written or oral statements that offend the concept of multiculturalism, if it is reasonable to anticipate that these statements will poison the school environment.[6] These actions would constitute misconduct and incur disciplinary procedures.

The judicial construction of the *role of the teacher* is constantly evolving, and the appellate courts have shaped this definition to include not only the main expectations and duties to which all school teachers must adhere, but also a variety of corollary and related functions, which teachers are expected to fulfill while upholding a strict code of conduct that applies to them at all times. In *Cromer*, Mrs. Cromer, a teacher, attended a meeting at her son's school. At this meeting, parents criticized one of the teachers at the school, for her teaching of human sexuality. Mrs. Cromer, who taught in the same school board, engaged in an argument with the teacher and in the process made public negative comments about this individual. As a result, Mrs. Cromer was charged with a breach of the Code of Ethics of the British Columbia Teachers' Federation. The issue that arose in this case was whether or not Mrs. Cromer could speak as a concerned parent, not as a teacher, and therefore be treated like all other parents and avoid being disciplined as a teacher. Lambert J. A., writing for the majority of the Court of Appeal states:

> I don't think people are free to choose which hat they will wear on what occasion. Mrs. Cromer does not always speak as a teacher, nor does she always speak as a parent. But she will always speak as Mrs. Cromer. The perception of her by her audience will depend on their knowledge of her training, her skills, her experience, and her occupation, among other things. The impact of what she says will depend on the content of what she says and the occasion on which she says it. (Supra note 4 at 660)

This passage sends a very clear message to teachers that they cannot freely dissociate themselves from their occupational role. The public perception of teachers is intricately linked to their actions, and regardless of their intention, teachers will always be judged as teachers whenever the public views them as such. Teachers are therefore under public scrutiny at all times and

their behaviour is the subject of discipline whenever it falls below a publicly acceptable standard. This case clearly defines how and when teachers may criticize other teachers, and how and when they may not.

A more far-reaching and perhaps disturbing aspect of this decision deals directly with the type of evidence that is necessary to prove that at the time that the misconduct occurred, the public was aware that the perpetrator was in fact a teacher. In relation to Mrs. Cromer, the British Columbia Court of Appeal stated:

> There has been no finding of fact with respect to whether any of the people present when Mrs. Cromer spoke knew that she was a teacher, but *I propose to assume* that an *appropriate official* within the meaning of Clause 5 of the Code of Ethics was present when Mrs. Cromer spoke, and I *propose to assume* that the *appropriate official* and perhaps the other people in the room knew that Mrs. Cromer was a teacher. (Supra note 4 at 660)

The Court here based its decision on assumptions rather than direct evidence that the people present knew of Mrs. Cromer's teaching status. While this line of reasoning may work in a small community where it is assumed that everyone knows each other, even though this may be stretched, it is harder to accept in a larger community where anonymity is more common.

The British Columbia Court of Appeal in *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987) also dealt with the issue of professional misconduct in the context of community standards. Two teachers, husband and wife, were suspended for misconduct. The husband had taken a partially nude photograph of his wife and they had submitted it for publication in a soft pornographic magazine. When the photograph appeared and came to the attention of the school board, both teachers were charged with misconduct under the School Act and were suspended for six weeks with loss of pay. In this case, the Court applied a type of "community tolerance" test to decide whether the Shewan's behaviour fell below acceptable norms. The Court stated:

> What conduct is necessary to achieve [a proper standard] is not necessarily what moral conduct will be tolerated in a particular community. The minimal standard of morality which will be tolerated in a specific area is not necessarily the same standard of behaviour that a school teacher must meet. The behaviour of the teacher must satisfy the expectations which the British Columbia community holds for the educational system.[7]

This test for misconduct makes it abundantly clear that teachers may be held to stricter codes of conduct than other citizens. The Court, however, never explains what the expectations are that the British Columbia community holds for the educational system. The steps that one needs to follow to arrive at the conclusion that these expectations have not been met, or have been compromised are not set out. In the facts of this case, it became irrelevant whether any specific member of the community was affected

negatively by the actions of the Shewans. According to the Court, the fact that their action did not meet community expectations for teachers led to the automatic assumption that it was misconduct and was therefore subject to disciplinary repercussions. The elements that the Court used to arrive at the conclusion that the Shewans' actions did not meet community expectations for teachers remain unclear.

The Court of Appeal justified its position that teachers must abide by stricter rules of behaviour than other citizens, by defining the teacher's role as one of trust, confidence and responsibility:

> Teachers must maintain the confidence and respect of their superiors, their peers, and in particular, the students, and those who send their children to our public schools. Teachers must not only be competent, but they are expected to lead by example. Any loss of confidence or respect will impair the system, and have an adverse effect upon those who participate in or rely upon it. That is why a teacher must maintain a standard of behaviour which most other citizens need not observe because they do not have such public responsibilities to fulfill.[8]

This analysis provides a definition of the role of the teacher, in relation to every other individual in the education system. The standard adopted to measure a teacher's actions to decide whether or not they amount to misconduct is at the same time very onerous and quite vague. It is onerous because it applies those standards that the British Columbia community holds valid for the teaching profession – standards that only the teachers are held to. It is vague because it fails to state rules that would help individuals identify behaviour that could be classified as misconduct. Manley-Casimir and Piddocke argue that this case does not give us a general standard that could help teachers to identify misconduct, so that they could avoid committing misconduct or at the very least know that they are doing so. Such a general standard could enable school boards to advise their employees beforehand OF what is expected of them, instead of deciding after the behaviour is committed that it is an offence and applying retroactive penalties (Manley-Casimir & Piddocke, 1990). There is obviously a need for a better definition of *misconduct* and a clearer indication of the type of behaviour that falls within its parameters. It is not necessary to compose a specific list of inappropriate behaviours that would attract discipline. Judicial bodies must inevitably decide issues of misconduct based on the context of each particular case. However, better guidelines would definitely provide guidance to members of the teaching profession and avoid leaving them guessing as to whether or not their behaviour will attract discipline.

In the two cases stated above, the British Columbia Court of Appeal dealt with issues of teacher misconduct, and attempted to define this behaviour in a general manner so that the judicial interpretation could be applied to other similar cases. The Court treated misconduct as an integral element of

the larger concept of the role of the teacher. They established that teachers have a duty to engender trust and confidence in many different key players - their students, their colleagues, their employer, their administrators, and the community at large. Whenever this duty is not met, misconduct has occurred.

The Court must engage in an examination of the context of each case to decide whether a finding of misconduct is warranted. A teacher cannot escape reprimand for misconduct simply because the impugned behaviour occurred outside school property, and during off-duty hours. The Court of Appeal made it clear that teachers will always be under public surveillance, regardless of time and place. They will always have to meet the professional standards expected by the community in which they teach. These standards may very well be more onerous for teachers than other citizens, since teachers hold a special position in the community. Allison Reyes, in her article dealing with teachers' freedom of expression explains:

> The integrity of the education system also depends to a great extent upon the perceived integrity of teachers. It is to this extent that expression outside the classroom becomes relevant. While the activities of teachers outside the classroom do not seem to impact *directly* on their ability to teach, they may conflict with the values which the education system perpetuates. (Reyes, 1995, p. 37)

The British Columbia Court of Appeal, in its analysis of the cases mentioned above, based its decision, on assumptions that in the circumstances, the public was aware that the wrongdoers were teachers, and that their behaviour actually offended the community. In the *Cromer* case no evidence was led that when Mrs. Cromer spoke, anyone in the room knew that she was a teacher. In the *Shewan* case no direct evidence was presented to show that the community was in fact offended by the publication of the photo. In each case, the Court applied its own judgment based on unproved theory to rationalize the conclusion that misconduct had in fact occurred.

Misconduct in the context of discrimination

Two recent decisions of the Supreme Court of Canada deal directly with the issue of teacher misconduct in the context of discriminatory practices. In the *Ross*[9] case, a teacher who published his anti-Semitic views while off-duty, was held responsible for professional misconduct for discrimination against a minority group, and was removed from his classroom activities. His employer, New Brunswick District No. 15 Board of Education was also found guilty of discrimination because it failed to discipline Mr. Ross appropriately. In the *Trinity Western*[10] case, the British Columbia College of Teachers was held to have erred in denying the application of Trinity Western University to set up their own teacher education program. The majority of the Supreme Court of Canada found that the Community Standards Form, required to

be signed by all members of Trinity Western University, an institution associated with the Evangelical Free Church of Canada, did not constitute discrimination, even though it specifically labelled homosexual behaviour as sinful and unacceptable. Based on the fact that the College of Teachers did not present evidence that Trinity Western University graduates held discriminatory views against homosexual students, the Court ordered that Trinity Western University be allowed to set up their own teacher education program reflecting its Christian worldview.

The Supreme Court of Canada decision in *Ross* is very important on many levels. First, it lends support to the Court of Appeal decisions discussed above, which found that a teacher's off-duty conduct is actionable if it falls below an acceptable standard. As such, teachers can not shield themselves from disciplinary hearings by simply arguing that their actions were carried out during their own private time, away from the school environment. Second, it establishes that where it is reasonable to anticipate that the off-duty conduct of a teacher creates a *poisoned learning environment*, it will undermine students' confidence in the ability of the teacher to carry out his or her assigned duties. In this sense, cases alleging acts of discrimination will require a lower evidentiary threshold, without the need to prove actual harm, but only perceived harm. Finally, it demonstrates that a teacher's rights and freedoms, under the *Charter,* will be derogated in cases where there are competing equality rights. All of these arguments are built upon a definition of the role of the teacher which places educators in a precarious position, in relation to all the other individuals with whom teachers have contact, and whom they affect.

On a general level, the Supreme Court of Canada endorses the definition of the role of the teacher espoused by the British Columbia Court of Appeal in *Cromer* and *Shewan*. The majority of the Court state, "Teachers are inextricably linked to the integrity of the school system. Teachers occupy positions of trust and confidence, and exert considerable influence over their students as a result of their positions" (Supra, note 9 at 857). This reasoning demonstrates the willingness of the Supreme Court to accept the proposition that teachers have a fiduciary duty towards students. Teachers have a clear responsibility to look out for the well being of their students, on all levels, so that the public confidence in the education system is not broken. This also shows that the definition of the role of the teacher is constantly evolving so that it can be applied to cases where a teacher's behaviour may influence the students in a negative fashion. In his article dealing with the off-duty conduct of teachers, the Honourable Mr. Justice La Forest reiterates this point:

> Teachers occupy positions of trust and confidence and extert considerable influence over their students. They are in a very real sense 'role models' for their students. As a result, it is not enough for teachers to merely

> "teach" these values. We also expect them to uphold them, and this may involve their activities both inside and outside the classroom. Needless to say, however, teachers, like other citizens, enjoy rights of privacy, and to considerable extent their off-duty activities should not be subject to external scrutiny. However, where teachers, by their extra-curricular conduct, displace the trust and confidence reposed in them by the community and thereby disrupt the educational experience of their students, society has an interest in intervening. (1998, p. 120)

Whereas in the previous cases the teacher's conduct did not necessarily impact on the emotional wellbeing of students, in a case dealing with discrimination the duties and responsibilities of teachers are broadened so that they cover instances of student perceived persecution due to membership in a historically disadvantaged group.

In *Ross*, a Board of Inquiry was convened and heard evidence of the nature of the respondent's writings, publications and statements. The Board found that these discriminated against persons of Jewish faith and ancestry. The Board then considered how such conduct impacted upon the respondent's teaching ability and noted:

> In the case of the teacher who has proclaimed the discriminatory views publicly the effect may adversely impact on the school community. It may raise fears and concerns of potential misconduct by the teacher in the classroom and, more importantly, it may be seen as a signal that others view these prejudicial views as acceptable. It may lead to a loss of dignity and self-esteem by those in the school community belonging to the minority group against whom the teacher is prejudiced. (Reyes, p. 855)

The evidence adduced at the hearing included copies of the writings and statements made by Mr. Ross. As well, two children testified that they were the victims of continued harassment, by other children, in the form of derogatory comments against those of the Jewish religion, inappropriate drawings of swastikas, and general intimidation. The complainant's daughter testified that she had been afraid of attending a sporting event at the school where Mr. Ross taught, because she knew that he taught there. The Board of Inquiry found that the evidence disclosed a *poisoned educational environment* in which Jewish children perceived the potential for misconduct and were likely to feel isolated and suffer a loss of self-esteem on the basis of their Judaism (Reyes, p. 856).

The Supreme Court of Canada upheld the finding of the Board of Inquiry, even though the testimony of the students did not establish any direct evidence of an impact upon the school district caused by Ross' off-duty conduct (Reyes, p. 856). La Forest J. justifies the position of the Board of Inquiry and the Supreme Court of Canada by explaining that although there was no evidence that any of the students making anti-Jewish remarks were directly influenced by any of Malcom Ross' teachings, given the high degree of publicity surrounding Malcom Ross' publications *it would be reasonable to anticipate*

that his writings were a factor influencing some discriminatory conduct by the students (p. 856). Therefore, even though there was no evidence that Ross was teaching his beliefs or discussing his religious theories with staff or students, or that his off-duty conduct was directly linked to the behaviour of students making discriminatory remarks, the Supreme Court of Canada found the connection. This resulted in the finding that Mr. Ross was guilty of misconduct in the form of discrimination. His employer, the Board of Education, was also guilty because it failed to take proper steps to discipline Mr. Ross, and therefore was seen to endorse Mr. Ross' views.

The Supreme Court of Canada asked whether it is reasonable to anticipate that Mr. Ross' off-duty conduct *poisoned* the educational environment in the School Board; and whether it is sufficient to find discrimination according to a standard of what is reasonable to anticipate as the effect of the off-duty conduct. The Court stated, "The school is an arena for the exchange of ideas and must, therefore, be premised upon principles of tolerance and impartiality so that all persons within the school environment feel equally free to participate" (Reyes, p. 857). Furthermore, the Court affirmed that teachers have a position of trust and influence, and they are held to high standards both on and off duty. Where a *poisoned* environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant (p. 858). In this case, the Supreme Court felt that it could be reasonably anticipated that Ross' views, expressed in his statements and his writings, while off-duty, created a *poisoned* environment.

Furthermore, the Supreme Court stated that a finding of discrimination may be supported by an inference on the basis of what is reasonable to anticipate as an effect of the off-duty conduct. They relied on the Board of Inquiry's finding that Ross' off-duty comments impaired his ability to fulfill his teaching position and concluded that his continued employment impaired the educational environment generally in creating a *poisoned* environment characterized by a lack of equality and tolerance. Ross' off-duty conduct impaired his ability to be impartial and impacted upon the educational environment in which he taught (Reyes, p. 859). The Court reached this conclusion based on an inference. They found that it is reasonable to anticipate that Ross' off-duty conduct created an environment of bias and discrimination. There was no direct evidence led that this tainted environment actually existed and if it did, that it was undisputedly the result of Ross' behaviour. Undoubtedly, the Court takes a strong stance against discrimination, applying assumptions that the teacher's conduct resulted in feelings of fear and shame amongst students of Jewish descent. Mr. Justice La Forest explains, "Young children are especially vulnerable to the messages conveyed by their teachers. They are less likely to make an intellectual distinction between comments a

teacher makes in the school and the teacher makes outside the school" (p. 873). Therefore, if teachers engage in discriminatory behaviour, on or off the job, this will constitute misconduct and attract disciplinary action. This decision sends a strong message that discrimination will not be tolerated in any form, and the courts will find a link between the teacher's actions and the resulting perceived harm, regardless of whether or not actual harm has been demonstrated.

Although the *Trinity Western* case also dealt with the issue of discrimination, the facts of the case differ substantially from the facts in *Ross*. Here, the Supreme Court of Canada did not deal with misconduct on the part of a teacher, on or off school property. In this case, at issue was a perceived discriminatory act on the part of the university, by requiring its students to sign a form that denounced homosexual behaviour, amongst other things, and labelling it as sinful and unacceptable. Because of this practice, the British Columbia College of Teachers refused to certify a teacher education program proposed by Trinity Western University. The Court was asked to decide whether this refusal on the part of the College of Teachers was justified. The university policy was the point of contention; however, the Court conducted an analysis of the role of the teacher to decide if this perceived discriminatory act should bar the university from establishing its own teacher education program. At the heart of the argument was the fact that students in this proposed College of Education would sign the form condemning homosexual behaviour, thus endorsing the discriminatory view. At the completion of their training, these same teachers could be hired to work in the public school system.

The Supreme Court of Canada endorsed the description of the role of the teacher espoused in *Ross*. Although the majority of the Court reiterated the importance of future teachers understanding the pluralistic nature of society and the diversity of our country's population, they distinguished this case from *Ross* on the basis of the type of evidence presented. They stated:

> The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at Trinity Western University. By contrast, in *Ross*, the actual conduct of the teacher had, on the evidence, poisoned the atmosphere of the school.[11]

A distinction is drawn here on the basis of what constitutes discriminatory behaviour. The Court seems to state that in *Ross*, the teacher not only held discriminatory beliefs, but also engaged in a type of conduct that caused a poisoned environment. In *Trinity Western*, the students' signing of the declaration displayed only their beliefs, and did not amount to discriminatory conduct; nor was it illustrative of possible future discriminatory conduct. The Court explained that perceptions were a concern in *Ross*, but they were founded on conduct, not simply beliefs.[12]

In its analysis, the Supreme Court of Canada seems to place a great deal of emphasis on the weight that should be accorded to the Community Standards document, as being illustrative of discriminatory views and practices both present and future. The Court stated:

> Trinity Western University's Community Standards, which are limited to prescribing conduct of members while at Trinity Western University, are not sufficient to support the conclusion that the British Columbia College of Teachers should anticipate intolerant behaviour in the public schools.[13]

Although the Court finds intolerant behaviour in the public schools unacceptable, it required specific evidence that this had in fact occurred:

> For the British Columbia College of Teachers to have properly denied accreditation to Trinity Western University, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving Trinity Western University graduates and other teachers affiliated with a Christian school of that nature.[14]

The call for specific evidence is in sharp contrast with the standard in *Ross* where, by viewing the discriminatory act, it could be reasonably anticipated that a poisoned environment had been created. In other words, the Court refused to apply the same test in an attempt to eradicate discrimination before it occurs.

The Court seems more concerned with the rights of Trinity Western students to get teacher accreditation, than with the impact that their views may have on the public education system. The Court prefers to focus on the harm that would be caused on the potential teaching candidates if they were refused the right to attend teachers' college at Trinity Western University. As a result, they did not place much emphasis on the problem that homosexual students would encounter in a public education system that allows teachers to hold strong views against them. The Court's examination of how homosexual persons might be affected by Trinity Western University's practices is limited to potential teacher candidates that might want to apply to such a program. Even on this account, they state that homosexuals will not be prevented from becoming teachers, because they could obviously attend a College of Education at another institution. The same argument could, however, have been applied to members of Trinity Western, who also would not be prevented from becoming teachers, by continuing to attend the fifth year of teacher education at Simon Fraser University.

In her dissent, Madame Justice L'Heureux-Dubé, provides an examination of the pressing need for teachers in the public schools to be sensitive to homosexual and bisexual students and to establish a welcoming environment where such students feel safe and accepted. She deals with the majority's views on the type of evidence necessary to make a finding of discrimination in this case and states:

> Considering the importance of perceptions for the healthy functioning of the classroom, I find my colleagues' emphasis on the need for positive proof of discriminatory conduct sadly ironic. *Ross* took a broader view than this of the school environment (at para. 100): 'In order to ensure a discrimination-free educational environment, the school environment must be one where all are treated equally and all are encouraged to fully participate.' Moreover, the principal metaphor for the homosexual and bisexual experience of discrimination has been that of the closet, an isolated refuge of invisibility often enveloped in fear. Indeed, the history of struggles against sexual orientation discrimination has been described as a battle against "the apartheid of the closet."[15]

Recent applications

A recent British Columbia Court of Appeal decision, *Kempling v. British Columbia College of Teachers*[16] deals directly with the issue of teacher misconduct in a discriminatory context. In the facts of this case, the British Columbia College of Teachers found Mr. Kempling guilty of professional misconduct because he wrote and published an article and some letters to the editor in the local newspaper, expressing his views against homosexuality. Mr. Kempling worked for the Quesnel School District, both as a secondary school teacher and as a registered clinical counsellor. A Hearing Panel convened by the British Columbia College of Teachers found that Kempling's writings were discriminatory, demonstrating that he was not prepared to accommodate the core values of the education system. One such value is non-discrimination, which the Panel said includes the recognition of homosexuals' rights to equality, dignity, and respect.[17] The Panel also found that, despite the appellant's conduct occurring off-duty and the lack of direct evidence of a poisoned environment, an inference could be drawn as to the reasonable and probable consequences of his published writings.[18] In other words, the Panel found the teacher's actions constituted discrimination absent any evidence of a poisoned environment. This is different from *Ross* where the Board of Inquiry found, based on the evidence, that a poisoned environment existed.

Mr. Kempling appealed the decision of the Hearing Panel to the British Columbia Superior Court, and eventually to the British Columbia Court of Appeal.

At both levels, the Hearing Panel's decision was upheld. The issue in the appeals dealt not only with whether or not Kempling's published writings were discriminatory, but also with whether or not they caused any harm. Mr. Justice Lowry, in a unanimous Court of Appeal decision, held that Kempling's published statements were discriminatory and caused harm to the integrity of the school system:

> A finding of conduct unbecoming may be justified on the basis that a teacher's conduct caused harm to the education system. I do not accept

> that it is necessary to determine whether an inference of harm is sufficient to sustain a finding of conduct unbecoming as there was, in my view, direct evidence that Mr. Kempling's writings caused harm. This harm is not to any particular student or parent (though such harm may have been caused), but to the integrity of the school system as a whole. [19]

The Court of Appeal did not determine the question of whether a finding of misconduct could be based on an *inference of harm*. Although the Hearing Panel made such a finding, the British Columbia Supreme Court and the British Columbia Court of Appeal found that Kempling's published statements were evidence of *direct harm* to the school system, and there was no need to make any inference. One can infer, then, that a teacher will be found guilty of professional misconduct if his/her behaviour causes harm to the integrity of the education system, with no need to demonstrate harm to any particular person. An explanation of what constitutes such harm is not provided; however, the facts of the case seem to suggest that whenever a teacher professes a discriminatory view, and the public is able to link that view to the teacher, the judicial posture is to construe that harm results to the integrity of the school system.

In the facts of this case, Kempling directly linked his writings to his professional position as a teacher and a counsellor. The community therefore linked his views with his position in the school setting. The Court of Appeal found that this was sufficient for a finding of misconduct and there was no need for actual evidence of a poisoned environment as espoused in *Ross*. Mr. Justice Lowry explains:

> Mr. Kempling made clear that his discriminatory beliefs would inform his actions as a teacher and counsellor. His writings therefore, in themselves, undermine access to a discrimination-free education environment. Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment. These statements are therefore inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole.[20]

Teachers will be found guilty of professional misconduct if they make discriminatory statements that can be linked to them in their professional roles and identities. In this case, Kempling provided within his statements a direct link to his position as a teacher and counsellor. It is questionable whether he would have avoided liability had he not written the articles in his professional capacity. Even if the statements were written in a personal style, without reference to his profession, it could be argued that his association with the education setting would cause harm to the integrity of the school

system. Much like the facts in *Shewan*, if one lives in a small community, the link between the teacher and the school system is easy to make.

Conclusion

In recent years, the Supreme Court of Canada and some provincial courts of appeal have constructed the role of the teacher to provide a framework for the adjudication of cases dealing with teacher misconduct. Judges have quickly expanded the definition of the role of the teacher and have created a set of rudimentary guidelines illustrating the type of behaviour deemed unacceptable for teachers and meriting disciplinary action. The need to clarify which type of behaviour constitutes misconduct arose in part due to the fact that these terms are not adequately defined in the provincial statutes that govern the teaching profession. The statutory definitions are often very general and open to a wide range of interpretation. They do not offer the necessary guidance to inform the members of the profession when their behaviour may be perceived as falling below an acceptable standard. In adjudicating these cases, the judiciary has outlined the types of unacceptable behaviours that will attract discipline. Although these decisions are driven by the context of each particular case, the result is often dictated by what type of behaviour the judges believe to be misconduct.

The appellate court decisions make it abundantly clear that teachers will be under public scrutiny at all times. The nature of the profession requires that teachers must always behave as though they are on duty. Their actions can never fall below acceptable standards. They must always maintain the confidence and respect of the whole community, and lead students by example. If they engage in behaviour that is unbecoming a member of the profession, even during off-duty hours and off school property, they will incur discipline.

The Supreme Court of Canada has dealt with two cases of teacher misconduct in the form of discrimination against protected groups. In both cases, they adopted the definitions of the role of the teacher, and professional misconduct, enunciated by the British Columbia Court of Appeal in *Cromer* and *Shewan*, and expanded them for application to instances of discrimination. In *Ross*, discrimination was in the form of public racist and bigoted statements against people of the Jewish religion. In *Trinity Western*, discrimination was in the form of a signed statement attesting that homosexual behaviour is sinful and unacceptable to students and faculty of the university. There are some factual differences in these cases, which must form part of the analysis regarding misconduct in the form of discrimination.

Ross dealt with a teacher, who, during his employment, made discriminatory statements against people of Jewish descent, while off-duty. *Trinity Western* did not deal with a person, employed as a teacher, making discriminatory

statements against homosexuals. In this case, the impugned conduct was attributed to the university, in its requirement that students sign the above-mentioned, anti-homosexual declaration. The British Columbia College of Teachers did not hold a disciplinary hearing against a member, but tried to prevent discriminatory conduct by refusing to certify the teacher education program proposed by Trinity Western University.

This led to the Supreme Court of Canada applying two very different evidentiary thresholds that are not only contradictory, but overlook prevention and hamper the establishment of a discrimination free society. This can be illustrated by the fact that in *Ross*, the Court endorsed a test which states that *where it is reasonable to anticipate* that the off-duty conduct of a teacher creates a *poisoned learning environment*, it will undermine students' confidence in the ability of the teacher to carry out his or her assigned duties. On the contrary, in *Trinity Western*, the British Columbia College of Teachers failed because it did not present direct evidence of discriminatory views held by previous Trinity Western University graduates, who had attended a teacher education program at other institutions, and proof of resulting harm.

In the context of teaching, a person will be found guilty of professional misconduct only if that person is already licensed as a teacher and working as such when engaging in questionable behaviour. There is no attempt to prevent discriminatory misconduct before it occurs, when it is reasonable to anticipate that a college of education that espouses discriminatory views will attract people who share similar views, to the detriment of a historically disadvantaged group.

In the recent *Kempling* decision, the British Columbia Court of Appeal dealt with a teacher who published discriminatory statements against homosexuals. The Court upheld a finding of misconduct stating that such views, when published and linked to the teaching profession, harm the education institution itself. Given the public perception of the role of the teacher, as a medium for the educational message, there are certain expectations that teachers must abide by at all times. One of these expectations involves the creation and maintenance of a discrimination-free environment. Whenever this environment is contaminated by statements that the teacher makes publicly, evidence of such behaviour will suffice to find that the teacher is guilty of professional misconduct and to apply appropriate sanctions.

The important connection that the Court must make seems to be that the public is in fact aware of the teacher's employment, either through the notoriety that the statements may gain (*Ross*) or the direct association that the author makes in his writings and statements to his employment as teacher (*Kempling*). Teachers will be found guilty of misconduct if they publish discriminatory statements. There is no need for an adjudicative body to base their findings on proof of actual harm that has occurred to particular

individuals or proof of a poisoned school environment. Discriminatory statements hamper access to discrimination-free education and therefore harm the integrity of the school system.

NOTES

1. S.O. 1996, c. 12
2. *Ontario College of Teachers Act, 1996 - O. Reg. 437/97*
3. Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*]
4. *Re Cromer and British Columbia Teacher's Federation* (1986), 29 D.L.R. (4th) 641 (B.C. C.A)
5. *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 47 D.L.R. (4th) 106 (B.C.C.A.)
6. *Attis v. New Brunswick District No. 15 Board of Education*, (sub nom. *Ross v. New Brunswick School District No. 15*) [1996], 1 S.C.R. 825 (S.C.C.)
7. *Supra* note 4 at p. 111
8. *Supra* note at p. 111
9. *Attis v. New Brunswick District No. 15 Board of Education*, (sub nom. *Ross v. New Brunswick School District No. 15*) [1996], 1 S.C.R. 825 (S.C.C.)
10. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 722
11. *Supra*, note 9 at p. 805
12. *Supra*, note 9 at p. 805
13. *Supra*, note 9 at p. 812
14. *Supra*, note 9 at p. 816
15. *Supra* note 9 at p. 847
16. [2005] B.C.C.A. 327
17. *Supra,* note 15 at paragraph 3.
18. *Supra*, note 15 at paragraph 3
19. *Supra*, note 15 at paragraph 42.
20. *Supra*, note 15 at paragraph 79

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