

THE JOHN AND ILZE SHEWAN CASE:  
UNCONVENTIONAL TEACHER BEHAVIOUR:  
PRIVATE LIFE IN PUBLIC CONFLICT

by

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Title of Thesis/Project/Extended Essay

THE JOHN AND ILZE SHEWAN CASE: UNCONVENTIONAL TEACHER BEHAVIOUR:

PRIVATE LIFE IN PUBLIC CONFLICT

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## ABSTRACT

This project focuses on the case of John and Ilze Shewan, who were both suspended, without pay for six weeks, for having taken and submitted personal, semi-nude photographs for publication in Gallery magazine. John Shewan had taken a few semi-nude photographs of his wife Ilze and entered a contest being run by Gallery magazine, and the photographs were chosen for publication. The decisions to suspend both teachers spearheaded a series of judicial disputes and much public notoriety. Conflicting judgements were rendered at the Reference Board level and at the Supreme Court level. The final court proceeding, at the Appeal Court of British Columbia, favoured the School Board and the Shewans did not proceed any further with their case.

The project is a detailed analysis of the case and provides a complete review of the events and an overview of the community. It also includes an analysis of the legal transcripts of each of the three judicial decisions handed down. Lastly, the study incorporates other literature in the final discussion of the issues and implications of the Shewan case.

The Shewan case raises several key issues concerning:

- a) the role of teachers and the expectations placed upon them by the various groups with whom they interact;
- b) the private conduct of teachers and whether there is a distinction between on-the-job and off-the-job conduct;
- c) the concept of personal freedoms of individuals in society and how those of educators are protected; and  
lastly
- d) the fair interpretation of teacher misconduct and the degree of the infraction.

These issues are addressed and elaborated on, with respect to the implications they hold for both educators and policy makers.

The Shewan case illustrates a unique example of unconventional teacher behaviour and highlights several major implications for all parties to the educational system. The one conclusion that this case does provide is that the area of teacher conduct needs to be carefully reviewed, assessed, and changed to better meet the goals and needs of the educational system and its participants.

DEDICATION

To my two concurrent little projects,

Erica and Daniel, with love.

## ACKNOWLEDGEMENTS

I wish to express gratitude to my Supervisory Committee for their support and insightful suggestions. My special thanks to Dr. Michael Manley-Casimir, my Senior Supervisor, for his constant encouragement and optimism. Finally I wish to thank my family for their understanding and support.

## TABLE OF CONTENTS

	Page
Approval Page . . . . .	ii
Abstract. . . . .	iii
Dedication. . . . .	v
Acknowledgements. . . . .	vi
Table of Contents . . . . .	vii
List of Tables. . . . .	viii
CHAPTER 1. Introduction. . . . .	1
Background. . . . .	1
Statement of the Problem. . . . .	2
Limitations . . . . .	3
Theoretical Orientation . . . . .	4
Method and Organization of the Study. . . . .	5
CHAPTER 2. Elaborating on the Events of the Case . . . . .	6
Introduction. . . . .	6
A. The Offence . . . . .	6
B. Chronology of Events. . . . .	9
C. Community of Abbotsford . . . . .	13
D. John and Ilze Shewan. . . . .	20
CHAPTER 3. The Three Judicial Decisions. . . . .	22
Judgement I: The Board of Reference. . . . .	23
A. Majority Decision . . . . .	23
B. Minority Opinion. . . . .	28
Judgement II: The Supreme Court of British Columbia. . . . .	34
Judgement III. The Appeal Court of British Columbia. . . . .	41
CHAPTER 4. Discussion of Key Issues. . . . .	46
Introduction. . . . .	46
A. Role and Expectations . . . . .	47
B. Private Conduct and Professional Conduct. . . . .	51
C. Personal Rights and Freedoms. . . . .	58
D. Defining "Misconduct" . . . . .	61
CHAPTER 5. Implications and Conclusions. . . . .	72
A. The Classification of Teacher Conduct and the Lack of Objective Standards . . . . .	73
B. The Private Conduct of Teachers and Their Perceived Role. . . . .	75
C. Better "Interfacing" in the Educational System. . . . .	80
REFERENCES. . . . .	84



LIST OF TABLES

	Page
Table 1. Population and Labour Force by Occupation for the Abbotsford Area . . . . .	17
Table 2. Ethnic Origin Breakdown (Abbotsford and Matsqui).	18
Table 3. Religious Breakdown (Abbotsford and Matsqui). . .	19

## CHAPTER 1

## Introduction

Background

The Shewan case is a unique example of unconventional teacher behaviour and the resulting actions taken by both the teachers involved and the school district. John Shewan and Ilze Shewan are husband and wife. They are both employed by the Abbotsford School District (#34). In the month of January, 1985 each of them was suspended under s. 122 of the School Act. The Shewans were suspended for a period of six weeks without pay.

The controversy began when Mr. Shewan took a picture of his wife in the nude from the waist up. The photograph was submitted for an amateur photo competition in Gallery magazine. This photograph was later chosen for publication and subsequently published in the February 1985 edition of Gallery. Sometime in January, 1985 the Superintendent of Schools for Abbotsford was informed of this photograph and a few weeks later the Shewans were suspended for reasons of misconduct. The School Board's position was that the Shewans' behaviour constituted misconduct because it amounted to "conduct unbecoming" a professional teacher. According to the School Board, teachers are role models for students and leaders in their community; their behaviour is highly visible and therefore must not conflict with community values and expectations.

The Shewans did not feel that their off-the-job, private actions constituted misconduct and appealed their suspensions to a Board of Reference.

The majority of the Board of Reference held that the Shewans' actions fell within accepted standards of tolerance in contemporary Canadian society, and therefore did not amount to misconduct. The School Board appealed to the Supreme Court of British Columbia and this court allowed the appeal and supported the misconduct verdict. The Shewans appealed this decision to the B. C. Court of Appeal and their appeal was dismissed. No further actions were taken.

At each stage of the proceedings, major legal issues were raised with respect to teacher behaviour, community values, and the pressures levied against school boards. This case is a good illustration of the social conflict that arises when teacher behaviour (on and off the job) conflicts with the expectations of the school community. It highlights several key issues for educators and policy makers. These are specified in the next section and elaborated on in later sections of this study.

#### Statement of the Problem

Teachers, considered as professionals, are often subjected to close scrutiny by the public. Their conduct, whether on or off the job, at times becomes a matter of public record. Misconduct is one of the several grounds upon which a teacher may be suspended. It is not

confined to actions in the classroom, but includes conduct of the teacher off the school premises. The John and Ilze Shewan case illustrates a unique example of unconventional teacher behaviour and the resulting dispute which unfolded. This case highlights the problems of differing interpretations of "proper" teacher behaviour and the pressures a community can exert on a school board. This case involved three provincial hearings which produced contradictory decisions.

The Shewan case raises several key issues concerning:

- a) the private conduct of teachers (off-the-job conduct) and the ramifications of "unaccepted " behaviour;
- b) the role of teachers and the expectations placed upon them by the various groups with whom they interact;
- c) the "fair" interpretation of teacher misconduct and the degree (seriousness) of the infraction; and lastly
- d) the concept of personal rights and freedoms of individuals in society -- including educators.

#### Limitations

In looking at the Shewan case one must keep in mind that the facts are unique to this case, and that the resulting court decisions are not necessarily applicable to other cases or situations. Yet, the case envelops the broader issue of social conflict between teacher behaviours and community values which are applicable to many other

Canadian cases. Another point of consideration is the fact that this study does not look at any new data, but only those facts brought forth by the judicial decisions. My initial intention was to interview the key players involved in the case, but unfortunately I did not get the cooperation that was hoped for and as a result the interviews had to be eliminated.<sup>1</sup> The facts that were provided should enable enough analysis and discussion of the above stated issues.

#### Theoretical Orientation

A theoretical orientation is provided for the study by Turner's (1957) idea of the "social drama". According to Turner, the "social drama" is a social process involving four stages: (1) the breach of some important rule or norm governing the relationship between the persons who come into conflict; (2) widening crisis threatening the breach of more relationships; (3) redressive measures brought into action by leading members of the relevant social groups, with the purposes of stopping the disturbance; and (4) re-integration of the conflicting parties or else the recognition of a split between them (Turner, 1957, pp. 91-94).

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<sup>1</sup> The key individuals contacted did not want to take part in the study -- the general feeling was that they did not want to go through the whole thing again (the case was over and done).

### Method and Organization of the Study

The Shewan case is a unique case highlighting in interesting ways the ideals in conflict in a social drama. My analysis therefore begins with a review of the events and an overview of the community in an effort to set the context of the dispute as fully as possible. This study also includes an analysis of the legal transcripts of each of the three judicial decisions handed down. Lastly, the study incorporates other literature in the final discussions of the issues and implications of the Shewan case for educators and policy makers.

The results of this study are set out in five chapters. The first chapter serves as the introduction by briefly describing the background and statement of the problem, the methods of investigation and the overall organization of the study. Chapter 2 details the events of the case and elaborates on the case perspectives. It also provides the reader with a brief overview of the community and the Shewans. Chapter 3 examines the three judicial decisions and the issues raised by the three levels of the legal system. The fourth chapter discusses the issues raised by this case in conjunction with the judicial decisions rendered and other reviewed literature. Chapter 5 concludes the study with a discussion of the potential implications of this case for educators and policy makers.

## CHAPTER 2

### Elaborating on the Events of the Case

#### Introduction

The aim of this chapter is to detail the events of this case. It establishes the context and outlines the series of events surrounding the case. The first section of this chapter provides the reader with some elaborations on the case perspectives mentioned in the first chapter. It also provides a chronology of the events, to assist in the understanding of the case. The second section of this chapter describes briefly the Abbotsford area, both as a school district and a community. Lastly, this chapter provides a few facts on the Shewans as teachers and the costs they incurred due to their suspensions. These three sections provide the reader with a foundation to understand the complexities of this case and follow the review of the three judicial proceedings in the subsequent chapter.

#### A. The Offence

The controversy began when Mr. Shewan took a picture of his wife in the nude from the waist up. The photograph was submitted for an amateur photo competition in Gallery magazine. This photograph was later chosen for publication and subsequently published in the February 1985 edition of Gallery. Sometime in January, 1985 the Superintendent of Schools for Abbotsford was informed of this

photograph and a few weeks later the Shewans were suspended for reasons of misconduct. The School Board's position was that the Shewans' behaviour constituted misconduct because it amounted to "conduct unbecoming" a professional teacher. According to the School Board, teachers are role models for students and leaders in their community; their behaviour is highly visible and therefore must not conflict with community values and expectations.

The Shewans did not feel that their off-the-job, private actions constituted misconduct and appealed their suspensions to a Board of Reference,

The dispute therefore began when the Superintendent of Schools discovered the offence and the Shewans protested the sanction which was imposed upon them. The following facts are relevant both to the Superintendent's finding the Shewans' conduct to be offensive and to the Shewans' disputing that finding:

1. Mr. Shewan with the concurrence of Mrs. Shewan submitted three semi-nude photographs of Mrs. Shewan, along with an entry form and essay to a magazine published in the United States called Gallery.
2. The photographs were taken by Mr. Shewan.
3. Gallery magazine was soliciting models for a "Girl Next Door" amateur erotica photo contest.
4. The contest winner was to receive a substantial prize and anyone chosen to be published would receive a small



monetary prize.

5. According to Mr. Shewan, his motivation for submitting the photos was to try to improve his wife's self-image and show her that he loved her (entirely personal motives).
6. For Mrs. Shewan, the motivation was that the photos might have improved her self-esteem and to please her husband (entirely personal motives).
7. Gallery magazine notified the Shewans in December 1984 that one of Mrs. Shewan's photos had been chosen for publication and that it would appear in the February 1985 edition.
8. Mrs. Shewan's photo was published on page 48 and it was one of five photos appearing on that page in the "Girl Next Door" contest portion of the magazine.
9. Mrs. Shewan's picture was the least revealing of the pictures printed in the magazine.
10. The photograph was published in Gallery magazine with the following caption on page 48:

Ilze S. 34, teacher

Clearbrook, B. C.

Canada

Photography by her husband, John

Ilze is a high school teacher who can speak, read and write in seven languages. The proud mother of a 15 month-old baby boy she also finds time for cooking and photography.

11. The picture appeared on the bottom left hand side of a page of photographs under the title "The Girl Next Door, February, 1985".
12. The other photographs on the page are of women who are either totally or partially nude and one page before and about 13 pages thereafter contained pictures of a similar nature.
13. Mrs. Shewan is seen lying on her back on a bed with the top of her body uncovered; she has on stockings, high heels, and a garter belt.

At this point we begin the chronology of events since the context of the picture taking and the picture itself has been established.

#### B. Chronology of Events

1982/1983

Mr. Shewan obtained an entry blank for an amateur photo competition in Gallery magazine.

December 27, 1984

Mrs. Shewan was notified that one of her photographs would be published in the February 1985 edition; with the letter she received a \$50 cheque and the remaining two photos.

January 23, 1985

Around this time the Superintendent of the district received a telephone call from a local radio station reporter inquiring about the photograph. The Superintendent bought a copy of Gallery and confirmed the identity. After that he called the Shewans to meet in his office.

January 24, 1985

The meeting was held, where Mr. Shewan answered most of the questions for himself and his wife. When asked about the appropriateness of submitting the photograph, Mr. Shewan said he felt it met community standards.

The Superintendent did not agree and felt that the School board would feel the same. Mr. Shewan replied that in his view those opinions did not reflect the community.

After the meeting, the Superintendent reported the matter to the School Board and it decided to suspend Mrs. Shewan immediately. The Board set January 30 as the date for the statutory hearing pursuant to s. 122 of the School Act. ✓

Prior to the statutory meeting of January 30 the Superintendent gave a television interview indicating that he was shocked and sickened by the whole episode.

January 30, 1985

At the statutory meeting, Mrs. Shewan confirmed her identity in the photo and she stated that she had not seen the magazine at the time she had sent the pictures in.

She felt there was some indiscretion but she did not feel it went against community standards.

Following the meeting, the Board decided to suspend Mr. Shewan as well and set a statutory meeting for February 2.

February 2, 1985

Mr. and Mrs. Shewan, again appeared with counsel and their counsel asked for more time to prepare for the hearing.

A joint public statement was put forth at this time by the Shewans but it was not accepted by the Board.

February 4, 1985

Mrs. Shewan was suspended without pay for six weeks. ✓

Mr. Shewan's statutory meeting took place and he also stated that there had been an indiscretion but that he felt that the magazine met community standards.

February 5, 1985

Mr. Shewan was notified that he was also suspended without pay for six weeks.

An appeal was taken by the Shewans pursuant to s. 129 of the School Act to a Board of Reference, appointed by the Minister of Education.

April 9 to June 18, 1985

The Board of Reference heard evidence.

June 28, 1985

The majority of the Board of Reference allowed the appeal and ordered full back pay to Mr. and Mrs. Shewan.

The minority decision of the Board of Reference found the Shewans guilty of misconduct, but reduced the term of suspension from six weeks to ten days.

The School Board appealed the decision to the Supreme Court of B. C.

December 19, 1985

Supreme Court of B. C. hearing begins.

January 30, 1986

Supreme Court's decision handed down allowing the appeal and reducing the term of suspension from six weeks to one month. /

Shewans appealed the decision to the B. C. Court of Appeal.

December 9, 1987

Court of Appeal hearing.

December 21, 1987

Court of Appeal dismissed the appeal and upheld the suspension decision of the Supreme Court.

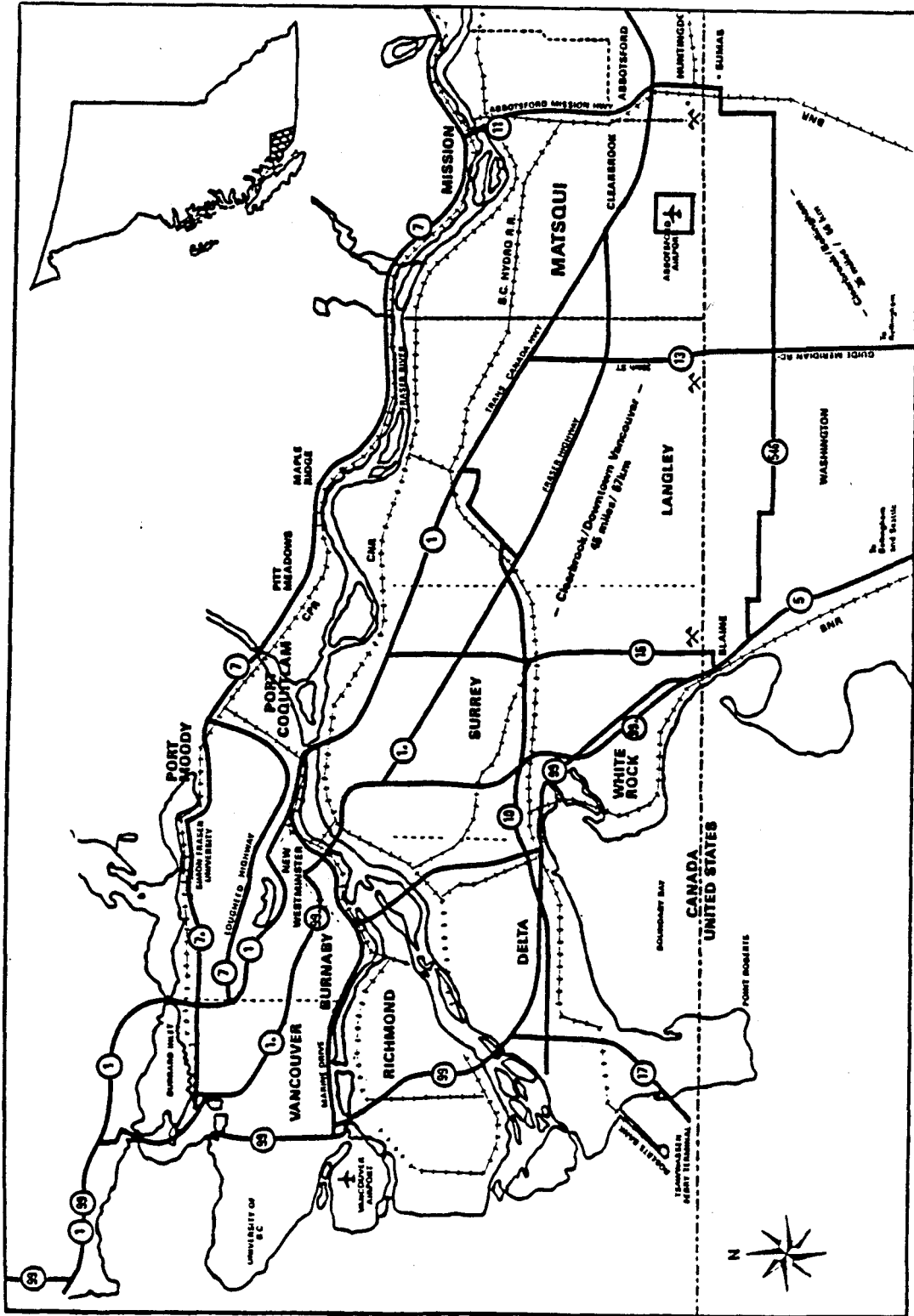
The Shewans decided against any further appeal.

### C. Community of Abbotsford

The British Columbia public school system offers education from Kindergarten to Grade 12. The school district of Abbotsford (#34) is no exception -- it provides the K-12 provincial standard, private school alternatives, and post-secondary offerings. The communities served by School District #34 consist of the two municipalities of

Abbotsford and Matsqui. This district is made up of: 31 elementary schools; 2 junior high schools; and 3 senior secondary schools. As of September, 1989 the district had a total teaching staff of 760 and a total student enrolment of 13,841. A number of private schools are located in this area, offering alternatives to the public school system. There are also three bible colleges in this district and a public community college, Fraser Valley College. Fraser Valley College offers one and two year career and vocational programs and first and second year academic programs transferable to universities in B. C. and elsewhere. The two local universities, U. B. C. and S. F. U., as well as several other colleges and technical institutions are within commuting distance of Abbotsford. Overall, the school district of Abbotsford is characteristic of many other smaller sized school districts in B. C.

As a community, Abbotsford is most often paired with Matsqui because their town centers have become indistinguishable. Clearbrook, the main business area of Matsqui, along with the Abbotsford town center form what is known as the Abbotsford-Clearbrook urban core -- a contiguous unit with very little visible indication as to the boundaries of each. Both districts comprise about 92,433 acres and are bounded by the Fraser River on the north, the United States border on the south, the municipality of Langley on the west and the municipality of Chilliwack on the east. The population of Abbotsford is approximately 18,000 and that of Matsqui is approximately 62,000.



Source: Matsqui Opportunity: A High-Growth Community, published by the Matsqui Economic Development Commission, Matsqui, B. C., May 1990.



Although the two communities have separate municipal governments, they form a single socio-economic unit as evidenced by the many joint programs, for example, fire protection, sewer and water, and recreation.

The Abbotsford-Matsqui area is one of the most productive agricultural areas in Canada; the major commodities being dairy, beef cattle, egg and poultry production, berry production, and vegetable farming. Agriculture and the processing of agricultural products are a significant source of employment. Yet the Abbotsford area has a very diverse labour force as illustrated by Table 1. The population statistics reinforce the fast growing rate of this area. According to the Abbotsford-Clearbrook Chamber of Commerce, the Abbotsford-Matsqui area is one of the fastest growing communities in North America (5-6%).

In terms of the demographics for this area, the statistics point to a diverse mix of people with varied religious affiliations. The Abbotsford-Matsqui area houses many ethnic origins and religious preferences, as is evidenced in Tables 2 and 3.

Table 1

## Population and Labour Force by Occupation for the Abbotsford Area

<u>Population Statistics</u>							
	1961	1966	1971	1976	1981	1986	(Forecasts) 1991 1996
Abbots.	6,033	6,247	7,479	9,590	12,745	14,496	17,250 20,700
Abbots. Area	20,483	22,610	31,304	41,083	55,052	66,256	82,078 99,567

Current growth rate per decade:

Abbotsford - +49.8%

Abbotsford Area - +60.0%

Labour Force by Occupation

	Male	(%)	Female	(%)
Construction trades	2760	18.1	50	0.5
Managerial and administrative	1795	11.8	425	4.5
Farming and horticulture	1435	9.4	810	8.5
Sales occupations	1430	9.4	1030	10.8
Manufacturing and related	1155	7.6	140	1.5
Transport equipment operating	1145	7.5	60	0.6
Service occupations	1130	7.4	1720	18.1
Processing	765	5.0	265	2.8
Clerical and related	715	4.7	3185	33.5
Machining and related	455	3.0	20	0.2
Material handling and related	450	3.0	65	0.7
Teaching and related occupations	420	2.8	495	5.2
Science/engineering/mathematics	325	2.1	30	0.3
Medicine and health	315	2.1	900	9.5
Social science and related fields	125	0.8	130	1.4
Other	<u>825</u>	<u>5.3</u>	<u>175</u>	<u>1.9</u>
	15,245	100%	9,500	100%

Average household income - \$26,271

Average income - \$17,402

Source: Abbotsford-Clearbrook Chamber of Commerce, Community facts booklet, Abbotsford, B. C. (reprinted with permission)

Table 2

## Ethnic Origin Breakdown (Abbotsford and Matsqui)

1986 Census		
Single Origin	Count for Abbotsford	Count for Matsqui
British	3850	12720
French	270	730
German	1650	8435
Chinese	60	325
S. Asian	350	2775
Dutch	1485	4125
Aboriginal People	135	245
All Other Single Origins	1100	4150
Mixed Origins <sup>a</sup>	5520	16725
<b>Total</b>	<b>14,420</b>	<b>50,230</b>

Source: Statistics Canada, 1986 Census

<sup>a</sup>The "Mixed Origin" category refers to those respondents of two or more origins -- not of a single origin.

Table 3

## Religious Breakdown (Abbotsford and Matsqui)

1981 Census		
Religious Denomination	Count for Abbotsford	Count for Matsqui
Catholic	1880	4515
Protestant	8285	28535
United Church	2110 <sup>a</sup>	6340 <sup>a</sup>
Anglican	1410 <sup>a</sup>	3515 <sup>a</sup>
Eastern Orthodox	110	145
Jewish	50	80
No Religious Preference	1250	5645
Eastern Non-Christian	215	1940
Others	40	100
<b>Total</b>	<b>11,830</b>	<b>40,960</b>

<sup>a</sup>Included in the total for the Protestant category.

Source: Statistics Canada, 1981 Census.

D. John and Ilze Shewan<sup>1</sup>

A few facts that are worth noting about the Shewans and their work in the Abbotsford School District:

- John has been teaching in the district since 1972.
- Ilze has been teaching in the district since 1976.
- John taught at Abbotsford Junior Secondary.
- \* Ilze taught at Clearbrook Junior Secondary.
- \* John has taught English, French, Social Studies, History, Law, General business, and Foods Cafeteria.
- Ilze has taught Drama, English, French, German, and ESL.
- \* Both are involved in extra-curricular and community activities.
- John was suspended from January 31 to March 13, 1985.
- Ilze was suspended from January 28 to March 10, 1985.

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<sup>1</sup>This account of the Shewans is taken primarily from the facts presented at the three judicial hearings. The transcripts are completely referenced in the References section of this project.

\* John's loss of salary resulting from the suspension came to \$3812.85.

\* Ilze's loss of salary resulting from the suspension came to \$3278.65.

\* Prior to the incident both John and Ilze were regarded as superior teachers and respected members of the community.

This chapter has elaborated on the background to the Shewan case in terms of the events, timing, place, and people. It is important to understand these elements before reviewing the legal proceedings. The reader's focus can then rest on the issues addressed by the proceedings and not the details.

## CHAPTER 3

## The Three Judicial Decisions

The purpose of this chapter is to review the three judicial decisions handed down on the Shewan case. During the dispute, three legal bodies were called upon to adjudicate in the matter of the suspension of John and Ilze Shewan: the Board of Reference (1985); the Supreme Court of British Columbia (1986); and the British Columbia Court of Appeal (1987). The two points at issue were: (1) whether or not the actions of Mr. and Mrs. Shewan amounted to "misconduct" within the meaning of s. 122 of the School Act and if so (2) whether or not the suspension imposed upon them by the School Board was just under the circumstances.

As each hearing is reviewed, the primary focus is on the arguments presented with respect to these two key issues. Also each review highlights the points of law and discussions raised by each judge in his written judgement. These are presented in a grid format for clarity and ease of comparison. Specific issues raised by these three judicial decisions are further addressed in the subsequent chapter. This chapter is intended to elucidate the verdict of each hearing and supply the reader with an ample amount of information pertaining to each judgement. The chapter concludes with an overall summary of each verdict as it applies to the two key points at issue.

Judgement I: The Board of Reference

A. Majority Decision

The first hearing of the John and Ilze Shewan case was undertaken by the Board of Reference, between April 9th and June 18th, 1985, in Vancouver, British Columbia. The three-person Board comprising of Mr. Marvin R. V. Storrow (Chairman), Mr. Gordon Eddy, and Mr. Phillip C. Rankin, heard evidence and arguments for six and one-half days. The plaintiffs, John and Ilze Shewan, were represented by David C. Tarnow, a lawyer retained by the British Columbia Teachers Federation, and J. S. Clyne represented the defendant, the Board of School Trustees of School District #34 (Abbotsford).

The Board began by stating that the main concern of this appeal was the six week suspension without pay levied against the Shewans by the Abbotsford School District. This was the assessed penalty of the "misconduct" charge brought against Mr. and Mrs. Shewan by their district. The Board turned to the meaning of the word "misconduct" for assistance in determining the fairness of the charge and the imposed penalty.

There is little written explanation on the word "misconduct" in the context of the School Act. The power to suspend a teacher is granted in Section 122 of the School Act, which states in subsection (1)(a):



A Board may at any time suspend a teacher with or without pay from the performance of his duties for misconduct, neglect of duty or refusal or neglect to obey a lawful order of the Board

The Board explained that there is little clarification given in reference to the meaning of the word "misconduct" in the context of the School Act. They explained that most statutes dealing with self-governing professional bodies use the word in conjunction with terms such as "unprofessional" or simply state "conduct unbecoming a member" or "infamous conduct". The Board found that these concepts should no be incorporated into the word "misconduct" in Section 122. They stated that it is a rule of construction and a common proposition that a word takes its meaning from the other words with which it is used. Their argument was that a word be taken in context and in referring back to subsection (1)(a), printed above, the Board found "misconduct" in Section 122 to be related to the employer/employee relationship. They explained further that there is a difference in the role of the Board of Reference and discipline committees of self-governing professionals that should not be overlooked. The Board of Reference is analogous to an Arbitration Board hearing discipline cases in the labour relations field. The Board went on to quote a leading textbook on arbitration law that states that while an employee's conduct outside the workplace may be subject to discipline that unless a substantial and legitimate business reason exists, the employer has no authority, control, interest or jurisdiction over an employee's

behaviour outside the hours of his employment. Therefore, the Board felt that they should approach the question of a teacher's conduct outside the school (off-the-job) with caution.

The next section outlines the arguments presented by each party to the case and the Board's responses and explanations to each. A grid format was chosen because it provides a clear and concise log of the points raised in this case.

#### SUMMARY OF ARGUMENTS AND RESPONSES

##### AT BOARD OF REFERENCE HEARING

Presenter	Argument	Board Response
a) Counsel for Shewans	<ul style="list-style-type: none"> <li>• Unless a teacher's conduct impairs his function as a teacher in broadest sense, we should not find misconduct</li> </ul>	<ul style="list-style-type: none"> <li>* Disagree, off-the-job conduct may be misconduct in right circumstances, for example -- if the Shewans were pictured in a lewd act it may well be misconduct</li> </ul>
b) Counsel for School Board	<ul style="list-style-type: none"> <li>* Shewans have impaired their teaching function (8 parents removed children from Mrs. Shewan's class)</li> </ul>	<ul style="list-style-type: none"> <li>• Speculative, not conclusion, action-- motives must be examined -- removal of students is not a true indication of impairment due to parents' personal motives</li> </ul>
c) Counsel for School Board	<ul style="list-style-type: none"> <li>• Loss of respect by their students</li> </ul>	<ul style="list-style-type: none"> <li>• Yet the School Board was willing to reinstate the Shewans -- they did not seek their dismissal therefore they must have felt that the</li> </ul>

Presenter	Argument	Board Response
d) Counsel for School Board	<p>* Shewans' behaviour amounted to misconduct because:</p> <ol style="list-style-type: none"> <li>1) very unbecoming conduct for a professional teacher</li> <li>2) they are condoning and encouraging the acceptance of a magazine such as <u>Gallery</u> (poor role models for their students)</li> <li>3) it was offensive to the people in the district -- the Shewans had failed to conform to the community standards</li> </ol>	<p>Shewans could overcome these kinds of problems -- Board agreed</p> <p>* Dismissed because that would be a BCTF matter in the Code of Ethics arena (not a matter for this Board)</p> <p>● A teacher is not on duty 24 hours a day, and his main function is to teach not to be emulated</p> <p>* Off-the-job, teachers ought to be allowed far greater latitude in their lifestyles</p> <p>* No community standards for Abbotsford were ever established or delineated by either party</p> <p>● Teachers should not be invisible, yet they cannot conform in the strictest sense</p> <p>* Adopted community standards test from reasoning of the Supreme Court of Canada decision in <u>Towne Cinema Theatres Ltd. v. The Queen</u></p>

-- contemporary  
Canadian community  
would tolerate  
Shewan's behaviour<sup>1</sup>

- Board should not ask whether the Shewans' conduct fell below some of their own community's standards, but whether it was within the accepted standards of tolerance in contemporary Canadian society
- \* After hearing evidence on the community standards and expert evidence, the Shewans' conduct would be tolerated by contemporary Canadian standards

In summary, the majority decisions for the Board stated that British Columbia teachers do not have different standards of behaviour depending on what community they teach in. They did feel that Mr. and Mrs. Shewan showed an "appalling lack of judgement", but that such an imprudent act does not amount to misconduct within the meaning of Section 122 of the School Act. The Board of Reference set the School Board's decision aside and ruled that the Shewans should be compensated for all wages and benefits lost as a result of their suspension. ✓

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<sup>1</sup>Towne Cinema Theatres Ltd. v. The Queen, S. C. C., unreported, May 9, 1985. Case rose out of a charge of presenting obscene motion pictures contrary to Section 163 of the Criminal Code.

This decision was brought down by Mr. Phillip Rankin and Mr. Gordon Eddy. One member of the Board of Reference, Mr. Marvin Storrow, did not agree. The next section will review his arguments in the minority opinion.

#### B. Minority Opinion

Mr. Storrow began his minority opinion with a review of the facts surrounding the publishing of the semi-nude photograph in Gallery magazine. He reviewed the February edition of the magazine in order to have a better sense of the publication and its contents. He concluded that the magazine's artistic level and literary content are not high, and on the evidence brought forth by both sides found it not to be a proper magazine for adolescents.<sup>2</sup> After hearing all the evidence on the community reaction Mr. Storrow's opinion was that of those members of the public who spoke out on the topic, the majority supported Mr. and Mrs. Shewan. Mr. Storrow also made the point that after speaking to the various witnesses, he saw the Abbotsford area as a fairly typical British Columbia community with people of varying religious beliefs and ethnic backgrounds. He was not convinced that there was anything particularly unique about the cultural or religious makeup, or point of view to adult magazines. He then pointed out the various arguments presented by the different witnesses called to

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<sup>2</sup>Chairman Storrow's conclusion on the artistic and literary content level is well presented in his written opinion on pages 4 and 5. Basically, his review of the February edition of Gallery magazine revealed that the magazine did not have "serious purpose" or "artistic merit".

testify. These are summarized in the subsequent section with specific reference to each party in the case.

BOARD OF REFERENCE - MINORITY OPINION

WITNESSES: SUMMARY OF ARGUMENTS

WITNESS

FOR THE SCHOOL BOARD

1. Parents (2)
  - Had not seen the photo or the magazine but felt it would be disgusting
  - \* They did not want their children taught by the Shewans
  - \* Eight parents did not want their children in Mrs. Shewan's class as of September 1985
2. Superintendents (3)
  - a) of Vancouver
  - b) of Burnaby
  - c) of West Vancouver
  - \* All agreed that the Shewans' actions constituted misconduct

FOR THE SHEWANS

1. Parents (2)
  - Having seen the photo, they did not see anything objectionable in the Shewans' actions and since they are highly regarded instructors, they would not object to their children being taught by them
  - They did not like the suspension ruling

2. Mrs. Gillian  
Ridington  
Chairperson of  
Periodical Review  
Board<sup>3</sup>
- \* Magazine contains explicit erotica  
by consenting individuals but without  
violence and explicit sexual acts
3. Principals of  
Mr. and Mrs.  
Shewan
- \* Shewans are teachers of the highest  
competence
- No impairment to either teacher's  
schoolroom performance demonstrated  
or anticipated
- \* Stated that if they had been asked  
before the submission of the photo  
they both would have advised not to  
submit it
4. Vice-President  
of Marketing for  
Mainland Magazines  
(Distributor of Gallery)
- \* Stated that sales of the magazine were  
not really increased because of this  
incident
5. Expert Witnesses (3)
- a) Dr. Robert Walker (SFU)
- b) Dr. William Bruneau  
(UBC)
- c) Dr. Michael Manley-  
Casimir (SFU)
- \* Unless the Shewans' ability to  
perform their functions as teachers  
was affected, their actions would not  
amount to misconduct
- \* Insufficient evidence of any effect on  
their teacher performance
- Did not breach the three aims of  
public education
6. Former Student of  
Mr. Shewan
- Mr. Shewan had been a very positive  
influence in his life and life  
choices

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<sup>3</sup>Periodical Review Board. This organization is not a statutory body but is one that reviews magazines before they are distributed to the public. It reviewed this specific edition of Gallery and authorized for public consumption.

After all the case review and testimony, the question still remained: Did the actions of Mr. and Mrs. Shewan constitute "misconduct" under the School Act? Storrow agreed with the two points argued by the School Board, that (1) disrespect for the teachers by their students was inevitable; and (2) the teaching profession had been brought into disrepute because of their actions. He also reinforced the fact that the Shewans should have realized that had their picture been accepted for publication their employer and community would certainly become aware of it, and that controversy would surround it. A point was also made concerning the amount of media interest surrounding this case. Storrow felt that this too was evidence of the large number of people in the community who had been offended by the Shewans' behaviour. Storrow made the point that certain occupations carry far more importance in the community than others. The reputation of certain occupations is built on the confidence that others have for them, for example, the medical, legal, and teaching professions.

A review of the concept of "misconduct" is needed and Storrow explained that he has difficulty with the stand that if the actions of teachers outside their office of "teacher" do not affect the relationship between the teacher and their students, then no "misconduct" within the meaning of Section 122 of the School Act can be established. He asked: Why is it necessary for the classroom relationship to be affected by contentious behaviour to constitute



"misconduct"? Although a profession may have its own subjective determination of what act or acts amount to misconduct, there has to be some element of objectivity in any such ruling. The absence of this would lead to different rulings for similar situations. Storrow felt that objectivity would be realized only when the term "misconduct" could be properly defined.

Storrow set off on this task by examining other professional groups and their treatment of the term "misconduct". He concluded that each Act gave "misconduct" its own meaning with specific reference to various terms, such as unprofessional, unbecoming, and infamous. Yet, a review of the School Act provided no such meaning of the term "misconduct" -- it was simply not defined. Since the Act did not help Storrow in his determination, he turned to common law authorities or dictionaries for assistance. He conferred with the Canadian Law Dictionary, Black's Law Dictionary, and others in trying to define "misconduct" and the meaning of "indiscretion". After reviewing all of the above, Storrow concluded that the lack of judgement in this case did amount to "misconduct" within the meaning of the School Act.

In his review of the evidence it showed:

(1) that Abbotsford, like many other areas, regards nudity as wrong and offensive, and something which persons teaching their children should not be condoning;

(2) Gallery magazine was seen as unfit for students, so how can teachers condone such a magazine and yet not commit an act of misconduct with the submission of the photograph -- knowing of its possible publication is conduct inconsistent with the due and faithful discharge of the duties of service of a teacher; and

(3) this type of behaviour by a teacher falls below that which is tolerated by the general public and inconsistent with the duty owed by a teacher.

Storrow went on to say that a teacher must have regard for and respect for the views held by the members of their community, whether they are the views of the majority or a minority. Teachers do not necessarily have to agree with these views but they must respect them. In Mr. and Mrs. Shewan's case, if their photography had been kept private then it would have been an entirely different matter.

Mr. Storrow also made the point that a school board must act as the representative for the community since it is elected by the eligible voters in that community. Even more important is the fact that teachers are held in high esteem by members of society and with that goes a high degree of responsibility towards the community and in particular towards the students.

Storrow cited the Supreme Court of British Columbia decision called Dian Cromer v. BCTF et al. In this case, Justice Mackoff had to decide whether or not a teacher violated the BCTF Code of Ethics. Justice Makoff stated:

He (the teacher) cannot wear two hats and shed one or the other as the situation dictates, particularly in a moderate sized community. (p. 22)

In Storrow's opinion these words are applicable to the Shewan case and along with this the British Columbia Teachers Federation Code of Ethics defines "pornography" to be: "material that exploits those it portrays by depicting them as sexual objects". This, in Storrow's opinion, is what Gallery magazine does to women -- it depicts them as sexual objects.

In conclusion he found Mr. and Mrs. Shewan both to be equally at fault and that the evidence before him had proven "misconduct" under Section 122 of the School Act. In reviewing the imposed penalty he found the School Board had failed to have regard for the teachers' previous high reputations and contributions. Storrow felt that a suspension of ten days for each would have been adequate.

On the 28th of June 1985 the majority delivered their written opinion allowing the Shewans' appeal and ordering the respondents be reinstated and compensated for all lost wages. From this decision the case moves on to the School Board's appeal to the Supreme Court of British Columbia -- Judgement II.

#### Judgement II: The Supreme Court of British Columbia

In brief, the Supreme Court of British Columbia overturned the Board of Reference decision and found that there was "misconduct" within the meaning of Section 122(1)(a) of the School Act. Justice Bouck reduced the penalty from six weeks to four weeks suspension. Mr. Justice Bouck heard the case in December 1985 in Vancouver and addressed the following three issues:

- (1) What was the nature of the appeal jurisdiction granted to this court by Section 129 of the School Act?
- (2) Did the Board of Reference err in law or fact when the majority found there was no misconduct?; and
- (3) If there was misconduct, what was the appropriate penalty?

In addressing the first issue of court jurisdiction, Justice Bouck identified Section 129 of the School Act as the relevant section that grants a right of appeal from the Board of Reference to the Supreme Court of British Columbia. He then went on to discuss at length, the reasoning behind his conclusion that he will act as if he represented a quorum of appellate judges in the British Columbia Court of Appeal hearing an appeal from the decision of a single judge of the Supreme Court of British Columbia. In essence, the appeal jurisdiction granted to the Supreme Court of B. C. in this situation is the same jurisdiction granted the British Columbia Court of Appeal to hear an appeal from the Supreme Court of B. C.

In assessing whether or not the Board of Reference erred in its ruling, Justice Bouck analyzed the reasoning behind the majority's decision. He began by summarizing the majority opinion and reviewing the various sources of definition for the term "misconduct". Then the evidence given at the Board of Reference appeal was reviewed and organized. In his view, the issue in this case involved the "moral standards of the community" where the Shewans taught and lived, and

not the contemporary Canadian standards adopted by the Board of Reference. The Canadian standards of tolerance test was designed for obscenity cases, and the moral conduct of a teacher amounting to misconduct may have nothing to do with obscenity. Hence, using the "tolerance" test was a poor way of testing moral conduct. Justice Bouck found it coincidental in these proceedings that the semi-nude picture may be considered obscene by some. Regardless, the Board of Reference should not have used a test of determining what is or is not obscene, to the real issue of whether or not there was misconduct. He concluded that the majority of the Board of Reference erred in law when they adopted the standards of tolerance test in Towne Cinema Centres Ltd. as a basis for allowing the appeal. The majority also gave undue weight to the expert evidence over the material before them. Justice Bouck did not feel that their ruling should be upset for this reason alone. If the evidence they heard supported their conclusion that the Shewans' behaviour did not offend the "moral standards of the community" then their decision may still be the right one.

In reviewing the admissibility and weight of lay opinion and expert evidence, Justice Bouck concluded that "misconduct" is tested mostly by objective testimony which uses facts and not opinion evidence. Since the photograph and magazine were before the Board of Reference, he felt there was no need to hear any expert or lay opinion as to whether the incident amounted to "misconduct". The real issue

was whether the conduct of the Shewans offended the moral standards of the community and amounted to misconduct, and to determine the answer the Board was required to hear objective evidence as opposed to selective opinions.

Justice Bouck tried to establish a means by which the moral standards of a community could be determined objectively. He stated that a judge should not decide moral propriety of a particular act by using his or her own value system. Other kinds of evidence should have been sought out. For example, the Board of Reference could have assessed the conduct of the average teacher in the community. By examining the conduct of other teachers, the alleged act of misconduct could be better compared to what was common behaviour of others in the profession. Justice Bouck felt that the Board of Reference did not hear evidence of this nature, because if it had it would have found that a substantial number of teachers in the Abbotsford area do not indeed publish their semi-nude pictures in Gallery magazine. This alone would not have been a conclusive test because the key factor was whether the act of misconduct affected the teacher in his or her professional capacity. If it did not, then it would not be an offence under the School Act.

According to Justice Bouck, by examining similar instances where a teacher was found guilty on misconduct, one can better assess the Shewans' own conduct in their district. In trying to objectively determine what the community standard would be, Justice Bouck reviewed

other cases where tribunals had adjudicated upon the conduct of public sector officials including teachers. The examples that were cited are briefly summarized in the following table.

SUMMARY OF CASES REVIEWED

Occupation	Community	Offence/Charge
1. Fireman (demoted)	Kamloops	Unsatisfactory conduct at scene of emergency
2. Nurse (suspended)	Oshawa	Possession of marijuana
3. Bus Driver (discharged)	Calgary	Common assault of babysitter
4. Air Canada Employee (fired)	N/A	Possession of marijuana
5. Teacher (fired)	Etobicoke	Possession of stolen goods
6. Teacher (suspended)	Peace River North	Relationship with a girl
7. Teacher (suspended)	Peace River North	Stolen property in premises, condoned use of hash and marijuana
8. Teacher (dismissed)	Vancouver	Gross indecency with a 17 year old boy

According to Justice Bouck, these decisions tell us that a teacher is an important member of the community, who leads by example. Teachers owe a duty of good behaviour to: a) their School Board; b) their local community; and c) the teaching profession. An appropriate standard of behaviour must be maintained both inside and

outside the classroom. This standard will vary from case to case but a teacher must be aware of the moral standards of the community where he or she teaches and lives, and not those of other districts or cities. Justice Bouck believed that there would be little difference from community to community, but what may be acceptable in a large urban setting may at times be misconduct in a smaller rural community.

Justice Bouck found the Shewans guilty of misconduct because their behaviour was abnormal and it reflected badly on them as teachers. He felt that they should have been examples to students and their actions had lowered the esteem in which they were held by their community. After his thorough review and for the reasons given above, Justice Bouck found misconduct and allowed the appeal.

Lastly, he addressed the issue of the penalty of six weeks suspension without pay and its appropriateness. Justice Bouck decided that a good way of deciding the fairness of the suspension period would be to examine awards where a teacher had been penalized for misconduct and compare the facts of those incidents with what the Shewans had done. In that way his judgement would be more consistent. The following is a list of the decisions cited by Justice Bouck.



## SUMMARY OF DECISIONS CITED

Case #	Charge (Incident)	Penalty
1	Female teacher took 7 day holiday (absent from duty)	2 months susp.
2	Female teacher found condoning liquor at school function	4 months and 19 days susp.
3	Male teacher had sexual relationship with 17 year old girl	6 months susp.
4	Female teacher in sexual scuffle with a female student	1 month and 13 days susp.
5	Male teacher struck a male student	dismissed
6	Male teacher slapped a student (second offence)	dismissed
7	Female teacher consistently late in arrival	dismissed

Drawing a precise comparison between the Shewans' case and the preceding case is virtually impossible, yet Justice Bouck wanted the penalty to be consistent with other cases, so far as it could. He decided that the penalty of six weeks suspension was excessive given the past history of the respondents and in looking at cases where penalties had been imposed for improper conduct. Justice Bouck decided on a more adequate penalty of one month's suspension in keeping with the awards he had cited.

John and Ilze Shewan decided to appeal Justice Bouck's ruling to the Court of Appeal of B. C. We now move to their appeal -- Judgement III.

Judgement III: The Appeal Court of British Columbia

In short, the Court of Appeal dismissed the appeal, and found Justice Bouck's orders justified. The appeal was heard on December 21, 1987 by the Honourable Chief Justice Nemetz, the Honourable Justice Hinkson, and the Honourable Justice Macfarlane. This court addressed the following issues:

1. Whether Mr. Justice Bouck exceeded his powers as an appellate judge by substituting his own view of what was misconduct for that held by the majority of the Board of Reference;
2. What meaning to give the word "misconduct: as used in s. 122(1) of the School Act, and the standard to apply in determining what acts constitute misconduct;
3. Whether Mr. Justice Bouck erred in imposing a term of suspension in excess of that which the majority of the Board of Reference would have imposed; and lastly
4. Whether the costs of the Supreme Court proceeding ought to have been apportioned because the School Board succeeded on only one issue, namely, the misconduct issue.

The reasons for judgement on each one of these issues is summarized in the following table. It is followed by an overall comparison of each judicial review and the final rulings on each key

issue. The next chapter will look at the key issues and the decisions rendered more closely, and the broader issues that must be addressed.

SUMMARY OF THE REASONS FOR JUDGEMENT IN THE  
COURT OF APPEAL OF B. C. (1987)

Issues	Reasons Given
1. Exceeding Judicial Powers	<ul style="list-style-type: none"> <li>● Mr. Justice Bouck did not reverse the findings of fact of the Board of Reference but concluded as a matter of law that the Board had applied the wrong standard in measuring the conduct of the teachers</li> <li>* If the Board of Reference had applied the correct test they would have reached the same conclusion</li> <li>● The rule is that an appellate court will not interfere with the findings of the tribunal of fact unless they appear to be clearly wrong</li> </ul>
2. Misconduct or Not	<ul style="list-style-type: none"> <li>● The circumstances clearly justified a finding of misconduct:               <ul style="list-style-type: none"> <li>- more is involved in finding misconduct than just whether the teacher is fit or competent to teach</li> <li>- off-the-job conduct may amount to misconduct because a teacher holds a position of trust and responsibility</li> <li>- one cannot only apply the standard by which Canadians generally will tolerate the exploitation of sex, in determining whether a teacher has failed to meet the expected standards</li> <li>- the behaviour of the teacher must satisfy the expectations which the community holds for the educational</li> </ul> </li> </ul>

system -- teachers must not only be competent, but they are expected to lead by example

- a teacher must maintain a standard of behaviour which most other citizens need not observe because they do not have such public responsibilities to fulfill
- the magazine's nature was relevant because it was sexually exploitive and not fit for adolescents
- Mrs. Shewan's pose was modest yet she realized that her job may be in jeopardy if others saw it
- the BCTF condemns the public display of all pornographic material and defines pornography as exploiting those it portrays by depicting them as sexual objects
- Gallery would come within the concerns of the BCTF
- publication in such a magazine was bound to have an adverse effect upon the educational system to which these two teachers owed a duty to act responsibly

### 3. Term of Suspension

- Justice Bouck's conclusion that a suspension of one month would be appropriate was based on a careful review of other cases
- The majority of the Board of Reference did not find it necessary to decide what suspension would have been appropriate because they did not find misconduct
- \* Taking into consideration the good conduct of these two teachers and their own regret over their behaviours, the penalty was just
- Although there is no case directly on point, the ones referred to show that a sentence of several weeks is not disproportionate

- \* There was no reason to interfere with Justice Bouck's decision
- This court was not persuaded that the judge failed to exercise his discretion judicially
- Costs of the Supreme Court and the Appeal Court were awarded to the School Board (District)

An overall comparison of each judicial review and the final rulings on each key issue is summarized in the following table:

SUMMARY OF THE RESULTS OF THE THREE JUDICIAL DECISIONS

Legal Issue	Board of Reference	Supreme Court of B. C.	Appeal Court of B. C.
	Decision in favour of John and Ilze Shewan (Majority 2 to 1)	Decision in favour of the School District	Decision in favour of the School District
a) Did actions constitute "misconduct"?	<ul style="list-style-type: none"> <li>• An imprudent act but not misconduct</li> <li>- Shewans' actions would be tolerated by contemporary Canadian standards</li> <li>- B. C. teachers do not have to have different standards of behaviour depending on what community they teach in</li> </ul>	<ul style="list-style-type: none"> <li>* Shewans' behaviour amounted to misconduct</li> <li>- teachers are leaders in the community; they are supposed to set an example for their students</li> <li>- this includes their behaviour both on and off the job</li> </ul>	<ul style="list-style-type: none"> <li>• Misconduct finding was justified because publication of such a photograph was bound to have adverse effects upon the educational system and their own community and students</li> </ul>
b) Term of suspension	<ul style="list-style-type: none"> <li>• Shewans to be compensated for all lost wages and benefits lost</li> <li>- No suspension</li> </ul>	<ul style="list-style-type: none"> <li>* More reasonable penalty of one month versus the School Board's term of six weeks</li> </ul>	<ul style="list-style-type: none"> <li>• Did not vary the one month suspension</li> </ul>

Note: From the Reasons for Decision of the Board of Reference, the Supreme Court of B. C. and the Appeal Court of B. C.

## CHAPTER 4

### Discussion of Key Issues

#### Introduction

This chapter focuses on the key issues raised by this case in conjunction with the judicial decisions presented in the preceding chapter and other related literature. Four key issues were identified in the first chapter of this paper. These were:

- 1) the role of teachers and the expectations placed upon them by the various groups with whom they interact;
- 2) the private conduct of teachers and whether there is a distinction between on-the-job and off-the-job conduct;
- 3) the concept of personal rights and freedoms of individuals in society and how those of educators are protected; and
- 4) the fair interpretation of teacher misconduct and the degree of the infraction.

This chapter looks at each of these issues in two ways. First of all, it looks at the legal treatment each issue received as a result of the Shewan proceedings. Secondly, it looks at each issue from another source or perspective. The aim of this chapter is not to critically assess the verdicts, but merely to clarify and elaborate the underlying issues. The next chapter will provide further insight on the implications these issues hold for educators and policy makers.

#### A. Role and Expectations

Teaching is a very "public" occupation. Teachers are always under the watchful eye of students, parents, the administration, the school system, and the community. Each of these groups set their own expectations for teachers and establish their own version of his or her professional role. The Shewan case, at each level of the legal proceedings, has brought forth some of the ideas held on the teacher's role. Let us go through each of the three court levels and briefly discuss their findings in this matter. After which we will look at a few other sources of ideas on the roles of teachers.

Beginning with the Board of Reference hearing, one of the expert witnesses stated that a teacher is regarded by both students and parents as a role model, and should be entitled to respect from them. The chairman of the Board of Reference, Marvin Storrow, stated in his minority decision that one becomes identified with his or her occupational role and must therefore carefully consider his or her actions. The majority decision of the Board of Reference stated that in their opinion a teacher's main function is to teach, not to be emulated. One can quickly begin to understand the differing views of different groups. In one instance the teacher is the model of all behaviour and in the other the teacher's focus is on her teaching.

At the Supreme Court level, Justice Bouck stated that a teacher is an important member of the community, one who leads by example. Justice Bouck reviewed a number of cases involving persons in



positions of public responsibility and he concluded that a teacher not only owes a duty of good behaviour to the school board but also to the local community and the teaching profession. At this level of proceedings we begin to realize the scope of the expectations put on teachers. The teacher is responsible to many groups and each group may not share the same view of what the teacher should be doing. The responsibilities of the teacher must be clearly defined to all groups, including the teacher.

At the final level of court, the B. C. Court of Appeal, the decision once again stressed the idea that teachers lead by example. This Court stated that teachers must not only be competent but they are expected to lead by example. It seems generally agreed among the courts that a teacher should serve as a good model for pupils. Teaching is more than just classroom teaching; it is "leading by being a good example". Thus the teacher's character and conduct may be expected to be above those of the average individual not working in such a "public" occupation. Are teachers moral exemplars? What attributes are inherent to the role? The next section addresses these questions.

The Shewan case clearly illustrates the situation where a teacher behaves in a certain way and believes that his or her behaviour is not contrary to his or her occupational role or the expectations of that role. Yet some of the groups, or members of the groups, with whom the teacher interacts believe there is a contradiction. Alasdair

MacIntyre, author of After Virtue - A Study in Moral Theory, explains this contradiction in this way:

The beliefs that one has in his mind and heart are one thing; the beliefs that his role expresses and presupposes are quite another. There are then many cases where there is a certain distance between role and individual and where consequently a variety of degrees of doubt, compromise, interpretation or cynicism may mediate the relationship of individual to role. (MacIntyre, 1984, p. 29)

MacIntyre chooses a special term for this special type of social role; he calls such a role a "character". This special type of social role places a certain kind of moral constraint on the personality of those who inhabit them in a way in which many other social roles do not. Thinking back to the role of the teacher, the "character" label seems to fit perfectly. Many occupational roles -- those of a salesman, a garbage collector, a secretary, or a planner -- are not "characters" in the way that a lawyer, a judge, a doctor, or a teacher would be. In the case of the latter roles or "characters", their role and personality fuse in a more specific way and their actions are defined in more limited ways. In other words, because of their positions or occupational roles these individuals must act in ways commensurate with their "character". MacIntyre explains that the word "character" was chosen as the term for these special social roles because of the way it links both the dramatic nature of the roles and the moral associations and limitations placed on the role. He goes one step

further by stating that "characters" are the moral representatives of their culture, and each culture specifies its own stock of "characters". The "character" is an object of regard by the members of the culture or by some significant segment of them. It is the "characters" that furnish the members of the culture with cultural and moral ideals.

Linking this back to the Shewan case, one realizes that teachers have definitely gained MacIntyre's role classification. Throughout the entire legal review, the general opinion held was that teachers are the moral exemplars in the classroom and outside of the classroom. We will discuss the issue of private and professional life in a later section. At this point it seems that one of the major problems with fairly assessing the role of teachers and their behaviours stems from these socially held ideals of what the role entails. This assessment challenge is further complicated by the large number of groups with whom teachers interact. This is better expressed in a paper by Manley-Casimir and Pidocke (1991) in which they state:

An incident such as the Shewans precipitated is the expression of the several counter-acting roles that a public school teacher must enact. Each of these roles reflects an interest that some other person or group has or claims to have in the teacher's behaviour, and is also to some extent a way of defending and limiting them. The teacher has a role vis-a-vis: the pupils, the parents or guardians of the pupils, fellow-teachers, other members of the school support staff, the school administration, the school board, the community, the constituency, the state, the teaching-profession, and the teacher's own teachers. (pp. 133-134)

These eleven groups hold their own expectations of the teacher and the limitations of his or her role. It seems fair to conclude that the teacher's role and the responsibilities of that role must be clearly defined in order to avoid role conflicts. Once the role and its responsibilities are well-established, then misconduct can be fairly assessed.

B. Private Conduct and Professional Conduct

The Shewan case clearly demonstrates that the law regards teachers as being "on duty" even in their "private" lives. While a secretary or a factory worker would probably have suffered no employment sanctions for posing semi-nude for a magazine, such behaviour by a teacher was deemed unacceptable. In reviewing the court proceedings, the judicial opinions on this issue are clear.

Beginning with the Board of Reference hearing, the judgement of the majority of the Board of Reference stated that:

We are not convinced that an employer can demand more of a teacher than they exhibit enough decorum and formality to do their job. Teachers are not on duty 24 hours a day. Surely their main function is to teach, not to be emulated. When teachers are off the job, they ought to be allowed far greater latitude in their lifestyle. (Decision of the Board of Reference, 1985, p. 5)

Surely teachers are not on duty 24 hours a day and they lead private lives, yet the Shewan case sets an eye-opening precedent for teachers

-- certain "private" behaviours can be classified as "misconduct" depending on community reaction. Mr. Storrow, in his minority opinion, did not agree with the majority decision. He cited Dian Cromer v. B.C.T.F. et al as a helpful case in determining what may be expected of teachers. In this case, Justice Mackoff stated:

He (the teacher) cannot wear two hats and shed one or the other as the situation dictates, particularly in a moderate sized community. (Decision of M. Storrow, 1985, p. 22)

In other words, in Storrow's opinion a teacher cannot wear the hat of a "private citizen" and a "teacher" simultaneously, and remove one or the other depending on the situation being addressed. One point that Storrow neglected to mention was the nature of the Cromer case with respect to the unacceptable conduct reviewed. In the Cromer case, the teacher alleged that she attended a parent meeting in her capacity as a concerned parent and not in her capacity as a teacher. At the parent meeting she apparently made certain accusations against a fellow teacher and thus was brought to trial. The fellow teacher instituted discipline proceedings against the Petitioner with the B.C.T.F. In other words, her "private" behaviour as a parent infringed upon her responsibilities towards other members of her profession, this was not the case for the Shewans. Their behaviour did not attack the character of other teachers or their in-class performance; it was strictly a matter of "personal and mutual

satisfaction" -- until the picture was published. These judicial opinions raise two important questions: 1) Does the teaching profession want the teacher's role characterized in such a way as to abolish the existence of the teacher's "private" life?; and 2) What kind of legitimate power do school boards have to investigate and assess the "private" legal behaviours of their teachers?

In the B. C. Supreme Court hearing, the judge tried to ascertain the moral standards of the community by establishing the average behaviour of other teachers in the community. He concluded that:

If a good number of teachers in or about Abbotsford are publishing their nude photographs in a magazine such as the one in question, then the conduct of the respondents may be within community standards. If no other teachers are doing this, then it may be misconduct. (Reasons for Judgment, 1986, p. 27)

One point to note is the nature of the offences in the cases cited; of the eight cases cited, six involved charges of a criminal nature (i.e., illegal behaviour). These cases surely cannot be fairly compared to the Shewan case. It definitely is not a case of criminal behaviour. The Shewans' conduct was not criminal behaviour. Most people would agree with a misconduct ruling for behaviour that is clearly illegal, whether it was on the job or off the job. It is a totally different story when personal, private behaviour is found to be misconduct because a few find it morally unacceptable. What other types of behaviour might be labelled "misconduct" -- smoking? living

with someone out of wedlock? reading Playboy or Playgirl? The line of reasoning used at this level of proceedings highlights some of the dilemmas school boards will face as a result of the Shewan precedent. The education profession will have to establish guidelines for behaviour, both on and off the job if extreme limits are established for acceptable teacher behaviour.

In reviewing the B. C. Court of Appeal hearing the preceding opinions are brought forth once again. This Court found that "misconduct" may include off-the-job conduct as well as conduct in the classroom because:

a teacher holds a position of trust, confidence and responsibility. If he or she acts in an improper way, on or off the job, there may be a loss of public confidence in the teacher and in the public school system, a loss of respect by students for the teacher involved, and others generally, and there may be controversy within the school and within the community which disrupts the proper carrying on of the educational system. (Reasons for Judgment, 1987, p. 5)

The minimum standard of morality that will be tolerated in a given community is not necessarily the minimum standard for a teacher. This Court stated that:

Any loss of confidence or respect will impair the system, and have an adverse effect upon those who participate in or rely upon it. That is why a teacher must maintain a standard of behaviour which most other citizens need not observe because they do not have such public responsibilities to fulfill. (Reasons for Judgment, 1987, p. 6)

In other words, the behaviour of the average citizen in a community is not assessed in the same way as the behaviour of a teacher in that same community. A "public" role leads to the loss of a private life it seems. The legal discussions have in essence concluded that the teacher must regard his or her off-the-job conduct as highly as his or her on-the-job conduct. These arguments are closely connected to the previous section on the role and expectations of teachers. Once the teacher's role is better defined in terms of expected behaviours, teachers can then begin to put their private lives into clearer perspective. Only if an employee clearly knows which behaviours constitute "misconduct", can he avoid these behaviours.

One interesting case that illustrates this issue is the Victor Valley Joint Union High School District v. Lou Zivkovich (L-7616) case. This American case was reviewed by the Commission on Professional Competence for the Victor Valley Joint High School District of San Bernardino County in California. Briefly, the case involved a teacher, Lou Zivkovich, who sent nude photographs of himself to Playgirl Magazine to determine whether or not he would be acceptable as a model for the magazine. Playgirl accepted his pictures and asked him to pose for the magazine; Mr. Zivkovich did so, going against the advice of his principal. A few months later he received a notice of "unprofessional conduct", and was to be dismissed within 30 days of his notice. Unlike the Shewans, Zivkovich faced permanent job loss. During his entire employment, like the Shewans,



Mr. Zivkovich had enjoyed a high reputation with his students and colleagues. Even after the photograph incident, he continued to enjoy an excellent reputation with the faculty and students and his ability to teach and work with students did not appear to have suffered. He also stated that he did not plan to engage in further nude modeling. The Commission found that the respondent demonstrated poor judgement and questionable professional conduct. It, however, did not want to confuse nudity alone with lewdness or immorality. The Commission also rejected the contention that a teacher cannot be dismissed for conduct engaged outside of the classroom. It stated:

This Commission rejects such a contention. The young people of this state are required by law to attend school. They have no choice as to the public school they are required to attend and they have little or no choice of teachers. Should these students fail to attend school both the students and their parents may be subject to legal process. Under these unique circumstances a particular duty is placed upon the teacher to insure that the pupil receives competent instruction, intelligent guidance and suitable example. (Reasons for Decision, 1975, p. 5)

At the same time, this Commission made a key affirmation for teachers' "private" lives. It stated:

It is equally true that a teacher has rights to a private life. The teacher, however, is well advised to exercise some discretion when their private life enters the public domain. (Reasons for Decision, 1975, p. 6)

Lou Zivkovich was retained in the district as a teacher because the Commission felt that his oversight was an isolated event and not sufficient to warrant a charge of unprofessional conduct and dismissal.

In comparing this case to the Shewans' case the immediate similarities are those of behaviour and resulting charges. Both cases involved "private" life behaviour (i.e., posing semi-nude or nude for a magazine) and both incidents brought on charges of misconduct or unprofessional conduct. Also both cases also involved teachers with excellent reputations and backgrounds, and each incident was an isolated event in the teacher's history. The one key difference between the two cases is the sanctions imposed. The Shewans faced temporary suspension without pay while Zivkovich faced dismissal. The Commission raised two key elements surrounding this issue of behaviour: 1) the idea of private behaviour entering the public domain; and 2) the idea that the behaviour is isolated in nature. In assessing the appropriateness of a teacher's behaviour in "private" life the Commission took into consideration the degree to which the behaviour enters the public domain. In both cases, the teachers' behaviour entered the public domain (i.e., without manipulation) and with the full knowledge of the parties involved. Since the private behaviour would definitely not remain private, the teachers should have expected the public outcry. The issue of "private" life and "professional" life are woven closer together. On the question of the isolated nature of the behaviour, the Commission decided that such a

behaviour would not affect the teacher's performance. In other words, in the Ziykovich case, the behaviour was a private act; it was only done once, and it did not warrant the severe judgement of dismissal. As for the Shewans, they clearly admitted their reasons, which were strictly personal, for submitting the photographs and they wanted to publicly apologize for their actions and continue with their professional duties. Their School Board would not allow this and the courts judged their actions to constitute "misconduct". If the Ziykovich case had been reviewed by our courts, perhaps a different precedent would have been set.

### C. Personal Rights and Freedoms

The issue of personal rights is very closely tied to the first two issues discussed in this chapter. In reviewing this issue we will look to other sources, rather than judicial reviews. As one reads through the legal proceedings on the Shewan case, it becomes apparent that these three courts have not made any reference to the personal rights and freedoms accorded to all individuals in society. The lawyers in the Shewan case did not raise Charter Rights as an issue therefore the judges did not have to consider these. It is true that at the time this case was heard the Canadian Charter of Rights had not been widely articulated as it is today. In Dickinson and Mackay's (1989) book, Rights, Freedoms and the Education System in Canada, a few key questions are raised:

- 1) Are teachers' rights somehow more circumscribed than those of other individuals or groups of individuals in our society?;
- 2) Are there justifiable reasons for limiting the rights of teachers?; and
- 3) Do rules and practices which are designed to constrain teachers' lifestyles interfere with protected liberty interests under section 7 of the Charter?

Since the inception of the Charter, these questions should be difficult to ignore, especially in the courts. It is difficult to draw a line between the rights of teachers as citizens, and the need for effective instructors to be more than subject-matter and teaching-method specialists. Yet, as courts address cases involving teachers this line must be drawn. In the Shewan case, the courts did not consider the limitations being placed on teachers' lifestyles; they only considered professional duty. Does this case represent an unwarranted intrusion into teachers' private lives or the vigilance of a school board acting in the best interests of its pupils and the community at large? Different groups in society will have different responses to this question. The aim here is not to defend a position on this issue, but to bring forth the key questions arising out of the issue. The reasons given were simply related to the teacher's role as the example-setter -- the leader, the moral exemplar. Are these valid

justifications? The teaching profession is unique in that it deals with society's hope for the future -- the children. Many other professions or jobs deal with non-living "products", but teachers are seen as influencing the young, impressionable minds of their students. Many parents see teachers as "extensions" of themselves in the classroom. In other words, teachers do not just have a so-called job; they are serving a function of the parent (in loco parentis) -- the "teaching function". In doing so, the teachers are expected to act in ways the parents would deem acceptable. The high moral responsibility that a community demands is not a valid justification for limiting the rights of teachers. If this were the case, then each community, with its own set of moral standards, would be setting its own limitations on its teaching staff and the teachers would have to change their lifestyles accordingly. How would a teacher ever know what was acceptable and where it was acceptable? A teacher would know by being told, or by observing, what the community expects. But these expectations would, in all fairness, have to be set out before employment and as a condition for employment.

This discussion leads us back to a point made earlier in this paper concerning ambiguity and a need for consistency in expectations and treatment. If teachers are to enjoy a true sense of freedom in their private lives an effort must be made to clarify and communicate their role and the expectations of that role to all concerned parties. Only then can we hope to attain fair and consistent treatment of

teachers and not rely on parental or societal "images" of what a teacher's job really entails. Yes, teaching is a delicate arena because society views anyone working with the "young" as open game to close scrutiny and reprimand, but at the same time teachers are trained in specific areas of interest and taught how to teach; not how to replace parents and teach morality. Although many teachers would agree that when it comes to matters of personal safety of students or the general safety of the group, they do take on the parental role as is required. The issue that really must be addressed is where is the line drawn between personal rights and freedoms and educational responsibilities. Perhaps if this line is established, then the subsequent issue of determining a fair interpretation of "misconduct" would be more easily attained.

#### D. Defining "Misconduct"

The British Columbia School Act, s. 122(1)(a) allowed a school board to suspend a teacher for "misconduct, neglect of duty, or refusal or neglect to obey a lawful order of the board". This section has been repealed by the Teaching Profession Act, s. 57, and the new s. 122(1) reads "A board may dismiss or discipline a teacher for just and reasonable cause". But the Council of the new B. C. College of Teachers will have the power to reprimand, suspend, or dismiss a teacher for "professional misconduct or other conduct unbecoming a member of the college". Therefore the idea of "misconduct" remains in

the structure of the public education system in British Columbia. The statute does not define "misconduct" in any specific way so school boards, boards of reference, and courts will have to decide the verdict. Let us trace the arguments presented at each level of proceeding for and against "misconduct" and its meaning.

At the Board of Reference level, one of the expert witnesses called by the Abbotsford School Board stated that in his opinion the Shewans' behaviour was "misconduct", namely conduct unbecoming a professional teacher. His reasoning was that a teacher is regarded by both students and parents as a role model, and should be entitled to respect from them. The appearance of the picture of Mrs. Shewan in Gallery reduced the professional relationship to an unacceptable "familiar or personal level". This would create a loss of respect for her as a teacher and the Shewans ought to have known this. Marvin Storrow, the Chairman of the Board of Reference, also believed that the Shewans had committed misconduct. He examined the definition of "misconduct" in various sources and he quoted the following:

Misconduct comprises a positive act and not mere neglect or failures. It is conduct inconsistent with the due and faithful discharge of the duties of service. (Decision of M. Storrow, 1985, p. 16)

Submitting the photographs was "misconduct" because a sizeable portion of the community regarded such a public display as intolerable, and these people would therefore lose confidence in the professional

integrity of the Shewans in particular and of teachers and the school system in general. But the majority of the Board of Reference did not conclude that the Shewans' behaviour constituted "misconduct". In their view the context of the word "misconduct" in section 122 of the School Act showed that in that statute misconduct is "related to the employer/employee relationship". They cited:

unless a substantial and legitimate business reason exists, the employer has no authority, control, interest or jurisdiction over an employee's behaviour outside the hours of employment. (Brown & Beatty, 1984, p. 167)

The majority agreed that some people in Abbotsford had clearly been offended by the picture, but this was not the proper standard for assessment. The standard to be applied was not whether the Shewans' conduct fell below some of the community's standards but whether it was within the accepted standards of tolerance in contemporary Canadian society. In their judgement the Shewans' behaviour was within these accepted standards. At this first level, the behaviour was regarded as an imprudent act but not misconduct.

At the B. C. Supreme Court level, Justice Bouck concluded that there has been misconduct. He felt that evidence concerning the average behaviour of other teachers in the community would be relevant. In other words, if other teachers were publishing their nude photographs in magazines such as the one in question, then the Shewans' conduct may be within community standards. On the other



hand, if no other teachers were doing this, then it would be misconduct. Justice Bouck did not feel that this alone was conclusive because the key ingredient is whether or not an act affects the teacher in his or her educational capacity. In essence, "misconduct" is found when behaviour negatively affects the teacher in his or her educational role. The Shewans' behaviour lowered the esteem in which they were held by the community and their students. It was also abnormal behaviour and constituted a departure from community standards, and therefore misconduct.

At the B. C. Court of Appeal level the main issue was "what meaning to give the word 'misconduct' as used in s. 122(1) of the School Act, and what standard to apply in determining whether certain conduct constitutes misconduct within the meaning of the statute". According to this Court, misconduct, which is "bad", "wrong", or "improper" conduct, may include off-the-job and in-classroom conduct. They defended this view on the grounds that teachers hold a position of trust and responsibility, and that their conduct cannot be permitted to jeopardize public confidence in the school system and its teachers. This Court found the Shewans' behaviour was bound to have adverse effects upon the educational system to which these two teachers owed a duty to act responsibly.

What have these court rulings told us? At this point we can conclude that teacher misconduct includes behaviour which offends the standards of a sufficiently large portion of the community in which

the teacher lives and works and where public confidence and respect for the teacher and the school system is adversely affected or is likely to be adversely affected. These decisions have also told us that the average standard of behaviour for an ordinary member of Canadian society is not good enough for a teacher. Teachers must maintain a standard of behaviour better than the average person. And more specifically we may conclude from this case that from now on in British Columbia a teacher who publishes, or causes to be published, his/her or another teacher's picture in an "adult sophisticate magazine" may be legally considered to have committed misconduct, and on that ground, may be reprimanded, suspended, or, possibly, dismissed at the discretion of the school board. In real terms however, this case has not provided a general standard by which to decide whether or not a given behaviour is "misconduct". As previously mentioned in preceding sections, a general standard would clarify and identify the behaviours constituting "misconduct".

Since the word "misconduct" is not defined in the School Act, let us turn to a few of the definitions that have been reviewed with reference to this case. The Canadian Law Dictionary (1980) provides the following meaning:

Any transgression of some established and definite rule of action, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour. In the law of master and servant there is no fixed rule of law defining the degree of misconduct which will justify dismissal. The particular act justifying

dismissal must depend upon the character of the act itself, upon the duties of the workmen and upon the nature of the possible consequences of the act. The conduct complained of must be inconsistent with the fulfillment of the express or implied conditions of service. (p. 53)

According to the Shorter Oxford Dictionary "misconduct" means:

1. Bad management, mismanagement
2. Improper conduct. (p. 1259)

Black's Law Dictionary (1979) defines it as:

A transgression of some established and definite rule of action, a forbidden act, a dereliction from duty, unlawful behaviour, willful in character, improper or wrong behaviour; its synonyms are misdemeanor, misdeed, misbehaviour, delinquency, impropriety, mismanagement, offence, but not negligence or carelessness. (p. 901)

The reviewed references hold a common theme -- some established and definite rule of action has been violated. In other words, a rule is established and exists proper to the behaviour which is deemed to be misconduct because it violates the rule. Other phrases such as "dereliction from duty" and "unlawful behaviour" contain the same idea of a departure from some established rule or norm. A law is a rule, and a duty must be prescribed in advance if it is to be made a duty. If a behavioural standard is to be followed or abided by, it must be somehow knowable (if not actually known) in advance by the people.

The second common theme is whether the misconduct affects the teacher in his or her educational capacity. Did the behaviour impair the teacher's performance of his or her classroom duties? If so, the behaviour constitutes misconduct. A proposed definition by Manley-Casimir and Piddocke (1991) tries to embrace these two common elements. It states:

A teacher's behaviour will be construed as misconduct if that behaviour belongs to a class or kind of behaviour which (a) is inconsistent with the primary purpose which defines the nature of the role that the teacher has undertaken to perform, and (b) may be reasonably anticipated to detract from the achievement of that primary purpose or to affect adversely the duties which follow from that primary purpose and which therefore are incumbent on the occupant of the role, i.e. the teacher. (p. 139)

This definition highlights the requirement that behaviour which is misconduct must be of a kind which may be reasonably anticipated to have detrimental effects on the performance of the teacher's role. According to this definition, a teacher has a duty to refrain from misconduct, but cannot meaningfully be expected to refrain from behaviour about which he or she has no idea and can have no idea, that this behaviour would or would not interfere with the performance of his or her role.

Magsino's<sup>1</sup> proposed classification of contentious teacher

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<sup>1</sup>This proposed classification is the work of Dr. Romulo Magsino. It was made available to the author of the journal article through personal communication.

behaviour, which sorts out the different range of actions that might arouse, or have aroused, accusations of "misconduct", is outlined in the Manley-Casimir and Piddocke article. This classification is as follows:

- A. Character-related behaviour (this includes the teacher's failure to provide an example of self-control and rationality):
  - 1. Alcohol abuse and drug abuse (this includes not only drunkenness, alcoholism (alcohol addiction) and drug addiction, but also the promotion of drunkenness and drug-addiction in others, whether this is or is not defined as criminal behaviour).
  - 2. Insubordination or contrary-minded behaviour.
  - 3. Personal grooming, including cleanliness, wearing beards, and attire.
  - 4. Behaviour showing signs of cruelty (whether physical or mental).
  - 5. Use of obscene or vulgar language
  - 6. Dishonest behaviour.
  - 7. Others.
  
- B. Sex related behaviour (with students and non-students):
  - 1. Homosexual or lesbian relationships (both public and private).
  - 2. Cohabitation, common-law marriage, or live-in relationships.
  - 3. Heterosexual relationships outside marriage, including adultery and those resulting in pregnancy.
  - 4. Sexual exhibition and lewdness.
  - 5. Seduction of, sexual advances towards, and dating students.
  - 6. Transexuality, including sex-change and tranvestism.
  - 7. Others.
  
- C. Unauthorized teaching activities (including those conducted outside the classroom):

1. Use of unauthorized material, e.g., sex or religion-related books, magazines, films
2. Use of unauthorized strategies or methods of teaching
3. Unauthorized teaching of controversial topics, issues, or subject matter
4. Ideological teaching, including partisan politicking and partisan support for candidates
5. Religious teaching for proselytizing purposes
6. Others(?)

D. Criminal behaviour

1. Serious criminal behaviour resulting in conviction.
2. Minor criminal behaviour resulting in conviction.
3. Serious criminal behaviour for which no formal charges or conviction followed.
4. Minor criminal behaviour for which no formal charges or conviction followed.

Note: Formal charges later dropped without coming to trial have different contentiousness than formal charges followed by trial and formal acquittal of the charge.

E. Contentious conduct as citizens (in political, religious, academic and social-personal spheres):

1. Free expression (written, oral, or symbolic) -- e.g., public espousal of controversial ideas or lifestyle; wearing symbolic material and religious garb; criticism of school policy, colleagues, superiors.
2. Affiliation or association -- e.g., membership in controversial political, religious, or social groups such as the Communist Party of Canada, the KKK, the neo-Nazi organizations, and cultic societies; marriage to a notorious person.
3. Public activities -- e.g., partisan speeches for a party or its candidate; refusal to take patriotic oaths or to participate in patriotic activities; participation in activities, such as demonstrations and petitions, of controversial groups.

F. Others.

(Manley-Casimir & Pidocke, 1991, pp. 136-138)

We must remember not all contentious behaviour is misconduct. What standards should we use to decide whether or not behaviour like those listed above are misconduct? This question brought about the proposed definition or principle that was quoted earlier. Is this proposed definition any better than those reviewed earlier? In this definition, "misconduct" is defined relative to a purpose or function performed by an employee or professional as part of his or her occupation. Thus, it is possible to derive for any particular instance what should be considered as misconduct, provided the various intentions or purposes, governing that social situation, can be specified. These intentions include the purposes and policies of the school system, and the values of the community which that school serves. This definition attempts to define "misconduct" in relation to (a) the degree to which the behaviour is known to or anticipated to detract from the main purpose of the teacher's role; and (b) the negative effects the behaviour has on the performance of the teacher in his or her classroom.

The courts, in their decisions, concentrated on deciding the Shewan case in accordance with statutes, precedents, and other applicable comparisons. No general definition of misconduct was ever derived and the courts made their own rulings on whether the Shewans' behaviour met the characteristics of other misconduct rulings. The courts felt the Shewans had crossed the fine line between misconduct and conduct that perhaps was foolish but not "plainly" misconduct.

Were any clear (or clearer) guidelines established for other educators and school districts, in regards to misconduct, by way of this ruling? Unfortunately, no one is truly better informed on the criteria for a verdict of "misconduct", but rather more unsure of which off-the-job conduct will be labelled "misconduct" next. The implications of this issue will be further reviewed in the next chapter.

This chapter has looked at four key issues raised by the Shewan case and it has presented each for elaboration and discussion. We now move on to the last chapter of this case review which will highlight some of the implications of this case that many educators and policy makers will have to address.



## CHAPTER 5

## Implications and Conclusions

The four key issues discussed in the preceding chapter hold many implications for educators and policy makers alike. This chapter will discuss several of the key areas needing review and change. These areas include:

- a) the classification of teacher conduct and the lack of objective standards;
- b) the private conduct of teachers and their perceived role; and
- c) the need for better "interfacing"<sup>1</sup> between all parties in the educational system.

The aim here is to raise concerns and highlight the deficiencies of the prevailing legal position of teacher misconduct. Each of the four key issues reviewed in chapter four is an integral part of the areas listed above. The discussion of each of these three areas will bring forth points raised in connection to each key issue in the Shewan case. Lastly, some concluding statements are made throughout this chapter to provide some "food for thought", but by no means answer the questions this case has raised.

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<sup>1</sup>This choice of term is elaborated on in the third section of this chapter.

A. The Classification of Teacher Conduct and the Lack of  
Objective Standards

When a ruling of "conduct unbecoming a teacher" or "misconduct" is attained, individuals conjure up their own image of what these two classifications of behaviour really stand for. Certainly, these two phrases do not define themselves. James A. Gross (1988) addresses these classifications of conduct and examines over two hundred American case decisions in which teachers have been charged with incompetence or conduct unbecoming a professional. Gross asserts that classifications of conduct are not standards of conduct, and any person subject to disciplinary penalties for misconduct has a right to know the standards by which his or her conduct will be judged (p. 10). Some actions are by their nature wrongful and punishable. Acts such as sexual abuse of a student or unrestrained and unwarranted physical attacks on another person, whether committed by teachers or anyone else are clearly not allowable. Other conduct can be deemed wrong not because it is inherently "bad", but because some authority in the community has prohibited it. This is when a standard must be provided to lessen the subjective rulings of a few who are in positions of authority. Yet, he points out, no precise and useful standard of conduct has been developed for teachers or for the various bodies that pass judgement on their conduct (p. 12). What are the consequences of this for teachers and for policy makers?

The absence of a standard of conduct gives rise to vague meanings and general interpretations. As Gross (1988) points out, in many of the reviewed case decisions, the standards of misconduct were fashioned so generally that they were not standards at all (p. 13). Vagueness is compounded by the application not of an absolute standard of conduct applicable to all teachers but of a subjective-relative standard, whereby the appropriateness of a teacher's conduct depends on how the conduct is perceived by students and/or the community. The Shewan case is the perfect example. Is the teacher (were the Shewans?) responsible for knowing when some unmarked boundary line has been passed? Will all teachers be capable of making such a determination?

Perceptions of students and/or communities cannot be appropriate standards for determining proper behaviour for a teacher or for making judgements directly affecting teachers' careers. The use of personal views and the perceptions of others as "standards" is also unfair, for reasons Gross (1988) offers:


- (1) it defines a teacher any useful guide to acceptable conduct before acting;
- (2) it deprives an accused teacher of any reasonable opportunity for self-defence [how can one defend against the personal views of judges and the perceptions of the accusers?]; and
- (3) it resolves doubts about guilt against the accused contrary to the traditional principle of innocent until proven guilty. (p. 17)

These three points highlight a few of the inevitable implications for teachers and policy makers of vague conduct policies. The less ambiguous the policy can be made, the more likely a better judgement will be made and more equitable the disciplinary procedure will become.

#### B. The Private Conduct of Teachers and Their Perceived Role

The Shewan case has clearly demonstrated that the law regards teachers as being "on duty" even in their "private" lives. One powerful presumption about teachers' conduct that influences the outcome of the whole range of unbecoming conduct cases is that teachers must be held to a higher standard of personal behaviour than persons engaged in most other pursuits. The justifications given for imposing this higher standard of conduct are best summarized in the following quote from the Gross study:

A person who accepts a teaching position willingly places himself and his conduct in the arena of public attention. What may be acceptable in other walks of life takes on an entirely different aspect when engaged in by a teacher. A teacher accepts a special place within the community. A teacher's influence and effect on students extends beyond the classroom and the school. A teacher stands in loco parentis. A teacher is a role model for students to emulate. A teacher is a purveyor of community values. A teacher is responsible for the well being of all students. A teacher is all of these things, and more. (pp. 18-19)



The problem with using modeling as a basis for determining the nature of conduct unbecoming a teacher and assessing appropriate penalties, however is, as Cohen (1980) asserts that no one is certain exactly how models are selected. Bandura (1977) also points out that modeling does not guarantee that views which have been learned will be articulated or that behaviour observed will be imitated. Parents are the first, and most important, models of behaviour. Peers may become controlling models, but so may community figures. The actual influence of any of these positive or negative models depends on a student's perceptions of what is desirable, and that may be far beyond the control of any teacher. Gross (1988) points out that the role model notion, without sufficient empirical content prescribed in advance, is an insufficient and unjust basis for determining and punishing conduct unbecoming a teacher.

The role model concept is also used as a basis for restricting teachers' conduct that would otherwise be beyond the legitimate concern of a school district employer, such as off-duty conduct occurring off school premises. Gross's study (1988) claims that private conduct can become the lawful concern of school officials only if the alleged conduct is explicitly linked to the performance of a teacher's job responsibilities:

if the conduct directly affects the performance of the professional responsibilities of the teacher or if, without contribution on the part of school officials, the conduct has become the subject of such public

notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position. (pp. 33-34)

He contends that the requirement of such a nexus, rather than the role model concept, should be the controlling test for all alleged teacher misconduct, on duty as well as off (p. 34). This link would distinguish between legal off-duty conduct and illegal off-duty conduct. This nexus also ties back to the issue of defining the term "misconduct" and the Manley-Casimir and Pidocke (1991) definition that relates conduct to job performance. The requirement of such a connection would mean that embarrassment to the school district would not suffice without a nexus between the allegedly embarrassing conduct and the efficacy in the professional task. The issue of public notoriety is often inappropriately weighted, as it was in the Shewan case. The question is whether the notoriety has long range consequences or whether it is a brief flurry of disturbance and gossip. This question was not adequately addressed in the Shewan case -- the immediate community outcry outweighed other considerations. Does the degree of risk to an institution warrant ending a teacher's career or damaging it permanently?

According to Gross (1988), determining the appropriate degree of risk requires the production and evaluation of evidence concerning such variables as the grade level of school involved, students' ages, subjects taught, likelihood that the act will be repeated, recentness or remoteness of the incident, as well as the degree of notoriety.

Consideration of each one of these elements should result in greater fairness in conduct rulings. If these factors had been given adequate consideration in the Shewan case, the courts might have ruled differently. Fairness, according to the Gross study (1988, p. 42), also requires that the judging panels reject any alleged nexus involving threats or other adverse reactions based on biases, prejudices, ignorance, or uninformed emotions of colleagues, students, and communities. It is inappropriate to consider community resentment in deciding whether or not to reinstate a person to a position from which he or she was unjustly removed. Communities must have a better understanding of what constitutes "misconduct" or "conduct unbecoming a teacher", and have the opportunity and medium to voice their concerns, but not the ability to dictate to school boards the disciplinary actions to be taken. The Gross study (1988) proposes that although subjective moral values can never be eliminated completely from the determination of conduct unbecoming a teacher, their negative influence can be reduced by requiring school districts to demonstrate an objective evidentiary nexus (instead of a speculative, subjective nexus) between an alleged misconduct and a teacher's job performance. This requirement of a link between conduct and teaching performance establishes a framework for defining "misconduct". The following quotation elaborates on some of the elements to consider in the determination of a teacher's fitness or unfitness to teach:

The likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. (Gross, 1988, p. 27)

This job-relatedness test should replace the role model notion in both on-the-job and off-duty conduct cases.

As discussed in an earlier section, the role model presumption assumes, of course, that any misconduct by a teacher is harmful to students' educational and personal growth. This being the case, the only relevant question is whether the alleged misconduct occurred. If it did, a detrimental effect on students is automatically assumed. Such an approach does not give fair warning to teachers of what constitutes prohibited conduct and its consequences. It also biases the outcomes of these cases by focusing only on teachers' obligations as professionals and not on their rights as individuals.

Teachers, as public employees and citizens, have constitutional rights -- these are not absolute, but public employers, including school districts, cannot abridge or deny them without demonstrating that their exercise caused serious disruption to the operations of the district or the educational process. In other words, educational policy makers must remember that teachers have personal rights, and



that they must be protected from parochial views and gossip. District policies on conduct and disciplinary actions must be clear and related objectively to job performance. If attempts are made to achieve these objectives, then the district too, will be open to less interference or pressure. Clear guidelines can benefit all concerned parties, particularly in such a sensitive and damaging area as teacher conduct.

### C. Better "Interfacing" in the Educational System

There has been a common thread running through much of the discussion in chapter four, and in this chapter as well -- there is real need for clearer, more informed decision-making and policy formulation in the area of teacher conduct. Key issues, such as the role of teachers, their off-the-job conduct, and their personal rights as citizens, would not be issues of concern if proper guidelines were available. The personal biases of students, colleagues, and communities would not be determining factors in rendering career-bending decisions. Gossip and personal interpretation would not be considered applicable or warrant action in such cases. Gross's (1988) job-relatedness nexus tries to mitigate these potential determinants by removing as much subjective evidence from the conduct determination as possible -- realizing that it is impossible to remove all subjective interference when such a decision is being made. When conduct is assessed in terms of its detrimental effects on job

performance, and not on emotional outcries, then more equitable decisions can be made and valuable precedents can be set. It is with these objectives realized, that better "interfacing" can begin. The term "interfacing" is borrowed from the area of computer science where it refers to the bringing together of different subsystems into one efficient working system. In other words, each subpart is made to communicate and interact with another until the whole system is fully functioning. This is essentially what is needed in the area of education and misconduct cases. Here, the term "interfacing" refers to the clear flow of information regarding conduct policies and procedures, between school boards, board administrators, school administrators, teachers, and school communities. In other words, the standards by which teacher conduct will be reviewed, are made clear and each player in the educational system knows and trusts the means by which inappropriate or questionable behaviour will be objectively assessed. This is not a minor task, but one which must be addressed if policy makers and educators care about more responsible and equitable conduct rulings. In many communities, where there is a certain "vagueness" in dealing with conduct cases, citizens often feel they must voice their disapproval or approval -- in essence they are doing the "interfacing" with the trustees on their school boards and their board staff. If the school district takes the first step and ensures both its teachers and community that it has taken the time and steps to develop a fair process for conduct cases then subjective

evidence will be drastically reduced. Interfacing with each concerned party is one possible avenue to better relations and decision-making.

The preceding section has looked at ways in which the issue of misconduct can be more objectively assessed and addressed by school districts. What about the issues of teachers' private lives and their rights as individuals? What implications do these two issues raise?

As attitudes and lifestyles change so do standards of what is deemed acceptable or unacceptable behaviour. This is especially true of the teaching profession as Gross (1988) points out in the following passage:

Not long ago female teachers who married were automatically dismissed, as were women teachers who attended minstrel show, worked as waitresses serving beer, dated married men, divorced, or had 'illegitimate' children. Often they were not hired unless they pledged to abstain from drinking, dancing, or falling in love. (p. 50)

Although such policies may seem ludicrous by today's standards, it is unfortunate that that realization is always retrospective. Meanwhile, personal notions of morality can destroy lives and careers as they have done so many times in the past. The Gross study (1988) points out the danger of having school boards, boards of reference, and court justices impose their own values indiscriminately on teachers. Even worse, when these personal or local community notions of morality are embellished with unproven assumptions about teachers as role models, teachers are denied a fair opportunity to defend themselves. Often

private conduct or off-duty conduct conflicts with professional duty, and responsibility and personal rights are infringed upon.

Schools provide students with school policies and teachers provide students with their own classroom rules, and students are expected to abide by them. Expectations and consequences are clearly laid out in order to facilitate learning and minimize disruptions. Yet teachers are given no clear guidelines as to what will be used as a basis for evaluating their conduct. Often the only basis for an accusation of misconduct stems from public outcry and not a true objective review of all the factors involved. This case review has highlighted a few of the areas needing careful review by both educators and policy makers. Throughout chapter four and this chapter some key issues have been discussed in an attempt to explicate the implications of these issues for the educational system. An overall framework has been suggested to formulate more equitable policies and procedures in the area of teacher conduct. District preparedness will lead to informed teachers and communities. Informed is forewarned and let the hearing begin.

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