

ONTARIO  
SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

O'DRISCOLL, MEEHAN AND SWINTON JJ.

**B E T W E E N:**

KENNETH FRANKLIN CRESSMAN

Applicant

- and -

ONTARIO COLLEGE OF TEACHERS

Respondent

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)  
) Paul J. J. Cavalluzzo, Victoria Réaume, Fay  
) C. Faraday, for the Applicant  
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) Caroline Zayid, for the Respondent  
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) HEARD: May 20, 2004

**MEEHAN J.:**

**Nature of the Proceedings**

[1] The Applicant makes application for:

- (a) an order in the nature of prohibition to restrain the Respondent, Ontario College of Teachers Discipline Committee, from proceeding with the hearing in relation to the Applicant, Kenneth Franklin Cressman;

- (b) a declaration that Ontario Regulation 437/97 (Professional Misconduct) made under the *Ontario College of Teachers Act, 1996* does not have retroactive or retrospective effect;
- (c) a declaration that, except as provided in Ontario Regulation 276/97 (Transitional Matters), the Ontario College of Teachers does not have jurisdiction to conduct discipline proceedings in relation to events that occurred prior to Ontario Regulation 437/97 (Professional Misconduct) coming into effect;
- (d) in the event that the Respondent College attempts to proceed with the Discipline Committee hearing before the final resolution of this Application, an interim order staying the decision of the Respondent's Investigation Committee, dated 23 October 2003, to refer the complaint regarding the Applicant to the Discipline Committee until such time as the merits of this judicial review are decided.

[2] The grounds for the Application are:

- (a) The Respondent, Ontario College of Teachers, erred in law and jurisdiction by wrongfully assuming jurisdiction to conduct Discipline Committee proceedings regarding allegations of professional misconduct in relation to the Applicant. In particular,
  - (i) The College erred in jurisdiction by wrongfully assuming jurisdiction to conduct Discipline Committee proceedings into the complaint of professional misconduct regarding the Applicant when the allegations which are the subject of the complaint relate to events that pre-date the existence of the College itself and that pre-date the enactment of the professional misconduct regulation under which the proceedings purport to be conducted; and
  - (ii) The College erred in law and jurisdiction by purporting to give the professional misconduct regulation (Ontario Regulation 437/97) retroactive or retrospective effect to apply to events which occurred prior to the regulation's enactment.
- (b) The Respondent has erred in law and jurisdiction by wrongfully assuming jurisdiction to conduct a hearing in respect of a principal who is currently retired and who retired from teaching prior to the enactment of the professional misconduct regulation.
- (c) The Respondent College has erred in law and denied the Applicant procedural fairness because the Respondent's delay in investigating the complaint and referring it to the Discipline Committee has resulted in a denial of procedural fairness and an abuse of process.

- (d) The present Application is an appropriate one in which to seek an order in the nature of prohibition because
- (i) although the professional misconduct allegations have been referred to the College Discipline Committee, the Discipline Committee hearing has not yet commenced;
  - (ii) the issue in dispute (retroactivity of the regulation) is a pure question of law; and
  - (iii) the Respondent College has, in another proceeding which is currently on appeal to the Divisional Court, taken the position, contrary to the advice of its independent legal counsel, that it will give the professional misconduct regulation retroactive or retrospective effect. This position is consistent with past decisions of the College Discipline Committee.

### **The Facts**

[3] Mr. Cressman was principal of Forest Glen Public School in New Hamburg with the Waterloo Region District School Board ("The Board") from 1992 until he retired in December 1996. Prior to that time, Mr. Cressman was the principal of another school and had been a teacher with the Board for a number of years. At the time of the Application, he was 63 years of age. He has not taught since his retirement in 1996 and he does not plan to engage in teaching in the future.

[4] In the public register of the College of Teachers, he is listed as "status cancelled – resigned". The date listed on the register for the cancellation of his Certificate of Qualification is 20 May 1997.

[5] While the Applicant was principal at the school, Ronald Wayne Archer was a teacher on staff.

[6] Mr. Archer was charged with having committed sexual assault, sexual exploitation, sexual assault with a weapon and uttering a threat to cause death in respect to the male student, MS, during the period March 1993 to February 1998.

[7] The assaults and abuse were reported to the police in February 1998. Mr. Archer was indicted on May 7, 1999. Mr. Cressman, in his capacity as former principal, was called to testify at the criminal trial which occurred between October 10 and October 27, 2000. On January 17, 2001, Mr. Archer was sentenced to four years of imprisonment which Mr. Archer is currently appealing, along with his conviction.

[8] There was, as well, apparently a civil suit against the Board and Mr. Archer resulting from the sexual assault, abuse and exploitation which has either been settled or discontinued.

There was a complaint initiated against Mr. Cressman with respect to the period including but not limited to the 1992-1996 academic years while Mr. Archer was employed as a teacher at the Forest Glen Public School.

[9] After submissions by counsel for Mr. Cressman on November 27, 2002, he was finally advised on October 30, 2003 that there was a decision of the Investigating Committee panel dated October 23, 2003, directing the complaint to be referred to the Discipline Committee.

[10] During the interim, counsel for Mr. Cressman wrote on several occasions inquiring as to the delay and reason for delay.

[11] The Notice of Hearing of the Investigation Committee alleged that Mr. Cressman was guilty of professional misconduct or incompetence as defined in s. 30(2) and (3) of the *Act*:

- 1) Failed to protect male student M.S. from Mr. Archer's abuse of him;
- 2) Failed to provide for the safety and well being of M.S. while he was in the school environment;
- 3) Failed to properly and adequately supervise Ronald Wayne Archer in circumstances where he knew or ought to have known that Mr. Archer had a propensity to act inappropriately and unprofessionally in a sexually inappropriate fashion;
- 4) Failed to create and maintain appropriate records in respect of Mr. Archer's relationships with minors, including the students at Forest Glen Public School;
- 5) Failed to act appropriately regarding the complaint he received from Teacher M. D. Melchin as it related to Mr. Archer and M.S. being alone in a classroom with the door locked and the window covered;
- 6) Failed to act appropriately regarding the complaint with respect to Mr. Archer showering with male students in his gymnastics club ("parallel bar club");
- 7) Failed to refer concerns about Mr. Archer and his activities with students to appropriate authorities such as the police or the child welfare authorities; and,
- 8) Failed to promptly report his concerns to the Board.

[12] Contained in the Respondent's material is an email from Mr. Cressman to the College dated August 2, 1997, indicating that he had retired as of December 31, 1996, and that he asks to cancel his membership in the College, as he is not intending to become involved in teaching in any manner. This letter dealt with payment notices for the College.

#### **Discipline Regime Prior to the Establishment of the College**

[13] Prior to the *Act* and the establishment of the College, teaching authorizations were administered through the Ministry of Education. Prospective teachers applied to the Minister of

Education for an Ontario Teacher's Certificate ("OTC"). The Minister also had the authority to cancel or suspend certificates.

*Education Act*, R.S.O. 1990, c. E.2, s. 8.

R.R.O. 1990, Reg. 297 [revoked by O. Reg. 183/97].

[14] Teachers were subject to discipline through a dual procedure under the *Teaching Profession Act* and the *Education Act*. A helpful overview of the previous disciplinary regime was provided by Kovacs J. in *R. v. P.G. (Re: Ontario (Ministry of Education and Training) v. Canada)*:

The Ontario Teachers' Federation is a body corporate, created under the *Teaching Profession Act* whose responsibilities include the promotion and advancement of education and the status of the teaching profession in Ontario. A code of conduct for members of the Ontario Teachers' Federation is prescribed by Regulation and overseen by its Relations and Discipline Committee. The Relations and Discipline Committee of the Ontario Teachers' Federation is established by Regulation pursuant to the *Teaching Profession Act*. That Committee is charged with considering complaints regarding professional misconduct or unethical conduct of Ontario Teachers' Federation members. If pursuant to such complaint the Committee finds a member guilty of professional misconduct or unethical conduct, it must make a recommendation to the Minister to cancel or suspend the teaching certificate of the member, reprimand the member or any combination of the above.

The Ministry conducts a separate investigation pursuant to the *Education Act* which requires assembling all relevant documentation. This includes transcripts of any trial and sentencing if a teacher has been convicted of a criminal offence.

[1993] O.J. No. 4313 at paras. 4 and 5 (Ont. Gen. Div.).

*Education Act*, R.S.O. 1990, c. E.2, s. 8(1)(13).

[15] The *Regulation made under the Teaching Profession Act* established the Relations and Discipline Committee. This Committee was mandated to consider complaints regarding professional misconduct or unethical conduct of a member and set out the procedures to be followed in hearings held by the Committee.

*Regulation made under the Teaching Profession Act*, O. Reg. 63/55, ss. 19-24.

[16] The Regulation provided in s. 25(1) that: "A member may be found guilty by the Committee of a professional misconduct or unethical conduct if in the opinion of the Committee he has contravened any of the provisions in Sections 13 to 18".

*Regulation made under the Teaching Profession Act*, section 25(1).

[17] Sections 13 to 18 set out the General Duties of Members, the Duties of a Member to his Pupils, the Duties of a Member to Educational Authorities, the Duties of a Member to the Public, the Duties of a Member to the Federation, and the Duties of a Member to Fellow Members.

*Regulation made under the Teaching Profession Act, ss. 13-18.*

[18] These duties include the duty to:

- “strive at all times to achieve and maintain the highest degree of professional competence and to uphold the honour, dignity, and ethical standards of the teaching profession” (s. 13);
- “show consistent justice and consideration in all his relations with pupils” (s. 14(d));
- “concern himself with the welfare of his pupils while they are under his care” (s. 14(f)).

[19] The procedure conducted pursuant to the *Teaching Profession Act* applied only to OTF members and not to all persons who held an OTC.

#### **The Current Disciplinary Regime for Professional Misconduct under the Act**

[20] The Ontario College of Teachers is the self-governing regulatory body for teachers in the province. The College was created by the *Ontario College of Teachers Act, 1996*. The provisions of the *Act* creating the College were proclaimed in force on 5 July 1996.

[21] While the legislation creating the College was passed in 1996, the College’s membership, its discipline committee and the offence of professional misconduct only came into existence over the course of 1997 and were not fully in place until December 1997.

[22] Section 62 of the *Act* provides for the College’s initial membership. This section was proclaimed in force on 4 April 1997. Under s. 62, College Council had power to make a regulation specifying a day on which every person who held an Ontario Teacher’s Certificate or letter of standing under the *Education Act* would be deemed to hold a certificate of registration with the new College. The regulation that was made provided that teachers would be deemed to be initial members of the College as of 20 May 1997.

*Ontario College of Teachers Act, 1996, S.O. 1996, c. 12, s. 62.*

*Ontario Regulation 184/97 (Teachers Qualifications), s. 58.*

[23] Parts III to VIII of the *Act*, which established the College’s framework for registration, investigation, discipline and fitness to practice, were proclaimed in effect on 20 May 1997.

[24] Pursuant to s. 40(1), para. 31 of the *Act*, College Council made a regulation defining what conduct constitutes professional misconduct. This regulation, O. Reg. 437/97, was filed and came into effect on 4 December 1997.

*Ontario College of Teachers Act, 1996*, s. 40(1), para. 31; also s. 30(2)

Ontario Regulation 437/97 (*Professional Misconduct*)

### **Transitional Provisions**

[25] Under Ontario Regulation 276/97, filed on July 27, 1997, a discipline matter referred by the Minister to the OTF before January 1, 1997 indicated that it was to be dealt with pursuant to the old *Act* and the regulation made thereunder. It deemed a later decision by the Minister upon referral from the OTF to be a decision of the College's Discipline Committee under s. 30 of the *Act*.

[26] For disciplinary matters referred by the Minister to the OTF after January 1, 1997, the Transition Regulation required the Minister to refer the matter to the OCT to dispose of in accordance with the *Ontario College of Teachers Act, 1996*.

[27] Section 62(1) of the *Act* provides that:

Every person who, on a day to be specified in a regulation made under subsection (2), holds an Ontario Teacher's Certificate or a letter of standing issued under the Education Act shall be deemed to hold a certificate of qualification and registration under this Act.

This section came into force pursuant to Ont. Reg. 184/97, s. 58. The day prescribed for the purpose of s. 62(1) of the *Act* is May 20, 1997.

May 20, 1997 is also the day that Mr. Cressman's certificate is cancelled according to the Register.

[28] There are also regulations such as Reg. 276/97, s. 2(2) dealing, as I indicated earlier, with previously ongoing discipline proceedings. The offence of professional misconduct or unethical conduct was defined under s. 25(1) of the Regulation made under the Teaching Profession Act if, in the opinion of the Relations and Discipline Committee, an individual has contravened any of the provisions of ss. 13 - 18. Sections 13 to 18 may be found at page 2 of Schedule B of the Respondent's Factum.

[29] The Ontario College of Teachers *Act*, in s. 14(5), provides:

A person whose certificate of qualification and registration is revoked or cancelled continues to be subject to the jurisdiction of the College for professional misconduct, incompetence or incapacity referable to any time during which the person held,

- a) a certificate of qualification and registration under this Act; or
- b) an Ontario Teacher's Certificate or a letter of standing as a teacher under the *Education Act*.

[30] Section 30(2) of that *Act* reads:

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

### Standard of Review

[31] The Applicant submits that whether the College has jurisdiction to conduct a Discipline Committee Hearing must be reviewed on the standard of correctness.

[32] The Respondent takes no position in regard to the standard of review.

[33] In determining the standard of review it is necessary for the Court to apply a pragmatic and functional approach in which four factors are considered:

- 1) the presence or absence of a privative clause;
- 2) the expertise of the tribunal relative to that of the reviewing court on the issue in question;
- 3) the purposes of the legislation and the provision in particular;
- 4) the nature of the problem, and in particular, whether it is a question of fact, law or mixed fact and law.

*Dr. Q. v. College of Physicians and Surgeons of British Columbia* (2003), 223 D.L.R. (4<sup>th</sup>) 599 (S.C.C.) at 609-10.

[34] In this case, there appears to be no privative clause and the expertise of the tribunal relative to that of the reviewing court calls for no deference in regard to jurisdiction.

[35] The purpose of the legislation is to establish a self-governing profession including the regulation of professional misconduct. A professional disciplinary body is owed no deference on questions of law and jurisdiction and should be reviewed on the standard of correctness.

*Carruthers v. College of Nurses of Ontario* (1996), 31 O.R. (3d) 377 (Div.Ct.) at 388-89

*Richmond v. College of Optometrists (Ontario)* (1995), 25 O.R. (3d) 448 (Div. Ct.) at 456-57

[36] All administrative tribunals must correctly interpret statutory provisions which grant and limit their jurisdiction.

*Syndicat des Employés de Production du Québec et de l'Acadie v. C.L.R.B.* (1984), 14 D.L.R. (4th) 457 (S.C.C.) at 463-64

*U.E.S., Local 298 v. Bibeault* [1988] 2 S.C.R. 1048 at 1085-86

*Canada (Attorney General) v. Public Service Alliance of Canada* (1991), 80 D.L.R. (4<sup>th</sup>) 520 (S.C.C.) at 528-30

[37] A question of natural justice must also be reviewed on the standard of correctness. In accordance with the Supreme Court of Canada's long-standing jurisprudence, a breach of natural justice is a "jurisdictional error" reviewable on a standard of correctness.

*Université du Québec à Trois-Rivières v. Larocque* (1993), 101 D.L.R. (4<sup>th</sup>) 494 (S.C.C.) at 507, 509

*U.E.S., Local 298 v. Bibeault, supra* at 1084-85

[38] The standard of review is that of correctness.

#### **Submissions of Counsel for the Applicant**

[39] Counsel for the Applicant submits that the conduct about which the complaint arises took place during a time period when a different procedure was involved and different definitions of professional misconduct were involved. He also submits that the only penalty which could be imposed for breach of those duties under the previous regime was that of suspension or revocation of the teaching certificate.

[40] His second submission is that the definition of professional misconduct under which these proceedings are taking place did not even exist at the time the Applicant resigned his position at the College or, if relevant, at the time he retired as principal in the year previous.

[41] His further submission is that there can be no public interest protection which arises in relation to retroactive or retrospective proceedings such as this by the Board because the issue of the Applicant's right to teach has already been dealt with by the cancellation of his certificate.

[42] His further submission is that the only purpose in proceeding is to either hold Mr. Cressman up to public disrepute or to impose a fine upon him or to impose the cost of proceedings against him, none of these elements being present as a penalty in the earlier legislation.

#### **Submissions of Counsel for the Respondent College**

[43] The Respondent College, on the other hand, maintains it has jurisdiction over the Applicant and its jurisdiction does not depend on a retroactive application of the *Act*.

[44] It argues specifically that s. 14(5) provides:

#### **Continuing Jurisdiction: Revocation, Cancellation**

A person whose certificate of qualification and registration is revoked or cancelled continues to be subject to the jurisdiction of the College for professional misconduct, incompetence or incapacity referable to any time during which the person held,

- a) a certificate of qualification and registration under this Act; or
- b) an Ontario Teacher's Certificate or a letter of standing as a teacher under the *Education Act*.

[45] It submits that Mr. Cressman held an Ontario Teacher's Certificate under the *Education Act* since 1965, thus, it includes the period during which the alleged misconduct occurred. The submission is then that the presumption of retroactivity raised by the Applicant is rebutted.

[46] The College submits, as well, that a plain reading of the entire legislative framework makes clear that the legislation intends that the College would have jurisdiction over misconduct occurring prior to the existence of the College. It argues, as well, that the transition matters in the Statute expressly provided for the College's jurisdiction only as far as former conduct had come to the attention of the Minister and had been referred to the OTF.

[47] Next, it concedes further that s. 30 of the *Act* came into force on May 20, 1997. At the time, there were no regulations defining professional misconduct. Ontario Regulation 437/97, which defined misconduct, was enacted on September 30, 1997 and filed December 4, 1997.

#### **Submissions of the Intervenor**

[48] The Attorney General for Ontario submits that the jurisdiction of the College over the Applicant does not depend on a retroactive application of the *Ontario College of Teachers Act, 1996* or in the alternative, that any presumption of retroactivity is rebutted.

[49] It argues that the only changes in the offence of professional misconduct are in relation to the procedural mechanism for prosecuting complaints of professional misconduct.

[50] As well, the Attorney General submits that the primary role of the College in discipline proceedings is to protect the public prospectively by pursuing the disqualification of unsuitable teachers.

#### **Analysis**

[51] Both counsel and the intervenor, the Attorney General for Ontario, in argument, dealt extensively with the duties of the College in dealing with past events which affect the qualification of members of the College at the present time. The factual situation in this matter, however, is somewhat unusual. The material indicates that Mr. Cressman retired from his position as principal before the *Act* was even proclaimed. When he continued to be billed by the College, he wrote and advised them that he had retired the year before and that he wished the College to cancel his certificate which had issued after his earlier retirement.

[52] I am satisfied that, in the circumstances of this Application, it is proper to assume without deciding that s. 14(5) gave the College continuing jurisdiction over Mr. Cressman. Once having made that assumption, without affecting cases which may arise in different circumstances, it is necessary to continue the analysis as to the jurisdiction of the College to prosecute Mr. Cressman

in relation to offences which were only created after he retired and after his certificate was cancelled. The Factum of the Respondent indicates that the duty to deal with pre-1997 conduct does not require a retroactive application of the legislation, since the purpose of the proceeding is to determine Mr. Cressman's ongoing suitability as a teacher.

[53] There is a strong legal presumption against the retroactive or retrospective application of statutes. A statute can only have retroactive or retrospective application if this is required by the express language of the statute or by necessary implication (*Gustavson Drilling (1964) Ltd. v. MNR* (1975), 66 D.L.R. (3d) 449 (S.C.C.) at 460). Even where it is clear that legislation is intended to have retroactive or retrospective application, the extent of the retroactivity or retrospectivity must be interpreted narrowly (*Joe Moretta Investments Ltd. v. Ontario (Minister of Housing)* (1992), 8 O.R. (3d) 129 (C.A.) at 145). In addition, it is a principle of statutory interpretation that penal statutes should be strictly interpreted in favour of the subject (*R. v. Phillips Electronics Ltd.* (1980), 116 D.L.R. (3d) 298 (Ont. C.A.) at 307-8). The Ontario Court of Appeal has recently confirmed that professional discipline legislation should be strictly complied with (*Henderson v. College of Physicians and Surgeons of Ontario* (2003), 65 O.R. (3d) 146 at 153-4).

[54] Since the hearing of this application, *Bhadoria & Ontario College of Teachers*, File 377/03 has been released: It dealt with an appeal from a decision of the Discipline Committee in March 2003 where it found letters addressed to the then Director of the Toronto Board of Education in 1989 were evidence of professional misconduct. It found as well that the College had the necessary jurisdiction to deal with the complaint although the conduct took place before the passage of the *Act*. It appears that Mr. Bhadoria was still a member of the College at the time of the disciplinary proceeding, which is not the case here.

[55] In *Bhadoria*, his conduct prior to the passage of the present *Act* led to termination of his position as a teacher. He challenged that termination in the courts and lost. Mr. Justice Cory of the Supreme Court of Canada, in *Toronto Board of Education v. Ontario Secondary School Teachers' Federation, District 15*, [1997] 1 S.C.R. 487 at para 53, indicated::

The fact that they may have been written outside the hours of teaching duty cannot either excuse or alleviate the seriousness of the misconduct.

[56] The Respondent also relies on the purpose of the *Act* as set out in s. 3 and summarized by the Divisional Court in *Kaizer v. Ontario College of Teachers* (2001), 155 O.A.C. 329 (Div. Crt.) at para. 4:

In carrying out its objects, which include receipt and investigation of complaints against members of the College and dealing with professional misconduct and fitness to practice issues, the College has a duty to serve and protect the public interest under s. 3 of the *Act*.

[57] The Respondent also relies on *Brosseau v. Alberta Securities Commission*, [1989] 1 S.C.R. 301 where in a similar situation the Alberta Securities Commission dealt with the qualifications of persons to continue trading in securities. Madam Justice L'Heureux-Dubé for the Court in that case, at p. 321, wrote:

The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[58] The Applicant, on the other hand, argues that *Re Royal Canadian Mounted Police Act* (1990), 123 N.R. 120 (Fed. C.A.) is a case which gives the proper interpretation of the principles dealt with in *Brosseau*. In that case, Mr. Justice MacGuigan of the Federal Court of Appeal, indicated at p. 137, para. 32:

The office or function of such statutes is to establish some form of legal disqualification rather than to punish as such. In short, there is an exception to the presumption against retrospectivity where there is (1) a statutory disqualification, (2) based on past conduct, (3) which demonstrates a continuing unfitness for the privilege in question. To my mind this is quite a narrow exception to the general presumption, one that is very much more limited in scope than the trial judge's holding that an exception occurs whenever the statutory purpose may be conceptualized in broad terms as the protection of the public, whatever may be the effect upon the subordinate value of vested rights or interests. The actual holding of *Brosseau*, as far as I can see, has no possible application to the case at bar since there is no question here of continuing unfitness.

[59] The present disciplinary code was not in effect when Mr. Cressman resigned his position. Thus, if applied to him it is being applied retrospectively.

[60] In this case, the College has the duty to scrutinize the qualifications of Mr. Cressman should he reapply for a certificate under s. 18. Applying the interpretation of the Federal Court of Appeal to the *Brosseau* case, it appears here, once again that there is no issue as to continuing unfitness and, therefore, no need to protect the public.

[61] On the material before us, the only issues which would remain for the Discipline Committee would probably be the imposition of a reprimand and/or fine and the costs of the hearing.

[62] It cannot be argued, in my view, that in the case of Mr. Cressman, the public interest exception in *Brosseau* could be utilized to proceed against him on the basis of a statutory offence which did not exist at the time of the commission of the alleged act that would result in sanctions imposed against him that also did not exist at the time of the alleged acts.

[63] Mr. Justice MacGuigan also went on to say in para. 34:

Whether there is a general category broader than the subcategory, it must at least be recognized that there cannot be any public interest or public protection exception, writ large, to the presumption against retrospectivity, for the simple reason that every statute, whatever its content, can be said to be in the public interest or for the public protection.

No Parliament ever deliberately legislates against the public interest but always visualizes its legislative innovations as being for the public good.

[64] To support his analysis, Mr. Justice MacGuigan reviewed the two supporting cases cited by Madam Justice L'Heureux-Dubé in *Brosseau: R. v. Vine* (1875), 10 L.R.Q.B. 195 and *Re A Solicitor's Clerk*, [1957] 3 All E.R. 617 (Q.B.D.).

[65] In the former case, a new statutory provision provided that convicted felons were forever disqualified from selling retail spirits. The Court found that this was not a statute as governed by the presumption against retrospectivity. In the latter case, the statutory amendment allowed the making of orders disqualifying persons convicted of larceny, embezzlement or fraudulent conversion of property from acting as a solicitor's clerk. Lord Goddard also found that the statute was not in truth retrospective and went on to say at p. 619:

...It would be retrospective if the Act provided that anything done before the Act came into force or before the order was made should be void or voidable or if a penalty were inflicted for having acted in this or any other capacity before the Act came into force or before the order was made

[66] No case was cited by any of the counsel for the proposition that a penalty such as fine and costs which did not exist at the time of the alleged acts could be imposed by statute or regulation passed sometime later without clear wording to that effect in the statute. Therefore, the presumption against retrospectivity has not been rebutted on the facts of this case, and the Discipline Committee has no jurisdiction to proceed.

### Delay

[67] The College submits Mr. Archer's criminal trial took place in October 2000. The College was advised in November 2000 of Mr. Archer's conviction. It concedes that the last submissions made to the Investigation Committee were on November 27, 2002 and the decision was made October 23, 2003.

[68] Section 26(9) of the *Act* provides:

The Investigation Committee shall use its best efforts to dispose of the complaint within 120 days of it being filed with the Registrar.

[69] The College relies on *J.G. v. Ontario College of Teachers* (2002), 1 Admin. L.R. (4th) 285 (Ont. Div. Ct.) at para. 28:

While the College's regulations encourage a standard time period of 120 days for the completion of an investigation, we do not think that the longer time taken in this case was unreasonable. This was a stale case, which would naturally pose problems for investigators. As she was entitled to do, the Appellant was raising procedural issues, and the resolution of these would add some time. The Appellant had counsel and was aware

of the fact that the issue was by then being actively considered. Standing alone, this time period is not of great concern...

[70] Conceding that the delay within the College is unexplained, counsel for the Respondent indicates that the principles set out by Mr. Justice Bastarache at para. 115 in *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, set out a framework for dealing with delay:

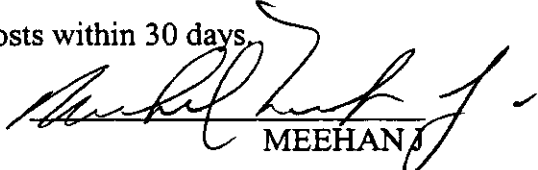
I would be prepared to recognize that an unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute . . . . [Emphasis Added]

[71] Whether a delay of eleven years from the time of the events underlying the first allegations against the Applicant, combined with the original investigation by the College, then its requests for various materials from Mr. Cressman and the time taken for a decision would amount, in the circumstances, to an inordinate delay is not necessary to answer because of the findings in relation to the lack of jurisdiction to proceed as already outlined.

[72] No issue of licensing or protection of the public arising here, the issue then becomes whether disciplinary action under the code and a possible penalty is available retrospectively and the answer is "No".

[73] An order shall issue in the nature of prohibition of the proceedings of the Discipline Committee as requested.

[74] Failing agreement counsel may make submissions as to costs within 30 days.

  
MEEHAN

**O'Driscoll and Swinton JJ.:**

[1] We concur with the reasons of Meehan J. However, we write these concurring reasons to clarify our view of the applicability of the decision of *Bhadauria v. Ontario College of Teachers* (Div. Ct., Docket 377/03, released June 9, 2004) and to explain why it is distinguishable from this case.

[2] Section 30(2) of the *Ontario College of Teachers Act, 1996*, S.O. 1996, c. 12 states that a member may be found guilty of professional misconduct "as defined in the regulations". The regulation which defines professional misconduct, O. Reg. 437/97, was filed and came into effect December 4, 1997.

[3] Mr. Cressman retired as a principal in December, 1996. He resigned from the College of Teachers in August, 1997, and the cancellation of his certificate of qualification and registration was effective May 20, 1997. He has indicated that he has no intention of teaching again.

[4] In contrast, Mr. Bhadauria still held a certificate of qualification and registration at the time of the disciplinary proceedings commenced in January, 2000. He had applied for a permanent teaching position in 1998, prior to the disciplinary proceedings.

[5] Section 14(5) of the *Ontario College of Teachers Act* shows that the Legislature intended the College to have continuing jurisdiction, in relation to professional misconduct, over teachers whose certificate of qualification and registration was cancelled or revoked for conduct referable to any time that the person held such a certificate or a letter of standing or an Ontario Teacher's Certificate. The main purpose of this section appears to be to permit the College to continue with disciplinary proceedings when a member has resigned in order to avoid those proceedings, and thus to cure the problem of a lack of jurisdiction over a non-member seen in *Chalmers v. Toronto Stock Exchange* (1989), 70 O.R. (2d) 532 (C.A.) at 542.

[6] While s. 14(5) confers jurisdiction on the College over conduct at any time that the individual had a certificate of registration or a letter of standing or an Ontario Teacher's Certificate, the provision does not clearly state that the regulation contemplated by s. 30(2), defining professional misconduct, is to have retrospective effect, nor does that follow by necessary implication. Unless the legislation expressly or by necessary implication makes the Professional Misconduct Regulation retrospective in operation, it should not be applied retrospectively (*Gustavson Drilling (1964) Ltd. v. MNR* (1975), 66 D.L.R. (3d) 449 (S.C.C.) at 460). Unlike O. Reg. 276/97, dealing with "Transitional Matters - Discipline", the Professional Misconduct Regulation is not expressly retrospective in its operation.

[7] In *Bhadauria*, the Court held that the Professional Misconduct Regulation could apply to Mr. Bhadauria's conduct in 1989 because of the holding in *Brosseau v. Alberta Securities Commission* (1989), 57 D.L.R. (4th) 458 (S.C.C.). In that case, the Supreme

Court of Canada held that the presumption against retrospectivity may be rebutted where the legislation imposes a penalty on a person related to a past event not for the purpose of punishment, but for the purpose of protecting the public. The Supreme Court quoted from the decision of the Alberta Court of Appeal, which had characterized the legislation as imposing a disqualification based on past conduct which might show current unfitness to trade in securities.

[8] The Factum for the Intervenor states that “the primary role of the College in discipline proceedings is to protect the public prospectively by pursuing the disqualification of unsuitable teachers” (para. 15). The Divisional Court in *Bhadauria* concluded that the disciplinary provisions “are designed to disqualify from teaching those persons whom the Discipline Committee finds to have committed acts which call into question their suitability to teach” (at para. 25).

[9] While there is a public interest in applying the Professional Misconduct Regulation to individuals such as Mr. Bhadauria, there is no public interest in disciplining an individual who resigned as a principal or teacher and cancelled his certificate of qualification and registration before that regulation ever came into effect. The only purpose of the disciplinary proceedings here can be punitive, and the only effect retrospective.

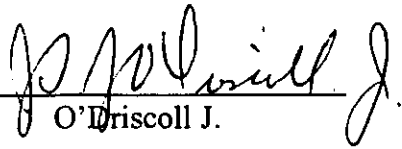
[10] Nor can the discipline process here be described as merely a procedural change, as described in *Bhadauria*. Mr. Bhadauria’s misconduct could have been the subject of disciplinary action under the previous regime, although under a different procedure. The Divisional Court concluded that the new regime did not change the status of his conduct (at para. 25).

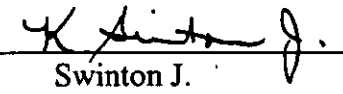
[11] However, that will not always be the case. Regulation 437/97 defines professional misconduct by setting out 27 acts of misconduct. A number of these acts are clearly ones which would not have been misconduct under the previous regime, since they make reference to the College, the Discipline Committee and the Investigating Committee (for example, 20 through 25). Thus, the application of the regulation is not simply a procedural change in all cases.

[12] The allegations against Mr. Cressman in the Notice of Hearing of the Discipline Committee refer to eight different grounds in the regulation. The regulation under the *Teaching Profession Act* did not have this degree of specificity. Moreover, if found guilty of professional misconduct, Mr. Cressman may be subject to a fine or costs. Under the previous regime, such sanctions were not available. Finally, under the previous disciplinary regime, had he resigned his membership, he could not have been subsequently disciplined. Thus, in Mr. Cressman’s case, the disciplinary proceedings are not just a change in procedure, but rather the retrospective application of the Professional Misconduct Regulation and the Act.

[13] In our view, the presumption against retrospectivity has not been rebutted with respect to the application of the Professional Misconduct Regulation to an individual like

Mr. Cressman, who resigned his membership in the College and ceased teaching before the Professional Misconduct Regulation came into effect. Therefore, we would dispose of this application for judicial review as set out in the reasons of Meehan J.

  
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O'Driscoll J.

  
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Swinton J.