

May 10, 2022

Red Flags with Bill 15 – Education (Reforming Teacher Profession Discipline) Amendment Act

By: Shaun Fluker

Legislation Commented On: [Bill 15](#) – Education (Reforming Teacher Profession Discipline) Amendment Act (30th Legislature, 3rd Session, Minister of Education)

One day the Supreme Court of Canada will revisit its 2001 decision in *Ocean Port Hotel Ltd v British Columbia (General Manager, Liquor Control and Licensing Branch)*, [2001 SCC 52 \(CanLII\)](#), [2001] 2 SCR 78, because the Court will eventually have to address its failure in *Ocean Port* to give adequate consideration to the importance of real independence in the administrative process established by the executive branch, both in matters generally and more particularly in disciplinary proceedings. The disciplinary process for Alberta teachers, recently added to the *Education Act*, [SA 2012, c E-0.3](#) by Bill 15, is a case in point. The Minister of Education stated at the beginning of second reading for the bill that the Commissioner in charge of the disciplinary process “would operate at arm’s length from the ministry.” (Alberta [Hansard](#), April 21 2022 at 767) This post examines Bill 15 to assess the accuracy of the Minister’s claim, and concludes that not only is the Commissioner not sufficiently independent of the Minister, the disciplinary process as a whole exhibits very little indicia of being independent.

Bill 15 added the disciplinary process to the *Education Act* as Division 3.1 in Part 7, entitled “Discipline of Teachers and Teacher Leaders”. These provisions will be added to the Act upon Bill 15 receiving Royal Assent but will not come into force until being proclaimed as such by the Lieutenant Governor in Council. As a drafting aside, this amendment is an excellent illustration of how terribly complicated a numbering system can get when existing legislation is substantially amended. This is one good reason why governments should restate revised legislation every once in a while, even though official legislative reporting is now online (see [Queen's Printer](#)) which seems to have ended the practice of restatement (Alberta’s statutes were last revised in 2000; hence, the citation RSA 2000 for any statute currently in force, but enacted prior to 2000). A restatement would eliminate the use of section numbers like we see here: 225.1 to 225.99998. Yikes!

The Minister provided her overview of the disciplinary process in second reading as follows:

Mr. Speaker, let me explain how this would work. Under Bill 15 the commissioner would have the authority to address and investigate a complaint. The office of the teaching profession commissioner would review and investigate the matter and may initially dismiss the case. They may recommend a penalty under an expedited process or use consent resolution agreements, dispute resolution, or mediation to resolve the issue. If the commissioner determines that the case warrants a hearing, a hearing would

be conducted by a panel. The panel would be comprised of teachers and public members who would render a decision on the matter and put forth a recommendation to the Minister of Education. Mr. Speaker, this is not a wholesale change from the current process, and we are simply making improvements to the process that will benefit students, parents, teachers, and teacher leaders. (Alberta Hansard, *ibid*)

This post focuses only on aspects of the disciplinary process most relevant to the question of independence, and there are certainly other procedural fairness concerns that could be raised here in relation to the disciplinary hearing process (see sections 225.995 – 225.999) and the online ‘Registry of Shame’ (see sections 225.9998 – 225.99992).

Generally speaking, the principle of independence in administrative law is concerned with the extent to which a statutory process is or can be influenced by the political executive (i.e. the Lieutenant Governor in Council or a minister). The assessment is primarily based on three attributes: (1) security of tenure of officials with decision-making power; (2) security of remuneration of those officials; and (3) administrative control of the institution. The more influence the political executive has over tenure or pay, the more likely it is that independence is weak or non-existent. This can include things like term of appointment, renewal, or allocation of work within the institution.

Independence within the administrative state has proven to be tricky business for the Supreme Court of Canada to adjudicate, because statutory officials (such as the Commissioner and the hearing committee in this process) have significant power to administer justice and adversely impact individual legal rights and interest. However, they are also established by, appointed by, and accountable to the very political executive from which they should operate at arm’s length. This is really an intractable tension between political interests and the rule of law. Administrative independence will likely always be a sore point in Canadian administrative law because it raises the question of whether a common law principle can have quasi-constitutional status and be the basis for striking down a statutory provision. The upshot of *Ocean Port* was to avoid this difficult question and overwhelmingly defer to the political executive and statutory regimes, which are often way too closely connected to partisan interests. As a result, *Ocean Port* has been widely criticized. See [here](#) for more discussion on this topic.

With this overview on independence in hand, this post will explain the basic framework of the Discipline of Teachers program and, along the way, raise red flags in relation to independence concerns.

The disciplinary process is triggered by an allegation of either ‘professional incompetence’ or ‘unprofessional conduct’, as defined in sections 225.3 and 225.4, respectively. Professional incompetence relates to a failure to comply with teaching [standards](#) already prescribed by the Minister under section 18. Unprofessional conduct is the category which caught my eye, as it has very open-ended and yet-to-be defined content:

Unprofessional conduct

225.4 Conduct that

- (a) is detrimental to the best interests of students, the public, teachers or teacher leaders or the teaching profession,
- (b) does not comply with the code of professional conduct, or
- (c) is the basis for a conviction for an indictable offence

constitutes unprofessional conduct.

Clause (a) is so loaded with vagueness (what is meant by ‘detrimental’?) it is difficult to envision how it could be enforced anywhere, other than in a kangaroo court. Clause (b) is certainly the most likely to be applied regularly, and this is a common aspect of disciplinary programs found in other professions – such as law. However, the big difference here is that the code of conduct will be established later, not by teachers themselves but in a regulation enacted by the Lieutenant Governor in Council (see section 225.5). This is **red flag #1**.

The disciplinary program is overseen by the Commissioner, who is appointed for a term of up to 5 years by the Lieutenant Governor in Council under section 225.6 – the same body who sets the conduct rules. The Commissioner also reports to the Minister annually (see section 225.7). Perhaps most problematic, section 225.6(3) gives the Commissioner the ability to delegate any of their power(s) to employees in the Minister’s department. Notably, this would appear to include the power of the Commissioner, on their own initiative, to investigate alleged professional incompetence or unprofessional conduct even in the absence of a complaint (see sections 225.91(3), 225.94). Thus, it would seem possible for the Minister’s staff to initiate an investigation into conduct of a teacher, which forms the basis of a complaint, and ultimately comes before the Minister herself for a disciplinary decision. This is **red flag #2**.

In the normal course, a complaint about teacher competence or conduct can be made by anyone and is to be filed with the Registrar (appointed under section 195.1) who, in turn, forwards the complaint to the Commissioner (see section 225.91). The Act contemplates dispute resolution and mediation procedures, however when the matter is heading to a disciplinary hearing the Commissioner must appoint an investigator to make a report (sections 225.94, 225.96). Upon consideration of the investigation report, the Commissioner may direct a hearing committee of panel members to be established under section 225.9, and refer the matter for a disciplinary hearing before that committee (see section 225.97(3)). Now, while the Commissioner is appointed by the Lieutenant Governor in Council (itself somewhat problematic given their role here), hearing panel members are appointed by the Minister, and serve at the pleasure of the Minister. The Act provides no security of tenure or remuneration for panel members who serve on disciplinary hearing committees (see section 225.8), nor does the Act say anything about qualifications to sit on this panel (notwithstanding the Minister’s statement in the Legislature that teachers would be on the panel). Most problematic is the fact that panel members are appointed by the Minister and report to the Minister. This is **red flag #3**.

A hearing committee is a recommending body to the Minister – contrary to the Minister’s statement in the Legislature that panel members make decisions – they do not make decisions on discipline. Section 225.9991 empowers the committee to make a finding in relation to alleged professional incompetence or unprofessional conduct. Section 225.9992 sets out the committee’s

recommendation function, including its obligation to compile a hearing record and produce a written decision. Subsections (1) and (2) are as follows:

Recommendations and decision of hearing committee

225.9992(1) If the hearing committee makes a finding that the teacher or teacher leader who is the subject of the hearing is not professionally incompetent or that the conduct of the teacher or teacher leader does not constitute unprofessional conduct, the hearing committee may recommend to the Minister that the Minister dismiss the complaint.

(2) If the hearing committee makes a finding that the teacher or teacher leader who is the subject of the hearing is professionally incompetent or that the conduct of the teacher or teacher leader constitutes unprofessional conduct, the hearing committee may recommend to the Minister that the Minister

- (a) issue a letter of reprimand to the teacher or teacher leader,
- (b) suspend one or more certificates of the teacher or teacher leader, with or without conditions,
- (c) cancel one or more certificates of the teacher or teacher leader or cancel a certificate and issue a certificate of a different class, with or without conditions, or
- (d) order that the teacher or teacher leader be ineligible for one or more certificates for a definite or indefinite period, with or without conditions.

These subsections indicate that disciplinary authority ultimately rests with the Minister. Section 225.9997 empowers the Minister to scrutinize the hearing record and take any of the actions set out in section 225.9992(1) and (2), *whether or not it is the recommendation of the hearing committee*. This is **red flag #4**.

In a quick comparison, it does appear that some of the content in Bill 15 was modelled on the Law Society of Alberta's disciplinary process, but important aspects of independence were not included. The *Legal Profession Act*, [RSA 2000, c L-8](#) gives an illustration of what independence looks like in relation to each of the red flags raised here in relation to Bill 15: (1) the Lieutenant Governor in Council does not establish the code of conduct for lawyers; (2) the disciplinary process is overseen and administered by the Law Society itself and the Benchers (the majority of whom are elected by lawyers); (3) hearing committee members on disciplinary matters are not selected from a roster of ministerial appointments; (4) the hearing committee has the power to sanction for misconduct, the Minister of Justice and Solicitor General does not.

Bill 15 establishes a disciplinary process in which the Minister of Education or persons in her department may directly or indirectly serve as the initiator of a complaint, oversee the investigation of the complaint, control the roster of panelists who conduct hearings, and ultimately scrutinize the hearing record and issue a ruling on the complaint notwithstanding the findings of an investigation or the hearing itself. The disciplinary process established by Bill 15 is clearly not going to operate at arm's length from the Minister and appears to be offside any reasonable perception of fairness in discipline.

This post may be cited as: Shaun Fluker, “Red Flags with Bill 15 – Education (Reforming Teacher Profession Discipline) Amendment Act” (May 10, 2022), online: ABlawg, http://ablawg.ca/wp-content/uploads/2022/05/Blog_SF_Bill_15.pdf

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>

Follow us on Twitter [@ABlawg](https://twitter.com/ABlawg)

