

**SCHOOLTEACHERS' FREEDOM OF EXPRESSION: MAPPING THE  
LEGAL TERRAIN IN CANADA AND THE POLICY DEBATE IN BRAZIL**

by

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## Abstract

The paper examines the scope of freedom of expression for schoolteachers in publicly funded non-denominational schools in Canada, as a frame to reflect upon a policy debate in Brazil. In that country a vocal movement – *School without Party* – pushes for legislation to counter alleged practices of teacher indoctrination. Building upon the discussion of principles derived from the Canadian Charter of Rights and Freedoms, legal precepts embedded in Canadian provincial legislation, and broad normative expectations on teachers' role and position in Canadian society, selected case law is explored and four dimensions related to the issue are sketched: 1) the extended sites of control for teachers' expression due to their professional identity; 2) the interdiction to engage in discriminatory or hate speech, which cause harm; 3) the value attached to cognitive dissonance and the space given to addressing sensitive topics in curricular speech and classroom materials; and 4) the possibilities for teacher engagement, on school property or during work hours, in political advocacy in the education field, especially when it involves reproach of government policy. The analysis concludes that the binomial of trust/responsibility seems to guide the interpretation of teachers' freedom of expression in Canada, in stark contrast with the premises and practices adopted by *School without Party* in Brazil. Recognizing the value of debating parameters for teachers' expression, the paper argues for an approach based on constructive dialogue and responsible teaching, grounded in the Brazilian constitutional principles and the broad notion of preventing harm, instead of the problematic assumptions and tactics embraced by *School without Party*.

## **Lay Summary**

What are the limitations on freedom of expression for teachers employed in public secular schools in Canada? Drawing from legal precepts and the social expectations placed on teachers, the paper examines the interpretation of this right in a number of cases decided by the courts. The Canadian experience is used as a frame of analysis to reflect upon a policy debate in Brazil, where a movement called *School without Party* argues that classrooms are rife with political indoctrination carried out by teachers, and pushes for legislation to curb this alleged practice. Stark contrasts are identified between the two settings. Canada derives delimitations on teachers' speech from the notions of trust and responsibility attached to the teaching profession. In Brazil, however, the assumptions and practices of *School without Party* go in the opposite direction: Mistrust and intimidation tactics underlie an attempt to restrict teachers' expression, with worrisome potential consequences.

## **Key Words**

Teachers; freedom of expression; Canada; Brazil; Charter of Rights and Freedoms; School without Party

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# Chapter 1

## Introduction

Freedom of expression is one of the hallmarks of democratic societies. In Canada, it is protected at the constitutional level, under section 2(b) of the Canadian Charter of Rights and Freedoms, enacted in 1982.<sup>1</sup> As an individual freedom, however, its exercise must always be weighted against other individual and collective rights through a heuristic process informed by social values and legal precepts. For certain professionals, such as schoolteachers, due to the nature of their activity and the social expectations placed on them, particular circumscriptions or delimitations to this fundamental freedom might be in place.

In this paper, I discuss the scope of freedom of expression for K-12 schoolteachers in secular public schools in Canada, mapping the legal and jurisdictional frameworks that, since the enactment of the Charter, have explicitly addressed this issue. Through this research, I intend to identify the main assumptions and values that have informed the delimitation of teachers' freedom of expression in the Canadian context, as well as to problematize their implication not only for teachers themselves, as a professional category, but also for students, parents, and for the broader underpinning notions of public, secular education in a pluralistic society.

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<sup>1</sup> *Everyone has the following fundamental freedoms:*

...  
(b) *freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;*  
[...].

Charter of Rights and Freedoms. Constitution Acts, 1867 to 1982, [http://laws-lois.justice.gc.ca/eng/Const/Const\\_index.html](http://laws-lois.justice.gc.ca/eng/Const/Const_index.html), retrieved on 2017-04-15.

Two research questions drive my inquiry:

- How are the delimitations on what public school teachers in non-denominational schools can and cannot express defined and justified in the Canadian context?
- What are the implications of these boundaries for teachers, students, parents, and the broad meanings attached to public secular education in a pluralistic society?

I explore these questions drawing from legislation and legal cases. My analytical framework relates education policy to law. As Mead (2009, p. 287) states, legal research in education is a useful way to identify the “current statutory boundaries and jurisprudential thinking” on a certain topic, providing not only a description of present implications, but also a hint at possible future developments. Legislation and litigation illustrate the interplay between the inextricable concepts of law and policy, setting boundaries and codifying values in a context that is constantly evolving. As such, while constitutional provisions present the articulation of higher order principles, ordinary legislation can be regarded as a tool to officially establish policy and translate its intent. Litigation, for its part, shapes the dynamic interpretation of constitutional principles and legal precepts in policy implementation and practice (Mead, 2009).

In this respect, I build this study upon a discussion of relevant federal constitutional provisions, provincial legislation, and case law that set landmarks for the interpretation of freedom of expression of public school teachers in non-denominational schools across Canada 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 paper deals strictly with cases involving teachers in secular public schools. In Canada, the rights and privileges of denominational and dissentient communities to manage their own school systems and access public funds are constitutionally protected, making tax-payer supported separate schools part of the public education system in some provinces. The literature suggests that the denominational nature of these schools might entail particular considerations in the balancing of conflicting rights and freedoms when teachers' fidelity to faith-based values are at stake and the church can demonstrate *bona fide* denominational requirements (Young & Ryan, 2014; Clarke, 2013; Long & Magsino, 2009; Piddocke, Magsino, & Manley-Casimir, 1997).

From this inquiry, I intend to draw insights to inform a current policy debate in my home country, Brazil, on the scope of teachers' freedom of expression in basic education (grades 1-12). This debate gained traction in the last few years, when legislators at different levels of government embraced ideas sparked by a movement entitled *School without Party*, and introduced bills to convert them into law.

Claiming that Brazilian schools are rife with political biases, the stated aim of *School without Party* is to ensure that politics, ideologies and partisanship are kept out of schools, so that parental values are respected and teachers' roles are restricted to what is deemed a "neutral" imparting of purely academic knowledge. Since basic education provision falls under the responsibility of states and municipalities but receives technical and financial support from the federal government and follows national guidelines and policies, the issue has countrywide relevance.

Not surprisingly, most teachers and education activists have dubbed this perspective as a gag attempt. For them, schooling has broader aims in order to fulfill the purposes of education set by the Brazilian Constitution: The full development of a

person, their preparation for citizenship and qualification for work.<sup>2</sup> Equipping the young for active citizenship and fostering critical thinking are thus seen as part of an educator's job, which would make teaching an intrinsically political activity.

As a staff member of the technical advisory unit of the Brazilian Federal Senate – the upper house of the National Congress – I am deeply interested and potentially involved in this topic. The nature of my professional activity is the mediation of technical and academic knowledge input into political decision-making processes, providing support to lawmakers on education policy issues. I believe that a closer look at how Canada tackles teachers' freedom of expression in the context of secular schools, which are analogous to public schools in Brazil, could bring nuanced arguments and fresh lenses to approaching the Brazilian debate, regardless of country specificities.

As such, I do not intend to devise “lessons” to be transposed from one context to another. Historical, cultural and institutional features that make each country unique cannot be overcome in this respect. However, the exercise of exploring a different context is undertaken as a novel frame for the analysis of a familiar setting.

The paper is organized as follows. In Chapter 2, I give an overview of the policy debate in Brazil. In Chapter 3, I review the relevant legal framework and the normative expectations placed on teachers in Canada. In chapter 4, I explore landmark court cases and arbitration, discussing their implication in terms of the sites of control of teachers' freedom of expression, the balancing of freedom and non-discrimination, the space for dealing with controversial issues in the classroom, and the scope for teachers' political expressions in schools. In Chapter 5, I contrast the

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<sup>2</sup> Constituição da República Federativa do Brasil, art. 205, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), retrieved on 2017-04-29. My translation from Portuguese original.



findings from the discussion of the Canadian experience to the assumptions and practices radiating from the Brazilian scenario. Finally, in Chapter 6, I summarize the analysis and present my conclusions.

## Chapter 2

### Demarcating Boundaries for What Teachers Can Say: The Brazilian Debate

The Brazilian Federal Constitution of 1988 ensures the free expression of thought, but forbids anonymity.<sup>3</sup> It guarantees the inviolability of freedom of conscience and belief, ensuring the free exercise of religious cults, as well as the expression of intellectual, artistic, scientific, and communication activities, without censorship or independently of authorization.<sup>4</sup> In the chapter dedicated to education – affirmed as a universal right and a duty of the state and the family, in collaboration with society – the Constitution includes freedom to learn, teach, research, and express thoughts, art, and knowledge. It also acknowledges pluralism of ideas and of pedagogical concepts as one of the tenets in this area. The National Education Guidelines and Framework Law, for its part, adds respect for liberty and appreciation of tolerance to the list of guiding principles of teaching.<sup>5</sup>

These broad ideas are at the heart of the contentious disputes stirred by *School without Party*,<sup>6</sup> a movement which presents itself as an “informal, independent, non-profit, non-ideological, non-partisan, and party-free association,” and claims to have drawn inspiration from a similar initiative in the United States (Escola sem Partido,

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<sup>3</sup> The ban on the protection of anonymous expression in the Brazilian Constitution has historical roots in 19<sup>th</sup> century provisions (Giacobbo, 2008). It relates to the notion that speech must be held accountable, allowing for the right of reply and other legal remedies if it violates human dignity or hurts third parties’ privacy or reputation.

<sup>4</sup> Constituição da República Federativa do Brasil, [http://www.planalto.gov.br/ccivil\\_03/Constituicao/Constituicao.htm](http://www.planalto.gov.br/ccivil_03/Constituicao/Constituicao.htm), retrieved on 2017-04-29. My translation from Portuguese original.

<sup>5</sup> Lei de Diretrizes e Bases da Educação Nacional (LDB). Pub. L. No. 9.394/1996. Brazil, [http://www.planalto.gov.br/ccivil\\_03/leis/L9394.htm](http://www.planalto.gov.br/ccivil_03/leis/L9394.htm), retrieved on 2017-04-29. My translation from Portuguese original.

<sup>6</sup> *Movimento Escola sem Partido* in Portuguese. Text from *School without Party*’s website is my translation from Portuguese original.

2017).<sup>7</sup> The movement argues that many schools in Brazil, both public and private, have fallen prey to nefarious teacher indoctrination based on the pretext of transmitting a supposed critical view of reality to students.<sup>8</sup> The main accusations pointed at teachers refer to alleged proselytism based on “leftist ideologies” targeted against concepts such as “the traditional family,” “the free market,” “Christian values,” and “the capitalist order,” as well as an undue appropriation of what would be parents’ rights to have children taught moral precepts that conform to their family’s convictions (Escola sem Partido, 2017). Therefore, politics, as translated into social justice values, and morality, in respect to sexuality, in particular, seem to be the core targets of the *School without Party* crusade.

Besides the reproduction of supportive articles and opinion pieces published in the press, the movement’s website portrays as evidence of the alleged problem of indoctrination a collection of testimonials sent by parents and students; some videos and audios captured in classrooms; and prints of social media posts by teachers (Escola sem Partido, 2017).<sup>9</sup> It also resorts to the results of a 2008 opinion poll carried

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<sup>7</sup> Specifically, the website *Noindoctrination.org*, referred as a successful model in countering school indoctrination in the US through the collection of testimonials from students around the country. This website, however, seems to be presently inactive and could not be accessed during this study. Its founder, a college student parent, described it as a nonprofit organization concerned with “intellectual tyranny” and bias in academia (Wright, 2004).

<sup>8</sup> Besides the original religious connotation, the definition of what constitutes indoctrination in education mobilizes arguments beyond the scope of this paper. Hess (2010, p. 319) provides a useful definition: indoctrination is a “deliberate attempt to cause students to adopt a belief on a subject for which there are legitimate multiple and competing views that students should deliberate.” In this perspective, indoctrination is very different from simply voicing one’s opinion and can originate not only from teachers’ speech, but also from the official curriculum itself.

<sup>9</sup> Among the entries scattered around different sections of *School without Party*’s website (such as *Testimonials*, *Defend Your Child*, *Forensic Evidence*) there are several anonymous posts, complaints regarding private schools, as well as reports by tertiary-level students and teachers. The testimonials related to the K-12 setting encompass a broad array of issues, from objection to the use of props as sex education resources to outraged comments on classroom material showing the controversial Landless Workers Movement in a positive light. Classroom moments recorded in video and audio, for their part, show extreme cases of teachers using inappropriate language and presenting oversimplified views on topics such as imperialism, terrorism and social inequality. It remains unclear if teachers were aware of being taped. It is also uncertain whether the short excerpts posted capture singular moments of undue

out with 3,000 respondents, which was sponsored and published by the largest Brazilian weekly news magazine, *Veja*. The poll was the central piece of a highly editorialized report on education, whose key point was to spotlight the “mediocre” quality of the Brazilian school system, despite an apparent generalized “blindness” to this situation. The main reasons for this quality lag, according to the report, were two-pronged. On the one hand, teachers’ poor pre-service education would lead to ignorance and adherence to left-leaning, archaic and oversimplified views on social phenomena. On the other hand, the category would largely embrace a misconception about the fundamental mission of schools: “forming citizens”, in the view of 78% of teacher respondents, rather than “teaching school subjects”, pointed out by only 8% of them (Weinberg & Pereira, 2008).<sup>10</sup>

Despite drawing attention to a relevant debate on the parameters surrounding the expressive activity of teachers (which constitutes the core of the teaching professional practice itself), the movement’s logic of action adopts a mix of surveillance and intimidation tactics. It advocates that students and parents – under anonymity, if they so wish – widely denounce “indoctrination practices” experienced in schools, exposing the teacher-perpetrators publicly.<sup>11</sup> It also showcases on its website a template of an extensive “extrajudicial notification” that parents are encouraged to send to those perpetrators (again, anonymously, if they believe this will protect their children from retaliation in class). The template contends that, since

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excess or represent the systematic practice adopted by those educators. The same can be said about social media prints reproduced in the website, given the difficulty in determining the extent to which they represent consistent classroom practice or depict episodic – although keen – examples of questionable online behaviour.

<sup>10</sup> No detailed information on the technical aspects of the poll, including basic data such as sample stratification by category (students, teachers and parents), was provided in the report.

<sup>11</sup> The validity of anonymous complaints vis-à-vis the constitutional banning of anonymity in free speech has been questioned in court decisions, but this approach has been admitted as a starting point for further investigations of illegal conduct in some circumstances (Giacobbo, 2008).

“freedom to teach does not equate to freedom of expression in the classroom,” any indoctrination practices shall not only be publicized but also taken to the courts, potentially subjecting the teacher who incurs on them to “criminal punishment for abuse of authority,” as well as to awarding compensation for “moral damages” to plaintiffs.

Another line of action adopted by *School without Party* is the advocacy for the inclusion of a placard in every single classroom of primary and secondary schools in the country with the following list of “teacher duties” (Escola sem Partido, 2017):

- Teachers will not take advantage of students’ captive audience to promote their own interests, opinions, conceptions, or ideological, religious, moral, political or party preferences.
- Teachers will not favour or disadvantage students due to political, ideological, moral or religious convictions – or for the lack of those.
- Teachers will not engage in partisan political propaganda in the classroom, nor will they encourage students to participate in public demonstrations, marches or protests.
- Teachers will present the main competing versions, theories, opinions and perspectives in a balanced way when dealing with political, sociocultural or economic issues.
- Teachers will respect parents’ rights to have their children receive moral education in accordance with their own convictions.
- Teachers will not allow that the above-mentioned rights be violated by third parties in the classroom.

The movement advocates for the enshrinement of these duties into legislation, at the local and national levels, as a deterrent measure and reminder. Its ideas have

encountered fertile ground among legislative bodies at municipal, state and federal levels, which placed the proposals embraced by *School without Party* on the country's policy agenda.

According to Brait (2016), the movement's first official record is a website created in 2004 by a lawyer and state prosecutor who as of today acts as its vocal coordinator. Apart from collaborators authoring supportive articles or blogs linked to the website, as well as individuals sharing personal experiences or testimonials, no other name is connected to the movement's institutional organization in the homepage. Neither is information on any formal organizational structure or funding scheme provided, although the movement is now formally registered as a private association.

The movement did not receive much visibility until a decade after it was created. In 2014, amidst a heated political domestic context which led to the demise of the left-leaning Workers' Party administration two years later, through the impeachment of the elected president, *School without Party* proposals were amplified in social media. Created in that year, the movement's Facebook profile has garnered more than 130,000 followers to date.<sup>12</sup>

*School without Party* received signs of support in mass street protests carried out against the government in 2014-2015. Among the movement's allegations, there were claims that indoctrination in schools integrated a deleterious coordinated approach to education inspired by Marxian theorists and pedagogues, which would be supported by left-wing parties, the education bureaucracy, textbook authors, and teacher unions, with the Workers' Party, in office since 2003, at its forefront (Escola

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<sup>12</sup> On their Facebook page (<https://www.facebook.com/escolasempartidooficial>, accessed June 15, 2017), the movement compiles an additional series of videos, testimonials and posts supporting its views.

sem Partido, 2017). It was also in 2014 and 2015 that politicians identified with the extreme right or linked to religious groups – Catholic and Evangelical Christians alike – introduced local bills that proposed to incorporate the movement’s ideas into state and municipal statutes in different regions of the country.

The topic was also taken up at the federal legislature, through bills introduced both at the Chamber of Deputies (the lower house of the National Congress) and the Senate.<sup>13</sup> With some slight differences in wording, their general goal is to inscribe the principles advocated by the *School without Party* movement in the National Education Guidelines and Framework Law. They also intend to establish a “communications channel” through which anonymous complaints of indoctrination can be filed with education authorities and subsequently forwarded to state prosecutors in charge of children’s rights. In relation to private schools, including denominational ones,<sup>14</sup> the bills prescribe they have to seek explicit authorization from parents for addressing any curricular content connected with moral or ideological conceptions. The bill proposed in the Senate goes a step further by expressly banning from all schools, public and private, what it calls “gender theory or ideology,”<sup>15</sup> as well as practices “that might compromise, accelerate or direct the natural maturation and development of personality in harmony with the students’ biological sex identity.”<sup>16</sup>

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<sup>13</sup> In particular, Bill 867/2015, in the Chamber of Deputies, and Bill 193/2016, in the Federal Senate. Introducing similar bills in both houses is common practice in the Brazilian bicameral legislature.

<sup>14</sup> All public schools in Brazil are secular. Confessional schools, despite being able to receive public funds through tax exemptions, are considered private institutions.

<sup>15</sup> The rhetoric against “gender ideology” has had a visible presence in the Brazilian policy arena during the present decade. Bracke & Paternotte (2016) provide an interesting analysis of this discourse and its ties to Catholic doctrine.

<sup>16</sup> My translation from Portuguese original.

While the proposals of *School without Party* have gained terrain in the policy arena, reactions to them have also increased. Teacher unions, secondary students' groups and education activists see the movement as a gag attempt, which preaches censorship and, under a discourse of neutrality, promotes a conservative, anachronistic and authoritarian agenda. That agenda, the critics say, disregards the values of diversity and pluralism; diverts attention from the "real" education problems faced by the country (such as underfunding and poor quality of public schools); fosters intimidation of teachers and the judicialization of educational relations; undermines trust in schools; and promotes discrimination in the classroom. In sum, in the view of its critics, *School without Party's* agenda, if adopted, would jeopardize the very purposes of education stated in the Constitution: the full development of a person, their preparation for citizenship and qualification for work (Ação Educativa, 2016).

This reaction recently received signals of support from national and international agencies. In 2016, as the first *School without Party* state bill was approved, in the Northeastern state of Alagoas,<sup>17</sup> the national education unions of both the public and the private sector challenged its constitutionality at the Federal Supreme Court. The federal ministry of education, the federal prosecution service and the country's general attorney, acting as intervening parties, all argued against the law. In March 2017, the assigned judge-rapporteur warranted an injunction, granting the immediate suspension of the state law's application due to unconstitutionality (Barroso, 2017). As it is an interim measure, this remedy is yet to be ratified or dismissed, according to the conclusion reached at the Federal Supreme Court plenary.

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<sup>17</sup> Law 7.800/2016 of the State of Alagoas, designated as the *Free School Law*.



In any case, the statute will only apply if, eventually, after being fully examined by the plenary, the majority dissents from the rapporteur.

Several clashes between the state law and the Federal Constitution were pointed out in the injunction. Among them, a conflicting perspective with the principles of pluralism and freedom to teach and learn were highlighted. As such, the statute was found to go against the full realization of the right to education, with the “emancipatory reach” that the Brazilian Constitution attaches to it. In addition, the injunction mentions the law’s incompatibility with the values embodied in international human rights treaties undersigned by the country.<sup>18</sup>

Another objection raised against the state law had to do with its infringement of the proportionality rule. In this sense, the injunction emphasized the risks it entailed of generalized ideological censorship and persecution of teachers non-conforming to dominant views.

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<sup>18</sup> In particular, the injunction cites the International Covenant on Economic, Social and Cultural Rights, signed under the United Nations system, and the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the Protocol of San Salvador), signed under the Organization of American States system. Interestingly, *School without Party* claims legal support from the body of the same American Convention, whose section 12(4) states that *parents have the right to provide for the religious and moral education of their children that is in accord with their own convictions*. The Protocol of San Salvador, however, states on section 13 that *education should be directed towards the full development of the human personality and human dignity and should strengthen respect for human rights, ideological pluralism, fundamental freedoms, justice and peace. [...] Education ought to enable everyone to participate effectively in a democratic and pluralistic society and achieve a decent existence and should foster understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups and promote activities for the maintenance of peace. [...] In conformity with the domestic legislation of the States Parties, parents should have the right to select the type of education to be given to their children, provided that it conforms to the principles set forth above*. According to the injunction, this conformity is lacking from the state law following *School without Party*’s approach.

American Convention on Human Rights (Pact of San Jose, Costa Rica, [https://www.oas.org/dil/treaties\\_b-32\\_american\\_convention\\_on\\_human\\_rights.pdf](https://www.oas.org/dil/treaties_b-32_american_convention_on_human_rights.pdf), retrieved on 2017-06-10.

Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights (Protocol of San Salvador), <http://www.oas.org/juridico/english/treaties/a-52.html>, retrieved on 2017-06-10.

Moreover, the rapporteur stressed a teleological distinction between freedom of expression and academic freedom, or freedom to teach. The distinction would result in different circumscription requirements. In his view, while the first would aim at preserving basic existential values related to the free circulation of ideas among equals and the functioning of democracy, the latter would point to protecting scientific advances, disseminating knowledge, and developing critical thinking through debate and exposure of students to diverging perspectives. Thus, freedom to teach would always be subordinate to pedagogical ends, being bound to the professional standards of every discipline, to the non-imposition of worldviews in unequal power relations, and to a pedagogical discussion of diverging perspectives. Although the precautionary suspension granted by the injunction will still be subject to a plenary decision, the manifestations brought forward by the intervening education and law authorities, as much as the reasoning presented by the judge-rapporteur, flag considerable difficulties for the proposals embraced by *School without Party* to be enshrined in law.

Similarly, a recent joint communiqué addressed to the Brazilian government and issued by three United Nations human rights special rapporteurs (on the right to education; on the promotion and protection of the right to freedom of opinion and expression; and on freedom of religion or belief) expressed criticism on the language used in the bills and their potential impact on human rights. The communiqué, which sprung from concerns brought to the special rapporteurs by Brazilian civil society organizations, included a request for evidence that would justify the adoption of *School without Party* proposals, as well as information on the measures that could ensure their compliance with international human rights standards, especially

regarding freedom of opinion and expression (United Nations/Office of the High Commissioner of Human Rights, 2017).

These problems notwithstanding, the ideas put forward by *School without Party* have found echo in vocal social sectors in Brazil. A supportive city councillor in São Paulo, for instance, stirred the media with reports of surprise visits to schools with the alleged goal of verifying attempts of “indoctrination” *in situ* (Rodrigues, 2017). The debate on the movement’s proposals might be carried forward in the legislature and the end result is still uncertain.

## Chapter 3

### Teachers' Freedom of Expression in Canada: The Legal Framework and Normative Expectations

The 1867 Constitution Act (formerly the British North America Act, 1867) and the 1982 Constitution Act, containing the Canadian Charter of Rights and Freedoms (herein referred to as the *Charter*), are the cornerstones of Canada's contemporary legal system.<sup>19</sup> The Charter is the benchmark framework for freedom of expression issues. The sections directly related to this topic, particularly in respect to schoolteachers, are presented below.

#### 3.1 The Canadian Charter of Rights and Freedoms

Section 2 of the Charter introduces the fundamental freedoms ensured for everyone in Canadian society: “(a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (c) freedom of peaceful assembly; and (d) freedom of association.” Although section 2(b) refers to *thought, belief, opinion and expression*, it is the latter that usually becomes the object of judicial action. Rarely would the state attempt to interfere with individual thoughts, beliefs or opinions of individuals. 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.”<sup>20</sup>

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<sup>19</sup> Charter of Rights and Freedoms. Constitution Acts, 1867 to 1982, [http://laws-lois.justice.gc.ca/eng/Const/Const\\_index.html](http://laws-lois.justice.gc.ca/eng/Const/Const_index.html), retrieved on 2017-04-15.

<sup>20</sup> *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 (CanLII), <http://canlii.ca/t/dmd>, retrieved on 2017-05-10.

Section 15, which deals with equality rights, is also a common yardstick for case law related to teachers' freedom of expression. It offers the basis of non-discrimination principles that are further specified in federal and provincial human rights codes, asserting that: "(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

Section 2(b) and section 15, along with the legal rights prescribed in section 7 of the Charter, are the ones most often brought into litigation in Canadian courts (Kindred, 2009). Considering their foundational standing, especially in regards to the fundamental freedoms enlisted in section 2, one might wonder why would they be so often interfered with, so as to require judicial review. Part of the answer might refer to the central role that freedom of expression (often referred to simply as "freedom of speech") assumes in the context of liberal democracies. It is inextricably tied to the search of truth and the highest social values, to citizen participation in social and political life and to individual self-fulfillment and autonomy. In addition, it may be that the broad scope of the freedoms covered under section 2(b) attracts litigation. Expression, as interpreted by the SCC, encompasses any form and content that conveys meaning. Its protection includes both the messenger and the receiver of the expressive activity (Kindred, 2009).

Claims of violation of freedom of expression brought before the courts are submitted to a legal test developed by the SCC, known as the Irwin Toy test.<sup>21</sup> It follows two steps, didactically depicted by Waddington (2011). First, the court must

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<sup>21</sup> Irwin Toy Ltd. v. Quebec (Attorney General), [1989] 1 SCR 927, 1989 CanLII 87 (SCC), <http://canlii.ca/t/1ft6g>, retrieved on 2017-05-10.

determine whether the activity restricted qualifies as “expression” to be protected by the Charter. Second, it analyses if the purpose or effect of the restriction imposed upon it was to hamper freedom of expression. Only if a particular case satisfies both criteria will it be judged as a section 2(b) case.

As with any other legal provision, the Charter cannot be interpreted in isolation from social values that inform the systematic articulation of its sections. In this respect, section 1 sets the tone for the qualified, and not absolute guarantee of freedoms and rights in Canada: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."<sup>22</sup> As such, section 1, known as the "reasonable limits clause," states the only justifiable criteria for limiting the exercise of rights and freedoms in Canada in the balance of individual rights and collective needs.

The SCC developed another legal test used to assess competing interests and verify if a factual infringement of the constitutional guarantee of a fundamental freedom can be overridden by section 1. Generally referred to as the "Oakes test,"<sup>23</sup> it provides a systematic and methodical way to judge in each particular context whether a breach of a right is reasonably and demonstrably justified. Kindred (2009) summarizes the application of the Oakes test in the following, hierarchically organized questions: 1) Is the breach "a limit prescribed by law"? 2) Is the purpose of the breach attending to a "pressing and substantial concern" that is justified in a "free and democratic society," meaning, is it sufficiently important to override a

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<sup>22</sup> Constitution Acts, (1867 to 1982), <http://laws-lois.justice.gc.ca/eng/const/page-15.html>, retrieved on 2017-04-15.

<sup>23</sup> R. v. Oakes, [1986] 1 SCR 103, 1986 CanLII 46 (SCC), <http://canlii.ca/t/1ftv6>, retrieved on 2017-05-10.

constitutional guarantee? 3) Is the breach rationally connected to this purpose? 4) Does it minimally impair the Charter right concerned? 5) Are its negative effects proportional to the objective pursued? As such, if a violation of freedom of expression is confirmed, according to the Irwin Toy test, the Oakes test must be used to assess if it can be admitted as a reasonable limit to the fundamental right.

The scope of application of the Charter is presented in section 32: it concerns “the Parliament and government of Canada in respect of all matters within the authority of Parliament” and “the legislature and government of each province in respect of all matters.” Thus, the Charter binds legislation and all acts of government at federal and provincial levels, but it 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 & Zuker (2002, pp. 363-369) show that SCC decisions related to section 32 have been *ad hoc*. 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).

The peculiar historical roots of the Canadian school system, however, require an explanatory note on the concept of public education. In contrast to the Brazilian experience, public education systems in Canada encompass separate and dissentient denominational schools, whose origins echo compromises made in the 19<sup>th</sup> century on the roles of the church and the state in the provision of education in British North America, which intertwined with the commitment towards the protection of linguistic minorities. This situation led to varied institutional arrangements and models of

taxpayer support of confessional schools in different provinces, which endure to this day (Wilson, 2012).

Thus, section 93 of the 1867 Constitution, while affirming the exclusive responsibility of each province in education, safeguarded the rights and privileges enjoyed by denominational and dissentient communities at the time their respective provinces joined Canada. This included the right to manage separate school systems, with access to public funding. Section 29 of the Charter reaffirmed this safeguard, stating that: “Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.” This constitutional protection might give rise to singular considerations by the courts when addressing conflicting rights in separate denominational schools, as the state has the duty to recognize their peculiar nature and observe their religious mandates (Young & Ryan, 2014; Clarke, 2013; Long & Magsino, 2009; Piddocke et al., 1997).<sup>24</sup>

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. While the former typically deal with equality rights, the latter lay down the general guidelines for education provision and the broad values underpinning the education system, under sections dealing with definitions, duties, rights and expectations related to students, teachers,

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<sup>24</sup> Even if “denominational cause” cannot be employed arbitrarily to override individual rights, it has been successfully invoked in labour disputes as a *bona fide* criterion for preferential teacher hiring, as well as for the dismissal of teachers noncomplying with faith-based requirements in their personal lives. In this sense, Young & Ryan (2014) point out that freedom of expression may be more restricted for teachers in the denominational context, whereas in relation to students, equality and non discrimination seem to have gained a heavier weight, penetrating “the constitutional shield” enjoyed by separate Catholic schools. In fact, this issue has to be taken as a component of a broader set of controversies involving the interplay of religion and schooling in the context of the increasingly secularized and rights-conscious framework accompanying the Charter era, with a potential long “judicial road” ahead (Long & Magsino, 2009).



administrators, parents, schools, school councils and school boards. Around half of the provinces have also enacted specific acts regulating the teaching profession, with provisions dealing with teachers' associations, certification and licencing procedures, professional conduct and disciplinary mechanisms. Rather than attempting to describe the whole array of provisions encompassed in this ample body of legislation, the next section adopts an exploratory approach, drawing on textual excerpts to illustrate normative expectations on teachers, which impact on the demarcation of the scope of teachers' free speech in Canada.

### **3.2 Under the Charter: Provincial Legislation and Normative Expectations**

Given the arrangement prescribed in the Constitution Act, education legislation regarding publicly funded local schools and policy falls under provincial responsibility. Each of the ten Canadian provinces has enacted statutes regulating education provision in their jurisdiction. Delaney (2007, pp. 31-41) demonstrates that, despite great variations in length and degree of detail, these acts (known as education acts or school acts) show remarkable similarities across Canada. In relation to teachers and expectations placed on them, provincial education acts are permeated by four distinct themes: "teaching of the prescribed curriculum; accountability; maintenance of order and discipline; and teacher professionalism" (Delaney, 2007, p. 37).

The notion of professionalism, in particular, resonates with the issues addressed in this paper. Besides appearing in legislation, professionalism is reflected in codes of ethics established by teacher unions and in professional standards set by regulatory bodies, such as the Ontario College of Teachers and the British Columbia Teacher Regulation Branch. The notion seems to be closely associated not only to the possession of certain qualifications and expertise, but also to a normative discourse

related to the upholding of an expected conduct that matches the responsibility attributed to the professional's role and position in society.<sup>25</sup> In the case of Canadian public school teachers, trust seems to be the pillar of this position, framing the way their professional identity is constructed.

In this respect, a key element in legislation and case law is the expectation that teachers function as role models for their students. As a consequence, there is increased public scrutiny on their behaviour, reaching beyond the school setting, in a “halo effect” (Pidcocke, Magsino, & Manley-Casimir, 1997). An example of a related statutory provision comes from New Brunswick's Education Act:

27. The duties of a teacher employed in a school include

(c) maintaining a deportment consistent with his or her position of trust and influence over young people,

(d) exemplifying and encouraging in each pupil the values of truth, justice, compassion and respect for all persons.

Another explicit example stems from the Ontario Education Act:

264(c) It is the duty of a teacher and a temporary teacher to inculcate by precept and example respect for religion and the principles of Judaeo-Christian morality and the highest regard for truth, justice, loyalty, love of country, humanity, benevolence, sobriety, industry, frugality, purity, temperance and all other virtues.

Despite the emphasis on somewhat overly idealistic expectations and the employment of an anachronistic language in Ontario's legislation – which falls short of reflecting contemporary Canadian social diversity and religious pluralism – both legal texts illustrate a view that has been upheld in court, creating a higher standard for teachers as compared to other professionals and private citizens in respect to free

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<sup>25</sup> By normative, I mean a prescriptive statement supported by a specific set of values aiming at a certain ideal or desirable state of affairs.

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. As Piddocke et al. (1997, pp. 205-208) argue, this perspective remains unproblematic if those ideals are shared among teachers, the school and the larger community. When these ideals diverge, however, a less rosy picture might emerge, leading to ostensive, externally imposed, or tacit, self-imposed, interdictions on teachers' speech.

While tacit self-censorship might be related to the notion of political literacy (Hoben, 2015) as well as objective school climate and conditions (Patterson, 2010), ostensive boundaries reflect the legal framework and case law. In Canada, a clearly demarcated area for teachers' expression refers to the core values and beliefs of Canadian society, embedded in or derived from the Charter. They are to be entrusted in and reproduced by the public education system, therefore by teachers as its main agents. Multiculturalism and diversity, as well as equality, non-discrimination, tolerance and, increasingly, accommodation of vulnerable groups seem to be particularly relevant in this respect. Alberta's School Act provides a good example of this perspective, in a section dedicated to “Diversity in shared values”:

3(1) All education programs offered and instructional materials used in schools must reflect the diverse nature and heritage of society in Alberta, promote understanding and respect for others and honour and respect the common values and beliefs of Albertans.

(2) For greater certainty, education programs and instructional materials referred to in subsection (1) must not promote or foster doctrines of racial or ethnic superiority or persecution, religious intolerance or persecution, social change through violent action or disobedience of laws.

A 2012 amendment to Ontario's Education Act is also illustrative:

169.1 (1) Every board shall

(a.1) promote a positive school climate that is inclusive and accepting of all pupils, including pupils of any race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.

The courts have generally decided that expressions directly contradicting these broad social values, in the form of hate or discriminatory speech, for instance, make up an interdicted area for Canadian schoolteachers. They may challenge the maintenance of a “positive school environment,”<sup>26</sup> causing harm to students, and resulting in reputational damages and negative impacts on the integrity of the school system itself.

These two stakeholders – students and the education system – form part of the complex web of power relations under which freedom of expression must be understood in the educational context. Kindred (2009) points out that 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. For instance, a teacher is a representative of the state power in relation to students, but at the same time he or she is subject to this power in relation to the school board's ability to discipline or to the teaching regulatory body's authority to issue certifications.

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<sup>26</sup> Ross v. New Brunswick School District No. 15, [1996] 1 SCR 825, 1996 CanLII 237 (SCC), <http://canlii.ca/t/1frbr>, retrieved on 2017-05-10, p. 831.

Competing interests have to be balanced in the delivery of public education and limitations to freedom of expression might emerge in any of the intersections of the numerous stakeholders involved – 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 (2013) 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 bear the same weight when deciding on children’s education. In fact, Canadian courts have recognized the paramount role of parents in the education and moral upbringing of children,<sup>27</sup> in contrast to a delegated notion of school authority. 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. However, this expression,

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<sup>27</sup> This issue is dealt at length in *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, 2002 SCC 86 (CanLII), <http://canlii.ca/t/1g2w5>, retrieved on 2017-05-10.

enshrined in the preambles of Alberta's School Act and Manitoba's Public Schools Act, for instance, 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).

The formalisation of advance notices and exemptions marks an attempt to balance conflicting perspectives and tensions among stakeholders that might emerge when teachers deal with contentious topics in the classroom. Alberta's School Act, for example, includes a provision requiring written notice to parents of planned discussions of sexual or religious topics:

50.1(1) A board shall provide notice to a parent of a student where courses of study, educational programs or instructional materials, or instruction or exercises, include subject-matter that deals primarily and explicitly with religion or human sexuality.

(2) Where a teacher or other person providing instruction, teaching a course of study or educational program or using the instructional materials referred to in subsection (1) receives a written request signed by a parent of a student that the student be excluded from the instruction, course of study, educational program or use of instructional materials, the teacher or other person shall in accordance with the request of the parent permit the student without academic penalty,

(a) to leave the classroom or place where the instruction, course of study or educational program is taking place or the instructional materials are being used for the duration of the part of the instruction, course of study or educational program, or the use of the instructional materials, that includes the subject-matter referred to in subsection (1), or

(b) to remain in the classroom or place without taking part in the instruction, course of study or educational program or using the instructional materials.

(3) This section does not apply to incidental or indirect references to religion, religious themes or human sexuality in a course of study, educational program, instruction or exercises or in the use of instructional materials.

Although exemption from religious practices and instruction carried out in schools has been historically accepted in Canada, opting out provisions have been questioned for not attending to the larger interests of children's emotional security and feeling of belonging (Clarke, 2010). Additionally, Clarke (2013) highlights that these exemptions are not always regarded as rights. Court decisions in Quebec denying exemption requests from a mandatory provincial program on Ethics and Religious Culture implemented in 2008 have affirmed that incorporating values of plurality and tolerance using curricular speech of a non-indoctrinating nature does not conflict with parents' freedom of religion.<sup>28</sup> Similarly, a recent case in Ontario deemed reasonable a school board decision that denied a parental request for advance notification and permission to withdraw his children from several curriculum areas claimed to conflict with his religious beliefs.<sup>29</sup> Far from rebuffing the primacy of parents in children's education, these decisions also take into consideration broader social values and signal at the protection of the interests of children as fully distinct persons.

Beyond tensions with parental views, the professional aspect of the teacher's role crosses another distinct set of normative expectations related to the position of teachers as job holders, employed by a school board, under a certain provincial governance structure. As such, teachers voicing criticism of official education policy and management, in their capacity of knowledgeable practitioners of the education field, might trigger conflicts over freedom of speech. Piddocke et al. (1997, p. 223)

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<sup>28</sup> S.L. v. Commission scolaire des Chênes, [2012] 1 SCR 235, 2012 SCC 7 (CanLII), <http://canlii.ca/t/fq4b5>, retrieved on 2017-05-06; Québec (Procureur général) c. Loyola High School, 2012 QCCA 2139 (CanLII), <http://canlii.ca/t/g9014>, retrieved on 2017-05-06.

<sup>29</sup> E.T. v Hamilton-Wentworth District School Board, 2016 ONSC 7313 (CanLII), <http://canlii.ca/t/gvrl0>, retrieved on 2017-05-06.

say that “[w]hile 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.’”

Teachers’ unions or associations play an important role in this respect.<sup>30</sup> 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.” Alberta’s Teaching Profession Act, for instance, deals with this mandate explicitly, including among the objectives of the provincial teacher association:

4(a) to advance and promote the cause of education in Alberta;

(c) to arouse and increase public interest in the importance of education and public knowledge of the aims of education, financial support for education, and other education matters;

Similar wording is found in Newfoundland and Labrador Teachers’

Association Act:

4. The objects of the association are:

(a) to promote the cause of education in the province by

(i) affording to educational authorities, teachers and the public in general the benefits of the collective experience and advice of teachers on practical educational matters.

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<sup>30</sup> Public school teachers are eligible for membership in the professional organization of their respective province or territory. Membership is compulsory in Alberta, Saskatchewan, Ontario and New Brunswick, and automatic in the remaining provinces except British Columbia, where membership in the provincial federation is available through membership in a local teachers’ association (Canadian Teachers’ Federation, 2017).



The broad normative ideas on the role of teachers – as role models, transmitters of core Canadian values, and professionals – reflect on the decisions Canadian courts have taken in concrete disputes over the scope of teachers' freedom of expression.

## **Chapter 4**

### **Demarcating Boundaries in Practice: Selected Canadian Case Law**

Since the enactment of the Charter, several conflicts over teachers' freedom of expression have been brought to judicial review or arbitration. Some have been settled at administrative boards, tribunals and lower courts at the provincial level, while others have reached superior provincial courts or the SCC. As part of the common law tradition, court decisions constitute a major and dynamic source of law in Canada, as they build upon Charter principles, codified legislation and previous cases to set new understandings and interpretations of law.

The cases discussed in this section have been selected for their significance and visibility in four dimensions related to the normative expectations placed on teachers in the Canadian context: 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.

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

Can an educator ever escape his/her role as a teacher? This is the key issue to be tackled in addressing if and to what extent teachers' freedom of expression outside of the classroom and the school setting can be justifiably curtailed. 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 – BCTF*,<sup>31</sup> a case decided in 1986, the SCC embraced a very broad interpretation of the scope of a teacher's professional identity. In this case, the court dealt with an appeal brought forth by Dian Cromer, a middle school teacher who faced a disciplinary charge at her professional association – the BCTF – for having made derogatory comments about a fellow teacher during a heated debate of a Parents' Advisory Committee meeting. One of the rules of conduct of the teaching profession included in the BCTF Code of Ethics required that criticism on the performance or related duties of a colleague be directly conveyed to that colleague prior to informing appropriate officials – and only after informing the colleague of one's intention to take the issue forward. Cromer argued, however, that she was speaking as a parent in the meeting and, as such, the disciplinary charge would constitute an infringement of her freedom of speech, as inscribed in section 2(b) of the Charter.

As the court dismissed Cromer's appeal and confirmed the BCTF charge, it stated that teachers do not get to "choose which hat they will wear on what occasion."<sup>32</sup> This judicial 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, social expectations and statutory duties.

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<sup>31</sup> *Re Cromer and British Columbia Teachers' Federation*, 1986 CanLII 143 (BC CA), <http://canlii.ca/t/1p6ph>, retrieved on 2017-05-10.

<sup>32</sup> *Idem*, p. 29.

Another emblematic decision regarding boundaries for teachers' freedom of expression emerged from the 1987 ruling on *Shewan v. Board of School Trustees of School District n. 34 – Abbotsford*.<sup>33</sup> Although this case did not deal with Charter claims, it built the understanding that teachers' off-duty conduct, as per their unique position of trust, confidence and responsibility in society, might be penalized if it is regarded to generate loss of confidence or respect for the teacher and the public school system, or to result in controversy within the school and the community that disrupts educational delivery.

John and Ilze Shewan were a married couple working as schoolteachers in Abbotsford, British Columbia, and were disciplined by the school board for having engaged in off-duty conduct found to contradict the community's moral standards. Both were highly regarded professionals, but ended up suspended after they had a topless picture of Ilze, taken by John, published by a men's magazine. The couple appealed the suspension, claiming their behaviour could not be classified as professional misconduct. Although the BC Court of Appeal shortened the initial suspension penalty, it sustained that their conduct bore an adverse effect on the education system to which they, as teachers, owed a duty to act responsibly. In the ruling, the court 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.

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<sup>33</sup> *Shewan v. Board of School Trustees of School District #34 (Abbotsford)*, 1987 CanLII 159 (BC CA), <http://canlii.ca/t/1p6pq>, retrieved on 2017-05-10.

Three decades later, Mackenzie (2016) wondered if *Shewan* would have the same result had it happened nowadays, considering the evolution of social norms on what is “inappropriate” behaviour. Although the “what if” question cannot be answered categorically, she recalls that the courts did not focus on any alleged obscenity attached to the picture, but rather on the disruptive effects of its publication upon the educational system. This context-based judgement, the author alerts, creates a precedent for deciding on an array of expressions carried on by teachers today in their online private lives.

#### **4.2 Confronting Social Values: Areas of Interdicted Speech**

The issue of teachers' off-duty conduct moved a step further when linked to discriminatory 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).

The 1996 ruling in *Ross v. New Brunswick School District n. 15*<sup>34</sup> became a landmark in this regard. Malcolm Ross was an elementary teacher who publicly displayed anti-Semitic beliefs in writings, statements, publications, and interviews for many years. A Jewish parent from his district, but whose children did not attend Ross's school, filed a complaint to the provincial Human Rights Commission

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<sup>34</sup> *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825, 1996 CanLII 237 (SCC), <http://canlii.ca/t/1fbr>, retrieved on 2017-05-10.

claiming that the school board, by keeping Ross employed as a teacher, showed endorsement of his statements and engaged in discrimination against minority students in general, and this parent's family in particular. A Board of Inquiry concluded that Ross's off-duty comments were discriminatory and derogatory of the Jewish faith and beliefs. It determined that the school district should: (a) place Ross on an unpaid leave of absence for 18 months; (b) move him to a non-teaching position, if one became available during that period; (c) terminate his contract at the end of the leave if no such position could be secured; and (d) terminate his contract immediately if he published, wrote or sold anti-Semitic materials during the leave of absence or during his employment in a non-teaching position.

Ross appealed the decision on the basis of his Charter freedoms of religion and expression. The case went all the way up to the SCC, which confirmed the initial understanding that Ross's conduct amounted to discrimination and should not be accepted by the school board. Even in the absence of direct evidence of discriminatory attitudes in Ross's professional practice, the ruling presumed that his comments created a "poisoned school environment," instead of the tolerant and impartial space of exchange of ideas that schools are supposed to be, where everyone should feel equally free to participate. Framing teachers as the transmitters of the values, beliefs and knowledge that comprise the educational message, in *Ross* the SCC sustained that educators should expect to be perceived as upholding this message inside and outside of the classroom.

The court conceded that the sanctions initially imposed indeed infringed on Ross's individual freedoms. Nevertheless, this infringement –with the exception of the penalty established in (d) – would be covered under the reasonable limits clause. Applying the *Oakes* test to *Ross*, the SCC found that: remedying discrimination that

had poisoned the school environment was a sufficiently relevant objective to override a constitutional freedom; the discipline measure adopted against Ross was 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 (*Ross v. New Brunswick School District No. 15*, [1996], pp. 29-32). However, the court understood that firing Ross for anti-Semitic comments during his leave of absence or during a non-teaching appointment, as determined in (d), extrapolated the district's jurisdiction and, in contrast to the other sanctions, could not be sustained. It amounted to a "gag order" that would restrain Ross's freedom without the necessary link to his teacher position (Dickinson, 2005).

In 2004, based on the reasoning developed in *Ross*, the BC Supreme Court upheld a professional misconduct sanction imposed by the teaching regulatory body over Chris Kempling, a high school teacher and counsellor who published personal discriminatory and derogatory views on homosexuality in a local newspaper.<sup>35</sup> Again, the basis of the argument was harm – even if only inferred – to the integrity of the school system and to the access of all students to a tolerant and discrimination-free environment. Clarke & MacDougall (2004) highlight that the particular vulnerability of LGBTQ students reinforces the importance of this decision, as it supported the need for public protection in the assurance of this group's equality rights.

Similar arguments were used by an arbitration board in Ontario dealing with a grievance on just cause dismissal of Paul Fromm, a teacher fired in 1997 for continued racist public statements and engagement in white supremacy movements in

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<sup>35</sup> *Kempling v. The British Columbia College of Teachers*, 2004 BCSC 133 (CanLII), <http://canlii.ca/t/1gbvq>, retrieved on 2017-05-10.

his off-duty time (Dickinson, 2003).<sup>36</sup> The violation of the teacher's freedom of expression was confirmed, but it was placed within the reasonable limits clause, for the discriminatory and racist content it displayed. On the same grounds Fromm's teaching license ended up revoked by Ontario's College of Teachers ten years after his dismissal.<sup>37</sup>

The bottom line of these decisions rests on the link between the accountability of the public school system and the trust reposed on the school board, who is the teacher's employer and who the teacher represents at the school frontlines. If the core values that the public education system is expected not only to adhere to but also 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, might intertwine with issues of academic freedom and curricular speech. A notorious earlier case is *R. v Keegstra* (1990).<sup>38</sup> James Keegstra was a social studies teacher in grades 9 and 12 in Eckville, a small town in Alberta. His teachings reflected spurious notions of history, including the alleged existence of an ancient and nefarious "Jewish conspiracy" and denial of the Holocaust. Besides espousing anti-Semitic views, Keegstra's teachings also showed prejudice against Roman Catholics. Not only did he

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<sup>36</sup> Re Peel Board of Education and Ontario Secondary School Teachers' Federation. (2002), 105 L.A.C. (4th) 15 (Ont. Arb. Bd.), as cited by Dickinson (2003).

<sup>37</sup> Discipline Committee, Ontario College of Teachers and Frederick Paul Fromm (2007), <https://www.oct.ca/ShowDocument.sample?documentType=Decision&id=196&lang=E>, retrieved on 2017-05-08.

<sup>38</sup> *R. v. Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC), <<http://canlii.ca/t/1fsr1>>, retrieved on 2017-05-10.



reward students for repeating his particular views on assignments and exams, but also he did not tolerate dissent on the controversial historical depictions he presented as factual accounts (Pidcocke et al., 1997, p. 162-165). He endured in his teachings throughout the 1970s, despite complaints presented by parents and the withdrawal of some Catholic children from his school. In that same period, he was twice elected to the town council and in 1980 he was acclaimed mayor – which seems to suggest he enjoyed a supportive majoritarian community environment.

It was only in the early 1980s that the school principal and the board took to attending to the complaints on Keegstra's teachings. After a due process of investigation, hearings and appeals, which included the board's admonishments against a teaching approach that departed from Alberta's curriculum and presented inaccurate discriminatory theories as facts, Keegstra's contract was terminated in 1983. The news on his dismissal gained national visibility and he lost the town mayoralty contest late in that year (Pidcocke et al., 1997).

He subsequently had his teaching license suspended and, in 1985, faced a criminal trial for the public "wilful promotion of hatred" against an identifiable group.<sup>39</sup> After a successful appeal, which quashed the initial criminal conviction and judged the relevant section of the Criminal Code unconstitutional for violating Keegstra's freedom of expression and presumption of innocence, the case found its way to the SCC. Even if by a narrow margin, in 1990 the majority in the SCC upheld the hate speech provisions of the Criminal Code as a constitutionally valid and reasonable limit to freedom of expression in a free and democratic society, according to the Oakes test. As such, Keegstra's charge was found to be in violation of section

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<sup>39</sup> Section 319 (2) of the Criminal Code, R.S.C. (1985). <http://laws-lois.justice.gc.ca/eng/acts/c-46/section-319.html>, retrieved on 2017-04-27.

2(b), but this infringement was considered duly covered and justified by section 1 of the Charter.

Piddocke et al. (1997) stress that Keegstra was not fired from his teaching position because of discriminatory speech or the voicing of controversial views denoting ignorance of history –“alternative facts,” as we might call them today. Rather, his dismissal was based on failure to comply with the school board’s directives to follow Alberta’s social studies curriculum and treat his personal historical perspective as “theory,” not “facts.” Also, for not admitting dissent, he could be regarded as an indoctrinator, who left no room to be rationally contested and proven wrong (Piddocke et al., 1997).

In fact, freedom of expression was not technically at issue in Keegstra’s dismissal, nor was his criminal trial concerned with the educational setting. The trial focused on his individual freedom of expression *per se*, regardless of his professional activity. Nevertheless, if Keegstra’s freedom of expression had been at issue in his dismissal from teaching, the final picture would probably be the same: section 1 of the Charter 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).

#### **4.3 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 Canadian classrooms? 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.

A provincial court decision in 2002, in *Morin v. Prince Edward Island School District n. 3*,<sup>40</sup> took a big stride in affirming Charter protection of the value of academic freedom in schools. In 1988, Richard Morin, an untenured grade 9 teacher in Prince Edward Island, showed in class a documentary dealing with the influence of Christian fundamentalism on American right-wing politics.<sup>41</sup> The film, part of a project carried out by Morin on the diverse meanings of religion, upset some students and parents. After complaints to the school administration, the principal banned the video and the continuation of the project.

Subsequent administrative appeals found that the video fit the prescribed provincial curriculum and was age-appropriate, but that the project lacked sufficient preparation and consideration of community values. The principal's decision was upheld and Morin was put on a temporary paid leave. He could not secure a position with the school board in the following year and embarked on a "legal odyssey" that included claims on the infringement of his section 2(b) freedom (Waddington, 2011, p. 61).

Morin's first trial only took place a decade later. It dismissed Morin's 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. Rather, it constituted a supervisory prerogative geared at preserving an "effective learning environment" that

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<sup>40</sup> *Morin v. Regional Administration Unit #3 (P.E.I.)*, 2002 PESCAD 9 (CanLII), <http://canlii.ca/t/4tkj>, retrieved on 2017-05-10.

<sup>41</sup> *Thy Kingdom Come, Thy Will Be Done*, available at <https://www.youtube.com/watch?v=ChjmviRYkQg> (accessed on 2017-05-05).

would ensure the achievement of curricular aims.<sup>42</sup> Morin took the case to Prince Edward Island Court of Appeal, where a majority decision overturned the initial verdict and awarded him 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. For the majority, however, the issue at stake related to the “freedom of teachers to carry out their mandate in a free and democratic society without fear that a whiff of controversy could spell the end of their careers (...).”<sup>43</sup> The majority affirmed the value of academic freedom as protected speech under section 2(b), making a point on the importance of debate, exposure to different perspectives and points of view for the development of critical thinking in education.

Nevertheless, the case still left important issues unaddressed. First, it paid scarce attention to students’ rights, as the recipients of the expressive content (Clarke, 2013). The 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.”<sup>44</sup> 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.

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<sup>42</sup> Morin v. Board of School Trustees of Regional Administrative Unit #3, 1999 CanLII 4418 (PE SCTD), <http://canlii.ca/t/1fnqh>, retrieved on 2017-05-05.

<sup>43</sup> Morin v. Regional Administration Unit #3 (P.E.I.), 2002, p. 35.

<sup>44</sup> *Idem*, p. 27.

This utilitarian perspective can be further complemented with a self-regarding argument for ensuring teachers' freedom of expression in the classroom as an essential requirement to the mandate of educators and as 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 judgment 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, p. 123) 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,” it can only be realized through freedom of speech. In this sense, freedom of speech and academic freedom can be seen as complimentary, rather than simply distinct notions, which act together to support the combination of trust and responsibility as the basis of the teaching profession.

A second gap in *Morin* refers to the relationship between academic freedom and the reasonable limits clause (Waddington, 2011). The courts did not discuss if the violation of Morin's freedom of speech would be covered by section 1 of the Charter because the school board never raised this claim. Hence an Oakes test application was not pursued. In fact, the decision refuted the absolute power of principals over teachers' speech – as argued by the board – but the requirement that teachers follow the “rules and regulation, curriculum and programming guidelines”<sup>45</sup> within the

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<sup>45</sup> Morin v. Regional Administration Unit #3 (P.E.I.), 2002, p. 28.

structure of the school system was reiterated. As a result, if the final outcome of the case gave no room for arbitrary censorship in the classroom or blanket prohibitions of controversial topics – safe from the interdicted areas of discrimination and hate speech – there remains space for the enforcement of restrictions that fall within reasonable limits.<sup>46</sup> But these limitations, to be valid, must be prescribed by law – in a broad sense, which includes official policy – and must comply with the four criteria set forth in the Oakes test: relate to an objective that is sufficiently important to override Charter freedoms; employ restrictions that have a rational connection with the goal; result in a minimal impairment of the right; and demonstrate overall balance and proportionality.

Another important case which also took place in the beginning of the 21<sup>st</sup> century entailed a decision by the SCC on the use of materials in early elementary grades depicting diverse models of families.<sup>47</sup> In the 1996-97 school year, James Chamberlain, a kindergarten teacher in the Metro Vancouver area, sought approval to use three picture books depicting families with same-sex parents as learning resources in the family life component of the K-1 provincial curriculum. The books<sup>48</sup> were part of a resource list compiled by the provincial association of gay and lesbian educators (Gay and Lesbian Educators of BC – GALE) as resources to promote tolerance and counter homophobia in schools. The school board passed a resolution preventing

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<sup>46</sup> The story might have ended differently had the Morin case happened in present day Alberta, for instance, where legislation explicitly determines advance notice for parents when teachers deal with religious topics in the classroom.

<sup>47</sup> *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, 2002 SCC 86 (CanLII), <http://canlii.ca/t/1g2w5>, retrieved on 2017-05-08.

<sup>48</sup> *Asha's Mums*, by Rosamund Elwin and Michele Paulse; *Belinda's Bouquet*, by Leslea Newman; and *One Dad, Two Dads, Brown Dad, Blue Dads*, by Johnny Valentine.

resources from gay and lesbian groups from being used in the district and ended up denying Chamberlain's request.

Chamberlain, himself a GALE activist, took the issue to court, together with another teacher activist, a school parent, a student and one of the books' author as joint petitioners.<sup>49</sup> In the initial trial, the board resolution was quashed, but the provincial Court of Appeal overturned the decision. The case reached the SCC, where a majority ruling in 2002 considered the school board's decision unreasonable and reinstated the initial result.

Although the petitioners' claims were the infringement of sections 2(b) and 15 of the Charter, the focus of judicial review fell on the conformity of the board's decision with the provincial School Act. In particular, the decision invoked the Act's preamble, which emphasizes the goals of a democratic society and the inclusive scope of the education system in British Columbia, and section 76, which maintains that strictly secular and non-sectarian principles ought to guide the conduct of public schools in the province, with the aim of inculcating "the highest morality," but teaching "no religious dogma or creed." Nevertheless, the Charter values of religious freedom, pluralism and equality lay in the background of the SCC decision (Clarke, 2013).

A concern with the morality of homosexual relationships lingered on the board's reasoning for banning the books. The board members argued the books' approach would clash with the religious view of most parents in the district. Also, they considered the material inappropriate, as it would expose young children to ideas

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<sup>49</sup> Smith (2004) gives an interesting account of *Chamberlain* as part of LGBTQ social movements' efforts to challenge heteronormativity in Canadian society. The fact that multiple stakeholders within the education system petitioned the case showcases an interesting approach to coalition building in this respect.

contradicting parents' beliefs and cause "cognitive dissonance." Likewise, they sustained the material was unnecessary to achieve curricular aims.

The majority at the SCC, however, concluded the board's decision was discriminatory of same-sex families and contrary to provincial legislation reflecting Charter values. In reality, the ruling underlined the importance of cognitive dissonance in education. Given that diversity is a fact in a pluralistic and democratic society, and different family norms and types exist, it argued that exposure to difference is necessary to teaching tolerance and respect. This perspective would not contradict 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."<sup>50</sup> As for the young age of the children concerned, the SCC put it simply: "Tolerance is always age-appropriate."<sup>51</sup>

Mackay (2009) notes that this decision reinforced the view – previously confirmed by case law – that schools should be free of discrimination, but took it to a higher level, by affirming the educational value that comes with cognitive dissonance. In contrast with the restriction on discriminatory speech, it seems that the decision in *Chamberlain* expands the frontiers for teachers' freedom of expression, as it relates to teaching of 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," according to the SCC. Both the state and children would agree to that, pursuant to Clarke's (2013) trilogy rationale.

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<sup>50</sup> *Chamberlain v. Surrey School District No. 36*, [2002], p. 747.

<sup>51</sup> *Idem*, p. 748.



In fact, at the core of the dissent in *Chamberlain* was the degree of control due to the other vortex of the triangle (parents) over instruction in public secular education. The primacy of parental views overweighed the accommodation of diversity in the minority's reasoning. It overlooked both the state's interests in the promotion of tolerance and children's interests in the advancement of minimal autonomy, as subjects with separate identities from their parents (Clarke, 2013).

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, contemporary school culture might contribute to a good deal of self-censorship as teachers try to play "safe" in their jobs and "learn what you 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.

#### **4.4 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 Canadian 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?

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 & Trask (2013) analyse how these cases have promoted "a shifting landscape" in the last 10-15 years in relation to teachers' right to express political views in the school setting, including critical positions on education policies and on their employer, government.

In 2002, teachers in British Columbia engaged in one-day work stoppages and political rallies as a reaction to government unilaterally enacted legislation that affected their collective agreement.<sup>52</sup> The Labour Relations Board designated these stoppages as strikes, which, according to the Labour Relations Code, were prohibited during the term of a collective agreement. The BCTF challenged this designation and claimed that those particular stoppages were not collective bargaining strikes, but rather political protests, which would be covered under section 2(b), (c) and (d) of the Charter. BC's Court of Appeal ruling<sup>53</sup> on this case upheld the strike definition of these mid-contract work stoppages, even if their purpose was politically oriented. As such, the court considered that, although their prohibition did not infringe section 2(c) and (d), it did infringe the guarantee of freedom of expression for teachers, as stated in section 2(b). Nevertheless, through the application of the Oakes test, the court came to the following conclusion:

The object of the prohibition is the prevention of disruption of services or production. That objective is pressing and substantial; the mid-contract prohibition is rationally connected to that objective. The prohibition extends a limit that is non-controversial in a collective bargaining context to a political protest context. Means of free expression other than through work stoppages remain unimpaired. The mid-

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<sup>52</sup> Eventually, the provincial teachers' union challenged the very constitutionality of this legislation and obtained a landmark victory in late 2016 at the SCC.

<sup>53</sup> *British Columbia Teachers' Federation v. British Columbia Public School Employers' Assn.*, 2009 BCCA 39 (CanLII), <http://canlii.ca/t/22bx7>, retrieved on 2017-05-10.

contract prohibition meets the standard of minimal impairment and is proportionate to the balance between free expression and harmful impact.<sup>54</sup>

Therefore, the infringement of teachers' freedom of expression in this case was found to be justified under section 1 of the Charter.<sup>55</sup>

Also in BC, another decision took a step further in clarifying the scope for teachers' political expression. In 2004, an arbitration confirmed teachers' rights to post critical material about education policy on school bulletin boards, discuss the matter in parent-teacher meetings and send critical reports to parents regarding budget cuts and its consequences on education provision.<sup>56</sup> 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 section 1. The BC Public School Employers' Association (BCPSEA) appealed the arbitrator decision, but the BC 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."<sup>57</sup> In this view, when teachers espouse a certain political position, they assume advocacy roles that would compromise their neutrality. Additionally, teachers' peculiar responsibility towards vulnerable underage

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<sup>54</sup> *Idem*, p. 34.

<sup>55</sup> The ruling also dealt with a similar political protest carried out by the Hospital Employees' Union. A fundamental issue addressed in the decision on both cases was the adherence to an "effects based definition" of strikes, rather than a "purpose based" one, which could open up room for vagueness and discretionary standards in the distinction between collective bargaining and protest motivated disruptions of public service provision.

<sup>56</sup> British Columbia Public School Employers' Association and British Columbia Teachers' Federation (2004), 129 L.A.C. (4th) 245 (Arbitrator Munroe); upheld 2005 BCCA 393 (British Columbia Court of Appeal), as cited by Kindred, 2009.

<sup>57</sup> British Columbia Public School Employers' Association v. British Columbia Teachers' Federation, 2005 BCCA 393 (CanLII), <http://canlii.ca/t/119lt>, retrieved on 2017-05-10, p. 37.

citizens would add to the need of preventing political biases in children's learning environment (Kindred, 2009).

Several other litigation cases on this issue have 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, an elementary school teacher wearing the armbands had been questioned by students on her reasons for protesting and disclosed her negative views of the tests.<sup>58</sup> The arbitrator found that in this case 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 impacted the delivery of the testing policy, affecting 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 of the Charter.

More recently, a 2013 BC 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. The case concerned a BCTF campaign that addressed overcrowded classes, school closures, and underfunding of special education programs in posters, pamphlets and buttons.<sup>59</sup> Although the

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<sup>58</sup> British Columbia School Employers Association, School district No. 73 v. British Columbia Teachers Federation, 2011 CanLII 22936 (BC LA), <http://canlii.ca/t/fk11h>, retrieved on 2017-06-12.

<sup>59</sup> British Columbia Teachers' Federation v. British Columbia Public School Employers' Association, 2013 BCCA 241 (CanLII), <http://canlii.ca/t/fxhj4>, retrieved on 2017-06-13.

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). 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 paper – might still come to be disputed in practice.

## Chapter 5

### Discussion

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 demarcated 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.

This assumption shows a stark contrast with the standpoint embraced by *School without Party* in Brazil. The discourse and practices advocated by the movement transpire a generalized sense of distrust in educators, which extends to the broad education system itself, including textbooks and the education bureaucracy. Embracing surveillance and scare tactics as its *modus operandi*, *School without Party* seems to lack the presumptions of legitimacy and professionalism that suppose teachers will usually "make good decisions, act responsibly, and do the right thing" (Clarke & Trask, 2014, p. 120).

This permanent sense of distrust has a potential negative effect on daily routines at school, since it fuels a hostile environment where teachers are intimidated and students are encouraged to embrace denunciation as the standard mode for

conflict resolution. It also curtails engagement in productive dialogue – the very foundation of the whole educational endeavour – in the school community, leaving important questions unaddressed. If, in a specific situation, parents or students think teachers err on the side of indoctrination, act in a biased way, present imbalanced views, and prevent dissent and debate – as some of the examples portrayed in the movement’s website suggest – would anonymous denunciations and legal threats constitute the best course of action? Would those epitomize the most reasonable ways to promote teacher accountability? Would an open dialogue, involving the school administration and, if need be, the local educational authorities, not make up a preferable alternative? How does this confrontational perspective fit with the goal of integral development of the person, one of the tenets of the Brazilian Constitution in respect to the aims of education? As the Canadian experience shows, litigation is a costly and time-consuming resort, which might place a heavy burden on those directly involved. Proposals that trivialize it should be regarded with due caution.

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, such as what 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. Would general claims of leftist proselytism and indoctrination, as *School without Party* purports, pass the evidence

test? Would confirmation of a prevalent trend of indoctrination leading to the enactment of legislation require more than editorialized news articles and anecdotal evidence posted in a website? In fact, this has been one of the points surmised by the United Nations human rights' rapporteurs, as they asked for further evidence that would justify the need for passing legislation inspired by *School without Party's* ideas.

Whereas Canadian courts have clearly established that discrimination and hate speech constitute harmful expression interdicted to teachers, cognitive dissonance falls into a different category. It 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.

This is another marked contrast with the perspective of *School without Party*. The movement argues for the absolute power of parents in relation to moral education, particularly in aspects concerning human sexuality. Does this demand conform to the constitutional precept of education as a duty shared between the state and the family, in collaboration with society? Or does it mistakenly weight too



heavily a single stakeholder – in this case, parents – in the complex web of players interacting in the educational arena?

Moreover, behind the veil of parental authority, *School without Party* cloaks an alarming anti-gender and LGBTQ-phobic view. It equates “gender” to biological sex; restricts identity to binary biological difference; and challenges the concept of “gender” itself as an analytical category or social construct. Rather than embracing the perspective of education as a window – or even as a mirror of parental values – the movement seems to conform to a metaphor of education as a wall, which would separate from the eyes of students all that they are not supposed to see and discuss. As such, it intends to have schools setting aside any “moral-related content” (meaning sexuality-related), which, in the movement’s view, should be stripped of the school curriculum altogether so as to be addressed only in an elective curricular component (Escola sem Partido, 2017). Without mentioning the harm this approach could cause to LGBTQ students themselves and to students raised by same-sex parents, could that perspective not endanger the crucial importance of sex education as a health-related subject for children and teenagers? Besides contradicting the broad notions of inclusiveness, tolerance and the accommodation of vulnerable minorities – pillars of contemporary democracies – the negative effects of such an approach could resonate in public health issues related to teenage pregnancy, the spread of sexually transmitted diseases, and youth mental health.

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>60</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.

This thin perception on the work of educators seems to broadly correspond to the view espoused by the advocates of *School without Party* in Brazil. The normative claim underlying the movement’s approach is one of teaching as a technical activity of knowledge transmission, which can be purposely detached from any morality orientation or political content. Teacher neutrality is the key term permeating this perspective.

The idea of neutrality is appealing. It has been ventilated in some of the Canadian case law discussed, as the courts stressed the need of schools remaining

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<sup>60</sup> In particular, *Mayer v. Monroe County Community School Corp.* (2007) and *Evans-Marshall v. Board of Educ. of Tipp City Exempted Village School Dist.*, where appellate courts followed the understanding set by the United States Supreme Court in *Garcetti v. Ceballos* (2006) (Clarke & Trask, 2014).

impartial spaces for the exchange of ideas, where teachers refrain from creating political battlegrounds and acknowledge the vulnerability of a younger captive audience. Neutrality is also heavily implied in the wording used by *School without Party* around the teacher duties proposed to be included in legislation and classroom posters.

In this respect, 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 – as the movement aspires. But *School without Party*'s list goes further and some of the duties the movement proposes can be somewhat more difficult to go along with. For instance, how can the generic claim that teachers refrain from promoting their own opinions while teaching be assessed? Why should teachers not encourage students to participate in civic movements that include public demonstrations? Who will decide what are the main competing versions, theories, opinions and perspectives that have to be addressed when political, sociocultural or economic issues are discussed in the classroom? Indeed, the claim for balanced approaches in teaching might be welcomed as a theoretical defence of pluralism. Nevertheless, the actual logic of action adopted by *School without Party* on its advocacy seems to be detached from that notion.

Hence, the neutrality ideal advanced by the movement must be taken carefully. As argued in the injunction that suspended the first state law inspired by *School without Party*, absolute neutrality might be at best a utopia (Barroso, 2017). As human beings, teachers are situated subjects, whose worldviews 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 give space for respectful dialogue, debate and dissent in the classroom. Instead of a generic quest for neutrality, which might have a chilling effect on almost any attempt to address social phenomena or philosophical issues in the classroom, abiding attentively to the principles of freedom to teach and learn and pluralism of ideas and pedagogical conceptions, as embedded in the Brazilian Constitution, and attending diligently to the goal of preventing harm to students, as prescribed by the Canadian courts, seem to configure more promising ways to promote ethical and responsible teaching without fostering reproachful teacher speech or promoting excessive curtailment of teachers' freedom of expression.

At worst, the discourse of neutrality might disguise a dogmatic view that places the label of indoctrination on everything that contradicts its own underlying rationale, in an attempt to suppress pluralism (Barroso, 2017). *School without Party* targets one side of the political spectrum – what it broadly identifies with “the left” – but it fails to acknowledge bias emerging from opposing ideologies and worldviews. In the movement's discourse, indoctrination “from the right”, as its website puts it, would be a possibility with rare occurrence: The “systematic and organized” efforts of school indoctrination in Brazil, according to the movement, would constitute an exclusive practice of “the left” (Escola sem Partido, 2017).

Indeed, *School without Party* seems to fail in recognizing its own biases and ideologies. The highly polarized domestic context in which the movement's visibility was enhanced should be noted in this respect. Religious groups, conservative

politicians, and avid advocates of the free market have fuelled *School without Party*'s voice in the past few years. Despite the movement's claims, it is hard to argue that its champions embrace a purely neutral stance.

## **Chapter 6**

### **Conclusion**

In this paper, freedom of expression for Canadian public schoolteachers in non-denominational schools has been explored as a frame to reflect upon a policy debate in Brazil, where the *School without Party* movement accuses teachers of indoctrination and campaigns for legislation to curb this alleged practice. The analysis built upon a discussion of legal precepts, academic literature and case law.

The scope for teachers' freedom of expression in Canada reflects principles enshrined in the Canadian Charter of Rights and Freedoms, as well as provincial legislation and normative expectations concerning teachers' role and position in society. The Charter spells out the fundamental freedoms ensured in the country and provides a mechanism to weigh conflicting rights through the application of heuristic tools embedded in legal tests. Provincial statutes unpack teacher duties and general principles regulating educational provision. Underlying the legal codes, normative expectations on the teaching profession link the ideas of trust and professional responsibility, providing guideposts for the courts when called to decide upon boundaries for teachers' expression in practice.

The review of selected case law brought to light four different dimensions of the issue in the Canadian context. The first refers to the extended sites of control that accompany teachers' professional identity, reaching out of the school gates. As such, teachers, regarded as role models, might face restrictions on their freedom of speech even when they are off-duty, carrying out their private lives.

The second dimension of analysis focuses on interdicted areas of expression for teachers, as transmitters of social values. Expression that discriminates against specific groups or promotes hate speech, for instance, contradicts core Canadian

values and cannot be entertained by public school teachers. When connected to the first dimension, this implies boundaries on public engagement in this kind of expression even outside of the school context.

The third dimension deals with curricular speech and the space given to Canadian teachers to address controversial topics in the classroom. Somewhat connected to aspects of academic freedom, the cases discussed support the importance of instilling critical thinking, tolerance and respect through public education in pluralistic democracies. In this sense, the metaphor of education as a window on the wider world, rather than a mirror reflecting parental views, captures the benefits of cognitive dissonance as an educational value.

Finally, the fourth dimension directs attention to the possibility of teachers manifesting critical views on education policy and engaging in political advocacy in schools around their own professional field. Interweaved with labour law conflicts, the freedom for teachers to reproach their employer – government – in respect to educational policy has been dealt with by Canadian courts. A broadly unionized environment seems to play a major role in this respect, as teachers' professional associations have taken up the lead in this discussion. The requirements of non-partisanship, balanced political messages and avoidance of harm to students are the parameters used in the judicial review of these cases.

Country-specificities aside, the Canadian experience regarding teachers' freedom of expression shows remarkable contrasts with the standpoint adopted by *School without Party*. Whereas the first underscores the binomial trust/responsibility, the latter seems to adopt quite the opposite perspective.

Even though the debate on parameters and limits that are intrinsic to the teaching profession is an important one – and some of the examples exposed by

*School without Party* seem to reflect excesses that should be addressed in their own contexts – the generalized mistrust and intimidation tactics that appear to be operating at the heart of the movement's premises might do more harm than good, by fostering a confrontational school climate and causing a chilling effect on the discussion of complex social phenomena.

In addition, the movement denies the value of cognitive dissonance, placing parental views as the only ones children should be exposed to in relation to morality or sexuality. This perspective is particularly worrisome in regards to the accommodation of gender diversity and the promotion of an inclusive school environment.

The *School without Party* standpoint seems to subscribe to a thin conception of the teaching craft, one that restricts it to a mechanical transmission of knowledge. This perspective reflects the notion that teachers are merely hired mouths for delivering an official curricular message. It aspires to an ideal of teaching as a neutral impartment of academic content, removed from political values.

Neutrality, however, is a problematic concept. It assumes a disinterested detachment that is hardly achieved in the understanding of social phenomena. Moreover, it can be employed as a tool for supporting dogmatism and suppressing pluralism. The very claim of neutrality embraced by *School without Party* can be questioned in this respect, considering the ideological profile of the movement's advocates.

The debate on teachers' freedom of expression in Brazil is a good reminder of the continuously evolving disputes over the interpretation of teachers' rights. The trust/responsibility construct achieved in Canada finds support at the highest level of the country's legal framework, having the Charter of Rights and Freedoms as the



foundation upon which the ideal balance between competing rights in society can be ensured. Likewise, the Brazilian constitutional principles of freedom to teach and learn and pluralism of ideas and pedagogical conceptions should be the beacon guiding the discussion of teachers' freedom of expression in Brazil.

Neither class monarchs nor hired mouths: Brazilian teachers should be trusted as responsible professionals able to exercise pedagogical discretion. For their part, teachers should respond to this trust accordingly, by exercising their professional activity with responsibility. If this broad expectation comes to be betrayed in context-specific situations, constructive dialogue, and not hostile intimidation or blanket prohibitions of topics, should be considered as the key conflict-resolution mechanism to be employed within the education system.

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