

CASE COMMENT

THE PROBLEM OF HERETIC TEACHERS: KEMPLING v. BRITISH COLUMBIA COLLEGE OF TEACHERS

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ABSTRACT. This paper argues that recent *Charter* decisions concerning the off duty expressive conduct of teachers have involved a narrow or “orthodox” interpretation of the reasonable limits on such expression. The author illustrates what he describes as a “messy area” by taking us through the controversial and well-known examples of *Shewan* and *Shewan*; the *Malcolm Ross* case; and the primary focus of the case comment, a recent British Columbia decision involving *Chris Kempling*. The author wonders whether judicial orthodoxy regarding teacher conduct, expression and opinion helps or hinders the fundamental objectives of public education and censors their autonomy for open discussion of important social, ethical and political issues.

LE PROBLÈME AVEC LES ENSEIGNANTS HÉRÉTIQUES :
KEMPLING V. BRITISH COLUMBIA COLLEGE OF TEACHERS

RÉSUMÉ. Cet article aborde le fait que les récentes décisions de la *Charte* concernant la conduite expressive en congé des enseignants ont impliqué une interprétation plus pointue et orthodoxe des limites raisonnables d’une telle expression. L’auteur illustre ce qu’il décrit comme une « zone trouble » en nous amenant dans les exemples controversés et bien connus de *Shewan* et *Shewan*; le cas de *Malcolm Ross* et le sujet principal de ce commentaire de cas, une décision récente en Colombie-Britannique impliquant *Chris Kempling*. L’auteur se demande si une orthodoxie judiciaire concernant la conduite des enseignants, leurs expressions et leurs opinions aide ou entrave les objectifs fondamentaux de l’éducation publique et censure leur autonomie pour des discussions ouvertes au sujet d’importantes questions sociales, éthiques et politiques.

INTRODUCTION

A heretic is defined as the “holder of an unorthodox opinion” (Barber, 2004). Originally restricted to dissent from the doctrine of the Christian church, heresy now has the wider meaning of holding and expressing views that depart from any orthodoxy – that is, what are correct or currently accepted opinions (Barber, 2004). Accepting this wide definition leads to the conclusion that legal doctrine comprises a moral orthodoxy. In exercis-

ing their *Charter* jurisdiction, judges have taken to expressing very broad normative values – for example, what equality and freedom should mean in a democratic society. It is clear from examining court decisions concerning the off-duty expressive conduct of teachers that this orthodoxy, called “*Charter* values” and “core values of the education system” by tribunals and courts, comprises a template for such bodies to use in determining whether teacher conduct deserves employment discipline, professional discipline, or both. Whether the dissonance between a teacher’s expressions and this orthodoxy results in the teacher’s *prima facie* exclusion from the sphere of protection provided by subsections 2(a) and (b) (freedom of religion and expression) of the *Canadian Charter of Rights and Freedoms* (1982), or whether it provides the justificatory grist for the “reasonable limits” analytical mill under section 1, the fact remains that it has been the nub of the judicial reasoning behind teachers having lost several high-profile off-duty conduct cases. In tandem has been the finding that harm (including inferred harm) results from the expression of unorthodox views in the form of a poisoned learning environment and a loss of public trust in the teacher, school, and board in question, as well as the education system at large.

This is a very messy area. Although it is settled law that teachers, like students, carry their civil liberties and rights (truncated though they might be in some cases) in through the schoolhouse gate, the important question for teachers is whether they carry their employment and professional obligations back through that gate when they leave. Although the Supreme Court has provided judicial guidance in a few landmark cases, particularly *Ross v. New Brunswick School District No. 15*, 1996 (hereafter *Ross*, 1996), the application of the broad principles it has laid down is potentially problematic given the contextual differences that can arise. Can one isolate distinguishing features that would justify legally proscribing out-of-school off-duty expression that targeted a *Charter*-protected group with negative comments in one set of circumstances but not another? Or do the broad principles established by the Supreme Court – modeling *Charter* values (perhaps some more than others), not undermining public trust and respect in the system, and not poisoning the educational environment – ultimately threaten to exclude all teachers from the *Charter*’s free speech provisions? Attendant issues of what is “public” and what is “private” and who gets to choose whether the teacher was speaking publicly or privately complicate the matter even further. And, perhaps most confounding of all is how one negotiates the dilemma posed by the public disavowal by a public servant of the values he or she is charged and entrusted with inculcating and modeling. This begs serious questions about whether free expression extends to the point of permitting public messengers to be in control of the message.

These issues and others lie at the core of the British Columbia College of Teachers’ (BCCT) disciplinary action against teacher Christopher Kempling

in 2003 for having publicly expressed negative views on homosexuality and gay rights and the court case that ensued. This Case Comment examines the Kempling case (*Kempling*, 2004a, 2004b, 2005) in the context of the issues outlined above. Before turning to the specific facts and issues in *Kempling*, however, it is useful to outline the views expressed by the Supreme Court of Canada on this topic in its 1996 ruling in *Ross*.

**THE OFF-DUTY CONDUCT TEMPLATE:
ROSS V. NEW BRUNSWICK SCHOOL DISTRICT NO. 15**

Teachers' peculiar social role as moral agents includes teaching morality to students not only through didactic instruction but also by modeling it in their own behaviour. Ontario's *Education Act* (1990) is unequivocal about this: teachers must "inculcate by precept and example" a host of virtues. The moral social agent *cum exemplar* role has provided the courts with the legal justification for the monitoring and censuring of otherwise "private" or "off-duty" conduct by teachers (although the contextual meaning of these terms is less than crystal clear).

Probably the first concerted attempt by a Canadian appellate court to peel back the layers of meaning comprising this particular policy problem was in the British Columbia case of *Shewan and Shewan v. Abbotsford School District No. 34* (1987) – a case in which a husband and wife who taught for the same school board were disciplined after a picture the husband took of his semi-nude wife was published in a so-called men's magazine. In ultimately upholding the board's discipline for just cause, though reducing the period of suspension, the British Columbia Court of Appeal adopted both a substantive moral test – the teachers' actions violated the community standards of the province – and a functional test – their actions undermined respect for the education system and their own ability to carry out their roles as moral exemplars. Both approaches have figured prominently in subsequent cases, including *Ross*.

The *Ross* case is reasonably complex. Before it reached the Supreme Court of Canada it progressed through several layers of the justice system: from a Human Rights Commission Board of Inquiry, to the New Brunswick Court of Queen's Bench, to the New Brunswick Court of Appeal. Because this Case Comment is not about *Ross* per se and because much has been written about it (see, for example, La Forest, 1996–98; Clarke, 1994–95; Clarke, 1998–99; Green, 1995–96), I intend to say only as much about *Ross* as is necessary to explain the groundwork it established for all subsequent off-duty teacher misconduct cases.

In 1988, David Attis, a Jewish parent whose children attended a school in the respondent board's district, lodged a complaint under the New Brunswick *Human Rights Act* (1973). Attis alleged that by failing to take action against one of its teachers, Malcolm Ross, who publicly made "racist, discrimina-

tory and bigoted” anti-Semitic statements, the school board condoned his views and discriminated against Jewish and other minority-group students. Although Ross did not make his views known within the school directly, his out-of-school writings and public appearances in which he did express such views were prolific. He “argued that Christian civilization was being undermined and destroyed by an international Jewish conspiracy” (Ross, 1996, para. 4). And, as is the case with most anti-Semitic views, Holocaust denial figured prominently in Ross’s statements.

Controversy over Ross’s out-of-school behaviour had been on-going since 1978, although it appears the board had not taken any formal action until 1988 when it issued warnings and reprimands. The board of inquiry established under the *Human Rights Act* to hear Attis’s complaint ruled that although Ross had not used his classroom as a platform for his views, his discriminatory out-of-school conduct violated the *Act* and had been condoned by the board’s failure to take action to prevent it. This had resulted in an anti-Jewish atmosphere that subjected Jewish students to a “poisoned environment” that, in turn, had a negative impact on their education (Ross, 1996, para. 6). Consequently the board of inquiry ordered the school board to place Ross on an unpaid leave of absence for 18 months; to appoint him to a non-teaching position if, during his leave, such a position for which he was qualified became available; to terminate his employment at the end of the period of leave if, in the interim, he had not been offered and accepted such a non-teaching role; and, to terminate his employment immediately if he continued to publish his anti-Semitic views.

On appeal the New Brunswick Court of Queen’s Bench found that the board of inquiry had no jurisdiction under the *Human Rights Act* to make an order requiring the school board to restrict Ross’s out-of-school activities if he were employed in a non-classroom capacity (this came to be referred to as the “gag order”). The other orders, however, met the test for judicial review. Although these orders interfered with Ross’s freedom of religion and expression under subsections 2(a) and 2(b), respectively, the Court applied section 1 of the *Charter* and found that they were reasonable and demonstrably justified limits on such rights.

Concurring that a teacher could be disciplined for off-duty conduct, the majority of the Court of Appeal concluded, however, that all aspects of the board of inquiry’s order violated Ross’s *Charter* freedoms and could not be justified under the section 1 “reasonable limits” clause because removing Ross from the classroom had not met a specific purpose that was so pressing and substantial as to override the guarantee of freedom of expression. To find otherwise, the Court held, “would . . . have the effect of condoning the suppression of views that are not politically popular at any given time” (Ross, 1996, para. 14, quoting Ross, 1993, p. 251).

The Supreme Court of Canada reversed almost entirely the Court of Appeal's ruling. First, the Supreme Court held that the board of inquiry had been justified in finding that the school board had discriminated by failing to prevent Ross from poisoning the school environment. Even though there was no direct evidence of a poisoned environment, the conjunction of the publicity around Ross's actions and the exemplary role of teachers supported a reasonable inference of such an effect. His views were fundamentally inconsistent with the moral purposes espoused by the New Brunswick school system – tolerance, impartiality, and the right of everyone to feel free to participate on an equal footing. And, applying the functional test from *Shewan*, the Court determined that Ross's views could only undermine public trust in the integrity of the system and its agents. As such, the Court found it critical to focus on the *position of teacher* rather than when and where the conduct occurs.

Although the highest court agreed that the order removing Ross from the classroom violated his *Charter* freedom of expression – it could scarcely have ruled otherwise given the high value and very expansive meaning which it had bestowed on this core democratic freedom in *Irwin Toy (Irwin Toy v. Quebec (A.G.))*, 1989) – this rights violation met all the components of the *Oakes* test (*R. v. Oakes*, 1986) and was hence a reasonable and justifiable limit on Ross's rights. First, the order served a pressing and substantial objective: the elimination of anti-Semitism and other forms of intolerance and bigotry, which undermined basic democratic values – especially equality rights, which the Court obviously viewed as being at the core of the *Charter*. The order withdrawing Ross from the classroom (the means) was rationally connected to this purpose (the ends) because of the potential of the teacher to exert strong influence over students by virtue of the nature of the position itself and the assumptions and expectations that attend it. Finally, the parts of the test that require weighing the importance of the objective of the impugned law (the order) against the seriousness of the impact of the rights violation, and determining whether rights were minimally impaired, were satisfied because other options had been considered and rejected as insufficient and it was only Ross's freedom to be a classroom teacher – the value of which the Court obviously discounted – that was being limited. The Court, however, rejected as unreasonable the gag order that would have restrained Ross's expression while he was not a classroom teacher.

Ross cemented in place several general principles that have been imported into other cases to buttress arguments for the disciplining of teachers for their out-of-school expression (see, e.g., *Toronto (City) Board of Education*, 1997; *Re Peel Board of Education*, 2002; and *Kempling*, 2004a). First, it is the *position of teacher* that justifies discipline for out-of-school conduct. (This begs the question whether there is any ability on the part of a teacher to step outside the position's parameters and speak as a private citizen.) Second, school boards are under a positive legal duty to take action against a teacher

whose actions poison the school environment. Third, a reasonable inference can be drawn as to the existence of such a poisoned environment, even in the absence of direct evidence thereof, because of the notoriety of the teacher's conduct, coupled with the teacher's role as exemplar and fiduciary – the repository of public and student trust (La Forest, 1996–98). Teachers are the most important medium within the communication centres that we call schools, for the transmitting of the moral messages that legislation and other policy directives require to be delivered to students. A functional test can be applied to conclude that the nature of the teacher's actions (especially where discriminatory) necessarily precludes his or her ability to carry out the role(s) for which he or she was employed. Finally, where the not-infrequent clash between free speech and equality rights is played out in the educational arena, the latter will trump the former.

**KEMPLING V. BRITISH COLUMBIA COLLEGE OF TEACHERS:
SAME PRINCIPLES, DIFFERENT CONTEXT?**

Background

Chris Kempling had been a teacher and member of the BCCT since 1980. According to the British Columbia Supreme Court he had enjoyed a “long and unblemished teaching career, and a notable record of community service” (Kempling, 2004a, para. 1). It is significant, as will become apparent, that he was and is also a registered clinical counselor. These are not the sort of general credentials one would expect of an individual at the centre of a heated controversy. Nevertheless, Kempling engendered such a controversy between 1997 and 2000 when he published an article and several letters to the editor in the local newspaper, the *Quesnel Cariboo Observer*, that elicited complaints from some readers who objected to what they considered discriminatory statements about homosexuals. Rather than reproduce examples of the impugned writings here, I will provide them below in the context of the legal relevancy attached to them by the BCCT discipline panel and the Court. Suffice it to say that a complaint lodged with the College led to an investigation, during which Kempling voluntarily produced other writings, of which the College had been unaware, about homosexuality and gay rights. These included essays written for free public distribution and “private” correspondence and memoranda to municipal council members and school board administrators. Following its investigation, the BCCT cited Kempling for professional misconduct, namely, “conduct unbecoming” a member of the College.

A hearing was held by a Hearing Panel of the disciplinary committee of the College in April 2002. Kempling neither personally attended the hearing nor sent a representative.

The Decision of the Hearing Panel

After reviewing his writings, the Panel concluded that Kempling was guilty of conduct unbecoming a member of the College. As summarized by the British Columbia Supreme Court, the Panel's reasons centred on the discriminatory nature of Kempling's writings which demonstrated his refusal "to take into account the educational system's core values," especially non-discrimination, "which includes recognizing homosexuals' right to equality, dignity, and respect" (Kempling, 2004a, para. 5). Although it could find no direct evidence that his writings had created a "poisoned school environment," the Panel applied *Ross* to conclude that a reasonable inference of such a result could be drawn. The Panel relied on the functional test used in *Shewan* and quoted in *Ross* for finding off-duty teacher conduct susceptible to professional discipline: the teacher's position of trust, confidence, and responsibility can result in a loss of confidence in the teacher and school system by students and the public, thus creating controversy and disruption in the education system. At a subsequent hearing on the issue of penalty the Panel recommended a one-month suspension of Kempling's teaching certificate, together with the publication of his name and a summary of the case. In April 2003 the BCCT Council held an oral hearing at which it adopted the Panel's findings and recommendations. Kempling appealed both the finding of conduct unbecoming and the suspension penalty to the British Columbia Supreme Court. The appeal was heard by Justice Holmes, who delivered his judgment on February 3, 2004.

The Decision of the British Columbia Supreme Court

• *Issues on appeal:*

Four general appeal issues were raised: whether there had been any procedural unfairness on the Panel's part in making a finding of conduct unbecoming; the appropriate standard of review for the Panel's finding of conduct unbecoming and the proper application of that standard; the appropriate standard of review for the BCCT Council's decision on penalty and the application of that standard; and, whether any *Charter* rights had been infringed and, if so, whether the infringement was reasonable and justified under section 1. I will ignore the procedural fairness issues and deal with the proper standard of review and its application only insofar as the arguments thereon shed light on the justification for finding out-of-school expression, both in general and in this particular case, worthy of sanction as conduct unbecoming. The rest of the analysis will focus on the application of the *Charter*.

• *The proper standard of review and its application*

NON-CHARTER ISSUES: Applying the Supreme Court of Canada's four-point pragmatic and functional approach to determining the proper standard of review of a tribunal's decision (*Pushpanathan v. Canada*, 1998), Justice Holmes

concluded that the Panel's finding of conduct unbecoming was subject to the test of simple reasonableness. This standard, which suggests considerable deference, was justified, despite the important public interest involved, by the heavy factual orientation of the issue before the Panel – the Court termed it a “fact-intensive question” – and the Panel's special expertise that was deemed superior to the court's own knowledge about the propriety of teachers' conduct. Although it is clear that whether certain statements were made is a question of fact, it is puzzling how the Court could conclude that the question of whether they were “discriminatory” was also a factual rather than a legal question, especially given the voluminous case law on the subject (how one defines discrimination is the preoccupation of the Supreme Court of Canada in *Law v. Canada*, 1999). Nevertheless, Justice Holmes applied a standard of reasonableness *simpliciter* to the Panel's substantive decision on conduct unbecoming.

The Court adopted the Supreme Court of Canada's test from *Law Society of New Brunswick v. Ryan* (2003) to determine whether the Panel's finding was reasonable. According to *Ryan*, a decision is unreasonable only if the tribunal did not use “a line of analysis . . . that could reasonably lead [it] from the evidence before it to the conclusion” it arrived at, and if its reasons “taken as a whole” do not stand up to a “somewhat probing examination” (*Kempling*, 2004a, para. 32, quoting *Law Society of New Brunswick*, 2003, para. 46–47, 55–56). Justice Holmes pointed out that a somewhat probing examination of the Panel's reasons allowed him to conclude that it had found ample evidence in *Kempling's* writings to determine that he had made derogatory and discriminatory statements against homosexuals. The Court quoted the following excerpts of the teacher's public writings as evidence that he “consistently associated homosexuals with immorality, abnormality, perversion and promiscuity” (*Kempling*, 2004a, para. 34).

Thus my main concern with giving same sex couples legal rights in child custody issues is due to the obvious instability and short term nature of gay relationships My second concern is how can children develop a concept of normal sexuality, when their prime care-givers have rejected the other gender entirely? . . .

Gay people are seriously at risk, not because of heterosexual attitudes, but because of their sexual behaviour, and I challenge the gay community to show some real evidence that they are trying to protect their own . . . members by making attempt [*sic*] to promote monogamous, long lasting relationships and to combat sexual addictions. . . .

The majority of religions consider [homosexual] behaviour to be immoral, and many mental health professionals, including myself, believe homosexuality to be the result of abnormal psycho-social influences. . . . Homosexuality is not something to be applauded. . . .

I refuse to be a false teacher saying that promiscuity is acceptable, perversion is normal, and immorality is simply ‘cultural diversity’ of which we

should be proud. (Kempling, 2004a, para. 34, quoting Kempling, 1997a; Kempling, 1997b; Kempling, 2000a; Kempling, 2000b)

Justice Holmes also adverted to the essays that Kempling had distributed free to the public, even though the Panel had not mentioned them in its own reasons. In particular, the Court concluded that readers of these papers, in which Kempling claimed that “the gay lifestyle” is promiscuous, and that “teaching about homosexuality in a way that does not paint it as unhealthy or immoral is tantamount to teaching falsehood,” might reasonably conclude that he was “insinuating that homosexuals are pedophiles or become homosexual as a result of pedophilia” (Kempling, 2004a, para. 36). Although he recognized that Kempling had somewhat qualified his statements in a letter to the editor in which he professed support for legislation extending limited rights to gays, and in one of his papers in which he expressed the need for tolerance, Justice Holmes held that this had not mitigated the “overall thrust of the bulk of his published writings” (Kempling, 2004, para. 37).

Kempling’s writings were thus found to be discriminatory and because non-discrimination was one of the “core values” of the education system, such a determination by the Panel was a proper basis for its ultimate finding of conduct unbecoming a member of the College. Justice Holmes rejected Kempling’s contentions that, as a matter of law, speech cannot constitute discrimination and conduct has to be directed at a specific individual to be considered discrimination.

That left the Court to deal with the off-duty conduct issue. As expected, Justice Holmes relied on the familiar dicta of Justice La Forest in *Ross* to conclude, on the basis of the functional test put forth therein, that where a teacher’s off-duty conduct “negatively impacts the school system” or his “ability to carry out his professional and legal obligations . . . fully and fairly” (Kempling, 2004a, para. 40), discipline is appropriate:

By their conduct, teachers as ‘medium’ must be perceived to uphold the values, beliefs and knowledge sought to be transmitted by the school system. The conduct of a teacher is evaluated on the basis of his or her position, rather than whether the conduct occurs within the classroom or beyond. Teachers are seen by the community to be the medium for the educational message and because of the community position they occupy, they are not able to ‘choose which hat they will wear on what occasion’ (see *Re Cromer and British Columbia Teachers’ Federation* (1986), 29 D.L.R. (4th) 641 (B.C.C.A.) at p. 660); teachers do not necessarily check their teaching hats at the school yard gate and may be perceived to be wearing their teaching hats even off duty. (Kempling, 2004a, para. 40, quoting *Ross*, 1996, para. 44)

Justice Holmes discussed Kempling’s conduct in the context of two kinds of harm: harm *per se* and inferred harm – harm that could be inferred as a reasonable and probable consequence of the conduct. He held that harm *per*

se had been done to the education system by Kempling's writings because of their discriminatory content and because he had linked his personal views to his professional status as a teacher and school counselor. That Kempling had done this is indisputable: he had spoken about putting his "professional reputation on the line" and contended that his views were consistent with his obligations as a teacher and counselor. Of critical importance to the Court was that Kempling had not been writing "qua private citizen" but rather "qua secondary school teacher and counselor" and that the explicit linkage between his views and his status effectively tainted the writings "in the eyes of students and the public" (Kempling, 2004a, para. 44).

This crucial part of the Court's reasoning merits two observations. First, one could arguably infer from Justice Holmes's dicta that teachers have a *choice* whether to speak as a private citizen or as a teacher/counselor. This inference arises out of the attention paid time and time again throughout his judgment to the particular mischief associated with Kempling's explicit linkage of his words to his status. He *chose* to link them, the court repeatedly emphasized. However, the Court sets up a false if not completely meaningless dichotomy around the matter of choice. Relying on *Cromer v. B.C.T.F.* (1986), the Supreme Court of Canada said in *Ross* that teachers cannot choose what hat – private or public – they are wearing when they speak outside of school. So it seems quite unfair to ascribe any degree of blame based on the inference that Kempling had a choice and made the wrong one.

The Court's emphasis on Kempling's linkage of his words with his status raises a further question: if he had edited out of his writings all information identifying his professional status and simply signed his name, would the harm justifying the discipline for off-duty conduct still have been done? Justice Holmes seemed to understand this logical progression, evidenced by his comment that even had Kempling not explicitly linked his status to his statements, name recognition alone in a small community like Quesnel would effect the same result. Once again, on such reasoning the option of writing qua private citizen could hardly be a real one. Yet another question arises: Is it acceptable that a person have fewer civil liberties simply because he or she works and resides and socially participates in a small community? I suppose it could be argued that Kempling could have written the pieces anonymously, but when one considers the fundamental purposes of extending free speech as a constitutional right, being forced to speak anonymously hardly represents the full search for the truth, the social participation and the self-fulfillment that, according to the Supreme Court of Canada in *Irwin Toy v. Quebec* (1989), comprise the core objectives of freedom of expression.

The Court went on to find additional harm caused by Kempling's explicit (or necessary) linkage between his views and his status: namely, the calling into question of his ability to be impartial in fulfilling his professional and legal obligations, and vicariously, the impartiality of the school system. The

Court never really articulated what it had in mind. It appears to have been sufficient that the views Kempling expressed might lead one to conclude that he would *not act* impartially in carrying out his professional duties.

Justice Holmes discussed next what he termed inferred harm, although the distinction between it and the kind of harm he identified as harm *per se* is not all that clear to me. In any event, among the types of inferred harm he envisaged were a loss of public confidence in Kempling as a teacher and in the school system in general, a loss of respect for Kempling and other teachers, and controversy in the school and community that disrupted the proper carrying on of the educational enterprise. Such inferences had been properly drawn by the Panel, the Court concluded, as it would be reasonable to expect that student and public confidence would be eroded and that gay students would be reluctant to go to Kempling for counseling, thus impairing his ability to carry out his duties. The Court also pointed to some evidence of controversy in the community in the form of letters to the editor and letters from the local teachers' and counselors' associations officially dissociating the groups from Kempling's views. Again, it is less than clear that either the Court or the Panel considered why controversy, especially of this ilk, should reasonably be seen as disrupting education.

The Court nevertheless found that the harm done by Kempling's writings, whether viewed as harm *per se* or as inferred harm, warranted the Panel's finding of conduct unbecoming and that, exclusive of *Charter*-related issues (discussed below), the Panel's decision was reasonable. Having met the appropriate standard of review, the finding should not be disturbed by the Court.

The Court recognized an even higher degree of deference regarding the College's imposition of the penalty because of its experience and expertise in such matters. In fact it had been given a statutory duty to balance various remedial options. The question of penalty was also intricately tied to factual findings and inferences. As a matter of mixed fact and law, then, the decision on penalty was also subject to the same standard of review that applied to the Panel's finding of conduct unbecoming – simple reasonableness. The Court found that, in determining the appropriate penalty, the College had properly considered and balanced aggravating and mitigating factors, including paying attention to Kempling's "long and unblemished" record of professional and community service. The Court rejected Kempling's contention that the College had erred in law by failing to consider this case as one where public protection was not implicated and by failing to assure that the penalty was commensurate with those imposed in similar cases. Justice Holmes concluded that there indeed was an element of public protection in this case:

The appellant does not appreciate that harm has been done to the general student body, homosexual students, the school system, and the teaching profession by publishing his discriminatory writings qua public school teacher and counselor. The fact that there was no evidence of specific

complainants is not determinative. Indeed, one reason that that no one came forward with a complaint could be because the group that his public statements were targeted against is vulnerable, generally kept invisible and less likely to come forward with complaints than members of the general population. Realistically, most homosexual students would be most reticent to challenge a teacher and counselor who is otherwise held in high regard, while placing themselves at risk in disclosing their sexual orientation to the public. (*Kempling*, 2004a, para. 65)

For the Court then, public protection was the main policy interest violated by the harm it found *Kempling* had caused by linking his statements with his status.

As far as comparability of penalties was concerned, the only case the Court viewed as at all comparable was *Ross*. And, as it rightly pointed out, the penalty imposed on *Ross* – permanent removal from the classroom – was considerably more severe than that given *Kempling*.

CHARTER ISSUES: There is no doubt that the proper standard of review when *Charter* issues are involved is one of correctness: the Court is entitled to subject the issues to its own analysis to determine the proper conclusion. *Kempling* had argued that his rights to freedom of expression [section 2(b)], freedom of religion [section 2(a)], liberty (section 7), and equality (section 15) had been infringed by the College's actions. The Court dealt with each claim in that order.

Although the Court acknowledged that *Kempling's* statements about homosexuality fell within the Supreme Court of Canada's definition of protected expression in *Irwin Toy* (1989) because they were intended to convey meaning, once again it invoked the speech *qua* teacher versus the speech *qua* private individual distinction in ruling against *Kempling*. Justice Holmes relied on the dubiously relevant precedent of *Walker v. Prince Edward Island* (1995) [where a person was sanctioned for speaking as a public accountant without being so certified] in concluding that *Kempling's* freedom of expression did not extend to statements made in the capacity of a public school teacher. And, leaving no doubt whatsoever this time that he believed that *Kempling* had a choice, Justice Holmes stated, "The appellant was at all times free and remains free to express his views on homosexuality in a non-violent manner *qua* private citizen" (para. 75). As pointed out above, this seems a surprising and, in fact, incorrect conclusion. In any event, it tortures the reasoning in *Walker* to conclude that the case stands for the broad proposition that an individual's right to express himself in a professional capacity is not part of the guaranteed protection of expression under section 2(b) of the *Charter*.

For almost identical reasons, the Court ruled that *Kempling's* freedom of religion had not been violated. Although a person may have the right to hold whatever religious beliefs he or she chooses, it does not extend to

expounding those beliefs in one's professional capacity, with the attendant potential for lending them credibility. Presumably only where the personal views of the teacher were congruent with the system's orthodoxy, or core values, would the right to speak out in one's professional capacity exist. Or, at least, the speaker or writer would not be sanctioned because the message would be the expected one. As a personal observation, I have seen scores of letters to the editor and op-ed pieces written in the press identifying their authors as teachers. Most of these have been attuned to the moral values of the education system and I rather strongly suspect no one was disciplined in any of the cases. Contrary to the Court's insistence, it appears it is *the content of the message* that determines when the linkage will be permissible and when it will not. Equality theory aside, Kempling's case suffered from a fatal absence of evidence identifying his religion and its beliefs and linking them to the College's actions that he alleged violated his religious freedom.

Not surprisingly the Court refused to accept that the jeopardy of losing one's profession by not remaining silent did not amount to the kind of fundamental choice going to the root of a person's dignity that was necessary for a section 7 liberty interest to be implicated. Citing the Supreme Court of Canada's holding in the so-called Prostitution Reference (*Reference re ss. 193 and 195.1(1)(c)*, 1990), Justice Holmes pointed out that section 7 liberty does not extend to a right to practice one's chosen profession (*Kempling*, 2004a, para. 83).

Finally, the Court rejected Kempling's equality rights claim because he had not been treated differently from anyone else in the proper comparator group – all other members of the BCCT. His rights were to be considered in the context of the professional group to which he belonged, not the public at large. It seems that despite the Supreme Court of Canada's rulings in *Andrews v. Law Society of British Columbia* (1985) and *Law v. Canada* (1999), the "similarly situated" test for determining equality rights violations is alive and well. This ruling appears tantamount to a legal acknowledgment that teachers *as a group* can be treated differently from society at large without the need to examine the substantive justness of such differential treatment. In other words, the right of teachers to speak out publicly based on a religious viewpoint is potentially a pale imitation of the rights of the general public. One might argue that such a legal principle should not be carved out of a section 15 analysis but rather that it should require justification under section 1 of the *Charter*.

Although the Court did embark on a lengthy section 1 analysis using the mandatory *Oakes* test (*R. v. Oakes*, 1986), the analysis (*obiter dicta* because the Court had found no *Charter* violations) was applied only to sections 2(a) and 2(b), its having found no basis on which to conclude that Kempling's liberty or equality rights under sections 7 and 15, respectively, had been engaged.

Hence, there was no justification offered for the apparent rule that teachers as a group have inferior equality rights compared to the public at large.

Justice Holmes began his section 1 analysis by pointing out that certain contextual factors operated in favour of a relaxed application of the *Oakes* criteria in this case: that the College's disciplinary action was aimed at the protection of a vulnerable group – children; that it was directed toward the amelioration of the disadvantage suffered by an historically disadvantaged group – homosexuals; that, even though the BCCT does not have a public mandate (in the same way a legislature does), its actions fulfilled a duty to the public; that the *Charter* rights allegedly infringed were of a “low value” in this case because the expression involved was discriminatory. Discriminatory expression, the Court noted, conflicted with the core values behind freedom of expression itself: the search for truth, social participation, and individual self-fulfillment. Without explaining why, the Court simply stated that “discriminatory speech is incompatible with the search for the truth” (para. 96). Of course, when the “truth” is the principles that the Supreme Court says comprise the notion of discrimination, the game is over, lost to the trump card of circular reasoning. Because of all these contextual factors Justice Holmes found it appropriate to show “considerable deference” to the College in applying the *Oakes* test.

He then proceeded to the first arm of the test, enumerating several pressing and substantial objectives that justifiably overrode Kempling's *Charter* rights: ensuring an equal, tolerant, and discrimination-free school environment; protecting students, especially gays and lesbians, from Kempling's anti-homosexual discrimination; and, restoring and upholding the integrity of, and public and student trust in, the school system and the teaching profession as non-discriminatory entities. It was necessary to show next a rational connection between these objectives and the College's actions. The Court repeated its earlier finding, based on *Ross* and other cases, that harm could be inferred and that it was not necessary for there to be “scientific proof [thereof] based on concrete evidence” (para. 101). And, as he had found earlier, Justice Holmes concluded that there were “grounds for a reasoned apprehension that [Kempling's] public writings engendered harm to students, the public school system and the teaching profession” (para. 104). Therefore there was a rational connection between the College's objectives and the means it chose to achieve them:

Sanctioning [Kempling] for publishing discriminatory statements and for publicly linking them to his professional status as teacher, is a statement that the teaching profession does not condone discrimination. It tells students and the public that what the appellant did was discriminatory and wrong, and helps to repair the damage done to the integrity of, and student and public confidence in, public schools and the teaching profession as non-discriminatory entities. (para. 105)

One wonders why simply publishing a piece disassociating the College from Kempling's views would not have achieved the same result – perhaps even a better one, because a full public refutation of his views and arguments could have been included.

Discussing next the minimal impairment component of the *Oakes* test, Justice Holmes correctly observed that it was unnecessary for the College to have chosen the least restrictive means of achieving its objectives. Under the *Oakes* criteria, as modified subsequently by the Supreme Court, the means need “only fall within a range of reasonable choices and be reasonably tailored to the objectives” (para. 106). Given the lack of severity of the penalty imposed (a one-month suspension), especially compared with the much more drastic consequences in *Ross*, Kempling's rights were, in the Court's view, only minimally impaired. Anything less would have risked not achieving the College's objectives.

The last arm of the *Oakes* test is determining whether a proper proportionality exists between the objectives and the effects of the rights infringement. Not surprising, given his views on minimal impairment, Justice Holmes concluded that “the objectives and salutary effects of the penalty outweigh[ed] its deleterious effects” (para. 115), thus bespeaking a proper proportionality. The Court repeated its contention, about which I have expressed some doubts above, that Kempling still had an effective means of voicing his views:

The appellant is free to exercise his freedoms of religion and expression in a manner that is unrestricted by the penalty, should he choose not to remain a BCCT member and not teach in public schools in British Columbia. If he chooses to remain a BCCT member, he is still free to exercise those freedoms, so long as he does not publicly do so in a manner that is discriminatory and would allow students or the public to reasonably perceive that he is doing so with the authority or in the capacity of a public school teacher or counselor. (para. 114)

At the risk of repeating myself, this seems an empty promise insofar as, first, the Supreme Court has said that teachers may “not choose what hat they are wearing” when they speak out publicly and, second, Justice Holmes himself acknowledged that, as a practical matter, Kempling would be known by all as a teacher/counselor in a small place like Quesnel even had he not explicitly made the linkage himself. So, it remains a puzzle to determine what the Court is really saying.

In summary, the Court concluded that even if it had been wrong and one or more of Kempling's *Charter* rights had been infringed, the infringement was justified under section 1. Hence, both the finding of conduct unbecoming and the penalty imposed in consequence of the finding were affirmed by the Court.

The Decision of the British Columbia Court of Appeal

It came as no great surprise, given the obvious depth of his convictions, when Kempling appealed the British Columbia Supreme Court ruling. Leave to intervene in the appeal was granted to the British Columbia Teachers' Federation and the Canadian Religious Freedom Alliance (CFRA), who, the Chambers judge concluded, represented respectively the interests of members of the teaching profession at large and of members of the public who were concerned about the protection of both freedom of expression and religion (*Kempling*, 2004b). In a unanimous decision released on June 13, 2005 the Court of Appeal dismissed the appeal, disagreeing with the trial judge on only two issues – the proper standard of review for the College Panel's finding of discrimination and whether the finding and suspension imposed on Kempling infringed his freedom of expression under section 2(b).

The misgivings I stated above about Justice Holmes's ruling that the standard of review for a finding of discrimination was one of reasonableness, not correctness, were vindicated by the appeal court. Writing for the Court, Lowry J.A. stated that "a determination that Mr. Kempling's writings were discriminatory must be based upon an analysis of those writings in light of human rights principles. That issue is a question of law" (*Kempling*, 2005, para. 26). The finding was subject therefore to review on a standard of correctness. This determination, however, did not affect the outcome of the case because the Court of Appeal found that the Panel's conclusion that Kempling's writings were discriminatory was not only reasonable but also correct under constitutional principles.

The Court of Appeal paid scant attention to its other departure from the lower court's reasons because, by the time of the appeal, the respondent had conceded that its actions had infringed Kempling's freedom of expression. The upshot was that the expression of Kempling and any other teacher (or professional for that matter) was not to be disqualified from the protection of section 2(b) simply because it occurred in a professional capacity, and certainly not on the basis of the *Walker* ruling which, as I concluded above, was hardly good authority for such a proposition (*Kempling*, 2005, para. 56). Any analysis weighing the value of the expression against the interests and values allegedly harmed by the expression was a matter for the balancing exercise comprising much of the *Oakes* test for applying section 1 of the *Charter*.

Justice Lowry quickly disposed of Kempling's argument that the College's actions had violated his equality rights. He noted that there was an insufficient evidentiary basis for Kempling's argument that his opportunity to express his religious and moral views had been affected. Such evidence would have been redundant anyway given the Court of Appeal's surprising (at least in my view) endorsement of Justice Holmes's truncated section 15 analysis that stopped at the first step of the three-stage process set out in

Law v. Canada (1999). Both Courts, then, found that there was no “differential treatment” of Kempling because he was treated the same as every other teacher. I discussed above why characterizing the relevant comparator group this narrowly is problematic and will not repeat those concerns here, except to say that such a conclusion should be worrisome not only to teachers but also to the members of all groups who might be similarly “cut off at the pass” from arguing that their being treated differently from others in society is unjustified.

Having found that Kempling’s section 2(b) rights were infringed, the Court of Appeal was required to apply the *Oakes* test to determine whether the infringement was reasonable and demonstrably justified. The Court focused on two of the four factors that *Harper v. Canada* (2004) established as relevant in the application of section 1 to violations of freedom of expression – the nature of the impugned expression and the nature of the harm said to be caused by the expression.

The analysis of the nature of the expressive activity implicates the kind of valuation of the expression that Holmes J. had used to disqualify *prima facie* Kempling’s writings from section 2(b) protection. The closer the expression in question comes to the “core” value of section 2(b) – represented in a case such as this by “a rational debate of political and social issues” – the more difficult it will be to justify limiting the expression under section 1 (*Kempling*, 2005, para. 75–76, citing *Ross*, 1996). The Court of Appeal acknowledged that some of Kempling’s writings fell within the pale of rational political and social debate. If Kempling had stopped there, the Court remarked, his words would have been protected. When he went further, however, and used language that invoked stereotypical notions about homosexuals and expressed his readiness to judge and treat all members of that group based on those stereotypes, he ignored fundamental principles of equality that are “essential to a functioning democracy,” especially the human dignity of all individuals (*Kempling*, 2005, para. 77). Speech, then, that avails itself of stereotypes undermining the democratic principle that all individuals are to be afforded human dignity as part of their right to equality, is far removed from the core values of section 2(b) and undeserving of a high level of protection thereunder.

The Court’s consideration of the second criterion established in *Harper* (2004) – the nature of the harm caused by the expression – led it to conclude that, in cases such as this, the expression need not have produced a “poisoned environment” as Kempling and the CFRA had urged on the basis of the *Ross* (1996) ruling. *Ross*, the Court concluded, merely stands for the proposition that the creation of a poisoned environment is a *sufficient* condition for showing harm but it is not a *necessary* one. Other forms of harm will suffice. In the present case, it was the Court’s finding that the content of Kempling’s writings not only undermined students’ access to a

discrimination-free school environment but also “damaged the integrity of the school system as a whole” (para. 79).

Last, when it came to balancing under the proportionality arm of the *Oakes* test the violation of Kempling’s rights with the harm caused, the Court of Appeal agreed with the lower court that the effect on Kempling – proscribing discriminatory statements about homosexuals that would be seen to be made by a teacher and counselor in the public education system – was “relatively limited when compared to the salutary effects” of “restoring the integrity of the school system and removing any obstacles preventing [students’] access to a tolerant school environment” (para. 82).

The Court’s application of the *Oakes* test led to its conclusion that, although Kempling’s freedom of expression had been infringed by the College’s finding and penalty, the infringement was reasonable and justifiable in a free and democratic society. All his other grounds for appeal having failed also, the appeal was dismissed and Kempling was left to seek leave to appeal from the Supreme Court of Canada. His application for leave to appeal was dismissed without reasons by the Supreme Court of Canada on January 19, 2006 (Kempling, 2005).

CONCLUSION

I began this Case Comment by remarking that this is a “messy area.” In thinking and writing about the issues and the Panel’s and the Courts’ reasoning in this particular case, I have come to realize that it is even messier than I first thought it to be. This is not the first case of this genre that I have written about. In commenting on the Paul Fromm arbitration case in Ontario I had little difficulty concluding that ultimately the special nature of teachers’ social role necessitated that they enjoy a reduced level of freedom of expression insofar as the system cannot tolerate the messenger’s public criticism of the message he or she is employed to deliver. Thus, I rebutted the argument that teachers’ knowledge and expertise should work in favour of inviting them into a full and open discourse on matters of public importance:

One could say that teachers’ very role should entitle, if not require, them to speak out against government and employer policies on matters of public interest. . . . When one considers, however, that the *raison d’être* for a teacher’s employment is to act as an agent of transmission of the cultural messages determined to comprise the formal and hidden curriculum, then it is a short step from permitting public criticism of the message to acknowledging that the medium is in control of the message. With apologies to McLuhan, in this case that cannot be. It surely cannot work in a public system where accountability is via the trust reposed in the board who employs the teacher and whom the teacher is supposed to represent. And, as the medium is supposed to transmit the message not only by precept but also by example, there can be no escape by resorting to the

old adage: “do as I say, not as I do”, especially when the medium makes it clear that he is only “saying” it because he is forced to. When the latter is the case, the message is undermined and serious questions arise about the ability of the teacher to fulfill the role for which he was employed.

(Dickinson, 2003, p. 154)

This was a relatively easy conclusion to reach in the Fromm case, mostly because the assumption that the discriminatory messages involved undermined public trust and faith in the education system seemed reasonable. It took no leap of imagination to conclude that the vast majority of the public would concur that anti-Semitic views associated vicariously with a public school board would undermine their faith and trust in the values held and taught by teachers, the board, and the system at large. In *Kempling*, however, it is not at all clear that the same assumption can be as easily made. Whether I and others like it or not, the views Kempling expressed are not as far from the core of public opinion as those of anti-Semites and Holocaust deniers. A rather considerable number of Canadians, including a conservative religious constituency (the Catholic Civil Rights League, for example, backed Kempling and assisted his drive for money to fund an appeal: see *Disciplined*, 2004), would agree with much of what Kempling had to say. Despite the rulings of Courts of Appeal and the Supreme Court of Canada (see, e.g., *Egan v. Canada*, 1995; *Vriend v. Alberta*, 1998; *Halpern v. Canada*, 2003), gay rights, especially gay marriage, remain politically and socially contentious. All this is to say that if the erosion of public trust and faith is to be a central argument justifying the censoring of public speech by teachers, it must be acknowledged that there are gradations of public opinion from issue to issue, and what court judgments and government policy statements decree might not at all represent that opinion. In a certain place on a certain issue, the teaching of the orthodox position advanced by the courts and government policy might *itself* undermine the faith of the majority of the public that the school system will teach the values they deem correct.

This suggests that what is at stake potentially, then, is a much broader issue of political philosophy: who ought to be in charge of determining the content of the values (such as the meaning of discrimination and the identification of the groups protected under the concept)? There is little doubt that in post-*Charter* Canada the courts have developed these values. And, there is likely no better solution if we wish to ensure the protection and equality of marginalized minorities. Putting the majority in charge of doing so has proven less than comforting for minorities in the past in Canada as elsewhere. What I am saying, though, is that it is somewhat disingenuous and potentially incorrect to tie limitations on free speech to an assumption that a viewpoint that deviates from Supreme Court jurisprudence defining certain value-laden concepts of social importance and what values lie at the “core” of democracy, necessarily and as a matter of fact “undermines

the public's faith and trust in the education system.”

What the test should perhaps be based on is the likely impact such views will have on those members of the public directly affected by the speech – in this case gays and lesbians. These are people with a statutory right to access a public institution; indeed, in the case of children under sixteen years of age (perhaps soon to be eighteen in Ontario) they are compelled by law to attend school and, for most, this means a public school. It is not unreasonable to assume that their opportunity to an equal education would be compromised by both the lack of trust they would have in a school counselor whose personal mission was to “convert” them into heterosexuals and the insecurity (which research shows is already considerable in schools that do not have a specific incident such as this going on) that would be ratcheted up by the controversy engendered within the school by the teacher's comments. In publicizing the results of a discipline case heard in 2001, the Ontario College of Teachers noted that the disciplined teacher's comments and actions relating to a gay colleague resulted in “the school atmosphere [deteriorating] and students [being] allowed to mock the teacher in a math class taught by another occasional teacher.” The gay teacher was advised by his federation not to return to the school until the situation was properly addressed (*Professionally Speaking*, 2001).

Troubling aspects of the *Kempling* decision remain. Of particular concern is the British Columbia Supreme Court's confusing, if not incorrect, message about the importance of Kempling's choosing to link his status with his statements. I have already indicated at length why this is problematic and need not repeat the arguments. The issue does, however, need to be addressed and clarified. Moreover, it is also disquieting that both the Supreme Court and Court of Appeal saw fit to truncate the discussion of Kempling's equality rights claim through the application of the similarly situated test: something tantamount to an uncritical pronouncement that teachers as a group cannot in any circumstances be compared to the public at large. Teachers obviously deserve a principled explanation and justification for why they should be viewed as modern-day “Gonzaleses” (*R. v. Gonzales*, 1962, was the notorious case of an Aboriginal man who was convicted for being intoxicated off a reserve and whose equality rights argument was dismissed under the *Canadian Bill of Rights*, 1960, because he was being treated the same way as all Indians under the *Indian Act*, regardless that non-Indians were not subject to such an offence).

Cases like *Kempling* arise out of the collision of fundamental rights: egalitarian rights and civil liberties. A Millian approach suggests that one's rights and liberties extend to the point where they interfere with the exercise of the rights and liberties of others (Mill, 1875). The trick in any democratic society is negotiating the margins of such collisions. We have come to accept by and large that those margins will ebb and flow according to the social

context just as one's general expectation of privacy will vary depending upon the social site in which one finds oneself. Sitting in my home I have a reasonable expectation that my privacy rights run deeper than they would when boarding an aircraft or crossing the border back into Canada. Such an analogy may well apply here and help to explain how the social construction of teachers' role has resulted in the abridgment of their liberties. The sphere of teachers' private lives is considerably smaller than for most other occupations and many other professions; although, make no mistake, plenty of others also sanction members whose private actions bring the profession into disrepute (see, e.g., *Re Morgan*, 1998). We seem much more ready, however, to see teachers as "crossing the border" and thus subject to greater scrutiny. This is an occupational liability that needs to be understood and weighed carefully by everyone pondering entry into the profession.

REFERENCES

- Andrews v. Law Society of British Columbia*, [1985] 1 S.C.R. 143 (S.C.C.).
- Barber, K. (Ed.). (2004). *Canadian Oxford Dictionary* (2nd.ed.). Don Mills, ON: Oxford University Press.
- Canadian Bill of Rights*, 1960 (Can.), R.S.C. 1985, Appendix III, c. 44.
- Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.
- Clarke, P. T. (1994–95). Public school teachers and racist speech: Why the "in-class"/ "out-of-class" distinction is not valid. *Education & Law Journal*, 6, 1–26.
- Clarke, P. T. (1998–99). Canadian public school teachers and free speech: Part III – A constitutional law analysis. *Education & Law Journal*, 9, 315–382.
- Concise Oxford Dictionary*. (1976). Oxford: Oxford University Press.
- Dickinson, G. M. (2003–04). Thoughts, words and deeds: Limiting teachers' free expression – the case of Paul Fromm. *Education & Law Journal*, 13, 131–155.
- Disciplined by the BCCT for expressing Christian position on homosexuality. (2004). Catholic Civil Rights League. Retrieved on October 30, 2004 from, <http://www.ccd.ca/index.php?id=140>
- Education Act* (Ont.), R.S.O 1990, c. E.2.
- Egan v. Canada*, [1995] 2 S.C.R. 513 (S.C.C.).
- Green, M. A. (1995–96). Freedom of speech and teachers' duties: Malcolm Ross – the final chapter. *Education & Law Journal*, 7, 289–300.
- Halpern v. Canada* (2003), 225 D.L.R. (4th) 529 (Ont. C.A.).
- Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827 (S.C.R.).
- Human Rights Act* (N.B.), R.S.N.B. 1973, c. H-11.
- Indian Act* (Can.), R.S.C. 1952, c. 149.
- Irwin Toy v. Quebec (A.G.)*, [1989] 1 S.C.R. 927 (S.C.C.).
- Kempling v. British Columbia College of Teachers*, 2004a, [2004] B.C.J. No. 173 (B.C.S.C.) [QL].
- Kempling v. British Columbia College of Teachers*, 2004b, [2004] B.C.J. No. 2113 (B.C.C.A.) [QL].
- Kempling v. British Columbia College of Teachers*, 2005, [2005] BCCA 327 (B.C.C.A.) [QL].
- Kempling v. British Columbia College of Teachers*, 2005, [2005] S.C.C.A. No. 381 (S.C.C.)

- Kempling, C. (1997a, July 27th). Guest editorial. *Quesnel Cariboo Observer*, n.p.
- Kempling, C. (1997b, August 10th). Response letter to the editor. *Quesnel Cariboo Observer*, n.p.
- Kempling, C. (2000a, July 1st). Letter to the editor. *Quesnel Cariboo Observer*, n.p.
- Kempling, C. (2000b, July 19th). Letter to the editor. *Quesnel Cariboo Observer*, n.p.
- La Forest, G. V. (1996–98). Off-duty conduct and the fiduciary obligations of teachers. *Education & Law Journal*, 8, 119–137.
- Law Society of New Brunswick v. Ryan* (2003), 223 D.L.R. (4th) 577 (S.C.C.).
- Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (S.C.C.).
- Mill, J. S. (1875). *On liberty*. London: Longmans, Green, Reader and Dyer.
- Professionally Speaking. (2001). Re: Stig Arne Korjus. Retrieved on October 30, 2004 from http://www.oct.ca/en/CollegePublications/PS/september_2001/blue6.asp
- Pushpanathan v. Canada (Minister of Citizenship and Immigration)* (1998), 160 D.L.R. (4th) 193 (S.C.C.).
- R. v. Gonzales* (1962), 32 D.L.R. (2d) 290 (B.C.C.A.).
- R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.).
- Re Cromer and British Columbia Teachers' Federation* (1986), 29 D.L.R. (4th) 641 (B.C.C.A.).
- Re Morgan. Law Society of Upper Canada Discipline Committee*. September 24, 1998. Retrieved on October 30, 2004 from, <http://www.canlii.org/on/cas/onlsdc/1998/1998onlsdc10080.html>
- Re Peel Board of Education* (2002), 105 L.A.C. (4th) 15 (Ont. Arb. Bd.).
- Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)* (1990), 56 C.C.C. (3d) 65 (S.C.C.).
- Ross v. New Brunswick School District No. 15* (1993), 110 D.L.R. (4th) 241 (N.B.C.A.).
- Ross v. New Brunswick School District No. 15* (1996), 133 D.L.R. (4th) 1 (S.C.C.).
- Shewan and Shewan v. Abbotsford School District No. 34* (1987), 21 B.C.L.R. (2d) 93 (B.C.C.A.).
- Toronto (City) Board of Education v. O.S.S.T.F., District 15* (1997), 144 D.L.R. (4th) 385 (S.C.C.).
- Vriend v. Alberta* (1998), 156 D.L.R. (4th) 385 (S.C.C.).
- Walker v. Prince Edward Island* (1995), 107 D.L.R. (4th) 69 (P.E.I.S.C.).

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