

#Inappropriate: Ramifications of Teachers’ Off-Duty Social Media Postings

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Teachers can be disciplined for their “off the clock” activity if their conduct impairs their ability to carry out their professional obligations or impairs public confidence in the education system. But how does this apply in the age of social media, when evidence of private off-duty conduct can be posted online for the world to see — indefinitely? This article reviews decisions from Canada and the United States to explore how online posts by and about teachers can form the basis of discipline. It proposes that the accepted standard for teacher discipline for off-duty conduct from the Supreme Court of Canada’s decision in Ross should apply to online activity — subject to mitigating factors that recognize the ubiquity of social media. The article concludes by offering practical tips for educators’ online conduct and suggesting relevant considerations in the event teachers’ personal lives on social media become an issue in their professional sphere.

Les enseignants peuvent être soumis à des mesures disciplinaires pour leurs activités “ en dehors des heures de travail ” si leur conduite porte atteinte à leur capacité de s’acquitter de leurs obligations professionnelles ou compromet la confiance du public dans le système éducatif. Mais comment cela s’applique-t-il à l’ère des médias sociaux, lorsque des preuves de comportement privé en dehors des heures de travail peuvent être exposées publiquement en ligne — indéfiniment? Dans cet article, l’auteure passe en revue des décisions rendues par des tribunaux canadiens et américains afin d’explorer comment les messages affichés en ligne par des enseignants, et concernant ces derniers, peuvent justifier l’imposition de mesures disciplinaires. Elle propose que la norme établie par la Cour suprême du Canada dans l’affaire Ross justifiant l’imposition de mesures disciplinaires aux enseignants à la suite de comportements survenus en dehors des heures de travail doive s’appliquer aux activités en ligne — sous réserve de facteurs atténuants qui reconnaissent l’omniprésence des médias sociaux. L’auteure conclut en proposant des conseils pratiques pour la conduite en ligne des éducateurs et en suggérant des considérations pertinentes dans le cas où la vie personnelle des enseignants sur les médias sociaux devient un problème dans leur vie professionnelle.

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1. INTRODUCTION

Here is a pop quiz:

Which of the following social media postings caused an educator to be fired?

- (a) a photo of a principal and a teacher simulating a sex act while away at a conference;
- (b) a photo of a teacher simulating a sex act at a bachelorette party;
- (c) a post in which a teacher called his principal homophobic;
- (d) a post in which a teacher called her class of fifth graders “the devils spawn [*sic*],” stated “I HATE THEIR GUTS,” and suggested she’d like them to drown;
- (e) a post by a teacher of a first grade class composed entirely of Latino and African-American students in which the teacher states, “I’m not a teacher — I’m a warden for future criminals!”¹

It is now well-established that teachers can be disciplined for their actions “off the clock” when their conduct impairs their ability to carry out their obligations as a teacher or impairs public confidence in the school system more generally. But how does this apply in the age of social media, when photos of “off-duty” activities can be posted for the world to see, and the evidence of poor judgment can last forever?

Stories of a teacher being fired as a result of his or her off-duty conduct posted online have popped up in the news from time to time since Facebook, Twitter, and Instagram have become part of many people’s day-to-day lives.² However, such disciplinary measures are rarely challenged, leaving the legal framework unclear; a standard delineating when discipline is appropriate for social media use unrelated to students and the school has yet to develop in Canada.³

Reviewing case law from regulatory discipline tribunals, labour arbitrations, and judicial review decisions from Canada and the United States, this article will explore how online posts by and about teachers can serve as the foundation for discipline, given teachers’ unique role as role models for their students and the public face of the school system at large. In light of the absence of a clear framework for dealing with allegations of professional misconduct and conduct unbecoming arising from social media postings, I will propose that the accepted standard for teacher discipline for off-duty conduct established in *Ross v. New Brunswick School District No. 15*⁴ should apply, subject to mitigating factors that

¹ The correct answer is (e), although the others did not get off scot-free. Each of these cases will be discussed later in the article.

² See, e.g. David Bateman, “High school teacher fired after investigation into ‘racist’ tweets” *The Toronto Star* (9 September 2015), online: The Toronto Star <<http://www.thestar.com/yourtoronto/education/2015/09/09/high-school-teacher-fired-after-investigation-into-racist-tweets.html>>.

³ Note that this article does not address cases in which teachers communicate with students online in an inappropriate manner, raising boundary issues.

have emerged from the case law and that recognize the ubiquity of social media and its ability to publicize and preserve aspects of one's private life.

After reviewing the legal framework for discipline for Canadian teachers' off-duty conduct in general, I will discuss the limited case law that has arisen pertaining to discipline for teachers' social media posts in Canada. The paucity of Canadian law in this area leads me to expand the review to the United States and explore US cases in which disciplinary measures have been imposed on teachers for inappropriate online postings. I assemble the lessons learned from both Canadian and American cases to propose a legal framework for disciplining teachers when issues arise from posts online. I conclude the article by offering practical tips for educators to apply to their online activities and in the event that their personal lives on social media become an issue in their professional sphere.

2. DISCIPLINE FOR OFF-DUTY CONDUCT IN CANADA

(a) General Principles

*Ross*⁵ is the leading case in Canada regarding discipline for teachers' off-duty conduct. Malcolm Ross was a teacher in New Brunswick who regularly made anti-Semitic comments in his off-duty time. He communicated his racist and discriminatory views in four books he authored, letters to a local newspaper, and by participating in a local TV interview. A Jewish parent filed a complaint with the New Brunswick Human Rights Commission, alleging that the school board discriminated against him and his children by employing Mr. Ross. A Board of Inquiry agreed and directed the school board to place Mr. Ross on unpaid leave, appoint him to a non-teaching position when one arose, and terminate him if no non-teaching position became available.⁶

The Supreme Court of Canada upheld this order, rejecting Ross's arguments that disciplining him for his off-the-clock remarks violated his freedom of expression and freedom of religion.⁷ Writing for the Court, Justice LaForest held that Ross's off-duty conduct "impaired his ability to fulfil his teaching position."⁸ Adopting the reasoning from an earlier decision respecting

⁴ Indexed as: *Attis v. New Brunswick School District No. 15*, 1996 CarswellNB 125, EYB 1996-80080, (sub nom. *Ross v. New Brunswick School District No. 15*) [1996] 1 S.C.R. 825, 37 Admin. L.R. (2d) 131, (sub nom. *Ross v. New Brunswick School District No. 15*) 133 D.L.R. (4th) 1, 171 N.B.R. (2d) 321, 437 A.P.R. 321, (sub nom. *Ross v. New Brunswick School District No. 15*) 25 C.H.R.R. D/175, 96 C.L.L.C. 230-020, 35 C.R.R. (2d) 1, 195 N.R. 81, [1996] S.C.J. No. 40 (S.C.C.) ["*Ross*"].

⁵ *Ibid.*

⁶ *Ibid.* at paras. 2-8.

⁷ *Ibid.* at paras. 112-13. Specifically, the Court held that any resulting infringement of Ross's freedoms was justifiable under s. 1 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 ["*Charter*"].

⁸ Above, note 4 at para. 47.

termination of a public servant for comments made outside of work, the Court held there are two kinds of impairment: impairment to perform the specific job — for which direct evidence is required — and impairment in a wider sense, whereby off-duty conduct “could or would give rise to public concern, unease and distrust of his ability to perform his employment duties.”⁹

Applying this test to the educational context, the Court highlighted a teacher’s important role as a “medium,” effectively part of an unofficial curriculum, who “must be perceived to uphold the values, beliefs and knowledge sought to be transmitted in the school system.”¹⁰ Justice LaForest observed that teachers are “inextricably linked to the integrity of the school system,” and their conduct bears directly “upon the community’s confidence in the public school system as a whole.”¹¹ He concluded:

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, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a “poisoned” environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.¹²

⁹ *Ibid.* at para. 46, citing *Fraser v. Canada (Treasury Board, Department of National Revenue)*, 1985 CarswellNat 145, 1985 CarswellNat 669, (sub nom. *Fraser v. Canada (Public Service Staff Relations Board)*) [1985] 2 S.C.R. 455, 18 Admin. L.R. 72, 9 C.C.E.L. 233, 23 D.L.R. (4th) 122, 86 C.L.L.C. 14,003, 19 C.R.R. 152, [1986] D.L.Q. 84 (note), 63 N.R. 161, [1985] S.C.J. No. 71 (S.C.C.), at 472-73. The foundational case respecting discipline for employees’ off-duty conduct is *Millhaven Fibres Ltd. and OCAW, Local 9-670, Re.* [1967] O.L.A.A. No. 4 (Ont. Arb.), in which the Tribunal held that a discharge for off-duty conduct may be justified if the employer can demonstrate that an employee’s off-duty behaviour (a) harms the company’s reputation or product; (b) renders the employee unable to perform his duties satisfactorily; (c) leads to refusal or reluctance of other employees to work with him; (d) has been guilty of a serious breach of the *Criminal Code*, or (e) places difficulty in the way of the company properly carrying out its functions. Although different, the test articulated in *Ross* effectively translates this test (particularly (a), (b), and (e)) into the educational context.

¹⁰ Above, note 4 at para. 44.

¹¹ *Ibid.* at para. 43.

¹² *Ibid.* at para. 45. See also Justice LaForest’s comments in *R. c. Audet*, 1996 CarswellNB 259, 1996 CarswellNB 260, EYB 1996-67324, [1996] 2 S.C.R. 171, 106 C.C.C. (3d) 481, 48 C.R. (4th) 1, 135 D.L.R. (4th) 20, 175 N.B.R. (2d) 81, 446 A.P.R. 81, 197 N.R. 172, [1996] S.C.J. No. 61 (S.C.C.), at para. 41: “In my view, no evidence is required to prove that teachers play a key role in our society that places them in a direct position of trust and authority towards their students. Parents delegate their parental authority to teachers

Although there was no evidence that Ross's views affected his teaching in any way — for example, he never discussed them in the classroom — the Court inferred from the evidence of the pervasive awareness of Ross's comments throughout the community that his continued employment created “a ‘poisoned’ [educational] environment characterized by a lack of equality and tolerance.”¹³

In an excellent article entitled “Off-Duty Conduct and the Fiduciary Obligations of Teachers”,¹⁴ Justice LaForest built upon his comments in *Ross* by explaining the reason why outside activity can form the basis of discipline for teachers:

[V]arious harms can accrue from the retention of a teacher who has engaged in off-duty misconduct, including the risk that the misconduct may recur with resultant injury to students, the danger that students may be influenced by inappropriate role models, diminution of teaching effectiveness caused by loss of respect from students and the community and the public's loss of confidence in the educational system. It is these specific harms, and not the violation of a state-imposed moral code, that the prohibition of off-duty misconduct seeks to redress.¹⁵

Importantly, however, not every case of off-duty misconduct will lead to an inference of impairment of an educator's moral authority or damage to the reputation of the school system. In *Toronto District School Board v. Ontario Secondary School Teachers' Federation*,¹⁶ the Divisional Court reviewed a school board's decision to terminate “ZM”, a Child and Youth Worker. ZM, who was in his forties and worked with primary-level students with behavioural issues, had been found guilty of sexual assault for unwanted kissing and sexual touching of a 23-year-old acquaintance, but was given a conditional discharge rather than a conviction, largely to minimize any impact of the finding on his professional life.

The Board fired ZM on the basis that his conduct had impaired his moral authority and the Board's reputation, and that he was an “appreciable threat” to the school. However, the court held, the Board did not have any evidence to support this view; in the face of an expert medical opinion that ZM obtained stating he was “not a risk to offend against students or other children, colleagues, or parents,” the Board presented no evidence of risk, and no evidence that he could not fulfil his duties or that others would struggle to work with him, other than the fact of the conditional discharge.¹⁷ The court held that the school board

and entrust them with the responsibility of instilling in their children a large part of the store of learning they will acquire during their development.”.

¹³ Above, note 4 at para. 49.

¹⁴ (1997) 8 *E.L.J.* 119.

¹⁵ *Ibid.* at 137.

¹⁶ *Toronto District School Board v. O.S.S.T.F.*, 2011 CarswellOnt 15449, 2011 ONSC 7018, 215 L.A.C. (4th) 205 (Ont. Div. Ct.).

¹⁷ *Ibid.* at paras. 10, 24-25, 30.

was effectively asking it to “take judicial notice of harm to its reputation based on nothing more than the nature of the misconduct in question.”¹⁸ This case makes clear that the nature of off-duty misconduct is not determinative of a disciplinary outcome — each case will be decided on its facts and on the totality of the evidence presented to the decision maker.

(b) Offensive Publications

In addition to *Ross*, two other key Canadian cases regarding teachers’ off-duty conduct have related to offensive publications. First, *Kempling v. College of Teachers (British Columbia)*¹⁹ considered a teacher whose license was suspended for one month after he wrote an article and various letters to the editor published in a local newspaper that expressed derogatory views about homosexuality. In upholding his suspension sanction, the B.C. Supreme Court highlighted that non-discrimination — which requires recognizing the rights to equality, dignity, and respect — is one of the core values of the public education system. As such, finding that a teacher’s writings were of a discriminatory and derogatory nature can properly form the basis of a determination of conduct unbecoming.²⁰

Another leading off-duty conduct case is *Abbotsford School District No. 34 v. Shewan*.²¹ In *Shewan*, the British Columbia Court of Appeal upheld a month-long suspension of two married teachers who had a semi-nude photo (of the wife, taken by the husband) published in a magazine contest. Acknowledging that they were “good teachers” and well-respected, the court held the *Shewans* had demonstrated an “appalling lack of judgment” by having this photo published and that their behaviour “reflected poorly on them, and on their profession.”²² The court highlighted its concern that “there may be controversy within the school and within the community which disrupts the proper carrying on of the

¹⁸ *Ibid.* at para. 30.

¹⁹ 2004 CarswellBC 210, 2004 BCSC 133, 27 B.C.L.R. (4th) 139, 31 C.C.E.L. (3d) 234, [2004] 7 W.W.R. 741, [2004] B.C.J. No. 173 (B.C.S.C.), aff’d 2005 CarswellBC 1370, 2005 BCCA 327, 43 B.C.L.R. (4th) 41, 255 D.L.R. (4th) 169, [2005] 10 W.W.R. 275, 132 C.R.R. (2d) 93, 213 B.C.A.C. 240, 352 W.A.C. 240, [2005] B.C.J. No. 1288 (B.C.C.A.), leave to appeal refused 2006 CarswellBC 121, 2006 CarswellBC 122, 229 B.C.A.C. 319 (note), 350 N.R. 193 (note), 379 W.A.C. 319 (note), [2005] S.C.C.A. No. 381 (S.C.C.).

²⁰ *Ibid.* at paras. 5 and 39. For the sake of clarity, “conduct unbecoming” relates to conduct not in the course of the practice of a profession, while “professional misconduct” is generally considered to relate to conduct while engaged in the practice of a profession: see James Casey, *The Regulation of Professions in Canada* (Toronto: Carswell, 1994) (looseleaf updated 2012), cited in *In the Matter of the Teachers Act, S.B.C. 2011, c. 19, and a Hearing concerning Sharon Gail Freeman*, British Columbia Ministry of Education Panel (6 February 2014), online: <https://www.bcteacherregulation.ca/documents/FormsandPublications/ProfConduct/DisciplineOutcomes/Freeman_Reasons_Findings_20140206.pdf> at 7.

²¹ 1987 CarswellBC 413, 21 B.C.L.R. (2d) 93, 47 D.L.R. (4th) 106, [1987] B.C.J. No. 2495 (B.C.C.A.).

²² *Ibid.* at 9.

educational system... The question in this case,” the court stated, “is not whether the photograph is obscene, but whether the publication of such a photograph of a teacher in such a magazine will have an adverse effect upon the educational system to which the teacher owes a duty to act responsibly.”²³ Notably, *Shewan* was decided in 1987, prior to the rise of the Internet and social media, and in the context of 30-year-old social norms. One wonders whether it would be decided the same way today.

(c) Discipline for Social Media Posts in Canada

There have been very few published decisions regarding teachers' personal social media postings in Canada. In two cases, teachers' Facebook postings about other job-related misconduct made a bad situation worse. *In re Crawford*²⁴ involved a teacher who was found to have inadequately supervised her students while on a trip to Ireland with a school sports team; she spent much of the trip sightseeing with her son, failed to secure medical treatment for a student injured during a game, and permitted her underage students to go unsupervised, during which time they went out drinking. To make matters worse, Ms. Crawford posted two comments on Facebook about the students afterward, stating, “13 great days then a couple of idiots decide to F it up. Gotta love teenagers” and “Let’s get drunk on the last night in Ireland!! Sounds like a great idea!!!”²⁵

The school district suspended Ms. Crawford without pay for 25 days, and prohibited her from participating in field trips without written permission from the district. The College of Teachers resolved the matter by consent; Ms. Crawford admitted she had committed professional misconduct, received a reprimand, and agreed to take a course regarding professional boundaries. At the time of the resolution, she appeared to be working in Shanghai, China.²⁶

In *Ontario College of Teachers v. Halliday*,²⁷ a teacher attended a “Dirty Disney” party that her roommate hosted at their home. She exhibited poor judgment insofar as one of the party guests was a student at her school board (although not at the teacher’s school); Ms. Halliday and her roommate both knew the student and her family from a local community group. The underage student brought her own alcohol to the party and drank it in the teacher’s home, then slept there overnight.

Compounding her misbehaviour, Ms. Halliday posted a picture of herself “dressed in immodest attire as Minnie Mouse, with a cigarette in her mouth and

²³ *Ibid.* at 6.

²⁴ *In the Matter of the Teachers Act, SBC 2011 c. 19 and In the Matter Concerning Toby Annette Crawford*, BC Commissioner for Teacher Regulation (23 December 2015), online: <https://www.bcteacherregulation.ca/documents/FormsandPublications/Prof-Conduct/DisciplineOutcomes/CRAWFORD_CRA_20151223.pdf>.

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ 2014 LNONCTD 90 (Ontario College of Teachers’ Discipline Committee) [“*Halliday*”].

a wine glass in her hand,” on her Facebook page — which clearly identified her as a teacher with the Board, right below the picture.²⁸ Administrators learned of the picture the following day. It is not clear that they would have discovered the teacher’s poor judgment had she not posted the photo online. Ms. Halliday was suspended without pay for 20 days and pleaded guilty to professional misconduct before the College of Teachers.²⁹

There is just one reported decision in Canada pertaining exclusively to social media-based misconduct: *Ontario Secondary School Teachers’ Federation v. Simcoe County District School Board*,³⁰ a labour arbitration. Simcoe pertains to a grievance filed by a teacher, “AB”, who was suspended in connection with an “intemperate” Facebook posting. On October 18, 2011, just after a tragic student suicide in another part of the province, AB posted the following statement:

We’ve failed yet again. I’m ashamed that this happens in Ontario schools. It’s difficult enough being an openly gay high school teacher in a small community. I can’t imagine being an LGBTQ student. I strive every day not be part of the problem. From this day forward I will be part of the solution. *To the homophobic Principal who told me that she didn’t think a gay teacher should be part of the GSA [gay straight alliance] — we need real leaders, not sheep.*³¹

The school board took exception to this post, claiming that the principal in question had not said that which AB attributed to him, and that, in any event, the posting caused reputational damage to the principal, the school, and the Board. The arbitrator held that the Board had legitimate reason to impose discipline, noting, “The nexus between AB’s off-duty Facebook posting and his employment was patent” and the post “was definitely reckless and far out of line”.³²

Observing that AB’s school was identified on his Facebook wall, the arbitrator held that the principal could have been easily identified and that the Board’s concern for reputational damage was well founded. The arbitrator further acknowledged, however, a few contextual factors: AB had implemented Facebook’s privacy settings and thought he was acting in private; he had been upset by the recent student suicide when he posted the remarks; he had a clean discipline record in his ten years of teaching; and he made clear that he sincerely regretted his action.³³ In this context, the arbitrator reduced the Board’s initial “excessive” suspension to three days.³⁴

²⁸ *Ibid.* at para. 17.

²⁹ *Ibid.* at paras. 26-27.

³⁰ 2013 CanLII 62014 (ON LA) [“*Simcoe*”].

³¹ *Ibid.* at para. 5 [emphasis added in decision].

³² *Ibid.* at paras. 11 and 15.

³³ *Ibid.* at paras. 9, 10 and 16.

³⁴ *Ibid.* at paras. 10 and 17 (the decision does not identify the duration of the initial suspension).

The only other publicly available ruling pertaining to educators' online missteps is a summary of a decision of the Alberta Teachers Association hearing committee.³⁵ The ruling relates to a teacher who, in July 2009, posted a photo on Facebook in which she and her principal simulated fellatio on the Washington Monument while away for a conference.³⁶ The teacher's Facebook friends included former students and parents of current students, and the photo was circulated throughout the community. The Alberta Teachers Association found the teacher guilty of unprofessional conduct, holding that by posting the photo she had undermined her own dignity, that of her principal, and that of the teaching profession. The Association issued a reprimand and a \$500 fine.³⁷

Interestingly, however, the principal in the compromising photo was *not* disciplined. The Association's investigation into the principal reportedly found insufficient evidence to warrant a hearing, noting that it had been a private photo and that the principal had not posted it.³⁸

3. DISCIPLINE FOR SOCIAL MEDIA POSTS IN THE UNITED STATES

(a) Legal Framework: The First Amendment

There are several published decisions in the United States relating to discipline for teachers' online conduct. Although American decisions are premised on a different legal framework and are not binding on Canadian courts, the reasoning in these decisions may be persuasive in Canada.³⁹

³⁵ Gaylene Schreiber, "Teachers' missteps have dire consequences: Red-faced after Facebook posting" *Alberta Teachers' Association News* (22 February 22 2011), online: Alberta Teachers' Association <<http://www.teachers.ab.ca/Publications/ATA%20News/Volume-45-2010-11/Number12/Pages/Teachersmisstepshavedireconsequences.aspx>> ["Schreiber"].

³⁶ Matt McClure, "Parents pull kids out of Alberta school over complaints about principal, including Facebook photo of fake fellatio on Washington Monument" *National Post* (27 June 2014), online: National Post <<http://news.nationalpost.com/news/canada/parents-pull-kids-out-of-alberta-school-over-complaints-about-principal-including-facebook-photo-of-fake-fellatio-on-washington-monument>> ["McClure"].

³⁷ Schreiber above, note 35.

³⁸ McClure above, note 36. McClure also reports that a parent had removed her children from the principal's school because she was dissatisfied with the school board and the Association's response to a separate complaint about what the parent perceived to be inappropriate jokes visible on the principal's Pinterest account. When the parent went to an Alberta Teachers' Association officer with printouts of the jokes, she was reportedly told that they did not warrant an investigation.

³⁹ Most disputes about teachers' off-duty conduct are resolved without proceeding to court, and those involved may call upon other persuasive authority — such as American case law, which is more abundant than Canadian decisions — for guidance as to how to resolve a matter.

US jurisprudence in this area has developed from cases exploring the freedom of speech of public employees. In *Pickering v. Board of Education*,⁴⁰ the United States Supreme Court articulated a balancing test to weigh a teacher's speech against the interests of her employer, emphasizing the need to "arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."⁴¹

In *Connick v. Meyers*,⁴² the Court refined this test by holding that the balancing test would be triggered only if the speech at issue related to a matter of *public concern* and was made by the employee in her capacity as a private citizen. It ruled that "federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to [an] employee's behavior."⁴³

A leading case in the application of this precondition to First Amendment balancing in the context of a teacher's online presence is *Snyder v. Millersville University*.⁴⁴ Ms. Snyder was a student teacher completing a placement at a high school. She informed her students that she had a MySpace profile, even though she had been specifically instructed not to inform students of her online presence. Her MySpace page featured a photo of her in a costume holding a beer, with the caption "Drunken Pirate." When Ms. Snyder discovered a student had looked at her MySpace page, she told the student that his actions were inappropriate and he should respect her professional boundaries. Ms. Snyder later posted on MySpace implying that she was not applying for a permanent position at the school because of another teacher.⁴⁵

⁴⁰ *Pickering v. Board of Ed. Of Tp. High School Dist. 205, Will County, Illinois*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (U.S., 1968).

⁴¹ *Ibid.* at 568-70.

⁴² 461 U.S. 138, 103 S.Ct. 138, 75 L.Ed.2d 708 (U.S., 1983).

⁴³ *Ibid.* at 147-48. Although *Connick* was decided in the context of a public employee other than a teacher, it has been interpreted to apply to public school teachers. See also *Garretti v. Ceballos*, 547 U.S. 410, 126 S.Ct. 1951, 164 L.Ed. 689 (U.S., 2006). In *Mandell v. County of Suffolk*, 316 F.3d 368 (C.A.2, 2003) the Second Circuit held that in order to apply the *Pickering* balance test, a plaintiff must first establish that: "(1) his speech addressed a matter of public concern, (2) he suffered an adverse employment action, and (3) a causal connection existed between the speech and the adverse employment action, 'so that it can be said that his speech was a motivating factor in the determination.'" At 382. For a more detailed discussion of free speech laws' application to educators, see Emily H. Fulmer, "Privacy Expectations and Protections for Teachers in the Internet Age", online: (2010, No. 014) *Duke Law & Tech. Rev.* <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1209&context=dltr>> ["Fulmer"] and Patricia M. Midiffer, "Tinkering with Restrictions on Educator Speech: Can School Boards Restrict What Educators Say on Social Networking Sites?" (2011) 36 *U. Dayton L. Rev.* 115, esp. at 119-28.

⁴⁴ 2008 WL 5093140, 2008 U.S. Dist. LEXIS 97943 (E.D.Penn., 2008) ["*Snyder*"].

⁴⁵ *Ibid.* at paras. 9-10.

A school administrator eventually viewed Ms. Snyder's profile and gave her a poor evaluation as a student teacher, noting her poor judgment in respect of her MySpace page.⁴⁶ Her university did not grant her an education degree because she had failed to satisfactorily complete her placement.⁴⁷ Ms. Snyder brought a First Amendment claim alleging that this violated her right to free speech. Her claim was rejected on summary judgment on the basis that her statements were not matters of public concern subject to the federal court's review.

Snyder is illustrative of a typical American off-duty social media conduct case; it is rare that a teacher's online postings are properly characterized as matters of public concern.⁴⁸ More often, cases are determined on the basis of contract or employment law grounds and a consideration of whether the severity of a penalty imposed in response to a teacher's off-duty online activity was proportionate and appropriate.

(b) Settlements and Informal Resolutions

Before discussing how reported decisions have assessed this issue, I will briefly touch on three cases of teachers' allegedly inappropriate online content that were resolved informally. Although these cases cannot stand for a legal test as to when discipline is appropriate, the facts and outcomes reveal some of the mitigating factors that ought to be considered in proceedings alleging misconduct on social media.

D'Amico v. Brownsville Area School District arose after a teacher hosted a bachelorette party for a friend, the events of which included entertainment by a male stripper. A guest at the party posted photos of the teacher with the stripper on Facebook without her knowledge, and the teacher had them removed less than 24 hours after the photos were posted. Nevertheless, her school district became aware of the photos and suspended Ms. D'Amico for 30 days without pay. After the ACLU threatened a lawsuit on Ms. D'Amico's behalf, her school district reinstated her. The district did not contest a union grievance to recover

⁴⁶ *Ibid.* at paras. 11-16.

⁴⁷ *Ibid.* at para. 17.

⁴⁸ For a possible exception to this, however, see Eric Heisig, "Teacher settles lawsuit against Wayne County school district over Facebook posts touting veganism" *Northeast Ohio Media Group* (14 April 2015), online: Northeast Ohio Media Group <http://www.cleveland.com/court-justice/index.ssf/2015/04/teacher_settles_lawsuit_agains.html>, which discusses a settlement obtained by a second-grade teacher in rural Ohio, who was fired after posting on Facebook about his opposition to certain dairy farming practices. The teacher was fired, told that parents in the agricultural community would disapprove and decrease their fundraising. With the assistance of PETA and the ACLU, the teacher reportedly obtained a settlement that included damages and reinstatement. One suspects that if this matter had proceeded to court, the teacher's statements might have been deemed of sufficient public concern to be subject to the *Pickering* balancing test, outweighing the school's interest in the matter.

back wages, and paid Ms. D'Amico \$10,000 in damages to resolve the matter without litigation.⁴⁹

*Murmer v. Chesterfield County School Board*⁵⁰ pertained to an art teacher who was fired after an unknown third party posted on YouTube an old clip of the teacher's appearance on an obscure cable TV show. The video showed the teacher demonstrating his "artistic technique" of painting with his buttocks while wearing a thong swimsuit. School administrators alleged that the video caused disruptions at the school and that Mr. Murmer's "inappropriate display of his body in a video intended for public viewing constituted conduct unbecoming of a teacher, who necessarily is a role model for his students."⁵¹ The ACLU filed suit on his behalf alleging a First Amendment violation, and Mr. Murmer received a \$65,000 settlement (equivalent to approximately two years' salary). It is important to note that Mr. Murmer took great pains to keep his personal art separate from his professional life; he never discussed it at school, and even appeared on the show under a pseudonym and wearing a disguise.⁵²

In *Payne v. Barrow County School District*,⁵³ a teacher's fairly innocuous conduct resulted in a worse outcome. Ashley Payne, a high school teacher in Georgia, had posted photos from her summer vacation in Europe on Facebook, including one photo in which she was smiling while holding a beer and a glass of wine. Her Facebook wall also included a post saying she was going to "Crazy Bitch Bingo" (a game played at bars in Atlanta). An unknown third party, who identified herself as a parent, emailed the school district to complain about the content on Ms. Payne's Facebook page. Interestingly, Ms. Payne claimed that she had used her privacy settings and had not "friended" any students or parents, raising questions about the identity of the anonymous tipster. In any event, her principal advised Ms. Payne that the district disapproved of her posting photos with alcoholic beverages and using profanity, and told her that if she did not resign, she would be suspended, which would adversely affect her ability to teach in the future.⁵⁴ Ms. Payne agreed to resign.

⁴⁹ "Settlement reached with school district over teacher who was suspended over photo with stripper at bachelorette party" ACLU (17 August 2010), online: ACLU <<https://www.aclu.org/news/settlement-reached-school-district-over-teacher-who-was-suspended-over-photo-stripper?redirect=free-speech/settlement-reached-school-district-over-teacher-who-was-suspended-over-photo-stripper-ba>> ["*Damico*"].

⁵⁰ 2007 WL 2914769 (E.D.Va., 2007); complaint available online at <<http://www.aclu-va.org/docket/murmer.html>> ["*Murmer*"].

⁵¹ *Ibid.* See, also, Fulmer, above, note 43 at 22-23.

⁵² "Art Teacher's Right to Create Art" American Civil Liberties Union of Virginia (21 April 2008), online: ACLU of Virginia <<http://www.acluva.org/docket/murmer.html>>.

⁵³ Petition for a Writ of Mandamus, Docket No. 09CV-3083-X (Sup. Ct. Barrow Cty., GA) (15 October 2009), online: <http://multimedia.onlineathens.com/pdf/2009/111009teacher_suit.pdf>; Maureen Downey, "Court Ruling goes against Barrow teacher who lost job over Facebook posting" AJC.com Breaking News (11 October 2011), online: AJC.com <<http://www.ajc.com/news/news/local/ruling-goes-against-barrow-teacher-who-lost-job-ov/nQMb8/>> ["*Payne*"].

Ms. Payne subsequently obtained legal advice and sought to be reinstated, commencing a lawsuit alleging that she had not received due process. Her claim was rejected (due process was not owed when she voluntarily resigned), and the school district refused to rescind her resignation.⁵⁵ Ms. Payne's experience serves as a cautionary tale for teachers who are unaware of their rights as employees when they are faced with allegations of unprofessional online conduct.

(c) Judicial and Arbitral Review

American judicial and arbitral decisions reviewing disciplinary action imposed on teachers for their social media postings provide a helpful sense of the factors that ought to be considered. I will review four such decisions before discussing how these factors might be applied in proceedings in Canada.

In *Land v. L'Anse Creuse Public School Bd. of Educ.*,⁵⁶ photographs of a middle school teacher simulating fellatio with a male mannequin at a bachelorette party were posted on the Internet, two years after the fact. The photos were taken without the teacher's knowledge and posted without her consent. The teacher had the photos removed shortly after students found them.

The school board terminated Ms. Land's employment, but the State Tenure Commission overturned this sanction, and the court affirmed the Commission's decision. Although the evidence demonstrated that "the photographs engendered widespread gossip and some students and parents lost respect for [Ms. Land]",⁵⁷ the Commission held that Ms. Land's behaviour was legal, occurred outside the school context, was not associated with her duties as a teacher, and did not impact her ability to teach. As such, the Commission held it did not constitute misconduct, and "absent such a showing, any negative publicity arising from petitioner's conduct did not provide reasonable and just cause for petitioner's discharge."⁵⁸

On judicial review, Ms. Land further highlighted that the context of the photos was a bachelorette party at which she had no reasonable expectation that children might be present, and all adults involved were willing participants. There was no evidence she had mentioned her conduct or attendance at the party to her students, and there was overwhelming evidence that Ms. Land was an excellent teacher.

In reviewing the Commission's decision to reinstate Ms. Land, the standard to be applied by the court was whether the decision was arbitrary or capricious. The court thus concluded that

⁵⁴ *Ibid.* See also Fulmer, above, note 43 at 23-24.

⁵⁵ *Ibid.*

⁵⁶ 2010 Mich.App. LEXIS 999, 2010 WL 2135356 (Mich App.), leave denied 488 Mich 913, 789 N.W.2d 458 (Mich., 2010).

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

the commission did not act arbitrarily or capriciously in deciding that, where there is no professional misconduct, *the notoriety of a tenured teacher's off-duty, off-premises, lawful conduct, not involving students or school activities, by itself, will not constitute reasonable and just cause for discipline* ... [Ms. Land]'s conduct, while coarse, was not inappropriate for its adult venue.⁵⁹

It should be highlighted, however, that the court found that the Commission had made “a choice between two reasonably differing views”. The high level of deference accorded to the decision below may have been a significant factor in the result; had the Commission gone the other way, the court may have similarly held that *affirming* the dismissal was not arbitrary or capricious.

Such speculation is particularly apt in light of a conflicting decision in Ohio. In *Warren County Board of Education*,⁶⁰ the dismissal of a high school math teacher was upheld by an arbitrator, who found the Board had just cause to terminate the teacher in the circumstances. *Warren* relates to a teacher whose estranged ex-wife posted “obscene nude photographs” of the teacher on popular online social media sites, after having threatened to do so. The arbitrator upheld the Board’s decision to fire the teacher, holding that his students’ ability to access the photos undermined his credibility and his status as a role model. The arbitrator also criticized the teacher for failing to secure the photos, failing to take legal action in response to his ex-wife’s threats, and failing to warn his principal of the potential release of the photos.⁶¹

In *Rubino v. City of New York*, an appellate court overturned the termination of an elementary school teacher for inappropriate remarks she posted on Facebook, stating that to terminate the teacher’s employment in response to her conduct was “shocking to one’s sense of fairness.” One day after a New York City student drowned while on a field trip to the beach, Ms. Rubino posted, “After today, I am thinking the beach sounds like a wonderful idea for my 5th graders! I HATE THEIR GUTS! They are the devils [*sic*] spawn!” She also answered a responsive post from a Facebook friend by indicating that she would not throw a life jacket to a drowning student. She deleted the post three days later.⁶² Regardless, she was promptly fired, pursuant to a hearing officer’s recommendation; the officer held that by referring to her students in the post, Ms. Rubino was not protected by the First Amendment because she was writing in her capacity as a teacher.

On review, however, the court held this penalty was “so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct ...

⁵⁹ *Ibid.* [Emphasis added.]

⁶⁰ 124 Lab. Arb. Rep. (BNA) 532 (Skulina, Arb. 2007), cited in William A. Herbert, “Can’t Escape from the Memory: Social Media and Public Sector Labor Law” (2013) 40 N. Ky. L. Rev. 427 at note 203.

⁶¹ *Ibid.*

⁶² 950 N.Y.S.2d 494, 24 Misc.3d 1220(A) (N.Y.Sup., 2012), *aff’d*, 106 A.D.3d 439, 965 N.Y.S.2d 47 (N.Y.A.D. 1 Dept., 2013) [“*Rubino*”].

or to the harm or risk of harm to the agency or institution, or to the public generally.”⁶³ Moreover, the court held, there was no evidence her posting injured her students or that she intended any injury, and no indication it affected her ability to teach.

Without ruling on whether Ms. Rubino’s post was protected by the First Amendment, the court held that terminating her for the post would be “inconsistent with the spirit of the First Amendment” and made helpful findings regarding the role of social media and its intersection of the private and public spheres:

Indeed, with Facebook, as with social media in general, one may express oneself as freely and rapidly as when conversing on the telephone with a friend. Thus, *even though [Ms. Rubino] should have known that her postings could become public more easily than if she had uttered them during a telephone call or over dinner, given the illusion that Facebook postings reach only Facebook friends and the fleeting nature of social media, her expectation that only her friends, all of whom are adults, would see the postings is not only apparent, but reasonable.* While her reference to a child’s death is repulsive, there is no evidence that her postings are part of a pattern of conduct or anything other than an isolated incident of intemperance.⁶⁴

Finally, the Court’s reasoning regarding the role of teachers as role models for their students was particularly helpful for teachers:

[W]hile students must learn to take responsibility for their actions, they should also know that sometimes there are second chances and that compassion is a quality rightly valued in our society. Ending [Ms. Rubino’s] long-term employment on the basis of a single isolated lapse of judgment teaches otherwise. While I do not condone [Ms. Rubino’s] conduct and acknowledge that teachers should act as role models for their students, termination in these circumstances does not correspond with the measure of compassion a teacher should show her students.⁶⁵

The fourth decision of interest is *In re O’Brien*, in which a New Jersey court upheld the termination of a tenured teacher.⁶⁶ Ms. O’Brien taught at a school whose student body was comprised almost entirely of members of minority groups; all the students in her first-grade class were Latino or African-American. On March 28, 2011, Ms. O’Brien posted two statements on Facebook:

- “I’m not a teacher — I’m a warden for future criminals!”
- “They had a scared straight program in school — why couldn’t [I] bring [first] graders?”⁶⁷

⁶³ *Ibid.*

⁶⁴ *Ibid.* [Emphasis added.]

⁶⁵ *Ibid.* [Emphasis added.]

⁶⁶ 2013 WL 132508 (N.J. Super.A.D., 2013) [*O’Brien*].

⁶⁷ *Ibid.*

The following day, an administrator at a school where Ms. O'Brien had formerly worked (who had access to view her Facebook profile) advised Ms. O'Brien's current principal of the posts. The principal confronted her about the statements, to which she responded that she did not intend the comments to be offensive, but was otherwise unrepentant. She was suspended pending an investigation. News of the posts quickly spread, and within a few days angry parents had staged a protest outside the school. The protest was attended by reporters and camera crews.⁶⁸

At her disciplinary hearing, Ms. O'Brien indicated that she was sorry "that the comments caused so much trouble" and she attempted to explain that she had said her students were "future criminals" because of their behaviour, not their race.⁶⁹ She offered examples of her students stealing from her and hitting her and each other. After concluding that her statements were not protected by the First Amendment because they were not a matter of public concern, the Commissioner found that by posting her remarks on Facebook, Ms. O'Brien "showed a disturbing lack of self-restraint, violated any notion of good behavior, and [acted in a manner that was] inimical to her role as a professional educator."⁷⁰ He did not accept that her comments were a momentary lapse in judgment:

If this was an aberrational lapse in judgment, a reaction to an unusually bad day, I would have expected to have heard more genuine and passionate contrition in O'Brien's testimony. I needed to hear that she was terribly sorry she had insulted her young students; that she loved being their teacher; and that she wanted desperately to return to the classroom. I heard nothing of the sort. Rather, *I came away with the impression that O'Brien remained somewhat befuddled by the commotion she had created, and that while she continued to maintain that her conduct was not inappropriate, she was sorry others thought differently.*⁷¹

The reviewing court affirmed the conclusion that Ms. O'Brien's relationship with the school community had been irreparably damaged "not because the community thinks so, but because O'Brien fails to understand why it does."⁷²

4. A PROPOSED FRAMEWORK

Social media is a professional minefield for educators. By effectively rendering content publicly available while maintaining an illusion that posts are kept within private circles, use of media such as Facebook, Twitter, and Instagram can land teachers in trouble in countless ways. Considering the

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* [Emphasis added].

⁷² *Ibid.*

aforementioned Canadian case law concerning discipline for off-duty conduct generally, prior to the advent of social media, education law commentators have opined as follows:

[In] the context of the new digital online age, teachers cannot fully participate in the use of websites, online social networking and the Internet because they have to censor their personal views and self-representation to avoid actual or perceived misconduct and its consequences.⁷³

The Canadian Teachers' Federation has developed a list of recommendations for educators' social media use, including "Do not post anything on a social media site that you would not post on the bulletin board outside your classroom."⁷⁴ An organization in one U.S. state went further: following a report in the *Columbus Dispatch* in October 2007 regarding the MySpace pages of various Ohio teachers, the Ohio Education Association urged its members to simply remove their online profiles, warning that they "can be used as evidence in disciplinary proceedings."⁷⁵

These approaches are unduly harsh and appear to assume on the basis of some teachers' poor decisions that all teachers are incapable of exercising good judgment. In light of the ubiquity of social media in professionals' day-to-day lives, a nuanced approach is much more appropriate.

First, the general rule articulated in *Ross* can and should continue to apply in the context of teachers' off-duty conduct related to social media. The question is whether a teacher's off-duty actions have "impaired his ability to fulfil his teaching position," in the sense that either (a) there is direct evidence that he cannot continue to perform his job, or (b) it can be reasonably inferred that he has impaired the community's confidence in the school system by giving rise to public concern, unease, and distrust.⁷⁶

Of course, it is not possible to draw a bright line indicating precisely what online conduct is inappropriate — each case will have to be considered on its facts to assess whether a teacher's posted comments or photos create a loss of confidence in the teacher and the school system as a whole. As the Divisional Court held in the case of "ZM",⁷⁷ evidence is required to draw such a conclusion; it cannot simply be assumed from the nature of the alleged misconduct that an

⁷³ Nick J. Scarfo and Marvin A. Zuker, *Inspiring the Future: A New Teacher's Guide to the Law* (Toronto: Carswell, 2011) at 21.

⁷⁴ "Cybertips for Teachers" Canadian Teachers' Federation Resources (retrieved 11 October 2016), online: Canadian Teachers' Federation <<http://www.ctf-fce.ca/en/Pages/Issues/Cybertips-for-teachers.aspx>>.

⁷⁵ Michael D. Simpson, "The Whole World (Wide Web) is Watching: Cautionary tales from the 'what were you thinking' department" *neatoday* (19 April 2008), online: National Education Association Office of the General Counsel <<http://www.nea.org/home/12784.htm>> (retrieved 11 October 2016).

⁷⁶ *Ross* above, note 4 at paras. 45-47.

⁷⁷ *Toronto District School Board v. O.S.S.T.F.* above, note 16.

educator's ability to fulfil her duties is impaired. In general, however, the cases are clear that comments of a hateful, discriminatory, or derogatory nature on the basis of race, religion, sexual orientation, or other similar protected grounds will undermine the education system's core values of equality, dignity, and respect and likely be deemed conduct unbecoming.⁷⁸

The other theme borne out in the cases is the relevance of mitigating factors affecting whether disciplinary sanctions will be imposed for a teacher's off-duty social media postings, as well as their severity. Social media can be a troubling hybrid of the public and private spheres: the impression that one's posts are limited to a particular group of "friends" is misleading given the ability to save, copy, and repost. Moreover, what is posted about someone and who has access to such posts are often outside the person's control. We cannot expect to retain excellent educators if all aspects of teachers' personal lives are under a microscope. It is wise to recall Justice LaForest's caution in *Ross*:

I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers.⁷⁹

The court's finding in *Rubino* is also apposite:

[W]hile students must learn to take responsibility for their actions, they should also know that sometimes there are second chances and that compassion is a quality rightly valued in our society. Ending [a teacher's] long-term employment on the basis of a single isolated lapse of judgment teaches otherwise.⁸⁰

Accordingly, when Canadian courts apply the *Ross* standard in disciplinary cases pertaining to off-duty social media use, I propose they consider, where relevant, the following (non-exhaustive) list of mitigating factors:

- The content in question was posted by a third party, without the teacher's knowledge or consent;⁸¹
- The teacher made prompt and reasonable efforts to ensure the content was no longer publicly available;⁸²
- The teacher made reasonable efforts to maintain the privacy of his or her social media accounts;⁸³ and

⁷⁸ See, e.g., *Ross* above, note 4; *Kempling*, above, note 19; and *O'Brien* above, note 66.

⁷⁹ *Ross* above, note 4 at para. 45.

⁸⁰ *Rubino* above, note 62.

⁸¹ As per *Land* above, note 56; *Murmer* above, note 50; *D'Amico* above, note 49; and *McClure* above, note 36.

⁸² As per *Land* above, note 56; *D'Amico* above, note 49; and *Rubino* above, note 62.

⁸³ As per *Simcoe* above, note 30; *Payne* above, note 53; and *Rubino* above, note 62.

- When a teacher posted intemperate comments online, he or she subsequently demonstrated sincere regret for the lapse in judgment.⁸⁴

Consideration of these factors in the application of the *Ross* standard bears in mind the unique challenges raised by social media, and will achieve an appropriate balance between maintaining public confidence in the education system and respecting a teacher's right to maintain a private life.

5. PRACTICAL TAKEAWAYS FOR EDUCATORS

A number of practical tips emerge after reflecting on the lessons from the Canadian and American cases respecting teachers' off-duty online presence. Educators should consider the following when maintaining and monitoring their social media accounts. In the event your "private" life enters your professional sphere in the school community:

- Your reaction after questionable content is posted or discovered is important. Courts and regulators will appreciate it if you have done your best to have the content taken down, and have expressed sincere contrition for any lapses in judgment.
- Courts and regulators generally acknowledge the difference between what you post and what is posted about you.
- Even still, some posts, such as obscene nude photos, simply cross the Rubicon, "undermining the teacher's role model status and credibility." To the extent such content already exists, it should be protected as much as possible so others do not have access.
- Privacy settings can be deceiving. It is not just students and parents who report questionable online conduct, but also colleagues and "friends".
- Self-identification as a teacher or as an employee of a particular institution or school board on your profile may be a relevant consideration in determining whether your posting has impaired the community's confidence in the school system.
- Criticizing your supervisors, colleagues, employer, or students online is never a good idea.
- If confronted with allegations of misconduct, do not resign before becoming aware of and considering your rights as an employee. Seek legal advice or speak to your union representative.
- Courts tend to defer to the judgment of arbitrators or tribunals at first instance, provided that their findings are within a range of reasonable outcomes. Investigations or proceedings commenced by your school board or regulator should not be taken lightly, even though they are less formal than a hearing in court.

⁸⁴ As per *Rubino* above, note 62; *Simcoe* above, note 30; and (although notably not demonstrated in this particular case) *O'Brien* above, note 66.

- If you are communicating racist, homophobic, or other discriminatory attitudes online, the principle remains regardless of the medium: such behaviour impairs your ability to lead in an inclusive educational environment, and will likely warrant serious disciplinary sanctions.