

# Neither Hired Mouth nor Class Monarchs: The Scope of Schoolteachers' Freedom of Expression in Canada

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## Abstract

What are the boundaries for teachers' freedom of expression in public, secular schools in Canada? Drawing from the constitutional text, legislation, and normative expectations emerging from the literature, this article examines the scope given to teachers' expression in landmark case law. The analysis shows that the binomial of trust and responsibility guides the interpretation of this fundamental freedom for teachers, who should neither act as class monarchs, absolutely free of restraints, nor as hired mouth, narrowly limited to the official curriculum. The article concludes that the ethical duties of preventing harm to students and engaging in responsible pedagogy circumscribe Canadian schoolteachers' freedom of expression.

*Keywords:* teachers, freedom of expression, Charter of Rights and Freedoms

## **Résumé**

Quelles sont les limites de la liberté d'expression des enseignants dans les écoles publiques et laïques au Canada? À la lumière du texte constitutionnel, de la législation et des attentes normatives émergeant de la littérature, j'examine le cadre de la liberté d'expression des enseignants dans la jurisprudence. L'analyse montre que le binôme confiance et responsabilité guide l'interprétation de cette liberté fondamentale pour les enseignants : ils ne doivent ni agir libres de toute contrainte ni se restreindre à la transmission du curriculum. Les devoirs éthiques de prévenir des dommages aux étudiants et de s'engager dans une pédagogie responsable délimitent la liberté d'expression des enseignants canadiens.

*Mots-clés* : enseignants, liberté d'expression, la Charte canadienne des droits et libertés

## Introduction

Freedom of expression (commonly referred to as “freedom of speech”) is one of the hallmarks of democratic societies. As with any individual right, however, social values and legal precepts inform the weighing of its exercise against other individual and collective rights. Schoolteachers face specific boundaries in this regard, given the nature of their professional activity and the social expectations placed on them. The limits on what they can say, within and outside the school setting, carry implications not only for teachers themselves, but also for students, parents, and for the broader underpinning notions of education in a pluralistic society.

The scope for teachers’ freedom of speech comes from the interplay between law and policy. This relationship sets limits and codifies values in a constantly evolving context, offering hints on future developments. These inextricable concepts follow a chain in which constitutional provisions establish higher order principles, ordinary legislation sets policy and translates its intent, while litigation shapes their dynamic interpretation in practice (Mead, 2009).

Delving into this chain, through the review of relevant federal constitutional provisions, provincial legislation, and landmark case law, the article discusses how freedom of expression of public school teachers across Canada has been interpreted in the last 35 years. The analysis is informed by concepts and categories derived from the literature on education and law, as well as on the specific issue of teachers’ freedom of expression in the Canadian context.

The analysis leads to four dimensions of the issue. First, the acknowledgement of extended sites of control for teachers’ expression beyond school gates and hours due to their professional identity. Second, the actual interdiction against teachers engaging in discriminatory or hate speech. Third, the identification of the value attached to cognitive dissonance and the space given to addressing sensitive topics in curricular speech and classroom materials. Finally, the possibilities for teachers to engage, on school property or during work hours, in political advocacy in the education field, when it involves reproach of government policy.

In the conclusion, it is argued that, despite grey areas, Canada has demarcated the terrain of teachers’ freedom of expression reasonably well, hinting at a more positive stance than some recent decisions in the United States on the same matter. Coupling a

high degree of trust in teachers with strong expectations on their professional practice, Canadian society seems to understand that teachers should be seen neither as “class monarchs,” absolutely free of restraints on their speech, nor as “hired mouth,” limited to imparting the official curriculum (Hess, 2010), but rather as responsible professionals.

As a final note on scope, the focus in this article is only on public, non-denominational schools. Although they form part of the public school system in many provinces and enjoy constitutional protection on their denominational nature, the peculiar context of separate and dissentient schools entails specific considerations for the balancing of conflicting rights and freedoms when teachers’ fidelity to faith-based values are at stake (Young & Ryan, 2014; Clarke, 2013; Long & Magsino, 2009; Piddocke, Magsino, & Manley-Casimir, 1997).

## **The Constitutional Framework for Freedom of Speech: The Canadian Charter of Rights and Freedoms**

The freedom of speech enjoyed by Canadian public schoolteachers is nested within the constitutional framework of the 1982 Canadian Charter of Rights and Freedoms (“the Charter”), which provides a crucial background to any discussion of teachers’ freedom of speech. This part of the article outlines briefly the relevant Charter sections for the topic: sections 2(b) and 15, combined with section 1, as well as section 32.

Section 2(b) of the Charter introduces *freedom of thought, belief, opinion, and expression* as one of the fundamental freedoms ensured for everyone in Canadian society. Despite the text’s amplitude, “expression” is the usual object of judicial action. Rarely would the state attempt to interfere with individual thoughts, beliefs, or opinions (Kindred, 2009). In fact, the Supreme Court of Canada (SCC) has already spoken in this respect, asserting that the “freedom to hold beliefs is broader than the freedom to act on them” (*Trinity Western v. British Columbia College of Teachers*, 2001, p. 775).

Expression, as interpreted by the SCC, comprises any form and content that conveys meaning. Its protection includes both the messenger and the receiver of the expressive activity (Kindred, 2009). When a party brings before the courts a claim that their freedom of expression has been impinged upon, that claim must be subjected by the courts to

a preliminary legal test, called the “Irwin Toy test,” that encompasses two steps.<sup>1</sup> First, the court determines whether the activity that was restricted qualifies as “expression” so as to be protected by the Charter. Second, it analyzes whether or not the purpose or the effect of the restriction imposed upon the activity was indeed to hamper freedom of expression. Only if a particular claim satisfies both criteria will it be judged as a section 2(b) case (Waddington, 2011).

Often cases of freedom of expression that come before the courts also relate to two sections of the Charter: section 15, which offers the constitutional basis of equality and non-discrimination, and section 1, which sets the tone for the qualified, and not absolute, guarantee of freedoms and rights in Canada. According to section 1, freedoms, including freedom of expression, are subject to “reasonable limits prescribed by law, as can be demonstrably justified in a free and democratic society.”

Another specific legal test, the “Oakes test,”<sup>2</sup> is used to verify if a breach of a fundamental freedom—of expression or any other provided by the Charter—can be overridden by section 1. Kindred (2009; quoting from section 1 of the Charter) summarizes its application in the following hierarchically organized questions: (1) Is the breach “a limit prescribed by law?” Meaning, is it part of a law, statute, regulation, or official policy? (2) Is the purpose of the breach attending to “concerns that are pressing and substantial” (as expressed in *R. v. Oakes* [1986], p. 138) that is justified in a “free and democratic society,” meaning, does it attend to a sufficiently important and justifiable objective so as to override a constitutional guarantee? (3) Is the breach rationally connected to this purpose, that is, is it not arbitrary or based on irrational considerations? (4) Does the breach minimally impair the Charter right concerned, that is, does it affect the exercise of a fundamental freedom as little as reasonably necessary to achieve the purpose leading to the breach in the first place? (5) Are the breach’s negative effects proportional to the objective pursued, that is, do the benefits outweigh the costs of infringing a fundamental right? As such, if a violation of freedom of expression is confirmed using the Irwin Toy test, the Oakes test must be used to assess if this violation can be admitted as a reasonable limit.

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1 The test was formulated in *Irwin Toy Ltd. v. Quebec* (1989), when the SCC dealt with a toy manufacturer claim that the prohibition of commercial advertising for children constituted an infringement of freedom of expression.

2 The test was formulated in *R v. Oakes* (1986), when the SCC dealt with the constitutionality of the reverse onus provisions of the Narcotic Control Act.

Regarding the Charter's scope, section 32 specifies it is binding to legislation and all acts of government at federal and provincial levels. The Charter's scope does not concern private actors engaged in private activities. In many contexts, including education provision, a clear distinction in this respect is not always self-evident. Public institutions might carry non-governmental activities; private institutions might live on public funding, and a continuum of public-private partnerships might be in place. Brown and Zuker (2002, pp. 363–369) show that SCC decisions related to section 32 have been ad hoc, on a case-by-case basis. Despite a conclusive statement on the matter, however, the application of the Charter to public school boards and their employees has become generally accepted, based on the very practice of the SCC (MacKay, Sutherland, & Pochini, 2013, pp. 69–71).

### **Besides the Charter: Provincial Legislation and Normative Expectations**

In addition to the Charter, the contours of teachers' freedom of expression respond to principles and precepts derived from provincial legislation. Particularly relevant are human rights codes and education statutes. Around half of the provinces have also enacted specific acts regulating the teaching profession (teacher acts or teaching profession acts) that are in addition to their main provincial education acts or school acts.

Despite great variations in length and degree of detail, Delaney (2007, pp. 31–41) demonstrates remarkable similarities across provincial education acts. Four common themes emerge in relation to teachers and the expectations placed on them: “teaching of the prescribed curriculum; accountability; maintenance of order and discipline; and teacher professionalism” (p. 37).

The notion of professionalism, in particular, resonates with the issues addressed here. Besides appearing in legislation, professionalism emerges in codes of ethics established by unions and in professional standards set by regulatory bodies, such as the Ontario College of Teachers and the British Columbia Teacher Regulation Branch. It is connected not only to the possession of certain qualifications and expertise, but also to a normative discourse, encompassing prescriptive value statements. At its core, there is a certain type of conduct that matches the responsibility attributed to the professional's role

and position in society. In the case of schoolteachers, trust seems to be the pillar of this position, framing the way their professional identity is constructed.

A key element in this regard is the normative expectation that teachers function as role models for students. This expectation leads to increased public scrutiny of their behaviour, reaching beyond the school setting, in a “halo effect” (Pidcocke et al., 1997). Having been upheld in court, this perspective creates a higher standard for teachers as compared to other professionals and private citizens in respect to free speech. The result is an extended spatial and temporal dimension of control over teachers’ expression, going beyond school gates and hours—an extension that, in the digital age, reaches the realms of the Internet and social media (Mackenzie, 2016; MacKay et al., 2013; Scarfo & Zuker, 2011).

In combination with the idea of role modelling, the notion that teachers are a medium for the transmission of a broader social message also shapes Canadian teachers’ role in a normative way. In this respect, teachers are seen as “cultural custodians” of ideals transmitted to the younger generations. This remains unproblematic if those ideals are shared among teachers, the school, and the larger community (Pidcocke et al., 1997, pp. 205–208). When ideals diverge, however, ostensive, externally imposed, or tacit, self-imposed interdictions on teachers’ speech emerge.

While tacit self-censorship echoes the notion of political literacy (Hoben, 2015) and reflects objective school climate and conditions (Patterson, 2010), ostensive boundaries reflect the legal framework and case law. A clearly demarcated area for teachers’ expression refers to the core values of Canadian society, embedded in the Charter. Multiculturalism and diversity (as well as equality, non-discrimination, tolerance and, increasingly, accommodation of vulnerable groups) are particularly relevant as values to be reproduced by the public education system, and therefore by teachers as its main agents.

While freedom of expression is traditionally discussed as a protection of the individual from excesses of the state, in the educational context it concerns multiple actors—parents, teachers, students, school boards, principals, professional bodies, provincial ministries of education, and so on (Kindred, 2009). In this sense, teachers addressing “sensitive” topics in the classroom—typically related to morality, religion, sexuality, or politics—risk walking a thin line between a triad of stakeholders in children’s education: parents, the state, and children themselves. Clarke (2013, pp. 35–44) discusses this “trilogy of interests,” arguing that, if parents attach value and meaning to their child-rearing

experience, the state also has a legitimate interest in the development of children as independent and fully functioning citizens, a stake that mirrors children's own interests themselves. To this triad, Clarke also adds teachers themselves, both as professionals whose job requires fostering a stimulating learning environment, and as citizens, who might espouse unpopular worldviews.

Noticeably, this pool of stakeholders might not each bear the same weight when deciding on children's education. Parental primacy in this respect is grounded on common law as well as Charter principles related to freedom of conscience and religion and liberty of the person. However, parental rights are not absolute. They rely on the presumption of the "best interests of the children," an idea that can also be applied to the purposes of teaching, even if it carries its own definitional challenges. Agreeing on what exactly constitutes these best interests among a plurality of conceptions of the "good life" can be a daunting task, often subjected to adult-biased views (Clarke, 2013; Milne, 2009).

Beyond tensions with parental views, the professional aspect of the teacher's role crosses another set of expectations related to their position as employees of school boards, under a provincial governance structure. As such, teachers voicing criticism of education policy and management, in their capacity of knowledgeable practitioners of the field, might trigger conflicts over freedom of speech. Pidocke and colleagues (1997) argue that "while criticism is a duty, unwelcome criticism may all too often be labeled 'disloyal,' 'disruptive,' 'insubordinate,' and 'adverse to the good reputation of the school or the educational system'" (p. 223).

Teachers' unions or associations play an important role in this respect. They can negotiate collective agreements that adopt language ensuring a certain level of individual professional autonomy and responsibility in planning and delivering instruction (Clarke & Trask, 2014). They may also actively pursue the protection and support of individual teachers' rights in administrative appeals and judicial litigation. Furthermore, they can function as legitimate parts in the advancement of the "cause of education," a prerogative expressed in some education acts.

Provincial legislation and these broad normative ideas on the role of teachers—as role models, transmitters of core Canadian values, and professionals—inform the decisions Canadian courts have taken in concrete disputes over the scope of teachers' freedom of expression.

## Demarcating Boundaries in Practice: A Review of Case Law

Since the enactment of the Charter, several conflicts over teachers' freedom of expression have gone through judicial review or arbitration. Four dimensions related to the normative expectations placed on teachers in the Canadian context emerge from these cases: (1) the extended sites of control that accompany teachers' professional identity, (2) the interdicted areas of speech contradicting core social values, (3) the space for dealing with controversial issues in the classroom, and (4) the scope for teachers' political advocacy in schools. The following section presents a review of various landmark case law, selected for their significance and visibility.

### Professional Identity: A Teacher Is a Teacher Is a Teacher

Can educators ever escape their role as teachers? This matter has been dealt with by Canadian courts in two landmark cases from the 1980s that set the framework for balancing individual Charter rights and broader community interests in relation to teachers' off-duty conduct and speech.

In *Cromer v. British Columbia Teachers' Federation* (1986), the SCC embraced a very broad interpretation of the scope of a teacher's professional identity. In this case, a middle school teacher was charged by the teachers' federation for voicing derogatory comments about a colleague during a Parent Advisory Council meeting. The teacher argued that she had been speaking as a parent on that occasion, and contended that the charge infringed her freedom of speech. The court, however, dismissed the appeal, stating that teachers do not get to "choose which hat they will wear on what occasion."

This understanding implies that it is ultimately the context, content, and shaping of the message that will determine if it is seen as a private citizen's or a professional educator's speech. In this sense, teachers may be permanently at risk of being perceived as wearing their teaching hats off-duty, and, as a consequence, of having their public expression permanently assessed against professional standards and normative expectations derived from their position and statutory duties.

Another emblematic decision emerged from the 1987 ruling on *Shewan v. Board of School Trustees of School District n. 34 – Abbotsford*. The school board suspended a married couple, both schoolteachers, due to off-duty conduct found to contradict

the community's moral standards—specifically for having a topless picture of the wife submitted by the husband to a men's magazine. The teachers appealed the suspension, claiming their behaviour related to their private lives and could not be classified as professional misconduct. However, the British Columbia Court of Appeal sustained it caused an adverse effect on the education system to which they, as teachers, owed a duty to act responsibly. The ruling even moved beyond this point, so as to affirm that their specific professional duty gives reason for expecting of teachers a higher standard of behaviour than that of most other citizens who do not have such public responsibilities to fulfill. If *Cromer* expanded teacher identity to a 24-hour day, *Shewan* made explicit the unique role of teachers and the responsibilities that ensue from it, setting specific boundaries for these professionals on their freedom of speech.

Three decades later, Mackenzie (2016) wondered if *Shewan* would have the same result had it happened today, given the evolution of social norms on what is considered “inappropriate” behaviour. Although the “what if” question cannot be answered categorically, the author recalls that the courts did not focus on any alleged obscenity attached to the picture published. Rather, it was the disruptive effects of its publication upon the educational system which supported the charge, a context-based judgement that creates a precedent for decisions over an array of expressions acted on by teachers today in their online private lives.

## Confronting Social Values: Areas of Interdicted Speech

If public school educators are bound by their teacher identity, both on and off-duty, what kind of speech cannot be accepted from them? Discriminatory speech collides against the equality provisions of section 15 of the Charter and is far removed from the values that underlie freedom of expression. Hate propaganda—the public promotion of animosity against members of a racial, religious, or otherwise identifiable group—is an offence provided for in section 319 of the Canadian Criminal Code. In the 1990s, far-reaching decisions demarcated this type of expression as clearly interdicted for teachers (Khan, 1997), indicating these professionals are far from the position of class monarchs who can say whatever they believe in.

The 1996 ruling in *Ross v. New Brunswick School District n. 15* dealt with an elementary teacher who publicly displayed anti-Semitic beliefs in writings, statements, and interviews for a period of years, until a parent filed a human rights complaint against the school board. A Board of Inquiry accepted the claim and determined the teacher should be placed on a leave of absence and transferred to a non-teaching position, if one became available. Eventually, he should be dismissed, if no such position could be secured. Moreover, the decision stipulated that the school board should terminate the teacher's contract immediately if he published, wrote, or sold anti-Semitic materials while on leave or in a non-teaching position.

Claiming the penalties infringed his Charter freedoms, the teacher appealed the decision, but the SCC confirmed the charge, even in the absence of direct evidence of discriminatory attitudes in his professional practice. The ruling in *Ross v. New Brunswick School* presumed that the teacher's off-duty conduct fostered a "poisoned school environment" (p. 831) instead of the tolerant and impartial space to exchange ideas that schools are supposed to be.

The SCC conceded that the sanctions the school district imposed on the teacher infringed on his individual freedoms, but, according to the Oakes test, this infringement was permissible under the Charter's reasonable limits clause. Remedying discrimination was a sufficiently relevant objective to override the teacher's Charter freedom. The discipline measures adopted were connected to this objective, in a proportional way that minimally impaired the teacher's right. And the negative effects of this impairment were outweighed by the objectives of preventing and remedying discrimination in educational provision. However, the court suspended the penalty of dismissal for anti-Semitic comments during the leave of absence or while in a non-teaching appointment, as it was considered as a "gag order" that would restrain freedom of expression without the necessary link to a teacher's position (Dickinson, 2005).

The reasoning developed in *Ross* supported later professional misconduct sanctions in Ontario<sup>3</sup> and British Columbia,<sup>4</sup> imposed on teachers charged with discrimination on the basis of participating in public events and publishing articles or interviews espousing racial discrimination or homophobic views. The bottom line of these sanctions rests

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3 *Re Peel Board of Education and Ontario Secondary School Teachers' Federation*, 2002.

4 *Kempling v. The British Columbia College of Teachers*, 2004.

on the link between the accountability of the public school system and the trust placed on the school board. If the core values that the public education system is expected to adhere to, promote, and steer in a pluralistic and democratic society come to be contradicted and challenged by a teacher's speech, the ability of that teacher to fulfill his/her duties is undermined. In this situation, harm to students can be presumed, giving room for a reasonable and justified restraint of the teacher's freedom of speech.

Tackling discriminatory expression inside the classroom, for its part, can intertwine with issues of academic freedom and curricular speech. A well-known earlier case is *R. v. Keegstra* (1990), in which Canada's hate speech legislation was confirmed. The case concerned a social studies teacher whose teachings reflected spurious notions of history, charged with anti-Semitic views. Not only did he reward students for repeating his perspective on assignments and exams, but also he did not tolerate dissent on the controversial depictions he presented as factual accounts (Pidcocke et al., 1997, pp. 162–165).

An extensive process led to the board's admonishments against a teaching approach that departed from the provincial curriculum and presented inaccurate discriminatory theories as facts. Eventually, the teacher's contract was terminated, his license suspended, and he faced a criminal trial for the public "wilful promotion of hatred" against an identifiable group, as stated in the Criminal Code. The case found its way to the SCC, where the hate speech provisions were sustained as a constitutionally valid and reasonable limit to freedom of expression in a free and democratic society, according to the Oakes test.

Freedom of expression was not technically at issue in Keegstra's dismissal, nor was his criminal trial concerned with the educational setting. Nevertheless, if it had been, the final picture would probably have been the same: section 1 of the Charter—the reasonable limits clause—would have justified the limitations placed on his speech as a teacher by the school board, and his noncompliance would make a cause for insubordination and dismissal (Long & Magsino, 2009).

## Education as a Window: Dealing with Controversy

If hate propaganda and discriminatory speech are at the extreme end of interdicted expression for teachers, what is the scope for dealing with controversial issues and

exercising academic freedom in the classroom? Should teachers be restricted to reflecting parental values when approaching sensitive topics? Or can they use their position to stir critical thinking even if it might upset part of the community? Two cases decided in the early 2000s set important precedents in this respect, signalling considerable space for teachers to move beyond a narrowly constructed role of hired mouth to deliver the curriculum.

A provincial court decision in 2002, *Morin v. Prince Edward Island School District n. 3*, took a big stride in affirming Charter protection of the value of academic freedom in schools. It concerned an untenured Grade 9 teacher who showed in class a documentary dealing with religious fundamentalism, which upset some students and parents, leading to a ban by the principal.

Subsequent administrative appeals upheld the principal's decision, and the teacher, put on a temporary paid leave, could not secure a position in the following year. Eventually, the teacher embarked on a "legal odyssey" (Waddington, 2011, p. 61) that included claims on the infringement of his freedom of speech. The first trial, a decade later, dismissed the freedom of expression claims for failing the Irwin Toy test. The ruling sustained that even though showing the video was a Charter-protected expressive activity, the principal's ban did not have the purpose or effect of restricting it, the second requirement involved in the test. Rather, in this perspective, it constituted a supervisory prerogative geared at preserving an "effective learning environment" that would ensure the achievement of curricular aims. The appeal, however, overturned the initial verdict and awarded the teacher damages for the violation of his freedom of expression.

The issue of academic freedom was at the heart of the decision in the appeal (Kindred, 2009, pp. 143–146). For the dissent, there would be no question of freedom of expression in the classroom since instructional speech in K–12 schools is bound by curricular requirements and parameters. The majority, however, affirmed the value of academic freedom as protected speech under section 2(b) of the Charter, making a point on the importance of debate and exposure to different perspectives and points of view for the development of critical thinking in education.

The case still left important issues unaddressed. First, it paid limited attention to students' rights, as the recipients of the expressive content (Clarke, 2013). The *Morin v. Prince Edward Island School District* decision mentions the educational interests of children, highlighting the "right of students in a democratic society to have access to free

expression by their teachers” (para. 67). But it does not discuss how this right reflects interests shared by children and the state, as both have a stake in fostering critical thinking and citizenship development (Clarke, 2013). Considering these two stakeholders, the guarantee of teachers’ freedom of speech in the classroom, as per the decision in *Morin*, would be pedagogically instrumental.

This instrumental perspective can be complemented with a self-regarding argument for teachers: Freedom of expression in the classroom would be an essential requirement to the mandate of educators and a condition for their professional enjoyment and integrity (Clarke, 2013). In this view, not only do teachers need to have a say on what is taught—which includes being able to go beyond the prescribed curriculum with updated sources and to challenge biased content with accurate material where appropriate—but they also need to have some degree of independent judgement on how the curriculum is to be taught. Choosing teaching materials and methods sits at the heart of what academic freedom means and is closely connected to freedom of speech. Even though, as Clarke (2013) points out, “academic freedom is a more restrictive concept relating primarily to the degree of autonomy that teachers exercise within the confines of the established curriculum” (p. 123), it can only be realized through freedom of speech. Rather than simply distinct notions, freedom of speech and academic freedom can be seen as complementary concepts, acting together to support the combination of trust and responsibility as the basis of the teaching profession.

A second gap in *Morin* involves the relationship between academic freedom and section 1 of the Charter (Waddington, 2011). An Oakes test application for reasonable limits on freedom of expression was not pursued because the school board—to whom the burden of proof would have fallen—never raised this claim. The final outcome of the case gave no room for arbitrary censorship in the classroom or blanket prohibitions of controversial topics—except the interdicted areas of discrimination and hate speech—but there remains space for the enforcement of restrictions that are considered to fall within reasonable limits.

Another important case entailed an SCC decision on the use of materials in early elementary grades depicting diverse models of families (*Chamberlain v. Surrey School District No. 36*, 2002). It concerned the attempt of a kindergarten teacher to use picture books depicting families with same-sex parents. The books were part of a list compiled by the provincial association of gay and lesbian educators concerning resources

to promote tolerance and counter homophobia in schools. The school board denied the teacher's specific request and prevented those resources from being used in the district altogether.

A concern with the morality of homosexual relationships lingered on the board's reasoning. It argued the books' approach would clash with the religious view of most parents in the district and the material was considered unnecessary to achieve curricular aims, as well as inappropriate, for it would cause cognitive dissonance, exposing young children to ideas contradicting their parents' beliefs.

Nevertheless, the SCC found this position discriminatory against same-sex parents and contrary to provincial legislation and Charter values linked to the goals of a democratic society and an inclusive education system, guided by strictly secular and non-sectarian principles. In fact, the ruling underlined the importance of cognitive dissonance in education as a necessary tool to teaching tolerance and respect, given that diversity is a fact and different family norms and types exist. The court found no clash with freedom of religion, as families whose religious values oppose homosexual family models do not have to abandon their beliefs, but simply "respect the rights, values and ways of being of those who may not share those convictions" (*Chamberlain v. Surrey School District No. 36*, 2002, para. 66). As for the young age of the children concerned, the SCC put it simply: "Tolerance is always age-appropriate" (*Chamberlain v. Surrey School District No. 36*, 2002, para. 69).

Mackay (2009) notes that this decision took the support of discrimination-free school environments to a higher level by affirming the educational value that comes with cognitive dissonance. In contrast with the restriction on discriminatory speech, the decision in *Chamberlain* expands the frontiers for teachers' freedom of expression as a concept related to tolerance, respect, and accommodation of minority groups. Education as a window—rather than a plain mirror of parental values—is the perspective that caters to the "best interests of children" (*Chamberlain*, para. 102) according to the SCC. Both the state and children would agree to that, pursuant to Clarke's (2013) trilogy rationale.

The courts' position, however, does not imply that Canadian teachers always feel empowered to address sensitive topics in the classroom. Without the backing of a union, litigation can take a heavy toll on individual teachers, involving high personal and financial costs (Waddington, 2011). Also, as Hoben (2015) discusses in *Learning What You Cannot Say*, contemporary school culture might contribute to a good deal of

self-censorship as teachers try to play it “safe” in their jobs and “learn what they cannot say.” Impassioned, critical speech—which brings to the forefront complex social problems with controversial origins and competing explanations for systemic failures in addressing them, such as racism and inequality—is not always rewarded by an environment primarily geared at efficiency, test results, and the development of job-oriented skills.

### **Educators Talk of Education: Room for Political Advocacy**

If a certain degree of protection for dealing with controversial topics in the classroom is granted to teachers, what are the boundaries for their speech as knowledgeable professionals on matters of education policy? Can they voice criticism on political inclinations and managerial decisions that affect the education system? Or, as hired mouth, should they keep reproach of government policy to themselves?

Teachers’ right to political expression in schools is one of the murky areas where legal controversy has recently arisen in Canada, intertwining labour law with Charter values. A series of grievances and cases opposing employers and teacher unions have helped frame the boundaries in this respect, highlighting the intersections between fundamental freedoms and work relations. Clarke and Trask (2013) analyze how these cases have promoted “a shifting landscape” in the last 10–15 years in relation to teachers’ rights to express political views in the school setting.

In 2002, teachers in British Columbia engaged in one-day work stoppages and political rallies as a reaction to unilaterally enacted government legislation that affected their collective agreement. The Labour Relations Board designated these stoppages as strikes, which were prohibited during the term of a collective agreement. The provincial teacher federation (BCTF) claimed that those particular stoppages were not strikes, but rather political protests, which would be covered under section 2(b), (c) and (d) of the Charter—freedoms of expression, peaceful assembly, and association, respectively. The Court of Appeal, however, upheld the strike definition of these mid-contract work stoppages, and as such considered that their prohibition did not infringe on section 2(c) and (d), even if it did infringe on teachers’ freedom of expression as stated in section 2(b). Nevertheless, through the application of the Oakes test, the court found that the prohibition fell under the reasonable limits clause. It prevented the disruption of services, a

pressing and substantial objective, which was rationally connected to the mid-contract clause and minimally impaired teachers' freedom, since they could pursue other forms to protest. Thus, the prohibition was considered proportional to the balance between free expression and harmful impact (*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2009).

Also in British Columbia, another decision took a step further in clarifying the scope for teachers' political expression. In 2004, an arbitration confirmed teachers' rights to post material critical of education policy on school bulletin boards, discuss the matter in parent-teacher meetings, and send critical reports to parents regarding budget cuts and the consequences on education provision (*British Columbia Public School Employers' Association and British Columbia Teachers' Federation*, 2004). For the arbitrator, these manifestations would be covered by section 2(b) of the Charter and attempts of school boards to prevent them would not be saved by the reasonable limits stipulated by section 1.

The British Columbia Public School Employers' Association (BCPSEA) appealed the arbitrator decision, but the Court of Appeal upheld this position by a majority vote. However, the dissenting minority pointed out that teachers' freedom of expression should be defined in a limited sense. Given the role of educators, the minority highlighted they have the duty to act as "neutral facilitators for the sharing of ideas" (*British Columbia Public School Employers' Association v. British Columbia Teachers' Federation*, 2005, para. 83). In this view, when teachers espouse a certain political position, they assume advocacy roles that would compromise their neutrality. Additionally, teachers' peculiar responsibility toward vulnerable underage citizens would add to the need of preventing political biases in children's learning environments (Kindred, 2009).

Other litigation has followed this previous majority decision, affirming the right of teachers to communicate disparaging views on education policy. A dissenting perspective came about in the arbitration of a grievance related to the right of teachers to wear protest armbands against the provincial policy of standardized tests. In that particular case, a British Columbia elementary school teacher wearing the armbands had been questioned by students on her reasons for protesting and disclosed her negative views of the tests (*British Columbia School Employers' Association, School district No. 73 v. British Columbia Teachers' Federation*, 2011). The arbitrator found that students had been affected by the protest, since these comments were made on the day they were taking the provincially mandated tests. This would have influenced the delivery of the testing policy,

altering its effectiveness and reliability as a decision-making tool (Clarke & Trask, 2013). Following the application of the Oakes test, inferred harm to students—recognized as a particularly vulnerable and impressionable group due to their young age—was the yardstick used to confirm the support for the restriction of teachers' rights in this context, under section 1, the reasonable limits clause of the Charter.

More recently, a 2013 British Columbia Court of Appeal ruling reversed a previous arbitration decision and reinforced teachers' freedom of speech about education policy as a valuable input to a democratic environment (*British Columbia Teachers' Federation v. British Columbia Public School Employers' Association*, 2013). The case concerned a BCTF campaign that addressed overcrowded classes, school closures, and underfunding of special education programs using posters, pamphlets, and buttons. Although the materials were non-partisan and targeted to parents as voters, employers demanded their removal. The union filed a grievance and the arbitrator found the employer's direction to be a justifiable freedom restriction, covered under section 1 since children could see the material, even if it was addressing parents. On the appeal, however, the court reversed this decision and found no evidence of actual or potential harm to children in the material. Still, it expressed the requirement that teachers' political messages should be balanced, respect students' rights, and prevent schools from becoming a "political battleground" (Clarke & Trask, 2013, p. 325). For now, these considerations seem to establish clear parameters in this area. Nevertheless, the dynamic nature of law, accompanying the evolution of social norms and moral values, and the remarkable presence of dissenting voices in the courts, illustrate that the struggle for affirming the space for professional educators' opinions on education in the public arena—as well as in the other areas explored throughout this article—might still come to be disputed in practice.

## Conclusion

Besides dealing with continuously evolving norms and values, future disputes on the scope of teachers' freedom of expression in Canada might be prompted by conflicts over issues that have not undergone conclusive adjudication. Examples of grey areas involve establishing what constitutes the best interests of children and who has a definitive say on that, applying the reasonable limits clause to curricular speech in context-specific

situations, and weighing parental rights vis-à-vis other considerations in the adoption of student opting-out policies.

In spite of these uncertainties, the terrain of teachers' freedom of speech has been fairly well-delineated in legislation and case law in the Charter era. In this respect, the overall understanding espoused by Canadian jurisprudence at large seems to be guided by a key underlying assumption: a high level of trust attached to teachers as professionals. There is a presumption of legitimacy and professionalism that supposes teachers will usually "make good decisions, act responsibly, and do the right thing" (Clarke & Trask, 2014, p. 120).

As the other side of the coin of the trust assumption, Canadian jurisprudence seems to place high-order expectations on teachers: Freedom corresponds to professional responsibility translated into the permanent duty of engaging in harmless speech. Harm, in this regard, is understood in a broad sense. It encompasses not only direct school disruption but also the notion of presumed damage to individuals and groups, such as the harm that can be caused by discriminatory speech situated far from the core values of the Charter and the education system. In any case, the evidence that confirms harm—be it actual or inferred—has to be backed by strong arguments and substantiated by factual examples for such a crucial individual liberty such as freedom of expression to be circumscribed in the name of collective needs.

In this sense, whereas Canadian courts have clearly established that discrimination and hate speech constitute harmful expression prohibited to teachers, cognitive dissonance falls into a different category. Exposing students to different ideas and values might be an essential pedagogical tool for promoting critical thinking and developing tolerance and respect in a democratic society, where diversity and pluralism are to be respected and cherished. Therefore, addressing sensitive and controversial topics in the classroom might be an intrinsic part of the job of an educator, even when it produces clashes with the views espoused by parents.

In fact, the protection of curricular speech addressing controversial topics—in a responsible and pedagogically appropriate way—opens up room for recognizing children as subjects distinguishable from their parents and bearers of their own learning rights. In addition, it provides a space for the achievement of teachers' mandate as educators and to their self-fulfillment as professionals.

By and large, the trust/responsibility construct developed in the Canadian context seems to reflect a relatively positive standpoint for teachers' free speech, even if it holds important circumscriptions to be observed. It differs from the perspective adopted by recent case law in the United States, for instance, which equated the teaching profession to a mechanical job, performed by public employees who simply sell their voice to reproduce a pre-determined government-approved speech, as hired mouth.<sup>5</sup> By seeing teachers almost as ventriloquist's dummies of the official curriculum, this viewpoint embodies an impoverished perspective on the role of educators. It leaves out of the picture the root purposes of education as a holistic endeavour of personal growth, and denies the possibility of having teacher expertise and professional judgement guiding this process of individual development (Clarke & Trask, 2014; Hess, 2010).

Such a reductionist approach might bear negative results for teachers and students alike. Teachers lose for being both de-skilled and de-professionalized, while students lose for being denied opportunities to develop critical thinking and even minimal autonomy (Clarke & Trask, 2014). The larger education system might suffer as well. Hess (2010) points out that adopting the hired-mouth perspective might lead to greater attrition in the profession. Stripped of the possibility of making relevant curricular decisions, teachers—especially strong teachers—tend to lose interest and leave teaching.

A thin perception on the work of educators seems to be broadly avoided in the Canadian perspective. Normative claims around teaching as a mere technical activity of knowledge transmission, devoid from any morality orientation or political content, are bypassed. Teacher neutrality would be a key term permeating this thin perspective.

The idea of neutrality is appealing. It has been raised in some of the case law discussed, as the courts stressed the need for schools to remain impartial spaces for the exchange of ideas, where teachers refrain from creating political battlegrounds and acknowledge the vulnerability of a younger captive audience. In this regard, it seems reasonable to expect that teachers withhold from advancing partisan preferences, imposing political or religious beliefs, and favouring students on the basis of personal views. Indeed, the claim for balanced approaches in teaching might be welcomed as a theoretical

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5 In particular, *Mayer v. Monroe County Community School Corp.*, 2007, and *Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, 2010, where appellate courts followed the understanding set by the United States Supreme Court in *Garcetti v. Ceballos*, 2006 (Clarke & Trask, 2014).

defence of pluralism. But the neutrality ideal must be taken carefully. Absolute neutrality might be, at best, a utopia. As human beings, teachers are situated subjects, whose world-views are inextricably influenced by their own positionality and background.

Acknowledging this fact, however, does not transform teachers into class monarchs (Hess, 2010), exempted from their responsibility as professionals employed in the peculiar context of schools. Rather, it affirms their duty to exert pedagogical discretion when dealing with complex topics, respecting curricular guidelines as well as academic standards and parameters established among disciplinary fields. In this sense, it is crucial that teachers allow space for respectful dialogue, debate, and dissent in the classroom. A generic quest for neutrality might have a chilling effect on almost any attempt to address complex social phenomena or philosophical issues in the classroom. Instead, attending diligently to the goal of preventing harm to students (as prescribed by the Canadian courts) seems to configure a more promising way to promote ethical and responsible teaching, without fostering reproachful teacher speech or promoting excessive curtailment of teachers' freedom of expression.

Given their role and position of trust in society, Canadian schoolteachers can expect a higher standard of conduct, even outside of the classroom, leading to particular circumscriptions on their freedom of expression. However, these limitations can hardly be labelled as arbitrary or exaggerated. Mostly, they have been justified and upheld by the courts on the basis of prevention of harm and promotion of core Canadian values to those who should be the main concern of the education system: students. In fact, students' well-being is the axis around which the complex web of rights involving teachers, parents, employers, and students themselves revolve, entailing some protection for teachers' "academic freedom" as a form of expression, especially in regards to teaching methods and class materials.

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