Crossing the Line: Homophobic Speech and Public School Teachers

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ABSTRACT

The issue of a teacher's expressed homophobic views outside the classroom and how those can be taken to affect his position as a teacher in a public school system has recently come up in the Kempling case. The case raises a host of educational and legal questions. In this article, we examine the competing constitutional claims relating to liberty and equality. On one hand, the teacher maintained that his rights to freedom of expression and freedom of religion, set out respectively under ss. 2(a) and 2(b) of the Charter, allowed him to make his controversial, public comments. On the other hand, the equality rights guaranteed under s. 15 of the Charter protect individuals from discrimination on the basis of sexual orientation. We argue that the suspension of Mr. Kempling by the British Columbia College of Teachers was necessary to uphold the equality rights and interests of gays and lesbians as well as to protect the integrity of the teacher's duty to act as both an educator and a role model.

Key words: Freedom of expression; Freedom of religion; Equality rights; Discrimination & sexual orientation; Educator and role model.

RESUMEN

La cuestión referida al punto de vista homofóbico, expresado por un profesor fuera del aula, y cómo esta cuestión puede afectar a su posición de profesor en un sistema público escolar, ha surgido recientemente con el caso Kempling. Este caso airea numerosas cuestiones educativas y legales. En este artículo, nosotros examinamos las demandas constitucionales competentes referentes a la libertad y a la igualdad. Por un lado, el profesor sostuvo que sus derechos a la libertad de expresión y a la libertad de creencias religiosas, recogidos con precisión bajo los artículos 2(a) y 2(b) de la Carta, le permitían mantener su controversia, sus públicos comentarios. Por otra parte, la igualdad de derechos garantizados bajo el artículo 15 de la Carta protege a los individuos contra la discriminación basada en la orientación sexual. Argumentamos que la suspensión del Sr. Kempling por la British Columbia College of Teachers fue necesaria para mantener la igualdad de derechos y los intereses de gays y de lesbianas, así como para proteger la integridad del deber de los profesores de actuar como educadores y en su papel de modelos.

Descriptores: Libertad de expresión; Libertad de creencias religiosas; Igualdad de derechos; Discriminación por la orientación sexual; Educador y su papel de modelo.

RÉSUMÉ

La question des idées homophobiques expresses d'un enseignant en dehors de la salle de classe, et comment ces vues peuvent être prises de manière à affecter sa position d'enseignante dans un système d'école publique, est survenue récemment dans le cas Kempling. Le cas soulève une foule de questions au point de vue éducationnel et legal. Dans cet article, nous examinons les prétentions constitutionnelles opposées en matière de liberté et d'égalité. D'une part, l'enseignant maintient que ses droits à la liberté d'expression et à la liberté religieuse, tels que décrits respectivement sous s.s. 2(a) et 2(b) de la Charte lui permettent de faire publiquement ses commentaires controversés. D'autre part, les droits à l'égalité garantis sous s. 15 de la Charte protègent les individus contre la discrimination basée sur l'orientation sexuelle. Nous sentons que le retrait de M. Kempling par le Collège des Enseignants de la C.B. était nécessaire pour maintenir l'égalité des droits et les intérêts des gays et lesbiennes ainsi que pour protéger l'intégrité de l'enseignant qui a un devoir de se comporter en éducateur et en modèle de rôle.

Mots-clés: Liberté d'expression; liberté religieuse; droits à l'égalité; discrimination et orientation sexuelle; éducateur et modèle de rôle.

The Problem

THE ISSUE OF A teacher's expressed views outside the classroom and how those can be taken to affect his position as a teacher in a public school system has come up again in the Kempling case. There, a secondary school teacher, who was also a guidance counsellor, made several public statements over an extended period of time, most notably in letters to a local newspaper, condemning homosexuality. In his letters to the local newspaper, Kempling "consistently associated homosexuals with immorality, abnormality, perversion, and promiscuity".¹ He also regularly identified himself as a teacher and a mental health professional. The teacher had a long and unblemished teaching career and a notable record of community service. The matter was taken up by the BC College of Teachers, the organisation that licenses teachers in the province of BC. They decided that Kempling was guilty of conduct unbecoming a member and suspended Kempling's professional teaching certificate for one month.² The British Columbia Supreme Court dismissed an appeal. Holmes J., the judge in that case, gave detailed reasons for dismissing the appeal, reasons based in both administrative law and constitutional law.

The case raises an issue of the competition among various rights claims and how a tribunal or court ought to resolve such a competition. The case raises issues involving the role of a teacher (in this case also a guidance counsellor) in society, what it means to say that a teacher is a role model, and how the rights of a teacher might be constrained in ways that they are not for others. Also raised is the question of the nature of state action and the extent to which a teacher can be said to be performing a government function, even outside the particular hours of government employment. The case raises issues about the extent to which the entitlements of students vis-à-vis their teachers extend to what the teacher does outside of the classroom. The case also raises issues of the nature and extent of the right of non-discrimination on the basis of sexual orientation, and the rights of freedom of expression and freedom of religion. Given that in Canada all of those are entitled to constitutional protection from state action, the question is how they can be balanced or to what extent they can be impinged upon so as to provide some sort of accommodation for all.

In this case, the particular issue arose in the context of expression about homosexuality, but the case has much larger implications. The comments could just as easily have been about the race, ethnicity (as was the all-important 1996 case of Ross³³), religion, health, age and sex of others. In a multi-cultural, pluralistic society such as Canada, all those are factors to which government and government actors must be alive. They are also factors, which ought to be treated with equal seriousness and concern by tribunals and courts. But they are not necessarily categories where the impact of hostile expression can be assessed in identical ways and so there ought not to be a ritualistic approach to assessing harm that applies in all cases. There is no constitutional basis for setting up a hierarchy of rights and entitlements, such that, for example, the evidence of discrimination usual in one situation (e.g., ethnic prejudice) is exactly the sort of evidence that must be provided so as to prove discrimination in a different context (e.g., homophobia).

Kempling argued that the BCCT's decision to discipline him violated his constitutional rights as set out in four provisions of the Charter⁴: ss. 2(a) and (b), guaranteeing freedom of religion and freedom of religion; s. 7 guaranteeing "the right to life liberty and security of the person"; and s. 15(1) guaranteeing equality to "every individual" and "the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on ... religion,...". The judge, however, summarily dismissed the teacher's arguments based on s. 7 and 15(1). We will not, therefore, engage these provisions in terms of Kempling's position. We will examine first the issues relating to the teacher's claims of freedom of religion and freedom of expression. Then we turn to look at the equality arguments against Kempling's stance. We argue that his constitutional rights to freedom of expression and freedom of religion should be restricted for two main reasons. First, it is unlikely that the teacher's discriminatory speech and religious beliefs (as manifested through his writings) are consistent with the underlying rationales of the two "freedoms". Second, the exercise of Kempling's freedoms is inconsistent with his educational obligations to act as a public school teacher. In the context of the interests competing with those of the teacher, we argue that lesbians and gays, particularly lesbian and gay students, have a claim to equality in the context of their education and that this claim can be satisfied only if gays and lesbians are accorded all of the components of full equality for the members of a minority group, namely, compassion, condonation and celebration. For a school official, identifying himself as such, to have prevailing constitutional entitlements to make statements negating all of those elements of equality entails a denial of equality itself.

Homophobic Speech and the Undermining of Values Associated with Freedom of Expression and Freedom of Religion

As to whether imposing sanctions on Kempling infringed his constitutional freedom of religion and expression, Holmes J. ruled that he had no constitutional right, under s. 2(b) of the Charter, to express "strictly personally-held, discriminatory views with the authority of or in the capacity of a public school teacher/counsellor".⁵ He clarified the

distinction between Kempling speaking out qua private citizen and Kempling expressing himself qua public servant: “The appellant was at all times free and remains free to express his views on homosexuality in a non-violent manner qua private citizen”.⁶ What Kempling could not do was to use his authority or capacity as a public school teacher and counsellor to back his discriminatory views. Consequently, the judge held that there was no infringement of the teacher’s freedom of expression.⁷ Holmes J. applied a similar logic when considering an alleged infringement of Kempling’s freedom of religion under s. 2(a) of the Charter: “In other words, there is no authority for the proposition that s. 2(a) guarantees freedom to state or manifest one’s strictly personal beliefs with the purported authority or capacity of one’s professional status”.⁸

Even though the judge held that no violations of ss. 2(b) and 2(a) had occurred, he still considered a second question, namely, if Kempling’s constitutional rights were infringed, was the infringement justified under s. 1 of the Charter, where constitutional protections are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Holmes J. answered this in the affirmative.

In his section 1 analysis, the judge noted that “close attention must be paid to contextual factors”⁹ in ascertaining what constitutes “reasonable limits” to constitutionally guaranteed rights. The judge examined the following contextual factors: the vulnerability of children, the need to protect gays and lesbians as an historically disadvantaged group, the need to maintain professional standards of conduct and the nature/value of Kempling’s expression.¹⁰ In light of these factors, the judge concluded that “considerable deference should be shown the BCCT and a less stringent application of the [s.1] test is warranted”.¹¹

Holmes J.’s section 1 approach is more consistent with the Supreme Court of Canada’s large and liberal approach to interpreting fundamental freedoms including those protected by ss. 2(b) and 2(a).¹² Hence, our analysis proceeds on the assumption that the disciplinary action taken against Kempling constituted a *prima facie* violation of his constitutional rights under ss. 2(b) and 2(a) of the Charter. We argue, however, that Holmes J. was correct in holding that these Charter rights could be restricted under a s. 1 analysis. One of our key arguments is that the very public expression of the teacher’s homophobic and discriminatory beliefs strayed some distance from the core values, which justify freedom of expression and freedom of religion.

Freedom of expression

In all cases involving free speech claims under the Charter, Canadian courts invariably identify three basic values, which justify the constitutional protection of freedom of expression. In *Ross v. New Brunswick School District No. 15*, a unanimous Supreme Court of Canada stated: “The purpose of the guarantee is to permit free expression in order to promote truth, political and social participation, and self-fulfilment”.¹³ Given the centrality of freedom of expression to a democratic society, it is understandable as the court in *Ross* intimated, that this right “should only be restricted in the clearest of circumstances”.¹⁴

Although not explicitly considered in the judgment, it is not difficult to conceive of (at least some of) the arguments Kempling might have made to maintain that his controversial speech was consistent with the values of truth, political participation and self-realization that underscore s. 2(b). From a truth perspective, the teacher could have claimed that he sincerely believes that homosexuality is immoral, abnormal and perverse. This position squares with his personal and subjective truth that heterosexuality is the only acceptable and legitimate form of sexual orientation and expression – even if scientific and contemporary thinking do not support this perspective. After all, as a majority of the Supreme Court of Canada held in *R. v. Zundel*, freedom of expression protects “minority beliefs which the majority regard as wrong or false”.¹⁵

Kempling may also have argued that democracies protect speech that is unpopular or that reflects minority or controversial perspectives. To shut him down simply for expressing these views would preclude his participation in the Canadian polity. Finally, he might have alleged that expressing himself in the ways he did was important to allow him to fulfil his potential as an educator, writer and defender of conventional norms of sexual orientation. In his eyes, this expression was arguably necessary for his personal growth and self-realization. Kempling might have relied on McLachlin J’s view in *R. v. Keegstra* that: “If the guarantee of free expression is to be meaningful, it must protect expression which challenges even the very basic conceptions about our society”.¹⁶

Notwithstanding the arguments put forward by Kempling, Holmes J. rejected them. He in fact noted that the teacher’s homophobic expression was “of low value, being in conflict with the core values behind the s. 2(b) guarantee of freedom of expression”.¹⁷ First, the judge stated that, “Discriminatory speech is incompatible with the search for truth”.¹⁸ He did not flesh this out. In *Ross*, however, a unanimous Supreme Court of Canada explained why racist speech was unlikely to promote the search of truth:

This Court has held that there is very little chance that expression that promotes hatred against an identifiable group is true. Such expression silences the views of those in the target group and thereby hinders the free exchange of ideas feeding our search for political truth. ... However, to give protection to views that attack and condemn the views, beliefs and practices of others is to undermine the principle that all views deserve equal protection and muzzles the voice of truth.¹⁹

Racist speech refuses to accept people for who they are because of their racial and ethnic origins. Similarly, homophobic speech refuses to accept people for who they are because of their sexual orientation. Hence, one can argue that homophobic speech is analogous to racist speech and for the very reasons cited in *Ross* is unlikely to facilitate the search for truth. Outspoken homophobes like Kempling are likely to silence many gays and lesbians who live in fear and are often reluctant to come out of the closet because of the social costs associated with full disclosure. In addition, on a purely scientific or medical level, there is no credible evidence to suggest that homosexuality is

related to “immorality, abnormality, perversion, and promiscuity” as claimed by Kempling. On the contrary, the best evidence shows that homosexuality, just like heterosexuality, is a legitimate and natural form of sexual orientation.

Second, as Holmes J. observed, discriminatory speech precludes gays and lesbians from reaching goals of individual self-realization: “[T]he appellant’s publicly discriminatory writings undermine the ability of members of the targeted group, homosexuals, to attain individual self-fulfilment”.²⁰ Kempling’s speech helps to silence and to marginalize gays and lesbians by undermining their ability to be true to themselves and to others. In this way, his expression precludes self-fulfilment for this vulnerable sexual minority. Finally, as Holmes J. concluded, homophobic speech is inimical to the political process rationale, which also justifies freedom of expression: “[D]iscriminatory speech stifles the speech and societal participation of others, in particular members of the targeted group”.²¹ If the personal is political, silencing of the personal because of one’s sexual orientation makes the political impossible. Furthermore, the closeted students are unlikely to advocate for the rights and interests of other gays and lesbians (if they so choose) and in this way lose an opportunity to participate in the larger polity to which they belong.

The demonization of gays and lesbians is a particularly cruel yet highly effective means of ensuring that this vulnerable minority is precluded from having a political voice in the communities in which they find themselves embedded. People will rarely listen, let alone allow others to speak, if they consider them to be illegitimate. Kempling’s speech is thus successful in frustrating the political process rationale as it applies to gays and lesbians, most particularly the young lesbians and gays who are his students.

Freedom of religion

In *R. v. Big M Drug Mart Ltd.*,²² Chief Justice Dickson of the Supreme Court of Canada underscored the importance of freedom of religion, and defined its central characteristics, in the following language:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.²³

In Kempling, Holmes J. acknowledged that the “publication of views informed by sincerely held religious beliefs is protected by s. 2(a), and the Court may not question the validity of those views”.²⁴

While the exact arguments made by Kempling that the disciplinary action taken against him infringed on his freedom of religion are not set out in the judgment, the arguments would probably be strikingly similar to those advanced by the anti-semitic teacher in *Ross* who challenged a Board of Inquiry’s order removing him from the classroom. The Supreme Court of Canada in that case summed up the teacher’s position vis-à-vis s. 2(a) in this fashion:

In arguing that the order does infringe his freedom of religion, the respondent submits that the Act is being used as a sword to punish individuals for expressing their discriminating religious beliefs. He maintains that “[a]ll of the invective and hyperbole about anti-Semitism is really a smoke screen for imposing an officially sanctioned religious belief on society as a whole which is not the function of courts or Human Rights Tribunals in a free society”. In this case, the respondent’s freedom of religion is manifested in his writings, statements and publications. These, he argues, constitute “thoroughly honest religious statement[s]”, and adds that it is not the role of this Court to decide what any particular religion believes.²⁵

Kempling may well have argued that it is not up to the courts, or anybody for that matter, to dictate to him his views about homosexuality. Notwithstanding the validity of this claim, the justification of the holding and the expression of his homophobic opinions, under the guise of s. 2(a), serves to undermine the very foundation upon which freedom of religion is built. While defining the essence of freedom of religion, Chief Justice Dickson reminds us in *Big M Drug Mart* that: “Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person”.²⁶ It is hard to imagine how the manifestation of religious belief through writing that describes homosexuality as “abnormal, immoral or perverted” respects the “inherent dignity and the inviolable rights of the human person.” Unlike the racist teacher in *Ross*, Kempling did not (technically speaking) attack the religious beliefs of gays and lesbians. Nonetheless, his systematic denigration and defamation of this group, solely on the basis of its sexual orientation, undercuts the very values on which s. 2(a) is founded.

In sum, the conveyance of homophobic and discriminatory expression in a visibly public manner undercuts the very values, which help account for freedom of expression and freedom of religion. Holmes J. was therefore right to conclude that an infringement of Kempling’s constitutionally protected rights, under s. 1 of the Charter, could be justified as constituting “reasonable limits” upon the teacher’s fundamental freedoms. One of the key reasons he gave to explain this infringement was the nature of the Charter rights themselves in the specific circumstances of the Kempling case. As Holmes J. noted: “The low value of the appellant’s expression is a factor militating in favour of a less stringent application of the [s.1] test”.²⁷

The Education Context: Further Justification for Restricting Freedoms

Like all employees, teachers must act honestly, cooperatively, loyally and obediently.²⁸ Yet, public school teachers are different from other employees because of the nature of their work and the status of their position. First, and foremost, teachers are educators who work with our children. Yet, in the process of educating, teachers may also influence students through the formal and informal curriculum. Thus, their position as role models is vitally important. Furthermore, teachers have the status of being professionals, in large measure by virtue of their education, training, and expertise. Although

teachers are employees, they are also educators, role models and professionals.²⁹ When Kempling engaged in discriminatory speech and conduct, his actions could not be reconciled with the specific educational roles he was called to perform.

In his analysis, Holmes J. focused on the professional aspect of teaching. After all, the BCCT disciplined Kempling following charges of professional misconduct or other conduct unbecoming a member. The judge framed the issue in these terms: “The question before the Panel was whether the making and publication of those statements in the circumstances and context in which it was done fell below acceptable standards of professional conduct”.³⁰ As a professional Kempling was expected to act in accordance with the educational system’s core values. In this regard, Holmes J. observed: “Non-discrimination which includes recognizing homosexuals’ right to equality, dignity, and respect, is one of the[se] core values”.³¹ Kempling’s homophobic writings negated any possibility of equality, dignity and respect for gays and lesbians. Consequently, Holmes J. went on to hold that “a finding that those writings were of a discriminatory and derogatory nature can properly form part of the basis of a determination of conduct unbecoming”.³² It should come as no surprise that a hatemonger such as Kempling could not fulfil the requirements of acting in a professional manner.

Although not considered in Holmes J’s analysis, we suggest that Kempling’s behaviour rendered him equally unfit to carry out his duties as both an educator and a role model. To educate comes from the Latin *educare*, which means to “cause to grow”. As educators, teachers are supposed to help their students to develop cognitively, emotionally and psychologically by fostering an open mind, an inquisitive spirit, a critical edge and a caring disposition. In fact, Kempling did just the opposite. He blatantly abused his position of responsibility and authority as a public educator to promote his own distorted personal agenda. Had he innocuously claimed the moon was made of green cheese, nobody would have cared. Instead, the stakes were much higher. Kempling spread lies, promoted intolerance and fomented hatred against a visible minority. Although he was careful not to express his controversial views in the classroom, the educative dimension of his writing did not escape notice because of his highly visible profile in the community. Furthermore, in conjunction with his writing, he expressly identified himself as a teacher and a counsellor as if to lend greater credibility to his teachings.

Teachers are not only educators. They also have a legal duty to act as role models for their students. Section 76(2) of British Columbia’s School Act³³ states that teachers must “inculcate the highest moral standards.” The case law likewise recognizes the role of the teacher as exemplar. In *Attis v. Board of Education of District 15 et al.*, for example, Ryan J.A. declared: “A teacher teaches. He is a role model. He also teaches by example. Children learn by example.”³³⁴ The basic idea central to role modeling is that teacher behaviour has some effect on student behaviour. In other words, consciously or unconsciously students may look to their teachers to learn what conduct is appropriate and what conduct is not. Whatever teacher behaviour is on display cannot undermine the values of the school community. Furthermore, whether the studied deportment occurs on school property or not is largely irrelevant. As a unanimous Supreme Court of Canada explained in *Ross*:

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 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.³⁵

If Fenstermacher⁶ is right in saying that “Children do not enter the world compassionate, caring, fair, loving, and tolerant”, then who will teach them the moral virtues of living? In part³⁷, students will informally learn about morality by scrutinizing the conduct of their teachers, both inside and outside the classroom. Let us never forget that teachers have the potential to exert significant sway over others, including students. Consequently, we hold teachers to account with more rigorous standards because we entrust them with our most valuable resource – our youth. As the Supreme Court of Canada in Ross stated:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system.³⁸

Kempling failed to act as an appropriate role model. His actions violated the public trust placed in him by the educational community and the teaching profession. His claim that ss. 2(b) and 2(a) of the Charter offered him constitutional immunity for his homophobic writings and beliefs must be rejected for compelling educational reasons. Because of the important role-model position of the teacher, there are constraints on what a teacher can express in an active way outside the classroom. This is particularly the case if, as in Kempling, the teacher is “linking his private, discriminatory views of homosexuality with his status and professional judgment as a teacher and secondary school counsellor”.³⁹ Then, as Holmes J says, the teacher calls “into question his own preparedness to be impartial in the fulfilment of his professional and legal obligations to all students, as well as the impartiality of the school system. That in itself is a harmful impact on the school system as a non-discriminatory entity.”⁴⁰

The Competing Equality Interests of Gays and Lesbians

Competing with Kempling’s expression and religion interests will be equality interests of the students, in particular of gay and lesbian students, but also of gays and lesbians generally. It is important to stress the interests of gay and lesbian students in this context because often their very existence is overlooked. Indeed, even in the BCCT’s report on the Kempling decision, gay and lesbian students were not specifically mentioned.⁴¹ In most other cases⁴² where gay and lesbian rights issues have been adjudicated upon in the education context, the focus has been on gay and lesbian adult interests. The invidious position of gay and lesbian students should not be underestimated and very occasionally a judge is alive to it.⁴³

One of the most striking aspects of Holmes J’s reasons in the BC Supreme Court in this case is the fact that he did, at several points, specifically mention the impact of speech such as Kempling’s on homosexual students. He said that student and public

confidence in him and the public school system would be undermined by Kempling's expression and "It would also be reasonable to anticipate that homosexual students would generally be reluctant to approach him for guidance counselling."⁴⁴ This concern for queer students is unusual in Canadian case law.⁴⁵

There are, it is true, a very few other cases where gay and lesbian students have had some direct input in the legal process. Probably the most significant is the Hall case where a high school graduate wanted to take his same-sex date to the prom.⁴⁶ But, in fact, that case highlights the difficult position of a gay or lesbian student. The publicity surrounding the Hall case was intense. Hall was fortunate that he lived in a reasonably supportive environment and his composure and resolution in the face of the media glare is a testament to his fortitude. But it is hardly a situation that school students should be put in in order to defend their equality and education interests. This is especially true in the case of a smaller community where queer students will, as Holmes J. said in Kempling, "likely be deterred from openly espousing opposing views or being public about their sexual orientation."⁴⁷

In this difficult context for young people,⁴⁸ this age of exploring and fixing who they are and trying to conform as best they can, it is hardly an equal contest when they are expected to fight against the interests of an adult such as Kempling, a guidance counsellor, at that, the very person whose job it is to advise them on the appropriate course their lives should take. It must be acknowledged that even now in society – and especially outside the largest cities – gays and lesbians will hardly be the most popular minority groups. Individuals like Kempling will, in their "traditional values" position, have the support of their well organised and influential religious groups. Similarly, they will often have the support of politicians and other elected officials, as the Chamberlain¹⁴⁹ case made clear in the context of the Surrey school board. In considering a contest between these competing interests, Kempling's religion/expression interests and the interests of gay and lesbian students, a court or a tribunal should consider the uneven playing field on which the competition starts.

The equality argument that would be made in this case is that gays and lesbians – students, teachers and others in society – are not being afforded the same atmosphere of respect, inclusion and celebration that is afforded to heterosexuals. A school's acceptance of Kempling, given his expression activity, would constitute a tolerance of such views and the creation of an environment tainted by them for those who must work with and most especially learn from him. His avowed hostility to homosexuality thus constitutes an impairment of the right of those who are homosexual to be treated equally.

Given that gays and lesbians are entitled "to the equality protection and equal benefit of the law without discrimination" under s. 15 of Canada's Charter of Rights and Freedoms,⁵⁰ what does this mean? One of us has argued elsewhere that the contents of true equality must be satisfied on different levels. In order for there to be real legal equality for the members of a given group, the state and its actors must show towards the members of the particular group compassion, condonation and celebration.⁵¹ Absent satisfaction of any one of those elements and the members of the group might have partial equality but not complete legal equality.

In order to satisfy the requirement for compassion, the basic principle of non-discrimination must exist. In the Kempling situation, gays and lesbians are expected to be taught by and get guidance from an individual who clearly despises the essence of who they are. They are thus being treated differently from their heterosexual counterparts. This situation is particularly difficult for gay and lesbian students. In many cases the parents will be hostile to the issue of homosexuality, so this discrimination is not cushioned by or carried together by a supportive family unit.

Likewise, the second level of equality – condonation – is hardly satisfied in this situation. Kempling might argue that it is not homosexuals he has a “problem” with, but homosexual activity. Condonation, however, involves an acceptance of activity involving the members of a particular minority group. This aspect of a homosexual student’s equality can hardly be said to be respected if a school teacher or official who is supposed by his very actions to help guide the actions of a student, is dedicated to trying to prevent homosexual activity. Similarly the interests of gay and lesbian adults are also affected, as the school teacher or official will be taken to be condemning their activity as gay and lesbian adults. The state can hardly be said to be condoning gay and lesbian actions, if its officials are arguing against them.

The final aspect of equality, namely celebration, is also negated in the Kempling situation. When celebration is respected, the state and its agents are actively promoting the value of the members of a particular group. In the context of homosexuals, it means including gay and lesbian material in curricula, proclaiming gay pride days, celebrating gay and lesbian marriage. Kempling’s actions represent the very antithesis of this, for they condemn gays and lesbians and their activities. At the student level, celebration will facilitate gay and lesbian students seeing themselves represented positively in the school actions and activities. It will foster their feeling good about themselves as gays and lesbians, a very difficult thing to do given the atmosphere of hostility towards and denigration of gays and lesbians in the school-yard. Kempling’s actions only validate such exclusion, marginalisation and inferiorisation. They represent the opposite of celebration. How could gay or lesbian students feel valued by the school or positive about their sexual orientation when one of their teachers, again one specifically designated to instruct them as to guidance, is actively arguing that what they are and what they do is wrong?

It might be argued in Kempling that Kempling is simply stating his beliefs and not acting on them, just the same situation as in TWU, where the majority of the Supreme Court of Canada said that homophobic statements prospective teachers made when applying for admission to start their education studies did not constitute acts of discrimination. The Kempling case can be distinguished however on the basis that the Kempling situation is much more invidious than a situation where would-be students sign a statement upon admission to study at an institution. Here is a teacher with some years experience who actively and continuously makes statements prejudicing the equality interests of gays and lesbians including his own students. These statements are not a mere formality, such as is, it might be argued, signing a document giving admission to a degree programme. Kempling’s statements were made as a teacher.

Furthermore, in order to find an infringement of the equality interests of gays and lesbians, it should not be necessary to prove actual instances of homophobic acts in the school that follow from Kempling's writings. In *Ross*, the Supreme Court of Canada thought important the evidence of anti-Semitism in the school where Ross worked and tied that evidence to Ross's expression.⁵² La Forest J said: "where a 'poisoned' environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant."⁵³

However, in the case of homophobia, gay and lesbian students face so much of this, it would be difficult to attribute it specifically to Kempling's actions. Furthermore, especially given the absence of parental and family support, gay and lesbian students will be more than a little hesitant to bring specific complaints forward. Parents may well not care either. The court must not expect the same degree of direct connexion between a teacher's action and a discriminatory environment in the case of homophobia that it might expect in other situations. Given the pervasiveness of homophobia, it is very easy for a homophobic teacher to hide within or blend into the pervasive homophobia and avoid specific attribution of the consequences of his actions on the discriminatory environment. It would be tragic if the courts in essence throw their hands up and say equality cannot be protected and homophobic expression not stopped in the schools because of the difficulty of pinning responsibility for a particular homophobic act on a particular teacher's particular expression.

Fortunately, Holmes J. in the BC Supreme Court did not accept that speech cannot constitute discrimination as a matter of law or that conduct must be directed against a particular individual to constitute discrimination.⁵⁴ The BC Human Rights Code itself brings certain publications within the scope of the discriminatory.⁵⁵ Furthermore, Holmes J. said that the fact that there was no evidence in this case of a "poisoned" school environment or specific complaints against Kempling did not mean that Kempling could not be disciplined.⁵⁶ This approach to the finding of discrimination is much more consonant with objectives of equality protection and it is to be hoped that this open approach sets the tone in future cases.

Resolving the Competition

Of primary importance in resolving the tension between interests in the Kempling case is the fact that the students involved have much less choice in the whole process than does Kempling. The students cannot really opt to go to a different school. Even if the students were geographically situated so as to make that possible, then they could only do that with the consent of their parents. Raising the issue would mean in many cases outing themselves. It would mean explaining the move to friends and neighbours. In the hostile environment that exists for many students that is simply not a fair or appropriate expectation. Furthermore, many students will not in fact be sure about their sexuality or there may be other factors that mean that decisions cannot be based solely or even mainly on their sexual orientation.

Courts and tribunals should be alive to the particular difficulties faced by children in any sort of rights assertion process. Holmes J. in *Kempling* was particularly so alive. It is important to find a way for children to be comfortable bringing these issues of sexual orientation before the institutions of the law or having others bring them. Courts and tribunals ought not to make demands in terms of evidence or expect the same clarity of position in the case of children involved in legal issues. Courts have to accept that gay and lesbian children may not speak about the issues relating to their homosexuality in a way so direct as an adult might or with the same precision and certainty. An outside adult, not necessarily related, might have to speak for a gay or lesbian child on an issue of homosexuality. A court has to be better at anticipating these issues that affect gay and lesbian children, at being sensitive to potential harm. The courts must not assume that homosexuality is not an issue just because the person in front of the court or implicated in the case before the court is not being as clear or direct about the matter as an adult might be. Holmes J. was able to put himself “in the shoes” of a queer student in *Kempling’s* school.

Of particular importance in this balancing of rights and freedoms is the constraint on the child in terms of participating in the education system. Also, as we have argued important is the fact that the *Kempling* situation, if permitted, denies all aspects of a gay or lesbian child’s equality interests. On the other hand, *Kempling* has much more flexibility in terms of options. He knows that, upon becoming a teacher, there are certain expectations and that he is seen as a holder of multiple roles, namely, professional, educator and role model. While he might not properly be constrained from having certain views, the espousal of those views in particular public ways, especially qua teacher, is rightly regulated. He has other options than being a school teacher and he has options in the context of being a school teacher. While this resolution unquestionably puts constraints on individuals like *Kempling* that other positions in society do not, the gay or lesbian student, by contrast has no real choice at all and is infinitely the more vulnerable of the two.

The BCCT clearly made the right decision in its resolution of the issues and the BC Supreme Court rightly upheld that resolution. By engaging in homophobic expression, in the manner in which he did, *Kempling* crossed the line and was justifiably disciplined. The question remains, however, why the homophobic statements of *Kempling* warranted only a one-month suspension of the teaching certificate, while the Supreme Court of Canada specifically approved the 18-month suspension in *Ross* for anti-Semitic expression. Could it be that homophobia is still not treated as so egregious as other forms of discrimination, even by so progressive a body as the BCCT?

References

1. *Kempling v British Columbia College of Teachers*, 2004 BCSC 133, para 34.
2. See BCCT Report to Members, vol. 14, no. 4, summer 2003, p. 6.
3. The *Kempling* case is strikingly similar to the *Ross* case, [*Ross v New Brunswick School Dist. No. 15*, [1996] S.C.J. No. 40] where a teacher was removed from his teaching position because he had made public anti-Semitic writings and statements while he was off-duty as a teacher. The Supreme Court of Canada in that case made some important statements about the position of a teacher. It found that while Ross's freedom of expression, protected under s. 2(b) of the Charter, had been infringed, that violation was demonstrable justified under s. 1 of the *Charter*. The *Ross* case will be important in resolving the *Kempling* case, though there are some differences.
4. Part I of the *Constitution Act*, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11. (subsequently referred to as the *Charter*).
5. *Kempling*, *supra*, note 1, para 73. In his writings to the local newspaper, Kempling identified himself on three separate occasions as a teacher and counsellor and explicitly linked his personal views to his professional standing as a teacher and counsellor.
6. Here, the judge relied on *Walker v. Prince Edward Island*, 107 D.L.R. (4th) 69 (P.E.I.S.C. - A.D.), subsequently affirmed by the Supreme Court of Canada [1995] 2 S.C.R. 407.
7. Holmes J. refused Kempling's claim that his conduct was similar to that of a fellow teacher in the case of *Morin v. Prince Edward Island Regional Administrative Unit No. 3 School Board* (2002), 213 D.L.R. (4th) 17 (S.C. - A.D.) In *Morin*, the school principal forbade a teacher to show a film on religious fundamentalism to his Grade 9 class. The court ruled that this infringed the teacher's s. 2(b) rights. Holmes J. distinguished *Morin* on the following grounds: "In *Morin*, the prohibition was on the showing of the film itself to the students. Here, the sanction by the BCCT goes really to the appellant's wrongful public linking of his professional position to the off-duty expression of personally-held discriminatory views in order to lend credibility to those views, as well as addressing the resulting harm to the school system." (para. 77)
8. *Supra*, note 1, para 80.
9. *Ibid.*, para 87.
10. *Ibid.*, para 87-99.
11. *Ibid.*, para 99.
12. In *Ross*, for instance, the Supreme Court of Canada stated:
 [T]his Court has adopted a two-step enquiry to determine whether an individual's freedom of expression is infringed. The first step involves determining whether the individual's activity falls within the freedom of expression protected by the Charter. The second step is to determine whether the purpose or effect of the impugned government action is to restrict that freedom.
Supra, note 3, para 61.
 In *Kempling*, the teacher's expression fell within the ambit of s. 2(b) because it "conveyed meaning" (see *Irwin Toy Ltd. v. Quebec (Attorney General)* [1989] 1 S.C.R. 927) and was not articulated in a "physically violent form." (see *R. v. Keegstra* [1990] 3 S.C.R. 697). Furthermore, the purpose and effect of the BC College of Teacher's suspension was to restrict the teacher's freedom of expression. The Supreme Court of Canada has also held (in *Ross*) that a public school teacher's right to make virulently anti-Semitic statements, when not on the job, received *prima facie* protection under ss. 2(b) and 2(a) of the *Charter*. In *Ross*, the local community certainly knew that the person making anti-semitic comments (in his writings and through the media) was a well-known educator even if he never signed his work as a teacher or linked his personal views to his professional rank.
13. *Ross*, *supra*, note 3, para 59.
14. *Ibid.*, para. 60.
15. *R. v. Zundel*, [1992] 2 S.C.R. 731, at 752.

16. *Supra*, note 12 at p. 842
17. Ross, *supra*, note 3, para. 95.
18. *Kempling, supra*, note 1, para 96.
19. *Supra*, note 3, para 91.
20. *Supra*, note 1, para 96.
21. *Ibid.*, para 97.
22. [1985] 1 S.C.R. 295
23. *Ibid.*, 336
24. *Supra*, note 1, para 79. The judge's authority for this proposition comes from the Supreme Court of Canada's decision in *R. v. Jones*, [1986] 2 S.C.R. 284.
25. Ross, *supra*, note 3, para. 70
26. *Supra*, note 22, p. 336
27. *Supra*, note 1, para 98.
28. See D.J.M. Brown & D.M. Beatty, *Canadian Labour Arbitration*, 3ed. . Aurora, ON: Canada Law Book, 1988.
29. One of the authors has examined elsewhere how these various roles relate to teacher claims to free speech in both an employment law and constitutional law context. See Paul T. Clarke (1998) – Canadian Public School Teachers and Free Speech : Part I – An Introduction, *Education & Law Journal*, Vol. 8, 295-314, 302-314
30. *Supra*, note 1, para 39.
31. *Ibid.*, para 5.
32. *Ibid.*, para 39.
34. [1994] 142 N.B.R. (2d) 1 (C.A.) at 35. Even though Ryan J.A. wrote for the dissent, the majority did not challenge this legal principle.
35. *Supra*, note 3, para 44. The Court's reference to the teacher as *medium* is borrowed from the work of Alison Reyes who considers the importance of teachers in the education process and the impact that they bear upon the system. As Reyes notes: "Teachers are a significant part of the unofficial curriculum because of their status as "medium." In a very significant way the transmission of prescribed "messages" (values, beliefs, knowledge) depends on the fitness of the "medium" (the teacher)." See, "Freedom of Expression and Public School Teachers" (1995), 4 Dal. J. Leg. Stud. 35, at p. 42.
36. G.D. Fenstermacher, "Some Moral Considerations on Teaching as a Profession." In J. I. Goodlad, R. Soder and K.A. Sirotnik (Eds.), *The Moral Dimensions of Teaching* (San Francisco: Jossey-Bass, 1990) at 132.
37. Other important sources of morality include family and religion.
38. *Supra*, note 3, para. 45.
39. *Kempling, BCSC, supra*, note 1, para. 46.
40. *Ibid.*
41. BCCT Report to Members, vol. 14, no. 4, summer 2003, p. 6.
42. Most notable, of late: *Trinity Western University v British Columbia College of Teachers 2001 SCC 31* ["TWU"]; *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 ["Chamberlain (SCC)"].
43. E.g. by L'Heureux Dubé J in *TWU* where she said: "... lesbian, gay, and bisexual youth ... do not enter the school environment with the same level of family support and understanding that other members of minority groups do. *TWU*, *supra*, note , para. 81. On judicial (lack of) understanding about queer issues, see Bruce MacDougall, *Queer Judgments: Homosexuality, Expression and the Courts in Canada*, Toronto: University of Toronto Press, 2000.
44. *Kempling, BCSC, supra*, note 1, para. 48. See also paragraphs 97 and 102.
45. See Bruce MacDougall, "The Legally Queer Child" (2004), 49 McGill Law J 3.
46. *Hall (Litigation guardian of) v Powers* (2001), 59 OR (3d) 423 (SCJ). See Bruce MacDougall, "The Separation of Church and Date: Destabilizing Traditional Religion-Based Legal Norms on Sexuality" (2003), 36 UBC Law Rev. 1.

47. *Kempling*, BCSC, *supra*, note 1, para. 97.
48. See, eg, *Jubran v Board of Trustees* (2002) BCHRT 10, 42 CHRR D/273 (BCHRT); *North Vancouver School Dist. No. 44 v Jubran*, 2003 BCSC 6. William Black, “Grading Human Rights in the Schoolyard: Jubran v. Board of Trustees” (2003), 36 UBC Law Rev. 45 at 52
49. *Supra*, note 42.
50. See, eg, *Egan v Canada*, [1995] 2 SCR 513; *Vriend v Alberta*, [1998] 1 SCR 493.
51. Bruce MacDougall, “The Celebration of Same-Sex Marriage”, (2000-01), 32 Ottawa L. Rev. 235, esp. 252-260
52. *Ross, supra*, note 3, para 40, 101.
53. *Ibid.*, para 45.
54. *Kempling*, BCSC, *supra*, note 1, para. 38.
55. *Human Rights Code*, RSBC 1996, c. 211, ss 1,7.
56. *Kempling*, BCSC, *supra*, note 1, para. 42.