

Bill 9 - An Act to Amend the Teachers' Society Act: A Lackluster Legislative Process

J E S S I C A I S A A K *

I. INTRODUCTION

The *Teachers Society Amendment Act* (Bill 9) was introduced to the Legislature on November 26, 2012. The Hon. James Allum of the NDP sponsored the Bill. From the onset, the mandate of Bill 9 was clear. Generally, the Bill aims to strengthen the internal discipline process administered by the Manitoba Teachers' Society (The Society).¹ Specifically, during the First Reading, the Minister of Education, Nancy Allan, stated that this goal would be achieved by improving the process by which the Manitoba Teachers' Society "investigates complaints, conducts internal disciplinary procedures and recuperates costs in cases of proven unprofessional conduct."²

The overall utility of Bill 9 cannot be starkly categorized as either beneficial or harmful. While a number of the amendments are an obvious step towards strengthening the legislation and aligning the regulation of professional misconduct of teachers with that found in other provinces, other amendments are unprecedented, unsubstantiated, and potentially unfavorable towards teachers and third parties.

II. AMENDMENTS

Bill 9 amended section 10(2) of *The Teachers' Society Act*, (*The Act*). Section 10(2) outlines the scope of authority of the Provincial Council (The Council). The Council is composed of elected representatives and

* J.D. (2015).

¹ Bill 9, *An Act to Amend the Teachers' Society Act*, 3rd Sess, 40th Leg, Manitoba, 2013 (assented to 5 December 2013, SM 2013, c 27), explanatory note [Bill 9 or the Bill].

² Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings*, 40th Leg, 2nd Sess, No 6 (26 November 2012) at 145 (Hon Nancy Allan) [2nd Session, First Reading].

members of the provincial executive. The Provincial Council has the authority to, *inter alia*, exercise all powers of the society, direct and supervise its business, property and affairs, exercise such powers as it deems necessary for the welfare of the society and its members, pass and amend by-laws as well as provide for the enforcement of the by-laws of the society and impose penalties for the infraction thereof.³

Bill 9 saw the addition of section 10(2)(b.1) which states: "The provincial council may, subject to the by-laws of the society, establish, maintain and enforce standards of professional conduct and a code of conduct for active members of the society."⁴ While the authority to enforce standards of professional conduct and a code of conduct contained in section 10(2)(b.1) could have been argued to fall within the broad scope of section 10(2) prior to the amendment, the addition of subsection (b.1) explicitly crystallizes the Council's authority to deal with matters relating to professional conduct.

The remainder of the amendments contained in Bill 9 are found within section 18. Section 18 outlines procedure and process for the Investigation of Complaints. The word 'active' was inserted into section 18(1), clarifying that the Society has the authority to investigate the conduct of any active member of the society.

Significant substitutions were made to section 18(2) regarding the laying of formal charges. Previously, a committee could lay a formal charge against a member of the society if they were found guilty of unprofessional conduct or conduct unbecoming a teacher.⁵ Bill 9 replaced the words 'found guilty' with the words 'engaged in.' As it now stands, a committee may lay formal charges against a member if they are found to have engaged in unprofessional conduct or conduct unbecoming a teacher. This effectively lowered the threshold by which a Review Committee could administer sanctions against a member for professional misconduct. This particular change prompted further clarification on exactly what standard was to be met in order to find that a member has 'engaged in' unprofessional conduct. It is of note that the Society's by-laws still use the words 'found guilty,' rather than 'engaged in.'⁶

³ *Teachers' Society Act*, RSM 1987, c T30, CCSM, c T30, s 10(2)(a-d) [The Act].

⁴ *Ibid*, s 10(2)(b.1).

⁵ *Ibid*, s 18(2), as it appeared from Jun 10, 2004 and Dec 4, 2013.

⁶ Unrevised, Manitoba Teachers' Society, by-law XI.3, *Review Committee By-law* (2013), ss 14-15.

Prior to Bill 9, no standard of proof was explicitly outlined in *The Act*. A further amendment of Bill 9 allows any Review Committee to determine on a balance of probabilities whether charges against a member were proven or unproven before imposing sanctions on the member. Furthermore, the sanctions available as a means of discipline by a Review Committee were expanded. In addition to admonishment, censure, and a recommendation to the minister that the member's teaching certificate be suspended or revoked, the following subsections were added:⁷

- (b.1) suspension of member in the society, with or without conditions;
- (b.2) termination of membership in the society; and
- (b.3) a penalty provided for in the bylaws of the society

Currently there are no penalties provided for in the bylaws of the Society. A number of amendments to Bylaw XI.3 were approved by the Provincial Council in 2004. These amendments include, *inter alia*, the payment of fines, orders to enter into additional agreements with the Society and orders to cease and desist any activity constituting professional misconduct. These amendments have not yet come into effect. Presently, penalties can be found only in the Society's Constitution, and are identical to those found in section 18(4) of the Act, as stated above.

Lastly, the amendments found in Bill 9 created three entirely new subsections within section 18 of The Act. Subsection 18(4.1) now allows the Review Committee to order the member in question to pay the Society up to \$5,000 of the costs of the investigation and hearing. Subsection 14 allows for a member whose membership is terminated to be reinstated according to the bylaws of the Society. Subsection (15) allows the society to enforce the order for costs in the Court of Queen's Bench.⁸

III. ORIGINS

The narrow focus and targeted amendments of Bill 9 beg the question: Why now? In the Second Reading of the Bill on December 3, 2012 it was stated that "teachers themselves believe that high professional standards are critical in the vocation of teachers."⁹ The

⁷ The Act, *supra* note 3, s 18(4).

⁸ *Ibid*, s 18.

⁹ Manitoba, Legislative Assembly, *Official Report of Debates and Proceedings*, 40th Leg. 2nd Sess, Vol 10 (3 December 2012) at 331 (Hon Nancy Allan) [2nd Session,

amendments of Bill 9 came at the request of the Society's membership at the annual general meeting of 2012.¹⁰ Ken Pearce, General Secretary of the Society stated that the amendments were "the result of concerns expressed from [MTS] members that the current penalties... went from one spectrum to the other with no middle ground."¹¹

Certain events of 2010 put the discipline of teachers in Manitoba at the forefront of national public awareness. On February 17, 2010 two teachers at Churchill High School were videotaped at a pep rally engaged in a lap dance. The dancing originated as part of a teacher dance competition and took place in the middle of the basketball court. The video was taken by a student on their cell phone and captured the male and female teachers mimicking oral sex and gyrating to music. The act was in clear violation of the Society's Code of Conduct.¹² The Society was called upon to respond expeditiously to the matter, and across the country, discussion was spurred regarding teacher misconduct and professionalism.¹³

IV. PRIOR TO ASSENT

Bill 9 found outspoken support from the NDP, Conservative and Liberal parties. Largely uncontested, members of the Legislature were quick to support the amendments proposed by the Society. Kelvin Goertzen of the Progressive Conservative Party voiced strong support for the removal of a guilty finding in regards to professional misconduct. In his view, the removal of a guilty finding prevents the government from performing the judicial function of the courts. He consequently voiced support for the addition of an explicit standard of proof - the civil standard of "a balance of probabilities". Goertzen stated

Second Reading].

¹⁰ *Ibid* at 330.

¹¹ Manitoba Legislative Assembly, *Standing Committee on Human Resources*, Vol 11 (7 October 2013) at 607 (Ken Pearce) [Committee].

¹² "Teachers filmed lap-dancing at school event", *CBC News* (23 February 2010) online: CBC News <<http://www.cbc.ca/news/canada/manitoba/teachers-filmed-lap-dancing-at-school-event-1.869832>>.

¹³ Wency Leung, "Too cool for school? Teachers need to know where to draw the line", *The Globe and Mail* (24 February 2010) online: The Globe and Mail <<http://www.theglobeandmail.com/life/too-cool-for-school-teachers-need-to-know-where-to-draw-the-line/article1210780/>>. The Society stopped posting the minutes of their annual meetings online after 2009. Requests for a copy of the 2012 Meeting Minutes were explicitly denied by the Society.

that the criminal standard of proof “beyond a reasonable doubt”, as compared to the civil standard on a balance of probabilities, was too high and would essentially create a standard so high it would be akin to having no standard at all.¹⁴

The overall contents of the Bill were supported by Hon. Nancy Allan, who stated that the strengthening of the disciplinary process for teachers at the hands of the Society was essential in maintaining the highest professional standards for teachers. The Liberal MLA and sponsor of the Bill, Hon. Jon Gerrard also added his voice to the supporters at the Third Reading of the Bill.¹⁵

Seemingly, the only critical conversation that occurred regarding the amendments came from Kelvin Goertzen, who briefly inquired as to whether the civil standard on a balance of probabilities was the standard that should be used when dealing with someone’s livelihood. He further inquired as to whether this was the standard used by other jurisdictions. Before Standing Committee of Human Resources, General Secretary Ken Pearce answered: “My understanding is it is the standard used in like organizations, and the reason for it is that, indeed, the practice has been in the past in these cases that it is on the balance of probabilities.”¹⁶

V. EFFECT OF PROCESS ON BILL 9

Bill 9 was uncontested by any political party. During the debate and committee stages, no serious issues were raised with either the language or the effect of the amendments. Based on the consensus of all political parties as well as the Society that had voiced the need for Bill 9, the Bill was not amended at any point. In this way, the legislative process took on a formality-like quality as opposed to performing a refining and critical function. Each party put forth their representative to adamantly support the new authority given to the Society without presenting any substantive evidence as to why the amendments would actually in practice accomplish what the Bill claimed to do. The result of such a process is the uncontested passing of a Bill with both some strong

¹⁴ Manitoba, Legislative Assembly, *Official Debates and Proceedings*, 40th Leg 2nd Sess, Vol 35 (2 May 2013) at 970 (Kelvin Goertzen).

¹⁵ Manitoba, Legislative Assembly, *Official Debates and Proceedings*, 40th Session 3rd Sess, Vol 7 (28 November 2013) at 487 (Hon Jon Gerrard) [3rd Session, Third Reading].

¹⁶ Committee, *supra* note 11 at 608.

elements and a number of provisions that would have benefited greatly from added critical consideration.

VI. CRITICAL COMPARISON ACROSS JURISDICTIONS

A. Standard of Proof

Contrary to the submissions of the General Secretary before the Committee on Human Resources, other jurisdictions are almost universally silent on what standard of proof is to be employed when evaluating unprofessional conduct of teachers. In Nova Scotia, Ontario, Saskatchewan, Alberta and British Columbia there is no mention of an explicit standard of proof within the four corners of the respective acts.¹⁷ The *Teachers' Association Act* of Newfoundland uses the vague phrase "...where a complaint...against a member of the association is proved to its satisfaction".¹⁸ Comparable legislation of like organizations does not support the General Secretary's assertion.

B. 'Has Engaged' vs. 'Found Guilty'

The substitution of 'found guilty' for 'has engaged in' is unprecedented when compared with the legislation of other jurisdictions. The legislation in Nova Scotia, Newfoundland, Ontario, Saskatchewan, Alberta and British Columbia all employ the phrase 'guilty of professional misconduct'.¹⁹ The *Teaching Profession Act* of Alberta includes one additional phrase on this matter, and is the only deviation from the strict finding of guilt employed by all other provinces. Section 42(1) of the *Teaching Profession Act* provides: "If a hearing committee finds that the conduct of an investigated person constitutes unprofessional conduct".²⁰

Substitution of the words 'found guilty' for 'engaged in' coupled with the now codified use of the civil standard of proof on a balance of probabilities creates an incredibly low threshold; the crossing of which

¹⁷ *Teaching Profession Act*, RSNS 1989, c 462; *Ontario College of Teachers Act*, SO 1996, c 12; *Teachers' Federation Act*, RSS 1978, c T-7; *Teaching Profession Act*, RSA 2000, c T-2; *Teachers Act*, SBC 2011, c 19.

¹⁸ *Teachers' Association Act*, RSNL 1990, c T-2, s 18(1).

¹⁹ Nova Scotia, *Teaching Profession Act*, *supra* note 17, s 11(2); *Teachers' Association Act*, RSNL 1990, c T-2, s 18(1); *Ontario College of Teachers Act*, *supra* note 17, s 30(2); *Teachers' Federation Act*, *supra* note 17, s 25; Alberta, *Teaching Profession Act*, *supra* note 17, s 24(3); *Teachers Act*, *supra* note 17, s 63(1).

²⁰ Alberta, *Teaching Profession Act*, *supra* note 17, s 42(1) [emphasis added].

allows a Review Committee to censure, admonish, suspend or terminate membership from the Society or ultimately recommend that a teacher's license be taken away by the Minister of Education. Termination of membership from the Society leaves a teacher without the protection of a union. If the Minister of Education revokes a teacher's license, they are no longer able to teach. In other words, if a Review Committee is fifty-one percent satisfied that a member has 'engaged in' professional misconduct, the livelihood of the member is threatened in a very real way. With no real definition provided as to what it means to have 'engaged in' professional misconduct, the disciplinary process of the Society is incredibly subjective. Furthermore, this process is now triggered by a much lower threshold. The amendments to *The Teachers' Society Act* subject Manitoba teachers to a disciplinary process that offers little protection or safeguard through which they may protect their livelihood in case of dispute arising from professional misconduct.

While the events of February 17, 2010 serve as an unarguable example of professional misconduct so blatant and damaging to the profession that strict disciplinary measures are no doubt justified, not all cases of alleged professional misconduct are as uncontested. Kelvin Goertzen referred to the amendments in Bill 9 as 'fail safe legislation,' and speculated that it was similar to insurance you buy but hope never to use.²¹ In reality, the amendments create a situation in which, by lowering the threshold that will trigger sanctions by a Review Committee, the possibility exists that the legislation may be used much more frequently.

C. Misconduct Defined

While all provinces have a 'Code of Conduct' or 'Code of Ethics' by which teacher organizations abide, some jurisdictions have gone as far as to codify precisely what is meant by 'professional misconduct' or 'unprofessional conduct.' The *Teaching Profession Act* of Alberta defines unprofessional conduct broadly, as any conduct detrimental to the best interests of students, public and the teaching profession; conduct that contravenes sections of the Act or bylaws; or conduct that harms or tends to harm the standing of teachers generally, whether or not the conduct is disgraceful or dishonourable.²² The *Ontario College of Teachers Act* defines professional misconduct specifically in the accompanying

²¹ 2 May 2013, *supra* note 14 at 969.

²² Alberta, *Teaching Profession Act*, *supra* note 17, s 23(1).

regulations by listing thirty acts that would qualify as professional misconduct.²³

The *Teachers' Federation Act* of Saskatchewan provides an incredibly narrow definition of professional misconduct. The Saskatchewan Legislature seemed to focus on misconduct within the teaching community rather than misconduct between the teaching community and the community at large. The definition includes wilfully taking any steps to secure the dismissal of a teacher on the basis of animosity or personal advantage, wilfully circulating false reports to any fellow teacher, and maliciously criticizing the work of a fellow teacher in a way that undermines the confidence of the public and pupils.²⁴ Lastly, the Saskatchewan legislation includes a number of *Criminal Code* offences in the definition of 'professional misconduct' including various sexual offences and offences tending to corrupt morals.²⁵

In Manitoba, the vulnerable state of an investigated member could be mitigated by a clear and exclusionary definition of 'misconduct' or 'unprofessional conduct'. Unfortunately, no such definition is provided for within the statute or by reference to a source outside of the statute.

D. Costs

The amendments regarding costs do a much better job of bringing the Manitoba legislation in line with that of certain other jurisdictions. Prior to Bill 9, no provision existed for the recovery of costs by the Society. Such a provision is commonplace in other jurisdictions. The new provision allows the Society to recoup up to \$5,000 of the costs of the investigation and hearing from the member, if the member is found to have engaged in professional misconduct.

During debate on Second Reading, Kelvin Goertzen inquired as to whether the provision on costs was simply another sanction; a fine on the member or a further punishment on top of the sanctions already provided for. He asked the Legislature whether this type of provision could be imposed within the context of the bill.²⁶ Though no one responded, affirmatively or otherwise, a brief survey of comparable legislation in other provinces provides a definitive answer.

The legislation in Ontario and Alberta allows the regulatory body to recoup the costs of inquiry from the member in addition to the

²³ O Reg 437/97, s 1.

²⁴ *Teachers' Federation Act*, *supra* note 17, s 30(a-d).

²⁵ *Ibid*, s 30(e).

²⁶ 2 May 2013, *supra* note 14 at 972.

imposition of a fine.²⁷ The fine in Ontario is up to \$5,000 upon a finding of professional misconduct. The costs to be recouped by the College of Teachers is to be set by the college.²⁸ The fine in Alberta is up to \$10,000 per finding of professional misconduct. The costs to be recouped by the Alberta Teachers' Association may be all or part of the costs of inquiry.²⁹ The legislation in British Columbia, like the Manitoba statute, only considers recovering the costs of the investigation and hearing. However, unlike the Manitoba statute, the equivalent provision in British Columbia's *Teachers Act* does not put a ceiling on how much those recouped costs can be.³⁰

Though the statutes in Saskatchewan, Newfoundland, Nova Scotia and PEI do not include provisions on costs, Bill 9's addition of section 18(4.1) provides greater clarity on who is to bear the financial burden of the investigation into teacher misconduct. Furthermore, potential abuse of this provision is mitigated by inclusion of the phrase "In addition to a sanction under subsection (4)".³¹ Subsection 4 outlines what sanctions may be administered after charges against a member have been proven on a balance of probabilities. Such an inclusion ensures that section 18(4.1) functions much in the same way as an award for costs in civil courts.

VII. CRITICAL COMPARISON ACROSS PROFESSIONS

There are a number of other self-regulating professions within Manitoba, the processes of which have been codified by the Legislature. Such professions include lawyers, registered nurses, doctors, pharmacists, and physiotherapists. They provide critical insight into what is considered standard practice for the evaluation of professional misconduct via statute.

There are two strong themes that arise in relation to the amendments found in Bill 9. Firstly, that across the legal and the healthcare sector, every piece of legislation declares that the threshold for administering sanctions following from professional misconduct requires a guilty finding on the part of the member. To 'have engaged

²⁷ *Ontario College of Teachers Act*, *supra* note 17, s 30(5); Alberta, *Teaching Profession Act*, *supra* note 17, s 43(1).

²⁸ *Ontario College of Teachers Act*, *supra* note 17, s 30(5).

²⁹ Alberta, *Teaching Profession Act*, *supra* note 17, s 43(1).

³⁰ *Teachers Act*, *supra* note 17, s 65(1).

³¹ Bill 9, *supra* note, s 18(4.1).

in' professional misconduct is a vague and insufficient threshold. This is true for lawyers, nurses, doctors, pharmacists and physiotherapists.³²

Secondly, that a standard of proof is not explicitly outlined in the comparable legislation of other professions, contrary to the submissions of Ken Pearce. The phrase found in *The Legal Profession Act* regarding what finding is necessary for the administration of sanctions is simply: "If a panel finds a member guilty of professional misconduct... it may do one or more of the following".³³ Variations of this phrase can be found in the *Medical Act*, the *Pharmaceutical Act*, the *Physiotherapists Act*, and the *Registered Nurses Act*.³⁴

The legislative process in this case displayed a lack of thoroughness. Ken Pearce, when questioned on the norms surrounding the standard of proof in relation to professional misconduct, declared before the Committee on Human Rights that the standard commonly used was that of proof on a balance of probabilities. A quick survey of the legislation employed by other professions as well as legislation of the same profession in different jurisdictions shows that this is clearly not the case.

While the inclusion of a definitive standard of proof may be useful for determining on what basis decisions are to be made, if the standard of proof is too low given the severity of the decisions at hand, such an explicit standard of proof may actually cause more harm. As the legislation currently reads, the Society may suspend an individual's membership or even recommend to the Minister of Education that their teaching license be taken away if it is found that the member has engaged in professional misconduct on a balance of probabilities.³⁵ This would effectively threaten an individual's livelihood if the Minister were to revoke their teaching license. Precedent for this low threshold and unique employment of the civil standard of proof cannot be found in either comparable legislation in other jurisdictions or comparable legislation of other professions.

³² *The Legal Profession Act*, SM 2002, c 44, CCSM, c L107, ss 37(1), 71(1), 72(1), 73(1), 74, 79(1); *The Registered Nurses Act*, SM 1999, c 36, CCSM, c R40, s 42(a); *The Medical Act*, RSM 1987, c M90, CCSM, c M90, s 59.5; *The Pharmaceutical Act*, SM 2006, c 37, CCSM, c P60, s 54(a); *The Physiotherapists Act*, SM 1999, c 30, CCSM, c P65, s 41(a).

³³ *The Legal Profession Act*, *supra* note 32, s 72(1).

³⁴ *The Medical Act*, *supra* note 32, s 59.5(a); *The Pharmaceutical Act*, *supra* note 32, s 54; *The Physiotherapists Act*, *supra* note 32, s 41; *The Registered Nurses Act*, *supra* note 32, s 42(a).

³⁵ Bill 9, *supra* note 1, cls 18(2), 18(4).

VIII. POTENTIAL EFFECTS OF BILL 9

The lower threshold of section 18(2) and the civil standard of proof on a balance of probabilities create the potential for increased volume of complaints against members that will result in the administration of sanctions. In turn, the Society may see an increase in the volume of complaints. The effects of this increase may be felt by the Society in the form of costs. The effects of such complaints on third parties must also be considered.

As any legislation or code of conduct cannot “cover every eventuality,” the determination of each complaint will depend on a “thorough consideration of the facts, a sensitive assessment of mitigating circumstances, and, above all, the exercise of professional judgment.”³⁶ A thorough consideration of the facts and a sensitive assessment of mitigating circumstances will exhaust both time and resources of the Society. A number of professional regulatory bodies have voiced frustration regarding the high cost of formal disciplinary proceedings. For example, the Royal College of Dental Surgeons met a total of eighteen times in one year. The costs of these meetings composed a significant portion of their annual operating budget.³⁷

Third parties will also be affected by a potential increase in the volume of complaints to the Society. These third parties include fellow staff, all students of the investigated members, as well as the employing school. As was the case with the incident of February 17, 2010, inquiries into professional misbehaviour by the Society often result in a suspension of the teachers during the investigation.³⁸ Such suspensions will have negative effects on both fellow teachers as well as students. In such cases, colleagues are often asked to cover the classes and curriculum of suspended co-workers.³⁹ Students are also effected in multiple ways. Firstly, any student directly involved in the misbehaviour of the teacher will no doubt be impacted. Secondly, all students under the tutelage of suspended teachers will experience a disruption in their learning environment.

³⁶ Kate Myers, *Teachers Behaving Badly?* (New York: RoutledgeFalmer, 2005) at 112.

³⁷ Lisa Feld and Peter A Simm, *Mediating Professional Misconduct Complaints* (Waterloo: The Network, 1998) at 73.

³⁸ “Lap-dancing teacher suspended”, *The Globe and Mail* (24 February 2010) online: The Globe and Mail <<http://www.theglobeandmail.com/video/lap-dancing-teacher-suspended/article4315532/>>.

³⁹ Damien Page, “Managing Serious Teacher Misbehaviour” (2013) School Leadership & Management: Formerly School Organization, 6.

Lastly, publicized cases of teacher misconduct will likely tarnish the reputation of the school involved. This is often true regardless of whether the complaints are founded or unfounded, and whether sanctions are actually administered to the teacher in question. Often, such cases seriously damage the reputation of a school; a reputation that alumni, current students and all staff have worked hard to build.⁴⁰

IX. MOVING FORWARD

Bill 9 contains a number of provisions that brought the Manitoba legislation in line with comparable legislation in other jurisdictions. The utility of the provisions regarding costs, 'active' members, and authority of the Society to regulate matters of professional misconduct can be easily recognized. Such provisions provide clarity and will bring Manitoba in line with other provinces. However, two provisions found in Bill 9 are unprecedented and likely unwise. These provisions are the substitution of section 18(2) replacing 'found guilty' with 'engaged in,' and the addition of the civil standard of proof in section 18(4). Not only did the General Secretary of the Society or a member of any political party fail to explain why these deviations from comparable statutes were an improvement or even necessary, but the standards of other comparable jurisdictions were misrepresented by the General Secretary before the Legislature. Regarding the two aforementioned provisions, the argument made in this article is that *The Teachers Society Act* was, to put it colloquially, better off without them.

As discussed above, the Bill 9 raises concern in a number of areas, namely the low threshold of section 18(2) and the civil standard of proof. However, the Hon Jon Gerrard of the Liberal Party raised an additional concern regarding the self-regulation of the Society in situations of professional misconduct. The Society finds itself in the unique position of being both an advocate and disciplinarian of its members. Gerrard went on to state that from his experiences with other organizations, it is critically important to recognize that the process be extremely fair.⁴¹ These concerns are echoed by Margot Priest in her article "*Privatization of Regulation: Five Models of Self-Regulation*" in which she states:

⁴⁰ *Ibid.*

⁴¹ Manitoba, Legislative Assembly, *Official Debates and Proceedings*, 40th Leg 2nd Sess, Vol 107 (12 September 2013) at 4989 (Hon Jon Gerrard).

The actions of [self-regulated organizations] are subject to judicial review and their governing statutes may also provide for appeals to the courts on disciplinary matters. The rules of the organizations are articulated and public, although they may be phrased in such broad terms (e.g. "conduct unbecoming...") that a high degree of discretion is placed in the profession members' interpretation of their rules. Generally, it is a condition of delegation that membership be nondiscriminatory and only limited by reasonable criteria such as competency and education. In practice however, certain groups or members may be favoured by statutory self-regulated regimes.⁴²

These concerns, coupled with the low threshold of section 18(2) and the addition of the civil standard of proof could be mitigated by the inclusion of a section assigning a duty of care to the head of the governing body, in this case the president of the Society. The imposition of such a provision creates an incentive for the President to ensure compliance with statutory process. This duty would be in addition to the president's implicit duty to ensure that the organization be law-abiding.⁴³ Such a provision is not unprecedented in other statutes governing self-regulated organizations. A number of organizations' legislation in Ontario have placed such a duty on their directors, including the *Environmental Protection Act* and the *Occupational Health and Safety Act*.⁴⁴

In response to the issue of costs and the potential increase in complaints and administration of sanctions on investigated members, a number of organizations have implemented a provision on alternative dispute resolution or mediation. Section 15(v) of the *Teachers' Federation Act* of Saskatchewan gives the Federation the authority to establish bylaws for mediation processes and section 31 provides instruction on how to proceed if mediation is unsuccessful.⁴⁵ Section 27(2)(c)(iii) of the *Teaching Profession Act* of Alberta states:

On reviewing the report, the executive secretary may direct that the matter will not be referred to a hearing committee if the executive secretary is of the opinion that there has been a settlement reached through mediation or another dispute resolution process provided for in the bylaws and there is no need to refer the matter to a hearing committee.⁴⁶

⁴² Margot Priest, "The Privatization of Regulation: Five Models of Self-Regulation" (1997-1998) 29 *Ottawa L Rev* 233 at 237.

⁴³ *Ibid* at 249.

⁴⁴ *Environmental Protection Act*, RSO 1990, c E19, s 194(1); *Occupational Health and Safety Act*, RSO 1990, c O.1, s 32.

⁴⁵ *Teachers' Federation Act*, *supra* note 17, s 31.

⁴⁶ Alberta, *Teaching Professional Act*, *supra* note 22, s 27(2)(c)(iii).

As an example of this, the Ontario College of Physicians and Surgeons has implemented a Complaint-Mediation program that has been successful in reducing the number of professional misconduct complaints that end up as the subject of formal complaint investigations. This is especially true for complaints that do not involve allegations of “egregious conduct.”⁴⁷ The result of the Complaint Mediation program is the production of a ‘Memoranda of Agreement’ between the complainant and the College. The agreement will often contain apologies, acknowledgements of what should have been done in a certain situation, or a promise on the part of the professional to undergo further education, submit to professional assessment or counselling, practice under supervision, or repay certain costs.⁴⁸ The implementation of such a program in Manitoba could serve to mitigate the costs and time required to investigate the volume of complaints that may result from Bill 9.

A. Looking Beyond Bill 9

Professions need legislation that is responsive to the quickly changing landscape of society. The very way educators teach is evolving along with technology. Schools are becoming a battleground and a breeding ground for new legislation surrounding changing social norms. For example, changing social views on homosexuality and tolerance of bullying are currently the focus of new legislation and much debate. Currently, the legislation regarding the teaching profession in Canada does provide guidance regarding the issues of technology, homosexuality, and the ever-blurring lines between ‘on-duty and off-duty’ that teachers deal with on a daily basis. The *Public Schools Amendment Act (Safe and Inclusive Schools)* - otherwise known as the widely publicized ‘Bill 18’ was passed in Manitoba during the 40th legislature. The amendments included a definition of bullying, recognition of cyber bullying, recognition that school boards must expand policies regarding appropriate use of internet, and requirements that school boards establish ‘respect for human diversity policy.’⁴⁹ These policies included accommodation of student activity promoting inclusivity among all pupils, including those student groups that use the name ‘gay-straight alliance.’ Over 315 citizens registered to speak at

⁴⁷ Feld & Simm, *supra* note 37.

⁴⁸ Feld & Simm, *supra* note 37 at 100.

⁴⁹ Bill 18, *The Public Schools Amendment Act (Safe and Inclusive Schools)*, 2nd Sess, 40th Leg, Manitoba, 2013 (assented to SM 2013, c 6), explanatory note.

public hearings in the legislature and the amendments were widely discussed and debated in various media forms while Bill 18 made its way through the legislature.⁵⁰

Teachers hold a precarious position in the face of such tumultuous discord. The way that teachers conduct themselves, what they choose to say about such matters, and the form in which they choose to say it is under close scrutiny. In *Kempling v British Columbia College of Teachers*, teacher Christopher Kempling was suspended for his comments on homosexuality published in a local newspaper. Kempling was found guilty of conduct unbecoming a teacher. He later raised constitutional challenges based on his Charter rights of freedom of religion.⁵¹ While the comments of Mr. Kempling fall within the realm of 'conduct unbecoming a teacher,' the matter proceeded through the judicial system until Kempling's leave to appeal to the Supreme Court was refused. Clear standards in legislation or professional codes of conduct regarding how teachers are to conduct themselves in relation to diversity of students, and homosexuality in particular, would help to prevent such matters from unnecessarily working their way through the judicial system.

In *Ontario College of Teachers v Fromm*, teacher Frederck Paul Fromm was found guilty of professional misconduct as a result of his involvement and comments found to be anti-Semitic and racist. In his defence he argued that his comments made while off-duty should not result in disciplinary action unrelated to his job performance or conduct while at work.⁵² The courts explored similar concepts in *Ross v New Brunswick School District No 15*, in which the Supreme Court stated: "It is on the basis of the position of trust and influence that we hold the teacher to high standards, both on and off duty".⁵³

In a time when 86 percent of Canadian citizens are active on social media and networking sites often visible to parents and students, a

⁵⁰ "Bill 18 opponents, supports speak at 1st public hearing", *CBC News* (3 September 2013) online: CBC News online: The Globe and Mail <<http://www.theglobeandmail.com/video/lap-dancing-teacher-suspended/article4315532/>>.

⁵¹ *Kempling v British Columbia College of Teachers*, 2005 BCCA 327, 255 DLR (4th) 169, leave to appeal to SCC refused, [2005] SCCA No 381.

⁵² *Ontario College of Teachers v Fromm*, 2007 LNONCTD 32 (Ontario College of Teachers Discipline Committee).

⁵³ *Ross v New Brunswick School District No 15*, [1996] 1 SCR 825 at para 45, 133 DLR (4th) 1.

whole new arena of potential teacher misconduct has surfaced.⁵⁴ Social media creates ample opportunities for conduct that would otherwise pass unnoticed to be taken out of context and publicized. In the American case of *Cairns v Akron Public Schools Board of Education*, a teacher posted a photo on Facebook of a number of her students with duct tape over their mouths captioned: “Finally found a way to get them to be quiet!!!!”. The teacher was immediately suspended and is currently facing dismissal. According to the teacher, the duct tape was being used to fix a student’s binder when the students began to play with the tape. They began to tape their mouths shut and encouraged her to photograph the “silly incident.” The school board in that case is also concerned about the privacy of the students in the photo posted on Facebook.⁵⁵

Currently there are no codified means to address teacher misconduct in the social media sphere, and discipline in such areas is often subsumed into the general realm of ‘conduct unbecoming a teacher.’ It is becoming apparent that new legislation is needed to address the changing issues surrounding teacher misconduct. While Bill 9 has incorporated amendments unique to Manitoba, they are not steps that address this changing landscape and may in fact be steps in the wrong direction, making codified teacher discipline in Manitoba less relevant than before.

Teachers are currently blindly navigating the murky waters of social media, privacy, personal lives, on versus off duty, and freedom of speech in addition to the many potential pitfalls of professional misconduct that have existed in the past. If amendments are to be made to legislation governing such misconduct and discipline, they should be aimed at providing clarity to matters such as these.

X. CONCLUSION

With the exception of sections 18(2) and 18(4), Bill 9 is a step towards strengthening the *Teachers Society Act* and bringing authority of

⁵⁴ Kirsten Thompson, “Teaching in a Fishbowl - What Can Happen When Teachers Are Online”, Miss L Whole Brain Teaching (9 March 2013) online: <<http://misslwholebrainteaching.blogspot.ca/2013/03/teaching-in-fishbowl-what-can-happen.html>>.

⁵⁵ “Melissa Cairns, Ohio Teacher, Faces Firing For Facebook Photo of Duct Tape Over Students’ Mouths”, *Huffington Post* (22 January 2013) online: Huffington Post <http://www.huffingtonpost.com/2013/01/22/melissa-cairns-ohio-teach_n_2529166.html>.

the Society in line with the authority provided to like organizations in other provinces. The deleterious effects of the two aforementioned provisions may include an increased volume of complaints resulting in inflated costs for the Society and a disruption in the learning environment for students and teachers alike. These adverse effects may be mitigated by the implementation of an alternative dispute or mediation program, or eliminated all together by further amending the *Teachers' Society Act* to align it with the standards implemented in other provinces and other professions.

The legislative process surrounding Bill 9 was not inquisitorial, thorough, or exhaustive. The debates and discussions of the legislature reflect a 'band wagon' mentality among all vocal political parties that one hopes is not the norm or an indication of process' to come. The lackluster manner in which Bill 9 was pushed through the Legislative Assembly is reflected in its shortcomings.

