Dalhousie Journal of Legal Studies

Volume 4 Article 2

1-1-1995

Freedom of Expression and Public School Teachers

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FREEDOM OF EXPRESSION AND PUBLIC SCHOOL TEACHERS

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The freedom of expression which public school teachers exercise both inside and outside the classroom is confined within certain boundaries. This article explores issues, interests, and concerns which are relevant in defining these boundaries as reflected in the activities and comments of School Boards, the Community, parents, students, and teachers. The socialization of children is an important function of the education system, and is a function which is achieved through various "messages" communicated through curriculums. To maintain the effectiveness of "messages" inherent in the curriculum, the expression of public school teachers must be subject to some control. Ultimately, however, what also needs to be addressed is the legitimacy of current messages in relation to the goals of education and the composition of Canadian society.

La liberté d'expression qu'exercent les enseignantes et les enseignants des écoles publiques à l'intérieur et à l'extérieur de la salle de classe se confine dans certaines limites. Cet article examine des questions et des intérêts ayant rapport à la définition de ces limites en considérant les activités et les commentaires des commissions scolaires, de la communauté, des parents, des étudiants et des étudiantes, et des enseignants et des enseignantes. La socialisation des enfants est une fonction importante du système d'enseignement. Plusieurs «messages» communiqués par des programmes scolaires remplissent cette fonction. Pour assurer que les «messages» dans les programmes scolaires soient bien communiqués, il faut surveiller l'expression des enseignantes et des enseignants dans les écoles publiques. Cependant, en fin de compte, il faut adresser aussi la légitimité des messages actuels par rapport aux buts du système d'enseignement et par rapport à la composition de la société canadienne.

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> Not only are teachers expected to carry on their daily tasks within parameters determined by their employer but also they are expected to provide role models, personification of exemplary conduct, both in their professional and private lives, to the children they teach. Case law, statute law, board policy, and professional codes of ethics all reflect evidence of complex contractual obligations owed by the teacher to his employer, to the state, to parents, and to children.[1]

Any conception of freedom of expression in connection with public school teachers must recognize the complexity of teachers' relationship, not only with students, but also with parents, the community, and the school. Due to the influence teachers have over students, an influence which does not stop at the "schoolyard gates," the concept of freedom of expression assumes significant implications with regard to the teaching profession.

The interest parents and various groups have in education indicates that education is much more than simply repeating what is in a text; it is about communicating a whole range of values and assumptions regarded as inimical to our existence as Canadians. Education, in many ways, is a form of socialization in which values and ideologies essential to the survival of the status quo are upheld.

Freedom of expression is undoubtedly situated within a framework robust with very noble goals. In theory, freedom of expression would seem conducive to an educational atmosphere. In practice, however, the education system imposes restrictions on expression which are necessary to maintain its integrity as an institution to which parents entrust their children.

The curriculum is a powerful vehicle through which ideas are communicated. Within the classroom, teachers are expected to adhere to the prescribed curriculum. Balanced with this concept, is the idea of academic freedom.[2] A co-operative relationship between academic freedom and the curriculum is essential to attain the educational goals of truth and knowledge. An approach which under-

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[1] E. L. Herbert & M. A. Dynna, "Freedom of Expression Outside the Classroom" in W. F. Foster, *Education and Law: A Plea for Partnership* (Welland: Editions Soleil, 1992) at 59.

[2] "Academic freedom" refers to freedom of expression within the classroom. The terms are used interchangeably throughout the paper.

mines either will result in the perversion and frustration of these goals. Problematic to schools and teachers is achieving a correct balance which accommodates both of their interests.

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

This paper proposes to analyze the extent of teachers' freedom of expression within and outside the classroom. The parameters of this freedom will be considered in relation to the values and beliefs of "Canadians" as reflected in the education system. Additionally, the concepts of "medium" and "message" will be explored as a metaphor for teachers and the information/knowledge they impart to students. In a very real way, the perpetuation of values in society through the education system depends on the control school boards wield over both the medium and message.

THE CONCEPT OF FREEDOM OF EXPRESSION

While the scope of this paper does not extend to an analysis of freedom of expression as guaranteed under section 2(b) of the *Canadian Charter of Rights and Freedoms*,[3] various statutes and case law which examine and expand upon the essence of the concept provide a useful and critical starting point for the discussion in this paper.

The preamble of the *Canadian Bill of Rights*[4] outlines the principles and beliefs upon which Canadian society is founded:

> The Parliament of Canada, affirming that the Canadian Nation is founded upon principles that acknowledge the supremacy of God, the dignity and worth of the human person and the position of the family in a society of free men and free institutions;

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[3] Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[4] R.S.C., 1960, c. 44, as am. S.C. 1970–71–72, c. 38, s. 29; S.C. 1985, c. 26, s. 105; S.C. 1992, c. 1, s. 144.

> Affirming also that men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the rule of law;
>
> And being desirous of enshrining these principles and the human rights and fundamental freedoms derived from them . . . .

It is within this context that the *Canadian Bill of Rights* situates freedom of expression. Freedom of expression, as guaranteed in section 2(b) of the *Charter*, has been interpreted as drawing upon these principles. For example, in *Irwin Toy* the Court indicated that freedom of expression is intricately connected with: (1) a belief that seeking and attaining truth is an inherently good activity; (2) participation in social and political decision making is to be fostered and encouraged; and (3) diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey meaning and those to whom meaning is conveyed.[5]

Freedom of expression is restricted only by "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (*Charter*, section 1). The characteristics of a free and democratic society are numerous. In *R* v. *Oakes*[6] some of these more notable characteristics are described as including:

> respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[7]

Ultimately, in theory, freedom of expression is located within an intricate web of ideals and values which are inextricably connected with concepts of democracy, justice, equality and diversity.

WHAT CONSTITUTES EXPRESSION?

Irwin Toy established that expression has both a content and a form. Content essentially is the meaning which is conveyed, and

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[5] *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R 927 at 976.

[6] [1986] 1 S.C.R. 103.

[7] *Infra* note 46 at 136.

form is the way in which that meaning is conveyed. For example, activity is regarded as being expressive whether or not it intends to convey meaning. This is a rather all-encompassing idea of expression which begs the question of what is excluded from being expressive. The only exclusion Canadian courts have seemed to recognize is expression communicated in a violent form.

RESTRICTIONS ON FREEDOM OF EXPRESSION

In *R* v. *Keegstra*,[8] McLachlin J. indicates some of the pressing concerns which prompt society to limit expression:

> [F]reedom of expression must in certain circumstances give way to countervailing considerations. The question is always one of balance. Freedom of expression protects certain values which we consider fundamental—democracy, a vital, vibrant and creative culture, the dignity of the individual. At the same time, free expression may put other values at risk. It may harm reputations, incite acts of violence. It may be abused to undermine our fundamental governmental institutions and undercut racial and social harmony. The law may legitimately trench on freedom of expression where the value of free expression is outweighed by the risks engendered by allowing freedom of expression.[9]

Thus the freedom to express oneself is recognized as being limited by risks society will not reasonably tolerate. Activity which undermines the spirit and intent in which freedom of expression is entrenched will not benefit from its protection. Ultimately, freedom of expression should be understood as existing to further the values from which it was derived.

TEACHERS AND FREEDOM OF EXPRESSION IN THE CLASSROOM

The principles inherent within the concept of freedom of expression also inform the shape and character of the education system and its

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[8] [1990] 3 S.C.R. 697.
[9] *Ibid.* at 807.

goals. For example subsection 54(e) of the *Education Act*[10] states that among the duties of a teacher is to:

> encourage in the pupils by precept and example a respect for religion and the principles of Christian morality, for truth, justice, love of country, humanity, industry, temperance and all other virtues.

This general duty is constrained by other sections of the Act. For example, while subsection 5(m) of the Act empowers the minister to "prescribe courses of study and authorize textbooks and related material for use in the school," subsection 54(a) of the Act states that a teacher must "teach diligently the subjects and courses of study prescribed" by or under the Act or regulations which are assigned by the school board. The controlled regulation of subjects and materials for study indicate that education is more than just teaching the three Rs (i.e. reading, writing, arithmetic); it is about transmitting values which are integral to the survival of society as it exists.

Gordon suggests that the function of education is twofold.[11] While the system is designed to mold students into "good" and "productive" democratic citizens,

> parents, legislatures, and the courts have often viewed the system of public education as serving a second, "inculcative" function: to serve as media for transmitting the values, beliefs, and ideology of their community to the next generation.[12]

These functions may not be twofold as Gordon contends but rather part and parcel of each other. For example, being a "productive" member of society often requires that certain values, beliefs, and ideologies become internalized within an individual. Successful internalization is imperative for the continued existence of society in its present form. Thus various groups within society have a vested interest in ensuring that there is some continuity and homogeneity in the values and knowledge which our schools transmit.

The curriculum is designed to meet the objectives central to the perpetuation of present society. Certain dichotomies are manufac-

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[10] R.S.N.S. 1989, c. 136.

[11] R. M. Gordon, "Freedom of Expression and Values Inculcation in the Public School Curriculum" (1984) 13 J.L. & Edu. 523.

[12] *Supra* note 9 at 524.

tured into the curriculum, for example communism versus democracy, developed countries versus third world countries; savages versus civilized persons. All of these dichotomies center around society's conception of good (desirable) versus bad (undesirable). By looking at the duties assigned to a teacher in subsection 54(e),[13] various assumptions are apparent. For example, what are the antitheses of Christian morality, patriotism, or industry? What do abstract concepts of "truth" and "justice" really entail? They are concepts which derive meaning not in a void, but in a context of assumptions; in this case, in the context of Canadian society which believes in certain fundamental values like "freedom," and "democracy."

To be effective, education and knowledge must be contextualized. In schools, a great deal of this contextualization occurs at a subliminal level. This occurs when

a. schools play the national anthem and say the lord's prayer every morning;
b. we teach "standard" English grammar or literature;
c. we teach a version of history which begins when Europeans came to Canada;
d. we present geographically incorrect maps which "misrepresent" actual land sizes; and
e. we teach values and beliefs central to a commercial and a free market society which values property.

All of these things, it can be argued, constitute a continuous context for learning in which certain things are valued and other things devalued. It is within this context that students are taught to interpret the world around them. In this context, a version of truth gains the necessary universal agreement to attain the status of "fact." As noted by Perelman, a fact can lose its status when people begin to question its validity so that it descends from the starting point of argumentation to the conclusion of argumentation.[14] Society guards against this slippage by ensuring that "facts" which are connected to "truths" do not lose their status. The curriculum (which must be

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[13] *Supra* note 10.

[14] C. Perelman & L. Olbrechts-Tyteca, *The New Rhetoric* (London: University of Notre Dame Press, 1969) at 67–70.

understood to *include* the context in which "truths" are communicated) thus becomes a powerful tool.

Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher).

The right of school boards to impose some restrictions on the expression of teachers at first seems antithetical to the learning process—education, after all, is about knowledge and truth, and the free exchange of ideas which would objectively further these goals. In theory, the free exchange of ideas would seem to be central to the concept of learning. In practice, however, while freedom of expression is certainly encouraged within an educational environment, there must be limits to this freedom if the prescribed "message" is to be successfully imparted to students.

It is possible to conceive of how freedom of expression unfettered can undermine some of the goals and objectives of the education system. Thus freedom of expression is limited to defined parameters. Teachers are not permitted to transmit their own versions of truth, but rather are limited to presenting versions sanctioned by school boards and ministers of education. There are several good reasons for imposing some restrictions upon the freedom of expression of teachers, including:

a. the need for consistency in what is taught;
b. the utility of education as a means of socialization;
c. the need to ensure that educational objectives are not undermined by "marginal" ideologies.

However, School Boards need to demonstrate that the limitations placed on teachers' freedom of expression are reasonable if they are to be upheld. The benefits of restricting teachers' expression are readily noticeable in a case like *Keegstra* v. *Board of Education of Lacombe No. 14.*[15]

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[15] (1983), 25 Alta. L.R. (2d) 370 (Bd. Ref.).

FREEDOM OF EXPRESSION WITHIN THE CLASSROOM: THE *KEEGSTRA* CASE

Mr. Keegstra was a teacher of grades nine and twelve social studies in Alberta. His classes focused on the presentation of a marginalized version of history known as the "international Jewish conspiracy" theory. This theory was taught in lieu of the sanctioned curriculum advanced by the Education Department, which Mr. Keegstra dismissed as presenting a censored version of history.

Essentially, Keegstra taught his student that Jews had instigated every historical atrocity (revolutions, depressions, wars, etc.) in their attempt to achieve world power. Keegstra also attributed various evil characteristics to Jews during his teachings, often characterizing them as treacherous, subversive, sadistic, money-loving, power-hungry, child killers, deceptive, secretive, and inherently evil. The majority of his class time was focused on these themes and students were expected to reproduce these teachings in tests, exams, and essays. While the School Board clearly did not subscribe to Mr. Keegstra's beliefs, their communications/directives indicate that their purpose was not to limit or undermine Mr. Keegstra's academic freedom or intellectual integrity.[16] Rather, the School Board directed that if this theory was to be mentioned in class, it was not to be given the status of fact.

Finally, after numerous warnings, the Board decided to dismiss Mr. Keegstra. The Board's reasons for dismissal (which were reaffirmed by a board of reference) were as follows:

> (1) Your failure to comply with Alberta Education's prescribed curriculum and, in particular, the social studies curriculum.
> (2) Your failure to modify sufficiently your teaching content and/or approach *to reflect the desires of members of the local community and the Board of Education*, as communicated to you by the Superintendent of Schools (emphasis added).[17]

On appeal, the School Board was found to have acted reasonably in terminating a teacher who had persistently and willfully refused to follow the curriculum prescribed by the Minister of

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[16] *Ibid.* at 375.
[17] *Ibid.* at 378.

Education pursuant to the *School Act*, and/or comply with a lawful and reasonable directive of the Board.

Although not many people would agree or support the teachings of Mr. Keegstra, the case does raise some interesting questions about freedom of expression within the classroom. The excerpts from the correspondence directed to Mr. Keegstra indicate that academic freedom is to be limited by (1) the curriculum, (2) expectations of the community, and (3) expectations of the Board as illustrated in the selected curriculum.

The power of indoctrination which teachers have over their students is clearly apparent in this case. All of the students interviewed believed the international Jewish conspiracy theory to be historical fact. Mr. Keegstra's version was attaining a factual status by the students adherence and belief in its legitimacy. Mr. Keegstra as the primary "medium" was able to convey his "message" of an international Jewish conspiracy to his students. The "message" gained unquestioned legitimacy through its association with Mr. Keegstra.

The Board was not only concerned about the diversion from the official curriculum but also about the inherently discriminatory aspect of the theory. Significantly, subsection 54(e) of the *Education Act* [18] includes among the duties of a teacher to encourage a love for humanity, truth and justice. The limitations placed on Keegstra are reasonable given these objectives. In *R.* v. *Keegstra*,[19] the Supreme Court of Canada considered whether Mr. Keegstra's guarantee of freedom of expression allowed him to express his theory. It is significant that the court held freedom of expression may be legitimately limited if the particular expression undermines the values upon which Canadian society is founded. It follows then that the freedoms guaranteed in subsection 2(b) must be read in conjunction with section 27 of the Charter which states:

> This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canada.

Any freedom of expression afforded within an educational context should be mediated by these same considerations. While multiculturalism within the education system may still be more theory than practice, it would be difficult for a Board to sanction an approach

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[18] R.S.N.S. 1989, c. 136.

[19] *Supra* note 8.

which was overtly discriminatory and contrary to the concept of multiculturalism, dignity, and tolerance upon which Canadian society is theoretically founded.

As *Keegstra* illustrates, bitter controversies can arise when teachers communicate and openly subscribe to ideas and values contrary to those sanctioned by the community and School Board. While *Keegstra* is an extreme example it prompts the question of whether more subtle and hidden forms of racism which conform to the dominant interests of Canadian society are being promoted in the curriculum. An examination of the way in which natives are portrayed in our history books, and the pro-European (ethnocentric) approach to education in this country reveals biases which merit cause for concern when considered in light of section 27 of the *Charter*.

The *Keegstra* case also poses an interesting question regarding the extent to which a teacher can deviate from the official curriculum. There is no question that Mr. Keegstra exceeded the limits of academic freedom in espousing his Jewish conspiracy theory as the only accurate version of history. However, the real issue of academic freedom and its parameters in public education were not explored thoroughly due to the nature of the case and the Board's analysis. In determining when academic freedom may be permitted in the classroom, American case law must be considered.

In the United States, the value of academic freedom has successfully challenged the complete authority which school boards would otherwise exercise over the curriculum. American case law suggests that the claim of academic freedom is legitimate and may be utilized in response to school board's accusations that teachers have transgressed the permissible boundaries of the curriculum.

AMERICAN CASE LAW AND ACADEMIC FREEDOM

Sterzing v. *Fort Bend Independent School District*[20] is a good example of the courts' recognition of the importance of academic freedom. In this case, parents objected to a teacher telling his civic studies class that he was not opposed to interracial marriages, and to his practice of bringing into the classroom alternative readings to supplement and expand upon the prescribed material. These com-

[20] 376 F.Supp. 657 (S.D. Tex. 1972).

plaints eventually resulted in the School Board's dismissal of the teacher. The Court affirmed Mr. Sterzing's right to express his opinions and ordered the school to reinstate him. The Court stated that

> it must also be [a] teacher's duty to be exceptionally fair and objective in presenting his personally held opinions, to actively and persuasively present different views, in addition to open discussion. It is the duty of the teacher to be cognizant of and sensitive to the feelings of his student, their parents, and their community. . . .
>
> The Court finds . . . his teaching to be proper to stimulate critical thinking, to create an awareness of our present political and social community and to enliven the educational process. These are desirable goals.[21]

This passage exemplifies how academic freedom may be used in conjunction with the official curriculum to enrich the learning experience. Central to the case was the fact that Mr. Sterzing continued to follow the curriculum while supplementing it with alternative viewpoints which encouraged students to think critically about the issues being presented.

The judgment of the court is very similar to two provisions in the *Nova Scotia Teachers Code of Ethics* which state:

> The teacher should avoid giving offense to the religious and political beliefs and moral scruples of his/her pupils and/or students.
>
> The teacher should be as objective as possible in dealing with controversial matters arising out of the curriculum subjects, whether scientific, or political, religious or racial.[22]

This issue of the objectivity of the teacher was similarly addressed by the Board in *Keegstra.* In *Keegstra,* the Board indicated that while they were not trying to undermine Mr. Keegstra's academic freedom or intellectual integrity, they did insist that

> all sides of a historical question must be presented in as unbiased a way as possible, so that students can judge contradictory points for themselves.[23]

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[21] *Ibid.* at 662.

[22] *Code of Ethics: Nova Scotia Teachers Union,* s. I(d), s. I(e).

[23] *Supra* note 15 at 374.

Additionally, the Board went on to state that their position was consistent with the objectives of the Social Studies Curriculum guide which emphasized the "process of developing, testing, and substantiating (or falsifying) generalizations [as] amongst the most important qualities of true inquiry."[24] Collectively, the *Nova Scotia Teachers Code of Ethics* and the above excerpts from *Keegstra* indicate that Canada may be willing to recognize academic freedom as a legitimate pursuit in furtherance of educational goals.

Thus, although teachers may constitute part of the unofficial curriculum as "medium" of the "message," this may not necessarily result in an absolute restriction of their freedom of expression. The critical factors in determining whether expression will be limited seem to be the content and form of the alternative message in relation to the prescribed message.

In its conclusion, the Court in *Sterzing* stated:

> Teachers occupy a unique position of trust in our society, and they must handle such trust and the instruction of young people with great care. On the other hand, a teacher must not be manacled with rigid regulations which preclude a full adaptation of the course to the times in which we live.[25]

In this statement, the court recognizes that a balance is required between the duty with which teachers are charged and their academic freedom. American case law is useful in outlining some of the considerations in determining when a teacher has exceeded the permissible levels of academic freedom in public schools.

In *Parducci* v. *Rutland* [26] the court outlined some factors which must be considered in determining when a teacher's freedom of expression must yield to state interest. In this case, the issue arose as to whether a teacher could be dismissed for assigning to his class a short story by a prominent contemporary writer. The story made references to several vulgar words, an involuntary sexual act, and the eradication of the elderly; causing several parents and three students to complain. The judge acknowledged the importance of academic freedom but stated that it was not absolute:

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[24] *Ibid.* at 375.
[25] *Supra* note 21 at 661.
[26] 316 F.Supp. 352 (M.D. Ala. 1970).

> It must be balanced against the competing interests of society. This Court is keenly aware of the state's vital interest in protecting the impressionable minds of its young people from *any* form of extreme propagandism in the classroom.
>
> A teacher works in a sensitive area in a schoolroom. There he shapes the attitudes of young minds towards the society in which they live. In this, the state has a vital concern.[27]

To allow a teacher academic freedom unfettered is to ignore the state's interest, however, to restrict it too much may result in a "chilling effect" amongst teachers. The effect of this would be teachers' reluctance to exercise their academic freedom and a corresponding impoverishment of the learning environment. In reconciling the state's interest and the teacher's academic freedom, the Court adopted the broad question posed in *Tinker* v. *Des Moines Independent Community School*,[28] that is, did the conduct result in a material and substantial interference in the school? In answering this question the Court considered two questions: (a) was the material inappropriate having regard to the characteristics of the students (age, sophistication); and (b) did the material create a significant disruption to the education process. Thus, the Court gave primary attention to the content and impact of the alternative message.

In addressing the first issue, the court held the reading was appropriate for high school juniors, and found nothing obscene in the story which was a satirical portrayal of society. In considering the second issue, the court found that most students greeted the assignment with apathy and therefore the assignment was not one which materially or substantially interfered with the operational requirements of the school. The court concluded that the interests of academic freedom would prevail where the interests of the state were in no way threatened. Thus the alternative message was deemed permissible to the degree that it did not undermine the state interests and was in some degree related to a discussion of a prescribed topic.

Similarly in *Mailloux* v. *Kiley*[29] the same two criteria were used to balance the interests of a teacher's academic freedom with the in-

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[27] *Ibid.* at 355.
[28] 393 U.S. 503 (1969).
[29] 323 F.Supp. 1387 (D.Mass. 1971).

terests of the state. In that case, a teacher wrote the word "fuck" on the blackboard in demonstration of the topic of taboo words. In deciding whether the use of the word was justified, the Court considered (a) the relevancy of the word to the topic being discussed, whether it was appropriate having regard to the circumstances; (b) whether the word was appropriate having regard to the students (age and sophistication); and (c) whether the word had a disturbing effect on school operations. The Court held that the word was relevant to the subject being discussed. Additionally, since the affected students were in high school and in "low track," they were considered to have enough sophistication to consider the word with the educational intent with which it was used without being embarrassed or offended. Lastly, the court concluded that the word did not having a disturbing effect because most students had probably used it or at least seen it before. Having considered all these factors, the court decided the word was appropriate and reasonable under the circumstances and served a serious educational function. Thus the teacher's academic freedom afforded a legitimate response to the state interest.

Brubaker v. *Board of Education*[30] is a good example of when academic freedom will not afford a defense. A teacher had obtained brochures from the R-rated movie "Woodstock" and proceeded to bring them to school. While the teacher only displayed a poster in her classroom, she gave the brochures to two teachers who proceeded to make them available to their grade eight students. The court characterized the brochure by stating that

> to the minds of eighth graders, the brochure's poetry can and probably must be fairly read as an alluring invitation and a beckoning for them to throw off the dull discipline imposed on them by the moral environment of their home life, and in exchange to enter into a new world of love and freedom—freedom to use acid and grass, freedom to take their clothes off and to get an early start in the use of such vulgarities as "shit," "fucking," and their companions.[31]

In considering the issues of relevancy and appropriateness, the court held that the brochures had no relevancy to the subjects being

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[30] 502 F.2d 973 (1974) (Ill. Ct. App. 1974).

[31] *Ibid.* at 976.

taught by the teachers, nor did the teachers make any attempt to discuss the relevancy of the brochures to the students. Additionally, the court found that the brochures were inappropriate having regard to the age and sophistication of the students. Also significant was the meaning conveyed in the brochure which was antithetical to educational goals; it was concluded that it promoted a viewpoint contrary to school teachings of the harmful effects of alcohol and narcotics, it violated socially acceptable standards, and the language used was not consistent with educational standards and objectives. Given that the material was inappropriate and could not be considered to advance the underlying goal of academic freedom (which is the furtherance of knowledge and truth), there was no need for the court to go on to consider whether the expression impaired the efficient operation of the school.

Brubaker would probably have been decided similarly in Canada because the alternative message totally undermined the prescribed message. The *Education Act* states teachers must

> regularly give appropriate instruction as to the nature of alcoholic drinks, narcotics and tobacco and special emphasis on their effect upon the human system.[32]

The *Code of Ethics* also states that teachers should avoid giving offense to the religious, political, and morals scruples of students and parents.[33] Given these two provisions, the brochure would probably also have been deemed inappropriate in a Canadian context. Generally, the American case law indicates that a court will consider three factors in determining whether academic freedom is permissible having regard to state interests:

1. is the material (message) relevant to the subject or topic being discussed;
2. is the material (message) appropriate having consideration of the age and sophistication of the students, and the goals and values of education; and
3. if these two criteria are met, then the court considers whether the material (message) resulted in a substantial and material disruption in the school's operations. That is, does

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[32] *Supra* note 8 at s. 54(f).
[33] *Supra* note 21 at s. I(d).

> the alternative message conflict with the prescribed message such that a material disruption occurs.

Canadian case law has yet to determine the permissive boundaries it will afford academic freedom where public education is concerned. Discussions tend to focus more on the nature of academic freedom at the university and college level. Given that the nature and extent of intellectual inquiry differs at this level from the elementary level, a perusal of case law in this area will not be considered. However, *Keegstra* is an important case in at least indicating that boards are aware of academic freedom as a possible relevant topic in discussions of teachers' adherence to prescribed curriculums. However, the degree to which teachers are permitted to depart from or supplement the curriculum is still an unknown factor. Perhaps if these issues arise in Canada, American case law may be useful in indicating an approach. However, of great significance will also be the nature of expression and whether it undermines the values upon which freedom of expression and the educational system are founded.

FREEDOM OF EXPRESSION OUTSIDE THE CLASSROOM

The nature of a teacher's duties, it can be argued, transgress the boundaries of the classroom. The crux of this argument is the premise that while a teacher is within the confines of the school she or he functions as a role model who upholds the principles and values upon which the school system is based. For a teacher to challenge those values once outside the physical confines of the school would undermine the credibility of those values and thus send an alternative message to students. Prior discussions of academic freedom focused both on the substance of the alternative message and the legitimacy the teacher gave to this message due to their status as the medium. Discussions of freedom of expression outside the classroom will similarly focus on the teacher as medium of a message. The teacher's role is so powerful that the relationship of medium and message continues outside of the classroom. As stated by Manley-Casmir and Piddocke:

> Public teachers, especially in a small town or a rural community, are rather like goldfish in a goldfish bowl: their behaviour is always open to public inspection and

> censure. School authorities, public authorities, the parents of the teachers' students, and members of the surrounding community scrutinize the teachers' acts and are ready to pass judgment on them.[34]

The *Education Act* is silent on the question of teachers' freedom of expression outside the classroom, except for subsection 54(e) which may be interpreted to extend a teachers duty beyond the classroom.[35] This section directs the teacher by precept and example to encourage in students a respect for religion, truth, justice and other democratic values. The *Code of Ethics*[36] can be understood to compensate for any deficiencies in the *Education Act* on this issue. Teachers have a great impact upon their students and the *Code of Ethics* reflects this and reveals the need for teachers in their activities outside the classroom not to undermine the confidence and security of their students and the education system. The most relevant sections in the *Code* deal with teacher–pupil, teacher–teacher, teacher–internal administration, and teacher–community interaction:

> The teacher should avoid giving offense to the religious and political beliefs and moral scruples of his/her pupils and their parents.
>
> The teacher should not make defamatory, condescending, embarrassing, or offensive comments concerning another teacher.
>
> The teacher should observe a reasonable and proper loyalty to the internal administration of the school.
>
> The teacher should so conduct himself/herself in his/her private life that no dishonor may befall him/her or his/her profession.[37]

These sections indicate that a teacher's freedom of expression is subject to scrutiny both within and outside the confines of the classroom. Ultimately, a teacher's freedom of expression must be balanced against the right of the school board to conduct its operation efficiently and without disruption. Since teachers are public em-

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[34] M. E. Manley-Casimir & S. M. Piddocke, "Teachers in a Goldfish Bowl: A Case of 'Misconduct'" (1990) 3 Edu. & L.J. 115 at 116.

[35] *Supra* note 10.

[36] *Supra* note 22.

[37] *Supra* note 22 at ss. I(a), II(a), III(a), and VII(a) respectively.

ployees, the extent of their freedom of expression outside of the classroom is comparable to other public employees.

Fraser v. *Public Service Staff Relations Board*[38] effectively addresses the question of the extent of public employees' freedom of expression. It indicates that freedom of expression for a public employee is not unrestricted. In *Fraser,* the right of a public employee to speak freely on important public issues was balanced against the government's interest in maintaining efficiency of operations and the confidence of the public.

In this case, Mr. Fraser (hired as a tax audit manager) publicly criticized the government on radio and television stations for its metric conversion program and its intention to institute the *Charter.* This criticism continued despite warnings and directives from his superiors that it should cease and eventually Mr. Fraser was discharged. The Public Service Staff Relations Board recognized that a balance had to be reached between Mr. Fraser's freedom of expression and the government's desire to maintain a public service "characterized by professionalism and impartiality."[39]

The Board stated that inherent in being a public employee is a duty to refrain from doing anything which would create a doubt about the ability and impartiality of public servants. Furthermore, the Board stated it is imperative for the Canadian public to have confidence in the impartiality, fairness, and integrity of public servants because of the latitude and impact they have on Canadian lives through their administration and implementation of Government policy. The Board held that Mr. Fraser's actions created a doubt about his ability to be impartial and fair in his dealings with clients. Secondly, his actions were construed as likely to undermine the confidence and trust of the Canadian public in the public service which would impair the functioning of the department. Commenting on both of these factors the Board stated:

> A public servant simply cannot be allowed under the rubric of free speech to cultivate distrust of the employer amongst members of the constituency whom he is obliged to serve. I am satisfied that Mr. Fraser cast doubt on his effectiveness as a government employee once he escalated his criticism of Government policy to a point and in a form that far exceeded the issues of general

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[38] [1985] 2 S.C.R. 455.

[39] *Ibid.* at 460.

> public interest . . . his incipient and persistent campaign in opposition to the incumbent Government conflicted with the continuation of his employment relationship. Once that situation arose he either had to cease his activities or resign from the position he occupied.[40]

Thus in reaching their decision, the Board considered the nature of public employment and the necessity for employees to appear impartial and fair. Since the integrity of the public service is connected to the integrity of its employees, the nature and effect of the comments were relevant. The Board found that the prolonged and visible criticisms of government were likely to undermine public confidence in the government and to elicit doubt regarding the impartial and judicious nature of government and the public service.

On appeal the Supreme Court of Canada stated that a certain balance is required: the "value of freedom of speech must be qualified by the value of an impartial and effective public service."[41] The Court felt the appropriate starting point for any discussion of a public employee's freedom of expression begins with the premise that they are entitled to *some* freedom of expression. The Court went on to state that inherent in accepting a government job is the acceptance of certain restraints. A public employee is under a duty to respect these restraints, which the Court defines as knowledge, fairness, and integrity. Any conduct which creates a doubt about a public employee's ability to deal with clients on this basis brings the public service into disrepute. Loyalty is another characteristic which a public servant owes to the employer. To hold otherwise would create a situation in which government would lack faith in the ability and integrity of public employees in implementing its policies. Having regard to these factors, the Court held that there are only three circumstances in which a public servant could criticize the government: (a) if it is engaged in illegal acts; (b) if its policies jeopardize the life, health, or safety of the servants or citizens; or (c) if the criticism has no impact on the actual or perceived ability of the servant to effectively perform his or her duties.

Mr. Fraser's comments could only be afforded protection if they fell within the third category since the other two were not applicable. There were two essential questions asked by the Court:

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[40] *Re Fraser and Treasury Board (Department of National Revenue)* (1982), 5 L.A.C. (3d) 193 at 226.

[41] *Supra* note 38 at 463.

(1) was there an impairment in the performance of the specific job because of the effect on clients, and (2) was there impairment to the public service because of the special and important characteristics of that job.[42] Central to the Court's analysis of both these questions was the idea of an actual or perceived impairment. In addressing this question the Court held that direct evidence of impairment while preferable will not prohibit a reasonable inference of impairment. An inference is permissible when the job is of an important and sensitive nature and when the form, substance, and context of the criticism is extreme. In this case, the Board was at liberty to draw an inference of impairment given the duration and pattern of Mr. Fraser's behavior. His behavior was regarded as sufficient to raise "public concern, unease and distrust of his ability to perform his employment duties."[43]

Thus in determining the degree of restraint required, it is necessary to consider the nature of the public employee's position (duties and visibility) and the comments made (substance, form, and context). Brown and Kilcoyne argue that these "standards . . . are elastic . . . and raise concerns of consistency and predictability" which will cause a chilling effect amongst public employees.[44] Central to this point is the distinction that some speech will obviously be protected while other speech will not. For example,

> whereas it is obvious that it would not be "just cause" for a provincial Government to dismiss a provincial clerk who stood on a crowd on a Sunday afternoon to protest provincial day care policies, it is equally obvious that the same Government would have "just cause" to dismiss the Deputy Minister of Social Services who spoke vigorously against the same policies at the same rally.[45]

Interestingly, Mr. Fraser was a tax auditor who spoke out on the issue of the *Charter* and metric conversion. These issues seem to have very little connection to his duties. As noted by Petraglia, "the Court seemed to be more upset by the form in which the criticism took than its actual content."[46] It could be argued that the Court's

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[42] *Ibid.* at 472.

[43] *Supra* note 38 at 472–73.

[44] R. Brown & J. Kilcoyne, "Developments in Employment Law: The 1985–86 Term" (1987) 9 *Supreme Court Review* 325 at 343.

[45] *Supra* note 38 at 468.

[46] P. Petraglia, "Public Servants and Free Speech" (1986) 2 Admin.L.J. 6 at 9.

approach leaves a serious question about the weight to be given the nature of employment, and the nature of the comment (content, form, and context) which could seriously affect the extent of speech afforded to public employees and lead to inconsistent judgments.

FRASER IN AN EDUCATIONAL CONTEXT

Teachers are government employees and thus should expect that their freedom of expression may in some way be constrained, especially due to the sensitive and important nature of their jobs. Thus any consideration of their freedom of expression outside school hours could be subject to a *Fraser*-type analysis in which comments (content, form, and context) which lead to any actual or perceived impairment of the functioning of the School or their ability to perform the duties of a teacher (as defined in subsection 54(e) *Education Act*) may not be protected. Additionally, failing direct evidence of impairment, a court may infer impairment having regard to the content, form, and context of their expression.

Attis v. *New Brunswick (School District 15)*[47] is probably the most publicized case which exemplifies the degree to which teachers may be held accountable for their actions during non-school hours. Malcolm Ross was a teacher in New Brunswick who had written several anti-Semitic books, including, *Web of Deceit*, *The Real Holocaust*, *Spectre of Power*, and *Christianity vs. Judeo-Christianity*. In addition to publishing these books, Ross also submitted letters to the editor and granted interviews during which he reiterated his anti-Semitic ideas. These publications generated a lot of publicity and debate and eventually forced the question of whether a teacher's freedom of expression outside of school was something which the school board had the authority to restrict.

The publicity surrounding Ross' activities and his position within the New Brunswick education system attracted the attention of both the local and national community. The Premier of New Brunswick, Hon. Frank McKenna, was very prompt to indicate that the opinions and beliefs held by Ross were not in any way representative of the New Brunswick community or the quality of educa-

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[47] (1992), 121 N.B.R. (2d) 1 (Bd. of Inquiry under the *Human Rights Act*).

tion in New Brunswick. Speaking on the Malcolm Ross affair, Premier McKenna stated:

> I would like to see some action taken against Mr. Ross that would make it very clear that his beliefs do not represent the beliefs of New Brunswickers and the system of education is not brought into dispute . . . . I'm concerned that a person who is a publicly-paid employee is enunciating beliefs totally contrary to those being taught in the education system . . . .[48]

Similar comments were made by the Minister of Education and other legislative members. A strong attempt was made on the part of government officials to dissociate the provincial educational system from the allegations of racism and bigotry surrounding Malcolm Ross. The strong reactions of politicians would indicate that the public perception of education in New Brunswick was affected by Ross' activities. The comments of McKenna and other legislative members also indicate that in any society the education system is a symbol. Within a Canadian context, which in theory subscribes to the idea of multiculturalism, the education system at a very minimum is expected to give the appearance of equality and tolerance. For example, during the heat of the controversy, the School Board adopted a multicultural policy with the official intention of providing an atmosphere of mutual respect for individual rights and freedoms, and to ensure that multiculturalism formed an integral part of the school system. Teachers were asked to comply with the policy. Ross' ability and credibility in promoting these values and beliefs at minimum conflicted with his publicized activities. By analogy with a *Brubaker*[49] type analysis, Ross' conduct undermined the values which the education system was attempting to further.

Also relevant, however, was the indication that Ross' activities had an impact on his ability or perceived ability to perform the duties of a teacher. As indicated in McKenna's comments, Ross' activities were inconsistent with the role required of a teacher in upholding educational and "Canadian" values. Thus Ross' activities constituted a message which was inconsistent with his role as teacher.

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[48] *Re Ross and Board of School Trustees, District No. 15* (1990), 78 DLR (4th) 392 at 401 (N.B.C.A.).

[49] *Supra* note 30.

Under a *Fraser*[50] type analysis, Ross' activities seemed to create a doubt about his ability to sustain fairness and integrity in his dealings with students and in his ability, or perceived ability, to give credibility to school and community sanctioned values and objectives.

In addition to repeatedly asking Ross to refrain from further publications and discussion of his beliefs, the School Board also stated that the hostility which he was generating was interfering with the tolerance the school was required to show for the beliefs of students and their families. This statement is similar to the provision in the *Nova Scotia Code of Ethics* which states that a teacher should avoid offending the religious, political, and moral scruples of his students and parents.[51]

As noted by Givan perhaps the most striking feature of the Malcolm Ross affair was the reluctance on the part of the School Board, Education Department, and New Brunswick Teachers' Association to get involved.[52] Givan aptly notes that:

> Lamentably the School Board was prepared to accept the damage being done to its reputation rather than test its erroneous presumption that teaching was not connected with the integrity of the teacher . . . .
>
> Like the School Board, both the professional association and the Department [of Education] chose a less than proactive stance, seemingly content to weather the storm of controversy impugning the practice of education.[53]

The role parents and the community played in attempting to effect a solution to the Ross affair is a reminder of the influence they exert over the education system. Attis, a parent who launched a complaint with the New Brunswick Human Rights Commission (NBHRC) against the School Board, successfully argued that Ross, in being allowed to serve in the capacity of teacher, provided a racist and anti-Jewish role model for students. The School Board, in failing to act, had thus violated section 5 of the *New Brunswick Human Rights Act*[54] by creating a poisoned environment for Jewish and

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[50] *Supra* note 38.

[51] *Supra* note 22 at s. I(d).

[52] D. Givan, "The Ross Decision and Control in Professional Employment" (1992) 41 U.N.B.L.J. 333 at 334.

[53] *Ibid.*

[54] R.S.N.B. 1973, c. H-11.

other minority students which ultimately hindered their ability to derive equal benefits from the education system.

At issue was the vested interest that every group and individual has in the education system. School boards are relied on to maintain the integrity of the system by guarding against "messages" inconsistent with community and school values. A failure to discharge this responsibility will undoubtedly attract the attention of various groups within society. This case demonstrates this point because it was not only Attis challenging the passivity of the school board, it was also the Canadian Jewish Congress (who was admitted as a party), and many other non-party individuals and groups.

In finding a solution, the Board utilized a *Fraser*[55] type of analysis. The Board of Inquiry noted that the School Board, as Ross' employer, had a responsibility to parents, students, and the community. Their responsibility was to create a learning environment free from the effects of discrimination that was, or had the appearance of being, fair and impartial. Ross' activities challenged the integrity of the system by creating a poisoned atmosphere in which Jewish and other minority students felt fear, anger, and isolation. Thus Ross' off-duty conduct can be understood as having detrimentally undermined his position as a teacher, as well as the impartiality and reputation of the school. Lastly, the board stated that teachers are role models and off-duty conduct can fall within the scope of the employment relationship. The Board thus concluded that an appropriate standard of moral conduct must be maintained inside and outside the classroom.

In its analysis, the Board stated that:

> Education of students must be viewed in the broad context of including not only the formal curriculum but the more informal aspects of education that come through interchange and participation in the whole school environment . . . . A school board has a duty to maintain a positive school environment for all persons served by it and it must be ever vigilant of anything that might interfere with that duty.[56]

These comments suggest that a School Board has a duty to restrict any conduct which impacts negatively on the school environment.

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[55] *Supra* note 38.

[56] *Supra* note 4 at 60, 80.

The integrity of the school is intricately connected with the actual and perceived integrity of teachers. It is important to stress at this point that a teacher's duty is not limited to the teaching of a subject. It also includes the duty to act as a role model in upholding the values expressed in subsection 54(e) of the *Education Act*. While Ross was no longer technically functioning in the capacity of teacher, his label as "teacher" (and therefore the "medium") surpassed the boundaries of the classroom and was sufficient to subject his actions to scrutiny. In discharging this responsibility, school boards are advised to take a proactive approach. The Board made a number of orders, the most relevant to this paper is that Ross was denied the right to teach.

It seems clear under the Board's effects-oriented analysis that a school can justifiably restrict a teacher's freedom of expression if that expression proves to be disruptive to the efficiency of education in the school. Thus the content of a teacher's speech outside class hours may still be subject to restrictions if it is inconsistent with school-sanctioned messages. Reynolds indicates that

> problems arise when a teacher, in connection with such ideologies which are unacceptable to the mainstream of the community, becomes involved in activities which are brought to the public's attention. The question then becomes does such knowledge adversely affect the students. . . . [I]f speech or activity presents danger to the status quo of the educational system, there is a sufficient clear and present danger for the state to take steps to silence that menace.[57]

Unfortunately, the Board's order was appealed to the Court of Queen's Bench and finally up to the New Brunswick Court of Appeal. The Court of Appeal quashed Ross' removal from the classroom as an unreasonable violation of his section 2 *Charter* rights.[58]

The issue defined by the Court of Appeal was whether the fear that the public might perceive the School Board as condoning Ross' beliefs was enough to limit his freedom of expression. Phrasing the issue in this way allowed the Court to do two things: (1) to minimize the discriminatory nature of Ross' comments and the purpose of the NBHRC effects-oriented order in combating this type of per-

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[57] J. L. Reynolds, "Free Speech Rights of Public School Teachers: A Proposed Balancing Test" (1982) 30 Clev. St. L. Rev. 673 at 695.

[58] *Attis* v. *Board of Education of District 15 et al.* (1993), N.B.R. (2d) 1 (C.A.).

vasive, highly detrimental, and invisible discrimination; and (2) to proceed through an analysis which failed to consider any of the objectives underlying the *Charter's* guarantee of freedom of expression, as considered in the first part of this paper. For these two reasons, the Court of Appeal judgment is inherently flawed.

In reaching its decision concerning whether silencing Ross' anti-Semitic comments was sufficient to override his *Charter* rights, the court gave minimal attention to the significance of Ross' occupation. Instead it focused on the fact that there was no direct evidence which would establish that Ross' comments were connected to the discriminatory remarks the Attis' children and other Jewish children were being subjected to in the schoolyard. By doing this the Court rejected the public perception test in *Fraser* in favour of an actual impairment test that was provable, and not to be inferred from evidence. The majority of the Court did recognize, however, that

> [t]eachers do indeed enjoy a high status in our society and have a unique opportunity to influence youthful minds. Having said that, however, the sanction, curtailment of Mr. Ross' freedom of expression, must be considered in the context of the evidence.[59]

Inherent in this decision is a choice to give credence to a minute part of *Fraser* (actual impairment and direct evidence), and ignore a significant part of it which focusses on public perception and the inference of evidence where sensitive and important jobs are concerned. The impetus for this conservative approach was the Court's concern that to do otherwise would create a legal space whereby teachers' freedom of expression could be unjustifiably limited. By instituting a high evidentiary requirement, the Court effectively limited the capacity of School Board to deal with future similar situations.

The dissent by Ryan J. recognized that freedom of expression is not an absolute right; it must be interpreted in a way which is consistent with its underlying values and principles which are integral within a free and democratic society.

> Included in these are the inherent dignity of the human being, commitment to social justice and equality and respect for cultural and group identity. To give free reign

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[59] *Ibid.* at 19.

> to the asserted freedom of speech and religion of Ross would be to trample upon these underlying values and principles, themselves having the status of entrenched rights under the Charter and in international law.[60]

Thus Ryan J. found that the NBHRC order was sufficiently tailored with regard to proportionality, rational connection, and minimal impairment to stand. Additionally, Ryan J. concluded that Ross, as a teacher, public servant, and role model, should not be permitted to promote his ideas while occupying the position and accompanying duties and obligations of a teacher.

Ultimately the dissent by Ryan J. is consistent with other decisions which have found that actual or perceived impairment is sufficient to limit a teacher's conduct both inside and outside the classroom. The majority's decision in the case can be considered an anomaly which has yet to be tested and followed by other cases. Significantly, in *Re Cromer and British Columbia Teachers' Federation*[61] a *Fraser*[62]-type analysis with an emphasis on per-ceived impairment was used to limit a teacher's expression.

In *Re Cromer*, Ms. Sauve, a guidance counselor, had developed a program on human sexuality for boys and girls in junior high school. As part of the program, two lists of questions typically asked by boys and girls were circulated amongst students. Some of the questions presented were objectionable to parents either because of the subject matter or the colloquial language used to pose the question. A meeting of the Parents' Advisory Committee was held to address concerns over the questions. Mrs. Cromer, herself a teacher at another school and the parent of a child attending the school, attended the meeting. During the meeting, an angry exchange occurred between Mrs. Cromer and Ms. Sauve in which Mrs. Cromer publicly criticized Ms. Sauve's responses to parents' concerns at the meeting. Ms. Sauve subsequently initiated a charge against Mrs. Cromer for violating clause 5 of the *Code of Ethics*.[63] Clause 5 prohibits public criticism of another teacher by a teacher. In her defense, Mrs. Cromer argued that her statements were not as a teacher, but as a parent and thus the *Code of Ethics* did not apply.

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[60] *Ibid.* at 36.
[61] (1986), 29 D.L.R. (4th) 641 (B.C. C.A.).
[62] *Supra* note 38.
[63] *B.C. Teachers' Federation's Code of Ethics,* cl .5.

Additionally, she argued that clause 5 violated her freedom of expression as guaranteed by subsection 2(b) of the *Charter*.

In arriving at its judgment the court made two very important points. Firstly, the Court stated that:

> Mrs. Cromer does not always speak as a teacher, nor does she always speak as a parent. But she always speaks as Mrs. Cromer. The perception of her by her audience will depend on their knowledge of her training, her skills, her experience, and her occupation, among other things.[64]

What emerges as a critical factor is the audience's perception of Mrs. Cromer. Thus even though her intent may have been to speak as a parent, the audience's perception of her status as "teacher" will be enough to contextualize her expression as such. This analysis begs the question of when and if a teacher's expression can ever be perceived as falling outside the confines of "teacher." This is consistent with the idea that the teacher's role transcends into spheres outside the classroom.

Secondly, the Court balanced Mrs. Cromer's freedom of expression against the purpose of the *Code of Ethics*.[65] The *Code* can be interpreted as representing the Board's interest because the Board has an interest (as does the public) in reducing disharmony amongst teachers, increasing the beneficial effects of criticism, and thus promoting a harmonious and productive educational environment. The extent to which teachers are able to work co-operatively and constructively will no doubt influence their actual and perceived ability to do their job. The Court balanced this interest inherent in the purpose of the clause against Mrs. Cromer's interest in her freedom of expression. The Court found that

> if Mrs. Cromer's comments had been directed to the subject matter . . . then I would have considered that the public interest in letting her speak out should have overridden the Code of Ethics. . . . But Mrs. Cromer's comments were not directed to the subject-matter of the meeting . . . they are outside the scope of any aspect of the public interest . . . .[66]

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[64] *Supra* note 61 at 660.
[65] *Supra* note 63.
[66] *Supra* note 61 at 661.

While the passage indicates that both the public and school board have an interest in the efficient operation of the school, the Court also suggests there is a public interest in limiting expression to comments related to the purpose of the meeting. In essence, had Mrs. Cromer spoken to this interest, her comments would not have been inconsistent with the school and public interest and thus there would be little or no perceived or actual impairment. Notable in the Court's conclusion is a consideration of Mrs. Cromer's comments in her role as teacher and also a consideration of the comments in terms of content, form, and context.

Attis (Bd. of Inquiry) and *Re Cromer* indicate that the perception of an individual as a teacher is sufficient to justify scrutiny of their conduct for any possible inconsistency with school sanctioned objectives or values and thus trigger the test in *Fraser*. If the expression does not conflict with prescribed "messages" and objectives then the teacher's role as "medium" is unimpaired. However, if the expression is inconsistent with school "messages" and objectives the teacher must be held accountable. Any inconsistency between prescribed and alternative messages or indiscretions by teachers diminishes their effectiveness as the "mediums" and thus the impact and credibility of any prescribed message. To this end attention is paid to the content, form and context of speech in relation to the role of the teacher in determining whether the expression undermined the interest and functioning of the school.

FREEDOM OF EXPRESSION OUTSIDE THE CLASSROOM: THE AMERICAN APPROACH

The primary focus in Canadian case law seems to be an emphasis on actual or perceived impairment in job efficiency or the functioning of the workplace as determined by considering the occupation and the nature of the comment (content, form, and context). Differentially, the American case law primarily focusses on whether the speech was on a topic of public concern. If it is, then the court proceeds to balance the right of the employee to comment on issues of public concern versus the right of the employer to have efficiency of operations. Although this seems similar in some respects to the Canadian approach there are some notable differences between the

two approaches. The American approach can be summarized in two cases, *Pickering* v. *Board of Education* [67] and *Connick* v. *Myers*.[68]

Pickering [69] established a balancing test which is used to determine the parameters of a teacher's freedom of speech outside the classroom. Pickering, a teacher in Illinois, wrote a letter to the local paper criticizing the School Board's lack of candour in regard to a proposed tax increase, the purpose of which was to raise revenue for the school. The letter criticized the Board's allocation of funds between educational and athletic programs, and stated that school administration spent too much money on athletics.

While Pickering claimed his statements were protected by freedom of expression, the Board took objection to the letter for several reasons. The Board claimed that (1) the statements in the letter were false; (2) the letter cast doubt on the integrity and competence of the Board; (3) the statements damaged the professional reputations of its members and school administrators; and (4) the statements were disruptive to faculty discipline, and would encourage controversy and conflict among teachers, administrators, the Board, and the community.

In arriving at its decision the Court stated:

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.[70]

Conspicuously absent from this approach is any concern that the teacher (as a public employee) should give the appearance of impartiality. The matter simply is analyzed on the basis of competing interests. Pickering's interest in speaking as a private citizen on an issue of public concern was balanced against the efficiency of the public service. In concluding that Pickering's freedom of speech outbalanced the Board's interest in this particular case, the Court stated that: (1) the statements were not directed towards co-workers or immediate supervisors, with whom Pickering would be in daily contact; (2) discipline and harmony in the immediate work-

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[67] 391 U.S. 563 (1968).
[68] 461 U.S. 138 (1983).
[69] *Supra* note 67.
[70] *Ibid.* at 568.

place were not endangered; (3) Pickering's performance of his daily duties was not disrupted, nor was the regular functioning of the school; (4) personal loyalty and confidence were not a requirement of the relationship between Pickering and the superintendent or Board; (5) the statements which were erroneous were easily countered as the facts were a matter of public record, and additionally the statements were not made with the knowledge they were false nor with reckless disregard of their validity; (6) public reaction was one of apathy and disbelief and thus cannot be said to have damaged the professional reputations of the Board, superintendent, and administrators; (7) there was no evidence that the letter caused controversy and conflict between teachers, community, Board and administrators; and (8) the letter addressed an issue which was of public concern and thus free debate should be encouraged rather than inhibited.

Schiumo,[71] Ellis,[72] and Johnson[73] have criticized the *Pickering* test as being too broad and thus too unpredictable to function as a rule of law. Johnson argues that the lack of definite issues to be considered in balancing interests leaves the test susceptible to a wide range of discretion which ultimately has the effect of undermining the right to freedom of expression. Ellis also suggests that the criteria represent "things subject to balancing, a kind of judicial acrobatics with no clear nor distinct rules by which the balance could be determined."[74]

Connick v. *Myers*[75] refined the test enunciated in *Pickering*.[76] In the *Connick* case, Myers (a government employee) circulated a questionnaire among office workers subsequent to finding out that she was to be transferred. The questionnaire was designed to gauge employee opinions about transfer policies, office moral, the need for a grievance committee, level of confidence in superiors, and whether employees felt pressured to work in political campaigns.

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[71] M. J. K. Schiumo, "A Proposal for Rethinking the 'Of Public Concern' Requirement of Pickering" (1992) 14 Comm. & L. 51.

[72] J. A. Ellis, "Public Teachers' Right to Free Speech: 'A Matter of Public Concern'" (1986) 12 So.U. L. Rev. 217.

[73] V. K. Johnson, "Ferrara v. Mills: The A, B, C's of the Public Educator's Freedom of Expression" (1987) 13 J. Contemp. L. 181.

[74] *Supra* note 72 at 221.

[75] *Supra* note 68.

[76] *Supra* note 67.

Her departmental supervisor considered the questionnaire to be an act of insubordination and dismissed Myers.

In determining whether the dismissal amounted to a violation of Myers' freedom of speech, the court imposed a two step test. First it had to be determined whether Myers comments were on issues of public concern. If this criterion was satisfied then the court would consider whether Myers' right to comment on issues of public concern outbalanced the right of the department to promote efficiency of services.

The Court held that whether an issue was of public concern had to be determined by having regard to the content, form, and context of the whole statement. Ellis characterizes this as a subjective test which focusses on what was said, how it was said, and when it was said.[77] At this point, the onus is on the employee to show that the speech is protected and that it was a substantial factor in the decision to terminate. The Court found that most of the questions were not related to issues of public concern except for the last item (whether employees felt pressured to work on political campaigns), which was by its nature an issue of public concern.

The Court then proceeded to apply the *Pickering* balancing test. As noted in *Connick,* this required "full consideration of the government's interest in the effective and efficient fulfilment of its responsibilities to the public" and the degree to which the speech interfered with this interest.[78] In gauging whether interference occurred, the Court considered the content of the speech, the manner, time and place of the speech, and the context of the speech as manifested in the circumstances surrounding it. Additionally, the Court held that actual disturbance is not necessary and that a mere threat or fear of disturbance is sufficient to warrant employer action. However, Ellis suggests that the employer should be required to show "something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[79] While Myers ability to perform her work was found to be unhindered, her conduct was held to undermine and jeopardize the close working relationship employees had with their superiors.

Connick v. *Myers* has been interpreted as undermining fundamental rights and freedoms by holding that where the expression

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[77] *Supra* note 72 at 225.
[78] *Supra* note 68 at 150.
[79] *Supra* note 72 at 248.

falls outside matters of public concern the speech will not be protected.[80] This seems to indicate that an employee's interest in freedom of expression *vis-à-vis* the employer's interest in efficiency, will not be protected unless the expression is directed toward a matter of public concern. Interestingly, *Connick* defines "any matter of political, social, or other concern to the community" as an issue of public concern.[81] Johnson suggests that the error in this approach is that undue emphasis is given to the content of the speech as opposed to the effect of the speech.[82]

FREEDOM OF EXPRESSION OUTSIDE THE CLASSROOM: AMERICAN AND CANADIAN COMPARISONS

It is useful to consider differences and similarities between the approaches of Canadian and American courts to freedom of expression outside the classroom and its implications for educators.

The *Fraser* test is based on the presumption that the employee owes a duty of loyalty to the government. This is essential since the employee implements and upholds government policy. Because public confidence is dependent on the public employee's ability to appear impartial and fair, there will be some restraint on the employees freedom of expression. Thus the premise from which a Canadian analysis starts is that the public employee is entitled to some freedom of expression. In an educational context, if teachers can be understood as the medium of the school curriculum, then the success of the message depends on the teacher's loyalty and adherence to principles and values enunciated in the official curriculum. Thus "messages" inside and outside the school are subject to scrutiny for any inconsistency with prescribed "messages."

Interestingly, the American approach enunciated in *Connick* states the following:

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that in-

[80] *Supra* note 71.
[81] *Supra* note 68 at 146.
[82] *Supra* note 73 at 191.

> fringes the employee's constitutionally protected interest in freedom of expression.[83]

Thus the occupation of an individual would not seem to have any effect on the extent of their freedom of expression. It is from this starting point that American courts balance the employee's freedom of speech and the employer's business interest in promoting efficiency of services. However, in limiting protection to matters of public concern and defining this as political, social, and other matters of concern to the community, *Connick* effectively limits the public employee's freedom of speech. Thus both Canadian and American approaches have constraints; the Canadian approach constrains expression by imposing principles of loyalty, fairness, and impartiality, while the American approach constrains speech by imposing the concept of public interest. The latter is potentially more oppressive because what is deemed to constitute an issue of public interest is inherently determined by those with political and economic power.

While the objective of both approaches is to limit freedom of expression which detrimentally impacts on the work environment, different steps are taken in achieving this end. The Canadian approach focusses on actual impairment or perceived impairment on the workplace or an employee's ability to adequately perform his or her job. In contrast, the American approach focusses on an actual disturbance or apprehension of disturbance in the employer's efficiency of operations.

The evidentiary requirements for proving an actual or perceived impairment differ from those required to prove an actual or apprehended disturbance.[84] Canadian law allows an inference of impairment, while American law requires evidence that an actual disturbance or apprehension of disturbance has occurred. The Canadian approach is broader in this respect because as Stushnoff notes:

> It would be very difficult for an employee to convince an adjudicator that certain public comments did not call into question the impartiality of the civil service when no evidence of impairment is needed to prove that the pub-

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[83] *Supra* note 68 at 142.

[84] S. Stushnoff, "The Freedom to Criticize One's Employer" in Foster, *supra* note 1 at 34.

> lic's perception of the employee's impartiality was impaired.[85]

The last notable point of comparison between the two approaches is the use they make of the content, form, and context in assessing whether an employee's expression will be protected. The American case law considers these factors in determining whether the employee's speech is in the public interest. Differentially, in Canadian case law these factors are relevant in determining whether the employee's expression resulted in an actual or perceived impairment in job efficiency or the functioning of the workplace. There may be a public interest component in assessing whether an actual or perceived impairment has occurred. For example, in *Re Cromer*, the Court stated that had Mrs. Cromer's comments been directed to the topic of the meeting, allowing her to speak would have been in the public interest. However, the extent to which considerations of public interest are relevant in determining whether there has been an actual or perceived impairment remains to be determined by the courts and administrative boards.

SIGNIFICANT IMPLICATIONS FOR EDUCATORS

Canadian case law, statutes and codes of ethics would indicate that the extent of freedom of speech which teachers enjoy will be constrained by the fact that they are teachers. The values of the education system, as defined by the curriculum, statute, and code of ethics, effectively constrain speech and conduct which is detrimental to the reputation and public confidence, and to the effective and efficient functioning of the education system.

Although the extent to which Canadian teachers enjoy academic freedom has not been explored in the courts, *Keegstra* indicates that its importance may be recognized by school boards and that it may, to a limited extent, exist within the classroom. However, the extent of this freedom will probably be influenced by the characteristics of the students (including their age and sophistication), the content of the message, and its consistency with prescribed messages.

For conduct falling outside school boundaries, *Cromer* effectively demonstrates that the public perception of a person as a

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[85] *Supra* note 84 at 43.

teacher, and thus their identification with the school, will have a grave impact on freedom of expression outside the classroom. Thus teachers have the onus of acting with caution outside school—being ever aware of the public perception of them as teachers.

The effect of *Fraser* is to impose a relatively low threshold for expression to be prohibited. As evidenced by *Attis (Bd. of Inquiry)* there need only be doubt cast on the actual or perceived ability of the teachers to perform their duties, to act impartially and fairly, or their ability to function as role models. No actual impairment needs to be shown, and nor is direct evidence required to show that such an impairment has occurred. This decision, however was subsequently overturned by the Court of Appeal, so it is now necessary to prove by direct evidence that actual impairment has occurred. Whether this case will be followed remains to be seen, as it constitutes a significant reading down of the decision by the Supreme Court of Canada in *Fraser.*

While the American approach is useful as a basis for comparison, Canada and the US are two distinct countries with different cultures and identities. Canadians typically like the perception of being "multicultural" and "tolerant": two concepts that perhaps undermine the credibility of each other. Nonetheless, freedom of expression must be considered within this context, and also in connection with the other values underlying the Charter.

In an educational context, the "medium" through which the "message" is delivered is the teacher. The school board has a very real interest in exercising some degree of control over teachers' freedom of speech to the extent that it conflicts with the school agenda. As a "medium," the teacher owes a duty to the community and school; an appropriate standard of behavior is needed inside and outside the classroom. In writing about teacher misconduct, Manley-Casimir and Piddocke comment on the powerful role of the teacher as medium:

> The primary purpose of the public school teacher is to teach students. This teaching is usually admitted to include moral training as well as intellectual, factual and physical training. Such training, both moral and intellectual, depends on the teacher's being an example (though not necessarily a perfect example) of the values which the

> teacher has undertaken to inculcate and develop in the pupils.[86]

Thus a teacher must ensure their speech is not inconsistent with their role as "medium" nor with the achievement of the purpose which they undertake, as defined in subsection 54(e) of the *Education Act*.

IMPLICATIONS AND FUTURE DIRECTIONS

The danger of unduly restricting a teacher's freedom of expression is to suppress alternative or minority viewpoints which may be equally as legitimate as the viewpoints of the status quo. Equally important is a recognition that everyone has a vested interest in the prescribed curriculum to ensure that the values which are essential to the functioning of a diverse society like Canada are not undermined. To allow unfettered freedom of expression would permit situations similar to those in *Keegstra* and *Ross* to go unchecked.

Alternative ways of bringing diversity into the classroom must be explored. Ultimately, officials should decide what should be included in the curriculum, however, a more inclusive approach to arriving at a prescribed curriculum may be beneficial. A broader curriculum which recognizes the diversity and reality of a multicultural society would by its very nature redefine the extent of a teacher's freedom of expression. This approach would make fewer topics "taboo" and encourage the pursuit of educational goals (such as truth) by encouraging and presenting a variety of viewpoints. This ultimately would have the effect of reducing the tension between the prescribed curriculum and alternative viewpoints expressed inside and outside the classroom.

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[86] *Supra* note 34 at 139.