THE ROSS DECISION AND CONTROL IN PROFESSIONAL EMPLOYMENT

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The *Ross*[1] decision raises the question of the duty, capacity, and willingness of occupational associations to exercise a shared responsibility with the employer to control through discipline the "micro-democracy of the work environment."[2] The case demonstrates that such a partnership is anticipated if the remedial and 217 educational purposes of human rights legislation are to be effectively realized.

Teaching is essentially an employment relationship, but it is also a profession as understood at law. It is neither an office nor Crown employment. The question of employee control is of foremost concern to those associations accorded status as professions. Given the arguments on which statutory liability was found to rest with Ross' employing School Board, it is but a short step to transferring liability to Ross' professional association, the New Brunswick Teachers' Association (hereinafter NBTA).

However, while Ross' union, the New Brunswick Teachers' Federation (hereinafter NBTF), the certified bargaining agent, was designated as a party to the proceedings relative to its interest and its relationship to the Human Rights Act, the NBTA neither sought nor was designated party status, relative to the profession's interest. Yet, in the result the necessary remedial order has left the NBTA seemingly at a crossroads. Its right to continue in the future to claim status as a professional association is at risk. Shedding light on that dilemma affords a focus for this paper.

The Tribunal's Dilemma

The Human Rights approach is, as Chair Bruce reiterated in *Ross*, "not to punish the discriminator, but rather to provide relief for the victims of discrimination."[3] Yet it became impossible for the Board of Inquiry to provide a remedy that did not have punitive aspects given the Chair's pivotal conclusion that: "The most striking impression from a review of the School Board's handling of the Malcolm Ross issue is the reluctance of the School Board to become involved, and the

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[1]*Attis* v. *Board of Education of District 15* (1991), 121 N.B.R. (2d) 1, (*sub nom. Attis* v. *New Brunswick School District No. 15*) 15 C.H.R.R. D/339 (Human Rights Board of Inquiry). [References hereinafter are to the edition reported in this *Journal* at 238.]

[2]*Brennan* v. *Canada and Robichaud*, [1987] 2 S.C.R. 84 at 95 per La Forest J.

[3]*Supra*, note 1 at 266.

slowness of its response."[4]

What the evidence demonstrates is a limited understanding on the part of the School Board of its duty to discipline within the labour law framework of 'just cause,' notwithstanding the availability of cogent legal advice and some twenty years experience with the labour law model established by the *Public Service Labour Relations Act*.[5] 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.

Equally reluctant and slow to respond or even accept jurisdiction for disciplinary control were both the Department of Education and the NBTA, in the face of having had almost a half century to become familiar with the professional statutory model. In the case of the Department of Education control rests in the Minister's power to remove the qualifying licence; however, the historical expectation is that the Minister should but act on the recommendation of the entities with primary jurisdiction, the School Board and the professional association. A flaw, perhaps, in this arrangement is that there exists no statutory duty on the part of any of these entities to receive a complaint from the public.[6] Like the School Board, both the professional association and the Department chose a less than proactive stance, seemingly content to weather the storm of controversy impugning the practice of education.

In the face of this general abandonment of jurisdiction the Board of Inquiry was left to find its way through the labyrinth, and to discern what it means to teach. In the result the Board concluded that Malcolm Ross "... has impaired his ability as a teacher and cannot be allowed to remain in that position" and that, "The only viable solution is that Malcolm Ross must be removed from the classroom."[7] In short, Ross is, within his current employment, a teacher who is forbidden to teach.

In effect the remedy is a removal of the licence to practice, or at the very least a significant alteration of status that begs a hearing and clarification by those who

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[4]*Supra*, note 1 at 261.

[5]R.S.N.B. 1973, c. P-25.

[6]That right is fundamental to the professional concept and must permit the public to act without fear of defamation actions should they be wrong; see, for example, *Sussman* v. *Eales* (1985), 31 A.C.W.S. (2d) 114 (Ont. H.C.). Moreover, as noted in *Re Schulman and College of Physicians and Surgeons* (1980), 29 O.R. (2d) 40 at 44, "No benefit or advantage can accrue to the patient by discipline against a doctor. The Discipline Committee is performing a statutory function exercised in the public interest by statutory command. No acquiescence by a patient can operate to deter the committee from its statutory duty to conduct a hearing and make a decision."

[7]*Supra*, note 1 at 268.

continue to be charged with determining if an individual is suited or fit to contract, or to offer service to the public through the claim to professional status. That question is entirely different from the Tribunal's finding of discrimination, and does not place the discriminator in double jeopardy.[8] Rather it stems from a separate contractual relationship and requires the professional association to ascertain whether the discrimination evidenced is within the bounds of ethical conduct.[9]

Yet, as has so often been said, hard cases make bad law. Central to the Board of Inquiry's remedy was, in the face of such general inaction, the recommendation that the Department of Education consider, in consultation with the NBTA, conduct a review of the *Schools Act*[10] toward determining the appropriateness of defining, "a clear statement of professional conduct expected of teachers."[11] The intent of that recommendation was to ensure that some central control rests with the Department to maintain minimal provincial standards.

While that recommendation failed to survive judicial review it has functioned, much like a declaratory judgment, to accelerate the debate on the appropriate tribunal to hear issues of professional misconduct. In short, the professional paradigm of the NBTA remains at risk, and this at a time when the teaching

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[8]*Re Weare*, [1893] 2 Q.B. 439. See also *Re Squires and Black* (1980), 107 D.L.R. (3d) 596 (Sask.Q.B.). What also must be protected, of course, are the high standards and reputation of an honourable profession – *Ziederman* v. *General Dental Council*, [1976] 2 All E.R. 334 (P.C.).

[9]In addition to the NBTA's determination of whether the discrimination found constitutes unbecoming conduct, it should consider Ross' direct attacks on education and the profession itself: "... children are the main targets and the most effective means of conditioning them is through the educational system. ... What I hope to do is show that in many ways schools are acting as tools of the conspiracy, and that your children are in the front line of battle, unprepared and unwary, and unable to defend themselves against the barrage of false information hurled at them." *Web of Deceit* (Moncton: Stronghold, 1978) at 75.

[10]R.S.N.B. 1973, c. S-5.

[11]*Attis* v. *Board of Education District 15* (1991), 121 N.B.R. (2d) 361 (Q.B.) [this *Journal* at 269] quoting the Order of the Board of Inquiry *supra*, note 1. Assumedly the Department would also consult with L'Association des Enseignants Francophones du Nouveau Brunswick (AEFNB) whose professional status is the same as the NBTA's, with a shared bargaining agent in the NBTF. If the Chair's concern is with professional integrity, which for teachers is factored by the expectation of exemplary conduct and the duty to diligently and faithfully teach, such is at the root of the relationship. The exemplary aim is usually part of statute, or as in the case of New Brunswick, the regulations. Moreover, it is the hallmark of teaching. Commenting on the archaic flavour of the exemplary duty section [s. 235(c)] of the Ontario *Teaching Profession Act* (R.S.O. 1990, c. T.2), Arbitrator Swan noted: "Moreover, there are possible breaches of this section that would offend against the spirit of other legislation, such as the *Ontario Human Rights Code* (R.S.O. 1990, c. H.19) and against any acceptable view of the extent to which employers should be permitted to intrude into the private lives of employees. The task of balancing those interests has been left, as usual, to the adjudicators..." *Infra*, note 16 at 270.

profession is gaining confidence in its capacity as a profession. Rather than any retrogressive return to the concept of 'cause' as regulated by common law judges, what in reality is called for is a willingness to make the professional model work.

The Essence of Professionalism

Professionalism is a claim to expertise accorded deference at law. The hallmark of professional status is the statutory right and duty to discipline, or to control the practice of that expertise in the interest of both the public and the profession. It is this responsibility to police the profession, to apply discipline to misconduct, that constitutes the offer and acceptance of the social contract of self-government. It is not a descriptive composite of virtues taken from trait theory, nor the need to licence in the first instance that locates the professional paradigm, rather it is continual warrant or guarantee of expert service by those in possession of that expertise. It is peer control.

The social contract of the professions has remained largely unquestioned for more than a century. However the emergence of the concept of the professional employee, particularly one employed by the public, has given rise to accusations of a shift in balance away from the public interest and toward the self interest of the profession. Indeed the argument is essentially that the interests conflict. To the degree that such arguments can demonstrate an abuse of power they are valid just as they are suspect if they emanate from the self interest of the government as employer. As a matter of integrity the professions must be independent of partisan politics.

Balancing Models of Discipline

Professionals, like all employees who bargain collectively, fall under remedial legislation aimed at restoring the balance of power that had been lost at common law. At the heart of such legislation is the mandate that there be a dispute resolution process to preserve the peace of the collective agreement. The universal adoption of rights arbitration or adjudication has become the lifeblood of the new relationship. The parties to a collective agreement have mutually exchanged the rigidity of 'dismissal for cause' for the flexibility of 'discipline for just cause' which is predicated on affording the labour arbitrator power not only to vary the penalty chosen, but to order reinstatement to employment. Neither is permissable at common law.

Adding flesh to the skeletal concept of 'just cause' has been the great accomplishment of the last half century of private sector labour law. The product is a coherent theory of discipline, distilled case by case in a manner reminiscent of the common law. In keeping with the desire to preserve relationships where possible, discipline is seen to be corrective, rehabilitative and necessarily individual, rather than simply punitive. Still the power to discipline, as a means of controlling

the relationship, remains with the employer. Moreover, that power to discipline in its own interest embraces, of course, the employer's reputation or public perception. In that regard it equitably balances the power of the professional assocation to discipline in its own interest 'misconduct' that is perceived to damage the profession's reputation and hence its economic worth.

What binds the two models is that in both, decisions made are subject to expertise in what constitutes 'just cause' in a particular employment, or 'misconduct' in a particular profession. Curial deference is afforded the expertise of the labour arbitrator or adjudicator just as it is the professional judicial or ethics committee. Such decisions are not generally subject to appeal, merely to the supervision of judicial review, on the principles of natural justice, or patent unreasonableness.

While those practising discipline predicated on just cause are now comfortable with the concept, such is less than true of those dealing with professional misconduct. Not only are the professions somewhat remiss in making more widely available the reasons for decisions of their tribunals, there exist no authoritative secondary texts for consultation. None the less, there is a well-defined jurisprudence. However, what is reported is often fragmented by concerns peculiar to particular professions, much as the off-duty conduct cases are critical to 'just cause' as applied to teachers. Consequently, as any random reading of the reported cases will demonstrate, there seems, at times, the need to reinvent the wheel.[12]

Yet, if there can be said to be a single debilitating link in the social contract of the professions, it is the professional's misplaced diffidence when faced with questions of law. Because questions of discipline presuppose a quasi-judicial or judicial hearing, unwarranted procedural fears of review via the prerogative writs tend to result in rule by lawyers, and unintended procedural paranoia often impedes findings of substance. Though belied by the *Ross* Inquiry, the rationale for the growth of administrative tribunals is equally rooted in cost and expediency.

On the other hand, the 'just cause' determination has equally and properly settled on a judicial model over that of a labour relations 'physician.' The fear of lawyers has been, as intended, largely dissipated. This is best evidenced in the NBTF's usual representation of itself at adjudication through in-house expertise. It is, however, a maturity that the NBTA cannot be said to have reached, and one

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[12]For example, while the professions warrant both integrity and competency, there is a dearth of authority on what constitutes 'professional competency' as opposed to 'just cause.' Accordingly, the court in *Mason* v. *Registered Nurses Association of B.C.*, [1979] 5 W.W.R. 509, the court requested from counsel a review of the authority extant in the United States which was then set out as part of the judgment.

that is critical to the preservation of the professional paradigm.

Teacher Misconduct: Threads of Common Misunderstanding

There are, in short, three distinct lenses through which teacher misconduct is viewed. First is that of cause for dismissal at common law, which came to be stated in statute and tested through the all or nothing approach of Boards of Reference or Arbitration, armed with the remedy of reinstatement if no 'cause' was found. This was an initial step by Canadian teachers towards achieving professional status. It is the pattern that remains in the majority of our provinces notwithstanding that all teachers have collective bargaining status.[13]

The second lens is the coherent jurisprudence derived from 'just cause for discipline,' and the third lens is that derived from 'professional misconduct' or 'unbecoming conduct.'

Each is a separate paradigm, its perspective born in a distinct jurisdictional environment. Therefore, a paradigm shift is required to give proper perspective to scholarly arguments designed to illuminate a field. The influence of one such recent 'expert' paper[14] is illustrative of the morass evidenced in positions taken in the Ross issue. It also requires comment inasmuch as it has been advanced by the NBTF as informative to practising teachers.

The educational reform movement in British Columbia has, as the paper's authors note, created a College of Teachers whose council will have the power to reprimand, suspend or dismiss a teacher for "professional misconduct or other conduct unbecoming a member of the college." The School Board's previous power to dismiss for listed causes under the *Schools Act* has been relocated in the *Teaching Profession Act* and altered to read that "A board may dismiss or discipline a teacher for just and reasonable cause."[15] On its face, the change would suggest a shift to labour law understandings of the appropriate jurisprudence to be applied.[16] However whether this is indeed the result will

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[13]The roots of that anachronism are strong. Only Newfoundland, New Brunswick, Quebec, and Ontario utilize full rights arbitration as it is understood by labour law practitioners. In New Brunswick, the Board of Reference system remains intact for educational managers such as superintendents; however, these are not subject to professional discipline.

[14]M. E. Manley-Casimir & S. M. Piddocke, "Teachers in a Goldfish Bowl: A Case of Misconduct" (1990-91) 3 Education and Law Journal 115.

[15]S.B.C. 1987, c. 19, s. 60.

[16]The question is whether 'cause' with its epithet 'just' does differ from 'cause,' for the common law makes no distinction between the two when appearing in legislation. What becomes important is the tribunal's understanding, relative to the great differences in result that stem from an arbitrator's arsenal of remedies. In Ontario, a teacher has the power to elect to remedy dismissal through either

depend upon the expertise of those who must hear and interpret.

The authors, through misplaced focus, deduce that there exists a concept of teacher 'misconduct' in need of definition. They have ignored the fact that the statutory standard is 'professional misconduct,' not mere 'misconduct' which standing alone is synonymous with 'cause' at common law. On this misunderstanding they set out to establish a uniform, general, a priori definition of teacher misconduct.

Their vehicle is critical analysis of *Abbotsford School District 34* v. *Schewan*,[17] a case cited with approval in *Ross*, on the duty of professional integrity owed not only to the school board as employer, "but also to the local community at large and to the teaching profession." The critical issue in *Schewan* was the meaning given 'misconduct,' as used in the *Schools Act*. Clearly the authors' sympathy lay with the majority decision of the Board of Reference in the first instance. The majority relied on the labour law understanding of Brown and Beatty,[18] and the dissent on the understanding of Batt.[19] Indeed, it was the definition in Batt's book that became the springboard of the authors' analysis. Moreover the School Board's expert witnesses were of an equally misplaced view that the cause giving rise to misconduct was "... namely conduct unbecoming a professional teacher."[20]

As the Board of Reference's decision was subject to appeal, rather than judicial review, the majority's understanding of the relationship was refocused to reflect the common law wisdom of the B.C.C.A. In as much as it was Paul Wieler who brought British Columbia's private sector into mainstream collective bargaining, his remark that "some parties can hardly wait to place their disputes before a judge who has never seen a collective agreement" underscores the plea for locating the appropriate expertise in those who must hear.

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a board of reference or arbitration. As noted in *Re Etobicoke Board and OSSTF* (1981), 2 L.A.C. (3d) 265 at 269: "In coming to our conclusion on the issue [of just cause], of course, it is the arbitral jurisprudence of just cause which we should apply, not the common law jurisprudence; the parties having chosen arbitration as a mechanism for resolving cases of dismissal, they must be taken to have intended that the carefully developed body of disciplinary awards which arbitrators have produced and which they generally follow be accepted."

[17](1986), 70 B.C.L.R. 40 (S.C.).

[18]D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration* 3d ed. (Aurora: Canada Law Book, 1991).

[19]F.R. Batt, *The Law of Master and Servant*, G.J. Webber, ed. (London: Pitman, 1967).

[20]*Supra*, note 14 at 118. See also *Re Beaulieu (No. 2)* (1977), N.B.L.L.C. (part II) 22135 wherein the School Board alleged a breach of 'professional ethics.' The adjudicator noted that the School Board had no Code of Ethics, rather, "the expression 'professional ethics' covered a vague and undetermined set of behavioral standards under which anyone could squeeze his or her concept of professional conduct according to the mood of the moment."

The Concept of Tribunal Expertise

If, by definition, professionalism requires specialized expectations, it follows that such expectations must be tested by those with the necessary expertise. An ethical code was never intended to be equated with the *Criminal Code*[21] as seems to be the NBTA's perception.[22] The interpretation of 'misconduct' like just cause, must be left to the profession to translate its expertise into rules on a continuing and not a static basis. As Whitford J. has noted:

> ... We consider that the rules of professional conduct of the Bar (as of most other professions) are rules which are properly determined by the profession itself in the light of tradition and experience, changing and developing over the years as circumstances change.[23]

Moreover, where a code of ethics has been drafted, as in the case of the NBTA, it cannot be taken to deny or limit questions of professional misconduct in the statutory sense. Fettering discretion, in effect, destroys it. Appropriately therefore, judicial reflection has cautioned that:

> No exhaustive list can be laid down of circumstances or conduct which would lead to revocation of the license to practice of a professional person. It would be imprudent to attempt to establish such a list.[24]

The test of what constitutes professional misconduct has always been, and must be, that of one's professional colleagues. Lord Esher M.R., in *Allison's Case* has provided the classic statement of that test:

> If it is shown that a medical man, in the pursuit of his profession, has done something with regard to it which would be reasonably regarded as disgraceful or dishonourable by his professional brethren of good repute and competency, then it is open to the General Medical Council to say that he has been guilty of infamous conduct in a professional respect.[25]

Or as Monin C.J.M. has noted, "... no one is better qualified to say what constitutes professional misconduct, than a group of practitioners who are

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[21]R.S.C. 1985, c. C-46.

[22]See *Re Busche and the N.S. Teachers' Union* (1975), 62 D.L.R. (3d) 330 (N.S.T.D.) wherein the charge was erroneously framed as a breach of specific headings of the Code of Ethics. The Court held that this was not a charge that the applicant was guilty of conduct "unbecoming a member of the teaching profession" per statutory authority, and that the professional committee had no authority to inquire into the applicant's alleged breach of the Code of Ethics. The charge should have been framed as alleging "unbecoming conduct."

[23]*Re T (a Barrister)*, [1981] 2 All E.R. 1105 at 1109.

[24]*Royal College of Dental Surgeons (Ont.)* v. *Shankman* (1980), 31 O.R. (2d) 335 (Div. Ct).

[25][1894] 1 Q.B. 750 at 763.

themselves subject to those rules."[26]

A somewhat obvious consequence of the absence of expertise at a hearing is the need to increase procedural standards. For example, with a College of Nurses model where laypeople sit alongside professionals, cross-examination of evidence has been held to be critical because of the potential want of appropriate expertise in the laypeople.[27]

Moreover, a right to appeal, while fundamental to our concept of fair play, can only be justified where there is a continuing expectation of equal or greater expertise in the decision to have been made. It should never be welcomed as a means of removing the burden from those responsible for the decision, but only to ascertain that their function was fulfilled, and that the process was not subject to whim or capriciousness, or in breach of the tenets of a proper hearing. Nonetheless, as statutory appeal provisions increase, our courts are more frequently required to reassess findings of professional misconduct.

Given the professional kinship of lawyer and judge, an exception might be made within the legal profession for appeals to the judiciary. Yet even there, W. J. Smith, on reviewing the appeal process relative to disciplinary proceedings before the Ontario Law Society, was compelled to entreat prudence. He cited Chancellor Boyd in support of the proper location of expertise: "... it is for the benchers representing what is best in the profession, to determine and adjudge what is and what is not becoming in a member of the society."[28]

Curial deference has always defended this logic. In *Schulman*, for example, the court observed that professional discipline committees "... deal with standards of conduct on a regular basis, and are in a better position than the courts generally to assess the impact and consequences of professional misconduct."[29] Accordingly, what needs to be restored is public and perhaps professional confidence that the NBTA does deal with standards of conduct on a regular basis.

Furthermore, this entails a willingness to consider whether findings of other

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[26]*Law Society (Man.)* v. *Savino* (1983), 1 D.L.R. (4th) 285 at 292 (Man. C.A.); see also *Discipline Committee of Alberta Teachers' Association* v. *Youngberg*, [1978] 1 W.W.R. 538 (C.A.), rev'g (1978), 8 A.R. 54, and *Re Hett and the Ontario College of Physicians and Surgeons*, [1937] O.R. 582 at 587 (C.A.), and *Re a Solicitor*, [1953] Q.S.R. 149.

[27]*Reddall* v. *College of Nurses (Ont.)* (1983), 42 O.R. (2d) 412 at 415-16 (C.A.).

[28]W.J. Smith, "Disciplinary Proceedings Before the Law Society" in *Law Society of Upper Canada Special Lectures, Administrative Practice and Procedure*, 1971 at 285, citing *Hands* v. *Law Society of Upper Canada*, 16 O.R. 625 at 635. See also *Re Novak and Law Society of British Columbia* (1972), 31 D.L.R. (3d) 90.

[29]*Supra*, note 6 at 43-44.

administrative tribunals, be they Human Rights Boards of Inquiry or other adjudications, are of value in formulating criteria as to what constitutes unbecoming conduct warranting professional disdain. Just as the bargaining agent is subject to a duty of fair representation relative to the cases it carries to adjudication, so too must the professional association be prepared to justify to the profession the actions of members it chooses to support before like tribunals.

The Question and Concept of Control as a Test

While the School Board, not the NBTA, was the named respondent in the *Ross* case, the rationale for a finding of liability on the employer may be, as noted initially, readily applied to the professional association. Liability was found to be statutory and not dependent upon theories of liability arising from criminal or quasi-criminal conduct or vicarious liability as in tort. The tribunal approved and followed Justice La Forest's analysis of the purposive thrust of human rights in viewing "in the course of employment" as being in some way "related or associated with the employment." That rationale is, in part, as follows:

> Not only would the remedial objectives of the *Act* be stultified if a narrower scheme of liability were fashioned; the educational objectives it embodies would concomitantly be vitiated. ... more importantly, the interpretation I have proposed makes education begin in the workplace, in the micro-democracy of the work environment, rather than in society at large.
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> It is unnecessary to attach any label to this type of liability; it is purely statutory. *However, it serves a purpose somewhat similar to that of vicarious liability in tort by placing responsibility for an organization on those who control it and are in a position to take effective remedial action to remove undesirable conditions.*[30]

'Control' was, of course, the original common law test to determine the existence of an employment relationship so as to permit vicarious liability to follow. The test envisioned an employee as "a person subject to the command of his master as to the manner in which he shall do his work."[31] The employer was seen to be not only a manager but a technical expert.[32] The professional employee cannot have been envisioned in the 19th century, and it has been necessary to redefine control; first by stretching it to embrace the manner or method in which the work is to be done,[33] and then, with Lord Denning's organizational test,[34] to determine if the work is an integral part of the business.

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[30]*Supra*, note 1 at 253-54 [emphasis, as original].

[31]*Yemens* v. *Noakes* (1880), 6 Q.B.D. 530 at 532-33.

[32]B. Hepple & P. O'Higgins, *Employment Law*, 4th ed. (London: Sweet and Maxwell, 1981) at 58.

[33]*Mersy Docks and Harbour Board* v. *Coggins and Griffiths Ltd.*, [1947] A.C. 1 at 12.

[34]*Bank Voor Handel en Scheepvaart N.V.* v. *Slatford*, [1952] 2 All E.R. 956 at 971 (C.A.), and *Stevenson Jordan & Harrison* v. *MacDonald and Evans*, [1952] 1 T.L.R. 101 at 111 (C.A.), applying *Kock* v. *Trustees of the Ottawa Civic Hospital*, [1979] 3 A.C.W.S. 201.

Rideout has observed that vicarious liability is really a vicarious duty of care and he concludes that it is, in a sense, strict liability for the fault of others.[35] That approach is consistent with Lord Denning's organizational test, for, as he has stated:

> The reason why employers are liable in such cases is not because they can control the way in which the work is done – they often have not sufficient knowledge to do so – but because they employ the staff and have chosen them for the task and have in their hands the ultimate sanction for good conduct; the power of dismissal.[36]

The power of dismissal, which in a labour law framework includes the entitlement to discipline, is the essence of control. However understood, control causes two critical problems for the professional. First, almost by definition, professional employment is additionally controlled by ethical responsibilities, whether imposed by oath, statute, or mutual practitioner agreement.[37] Second, were the skilled employee simply to rely on supervisory direction without exercising his or her own professional judgment the employee could conceivably be in breach of his contract.[38] Moreover in the statutory model accorded teachers, status is dependent, not upon licensing, but upon the employment contract which must precede mandatory membership in the professional body.

Properly understood, control of the practice of teaching is directed by the individual in concert with his or her colleagues, including principals and other teacher administrators. It is, as earlier noted, peer control. Actual control, by the employing school boards is, as the Board of Inquiry recognized, limited in that supervision through continual monitoring of Malcolm Ross' classroom could not have corrected the problem "as the influence of a teacher on students is so much more complex than the formal content of any subject matter taught by the teacher."[39] The necessary good conduct that concerned Lord Denning is only apt to be brought to light through the interaction of peers, for centralization and specialization have reduced professional independence, making teaching largely a team practice.

This but enhances the concept of locating the power of discipline in those required to demonstrate they have an appropriate understanding or expertise.

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[35]R.W. Rideout, *Principles of Labour Law*, 3d ed. (London: Sweet and Maxwell, 1979).

[36]*Cassidy* v. *Ministry of Health*, [1951] 2 K.B. 343 at 360.

[37]K.P. Swan, "Professional Obligations, Employment Responsibilities and Collective Bargaining"(1978/79) 9:3 Interchange 88. See generally *Surrey Memorial Hospital* (1979), 24 L.A.C. (2d) 342.

[38]*Supra*, note 31.

[39]*Supra*, note 1 at 268.

Such an understanding is in accord with the relational concept of the employment contract which is better understood in the metaphors of a marriage or a partnership than in any adversarial focus. The extension of the burden, on the basis of the "ability to take effective remedial action to remove undesirable conditions," is moreover of direct benefit to employees who may suffer discrimination in the workplace at the hands of professional colleagues.

Conclusion

While schools are microcosms of what society is, teachers must strive to be role models of what society ought to be, and of what the state's greatest assets, its children, will determine it will become. The teacher's burden is a sacred trust deserving and demanding professional status. It is to be hoped that the legacy of the *Ross* inquiry will be a renewed dedication of expertise to service as anticipated by the social contract of the professions, and reflected in the membership pledge:

> We, the members of the New Brunswick Teachers' Association, accepting the responsibility to practise our profession, according to the highest ethical standards, acknowledge our responsibility to the teaching profession. We are prepared to judge and to be judged by our colleagues according to the provisions of the Code of Ethics.[40]

The outstanding issues in the *Ross* case stand as a test of that commitment.

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[40]*Members' Handbook* (Fredericton: NBTA, 1988) at 39.