

Retroactivity Part 2: Court Rules that Professional Misconduct Regulations Won't Always Apply Retroactively

By Fay Faraday

In May 2004, the Ontario Superior Court (Divisional Court) heard two applications for judicial review which challenged the retroactive application of professional misconduct regulations under the *Ontario College of Teachers Act, 1996*. Both cases raised two key issues:

1. First, can the *Ontario College of Teachers Act, 1996* and the regulation under it which creates the offence of professional misconduct apply retroactively? Can the regulation apply to events that took place before the *Act* and/or regulation came into effect?
2. Second, does the College's delay in investigating allegations of professional misconduct violate the duty of fairness?

In its first decision, *Bhadoria v. Ontario College of Teachers*, released 9 June 2004, the Divisional Court ruled that the regulations did apply retroactively. In its most recent decision, *Cressman v. Ontario College of Teachers*, released 25 January 2005, the Divisional Court ruled that the regulations did not apply retroactively on the facts of that case and clarified the application of its earlier ruling in *Bhadoria*. The Ontario College of Teachers will not appeal the *Cressman* decision. Meanwhile, the Court of Appeal has refused leave to appeal *Bhadoria* on the issue of retroactivity but will hear an appeal on the issue of delay.

The *Bhadoria* decision was reviewed in detail in the November 2004 edition of *Update for Professionals*. To read the earlier article click [here](#). To see the *Bhadoria* decision click [here](#). This article reviews the developments in the *Cressman* decision.

Background

The Ontario College of Teachers was created by legislation that was passed in July 1996 and its discipline committee was created in May 1997. The regulation defining professional misconduct for teachers came into effect in 4 December 1997.

Kenneth Franklin Cressman was an elementary school principal. He began teaching in 1965 and retired in December 1996. He was never an active member of the College as he retired before the College had any members. In August 2002, almost six years after he resigned, the College Registrar initiated a complaint against Mr. Cressman raising allegations of professional misconduct regarding Mr. Cressman's supervision of another teacher, Ronald Wayne Archer, during the period 1992-1996. In October 2003, the College's Investigation Committee directed that the allegations of professional misconduct be referred to a hearing before the College's Discipline Committee.

Regulations Only Apply Retroactively Where Necessary for Public Protection

In *Cressman* the Court clarified the circumstances in which professional misconduct regulations will apply retroactively. In so doing, the Court provided a more precise definition of the circumstances in which the law will apply to past events and outlined some factors which may

be relevant to deciding if and the extent to which the law will apply retroactively in the facts of any specific case.

The Court ruled that there is a strong legal presumption that a statute does not apply retroactively. The professional misconduct regulations will only apply to events that occurred before the law was passed if

- (a) this power is required by the express language of the statute or regulation itself or by necessary implication; or
- (b) if the legal presumption against retroactivity can be rebutted by showing that it is necessary for the College to address past acts in order to protect the public in relation to a teacher's current suitability to practice the profession.

The Court ruled that nothing in either the *Ontario College of Teachers Act* or in the regulation stated that the *Act* or regulation were to apply retroactively. In *Bhadoria*, the Court had ruled that the intention to apply the law retroactively could be found in part by reference to s. 14(5) of the *Act*. This section gives the College continuing jurisdiction in relation professional misconduct which arose during any time when a person held a teaching certificate even if they had resigned or had their license revoked. In *Cressman* the Court gave s. 14(5) a narrower reading. The Court clarified that this section is intended to give the College continuing jurisdiction where a person resigns in order to avoid disciplinary proceedings – a situation which had caused a problem with various other colleges. In *Cressman* the Court ruled that s. 14(5) does not either expressly or by necessary implication provide that the law was intended to apply retroactively.

The Court further ruled that in *Cressman* the “public protection” exception was not made out. A case will meet the public protection exception where the regulation imposes a penalty on a person related to past event not for the purpose of punishment, but for the purpose of protecting the public.

In *Bhadoria*, the case fell within the public protection exception because the teacher continued to be a member of the College and had applied for a permanent teaching position. In *Cressman*, the “public protection” exception was not made out because the teacher had retired and had no intention of teaching in the future. As a result, in that case the only purpose of applying the legislation was punitive. The College had no current public interest mandate.

The Court also indicated that in Mr. Bhadoria's case the discipline process resulted in only a procedural rather than substantive change. Mr. Bhadoria's misconduct could have been the subject of disciplinary action in the pre-1997 regime, although under a different procedure. In *Cressman*, the Court ruled that this will not always be the case as a new regulation could create new offences and new penalties creating new liabilities which did not exist at the time the impugned conduct occurred. As a result, even if a regulation applies retroactively, the Court indicates that the extent to which it may apply will have to be examined closely on the facts of each case.

As the Court ruled that the regulation did not apply retroactively to Mr. Cressman, the Court

declined to address the question of delay.

However, on 28 January 2005, in the case of *Bhadoria* the Court of Appeal granted leave to appeal on the issue of delay only. As a result, that court will have an opportunity to address the extent to which the College's Investigation Committee must comply with the statutory direction to use its best effect to reach a decision within 120 days.

To view a copy of the Divisional Court ruling in *Cressman*, click [here](#).