CHRONOLOGY OF RELEVANT DATES IN THE LITIGATION

The Intervenor, Canadian Religious Freedom Alliance ("CRFA"), adopts the chronology in Mr. Kempling's Factum

OPENING STATEMENT

> *"[F]reedom of speech means not just the right to question the dominant political structure, but to question the dominant society and culture*."
>
> Iacobucci J. (in dissent), *Little Sisters Book and Art Emporium* v. *Canada*, [2000] 2 S.C.R. 1120 at p. 1260

Under the plain language of the *Canadian Charter of Rights and Freedoms* (the "Charter") "everyone" enjoys freedom of expression and religion. The court below radically altered these guarantees by limiting the protection of ss.2(a) and 2(b) to individuals in their "personal capacity", but not in their professional capacity. There is no precedent for such a restriction of those fundamental freedoms.

The decision below contained two fundamental flaws. First it created two kinds of citizens: those who enjoy fundamental freedoms and those who do not because they have chosen to pursue a professional occupation. Professionals, be they teachers, lawyers, doctors, accountants or dentists, possess the same fundamental freedoms as other citizens, both on the job and off. By electing to become a professional, one does not give up one's rights to expressive freedom or expression of religious belief. While the fundamental freedoms of professionals, just like the fundamental freedoms of any other person, are not absolute, they exist to the same extent and degree as the fundamental freedoms of any other person, subject only to limitations justified under section 1.

Second, the decision eviscerates sections 2(a) and (b) of the Charter by removing their protection from where it is most needed: unpopular or controversial beliefs and speech. The categorization of ideas or speech as "discriminatory" far too easily can become a means of shutting down one side of a debate, especially where controversial issues like sexual morality are involved. Labelling the content of speech as "discriminatory" is not sufficient to justify an infringement of

a person's freedoms of expression or religion. To justify a limitation on religious and political expression under section 1 of the Charter requires, at a minimum, evidence that the speech in issue has caused actual harm. Mere disagreement with the message or belief conveyed does not constitute proof of harm. The court below upheld a limitation on religiously-based speech in the absence of such evidence. Such a legal precedent, if left undisturbed, will have a chilling effect on professionals who will refrain from engaging in political and religious expression deemed "discriminatory" for fear of discipline by their professional bodies. Further, it appears to allow professional bodies to censor their members' public expression. This is not acceptable in a free and democratic society.

PART 1 – STATEMENT OF FACTS

1. The CRFA accepts the facts as set out in the Appellants' Factum.

2. The CRFA is comprised of four organizations: the Evangelical Fellowship of Canada, the Catholic Civil Rights League, the Christian Legal Fellowship and the Christian Teachers' Association of British Columbia. These organizations have an interest and an established history of interventions in cases involving freedom of religion and freedom of expression. By Order of Rowles J.A. on October 14, 2004, the CRFA was granted leave to intervene in this appeal.

PART 2 – ISSUES ON APPEAL

3. The CRFA will make submissions on the following issue, as described in Part 2 of the Appellant's Factum:

> **Issue I:** The Judge erred in fact and in law in finding that Mr. Kempling's *Charter* rights were not infringed.

PART 3 – ARGUMENT

4. The CRFA submits that the Learned Judge erred:

(a) in finding that the decision of the Respondent, the British Columbia College of Teachers ("BCCT"), did not infringe the rights of Mr. Kempling under s.2(a) and s.2(b) of the *Charter of Rights and Freedoms*; and

(b) by applying an incorrect approach to his section 1 analysis; in particular by characterizing Mr. Kempling's speech as "discriminatory" and failing to properly apply the harm principle in his justification analysis.

A. THE CHARTER'S FUNDAMENTAL FREEDOMS ARE NOT LIMITED TO CONDUCT IN ONE'S "PERSONAL CAPACITY"

5. Sections 2(a) and 2(b) of the *Charter* extend their guarantees to "everyone". Holmes, J. erred when he effectively limited those protections to "everyone in their personal capacity". Such an interpretation runs afoul of the plain language of the *Charter* and the jurisprudence under sections 2(a) and 2(b) of the *Charter*. It severely restricts professionals in the exercise of their fundamental freedoms.

A.1 Restricting the Protection of Section 2 to Activity in One's Personal Capacity Contradicts the Plain Language of the Charter

6. Section 2 of the *Charter* provides that:

> "**Everyone** has the following fundamental freedoms:
> (a) freedom of conscience and religion;
> (b) freedom of thought belief, opinion and expression, including freedom of the press and other media of communication." (emphasis added)

Nowhere does the language of the *Charter* suggest that the fundamental freedoms of section 2 are enjoyed only when a person engages in "non-professional" activities. Whether a person speaks out as a teacher, lawyer, doctor, laborer or farmer, each person enjoys the full scope of the freedoms guaranteed by ss. 2(a) and (b), subject only to limits justified under section 1 of the *Charter*. In effect, Holmes J. read into section 2 words that do not exist and thereby

fundamentally limited the fundamental freedoms guaranteed by the *Charter*. Section 2 does not read "everyone acting in his or her personal capacity", but simply "everyone".

A.2 Restricting the Protection of Section 2 to Activity in One's Personal Capacity Contradicts the Jurisprudence under Sections 2(a) and 2(b) of the Charter

(a) Section 2(b): Freedom of Expression

7. It is trite law that in Canada freedom of expression protects controversial speech. As long as an activity is expressive in nature and is conveyed by non-violent means it enjoys the protection of section 2(b). That is the first step of any s.2(b) analysis as the Supreme Court of Canada made crystal clear in *Irwin Toy Ltd.* v. *Quebec*, [1989] 1 S.C.R. 927. At page 968, it stressed that section 2(b) protects "all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream". Under the second step of the *Irwin Toy* analysis, "[i]f the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed", it contravenes s.2(b) (page 974).

8. In *Irwin Toy* (page 969), the Supreme Court adopted the wording of the European Court in the *Handyside* case as support for its broad approach to freedom of expression, stating that the guarantee:

> ... is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broad-mindedness without which there is no "democratic society.

9. Although Holmes, J. acknowledged that the *Irwin Toy* two-step test governs any freedom of expression analysis, he departed from that paradigm by asserting that s.2(b) would only protect a person's speech if that person were speaking while wearing "the right hat". Put simply, the court below held that if the speaker is wearing a hat labelled, "I am speaking in my personal capacity", the speaker is an "everyone" protected by section 2(b) of the *Charter*. But if the speaker is wearing a hat that says, "I am a teacher and this is what I think", that person no longer is an "everyone" with full protection under section 2(b). This is a very odd proposition of law that finds no support in the jurisprudence, including the jurisprudence involving teachers.

10. *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 was a case involving a teacher. At issue was the constitutionality of conditions in a human rights order disciplining him for his public campaign of Holocaust denial and anti-Semitism while off-duty, which had resulted in growing anti-Semitism in Moncton-area schools. The Supreme Court of Canada upheld a finding that the school district had discriminated against Jewish students by failing to take action against the teacher for his statements. Notwithstanding this conclusion, the Court held (at p.863) that the board's order infringed the teacher's freedom of expression. In reaching that conclusion, LaForest, J., for a unanimous court, stated (at p. 865):

> There can be no doubt that the first step is satisfied. The writings, publications and statements of Malcolm Ross constitute expression within the meaning of s. 2(b). They clearly convey meaning. The truth or falsehood of their contents is not a matter to be considered in the context of determining whether they fall within the guarantee of freedom of expression; nor is the unpopularity of the views espoused within them.

As to the second step of the *Irwin Toy* test, the Supreme Court found that the board's order restricted the teacher's freedom of expression (at para. 66). There is no suggestion in *Ross* that the protection afforded by s.2(b) to a teacher depended on whether the teacher was speaking in a "personal capacity" or in a "professional capacity". With respect, the decision of Holmes J. is contrary to the Supreme Court of Canada's decision in *Ross.*

11. The court below reached its conclusion that section 2(b) does not protect a teacher's right to "express or to purport to express strictly personally-held, discriminatory views with the authority of or in the capacity of a public school teacher/counselor" by relying on the decision of in *Walker v. Prince Edward Island* (1993), 107 D.L.R. (4th) 69 (P.E.I.S.C.A.D.). The CRFA concurs with the Intervenor, the British Columbia Civil Liberties Association, that the court below misunderstood and misapplied the *Walker* decision.

Reasons for Judgment, para. 73

12. *Walker* involved provisions in a statute prohibiting persons who were not chartered accountants from practicing or representing himself as a "public accountant". The P.E.I. Court of Appeal upheld the constitutionality of the rule on the basis that it simply prevented people from misrepresenting their qualifications (at para. 7):

> However, in my view, s. 14(1) of the *Public Accounting and Auditing Act* does not contravene s. 2(b) of the Charter even if some aspects of public accounting and auditing do meet the very broad definition given to the term "expression" by the Supreme Court of Canada in *Irwin Toy*. **I have come to that conclusion because s. 14(1) does not prohibit anyone from expressing themselves about any accounting matter; it only restricts the capacity in which they can do so**. What it does is prohibit those who are not authorized by the Institute from carrying on business as, laying claim to the authority of, or representing themselves to be public accountants… [emphasis added]

Unlike the *Walker* case, Holmes J.'s decision does not restrict the capacity in which people may express themselves on expert or technical matters. Instead, it restricts the ability of certain people from expressing themselves on matters of general public interest because of their professional status.

13. The Court in *Walker* went on to state at pages 73-74:

> … A construction which would have s. 2(b) include a guaranteed right to carry on a business, to practise a profession, to be regarded as authoritative in a field, or to charge a fee for services as a public accountant overshoots its purpose and goes beyond what is necessary to give effect to it. Accordingly, the trial judge went too far in this case and erred in law by interpreting s. 2(b) so that it would not only guarantee a right to communicate opinions and ideas but also include the right to have them recognized as authoritative and to charge the public for them.

The Supreme Court of Canada dismissed the appeal, with the Chief Justice ([1995] 2 S.C.R. 407) only stating (page 409):

> In light of our previous decisions as regards ss. 2(b), 6 and 7 of the *Canadian Charter of Rights and Freedoms*, we are all of the view that there has been no restriction to those rights in this case.

14. *Walker* appears to stand for the proposition that a rule that prohibits a person from representing to the public that he can speak authoritatively on a technical matter does not infringe section 2(b) of the *Charter* when that person does not possess the professional qualifications to make such authoritative statements. (The decision of the Supreme Court of Canada leaves some ambiguity as to the actual ratio of the judgment.) It is very difficult to see how the court below extracted from *Walker* the radically different, and logically unconnected, proposition that a professional does not have the same right speak out on matters of general interest as others.

15. In the case at bar Mr. Kempling did not hold himself out as qualified to practice as a teacher when he lacked the requisite qualifications, which would be the situation analogous to that in the *Walker* case. Here, he was writing on a matter of general public interest – the public policy implications of sexual conduct. The CRFA submits that in no sense can Mr. Kempling's case be considered similar to the situation in *Walker.*

(b) Section 2(a): Freedom of Religion

16. The expression for which Mr. Kempling was punished was motivated by his religious beliefs as evidenced in the following of his published statements:

- "There is a petition circulating in my church against Bill C-23, which extends legal recognition to homosexual relationships …" **Appeal Book ("A.B.")**, **p. 19**
- "The majority of religions consider this behaviour to be immoral …" **A.B., p. 39**
- "To all my critics I say, 2 Peter 2:4-19. Read it and weep." **A.B. p. 43**
- "And although certain churches have opened their doors and even pulpits to practicing homosexuals, we consider that to be apostacy and so do many of their congregants who are leaving in droves." **A.B. p. 45**
- "My religion prohibits me from hating anyone and I have tried very hard to emphasize that my concerns rest solely with moral and religious issues. Indeed, it is my contention that the School Act obliges me to inveigh against immoral behaviour." **A.B., p. 50**

17. A very close link exists between aspects of s.2(a)'s guarantee of freedom of religion and freedom of expression under s.2(b). In the seminal case of *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295, Dickson, J. (as he then was), in the course of defining the scope of freedom of religion under the *Charter*, stated that the "essence" of s.2(a) protects the "right to declare beliefs … without fear of hindrance or reprisal"(page 336).

18. In the recent decision of *Syndicat Northcrest v. Amselem*, 2004 S.C.C. 47, both the majority and minority of the Supreme Court re-affirmed the expansive definition of freedom of religion articulated in *Big M Drug Mart, supra*, and Bastarache, J., for the minority, re-iterated that freedom of religion has two elements (para. 137):

> First, there is the freedom to believe and to profess one's beliefs; second, there is the right to manifest one's beliefs, primarily by observing rites, and by sharing one's faith by establishing places of worship and frequenting them.

The profession of one's beliefs, including how they apply to matters of morality, thus engages both ss. 2(a) and 2(b) of the *Charter*.

19. The misreading of the *Walker* decision by Holmes, J. in respect of section 2(b) of the *Charter* equally affected his analysis of Mr. Kempling's argument under section 2(a). After referring to a number of decisions of the Supreme Court of Canada, Holmes, J. stated:

> …in none of these cases has the scope of s. 2(a) been extended beyond its exercise by citizens in their personal capacity. 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.
>
> ***Reasons for Judgment,*** para. 80

The CRFA submits that the proper analysis should be the reverse. Section 2(a) is not subject to internal limitations. In *B(R) v. Children's Aid Society*, [1995] 1 S.C.R. 315, Mr. Justice LaForest stated (at pp. 383-384):

> This Court has consistently refrained from formulating internal limits to the scope of freedom of religion …; it rather opted to balance the competing rights under s. 1 of the *Charter*...

20. The court below failed to point to any jurisprudence of the Supreme Court of Canada to support its novel proposition that s. 2(a) does not extend its protection to "everyone", in accordance with the plain language of the section, but only to "everyone in his or her personal capacity" and failed to deal with the jurisprudence that discourages internal limits to section 2.

21. The protection of section 2(a) of the Charter is not confined to situations where a person is wearing his "personal capacity hat". For many religious belief goes to the core of their human entity and influences all aspects of their human conduct. The centrality of religion to human dignity was recognized by the Supreme Court in *Amselem, supra* (para. 39):

> In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition

> and spiritual fulfillment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith.

22. Because religion is linked so closely to one's self-definition, it is impossible to expect teachers or other professionals to detach themselves from their religious beliefs when entering into debates on issues of general public interest. In *Chamberlain* v. *Surrey School Board*, [2002] 4 S.C.R. 710 (at para. 19) the Supreme Court of Canada rejected an artificial segregation of religious belief in one's participation in public life.

23. The conclusion reached by Holmes, J. also ignores the decision of the Supreme Court of Canada in *Trinity Western University* v. *British Columbia College of Teachers*, [2001] 1 S.C.R. 772. In that case the BCCT denied accreditation to TWU's nascent teacher education program on the basis that the university's code of conduct called for students to refrain from, *inter alia*, homosexual practices. The Supreme Court rejected the BCCT's reasoning. In course of its reasons for judgment, the court gave weight to the section 2(a) claims asserted by TWU; freedom of religion was given full play in the case of a teaching institution, a position directly contrary to the assertions made by the court below (see pp.809-811).

24. In the result, Holmes J. erred in holding that Mr. Kempling's section 2(a) rights were not infringed by the actions of the BCCT.

A.3 Restricting the Protection of Section 2 to Activity in One's Personal Capacity would limit the Expressive and Religious Freedom of Professionals

25. Holmes, J. distinguished between an individual speaking in his or her "personal capacity" from speaking "with the purported authority or capacity of one's professional status". Holmes, J. appeared concerned that if a person speaks in a professional capacity, the person's views will possess more credibility. The CFRA submits that there are several problems with this analysis.

> ***Reasons for Judgment*****,** para. 77

26. First, as a matter of principle it is not obvious why the scope of the fundamental freedom enjoyed by the speaker should expand or contract according to the credibility or weight that the hearer might place on the speaker's words. Second, placing greater restrictions on speech that

might be viewed as more credible by a listener because of the training and education of the speaker seems completely counter-intuitive. One of the purposes served by sections 2(a) and 2(b) of the Charter is the pursuit of truth. Yet the approach taken by Holmes, J. would result in a situation where the greater one's education and training, the heavier the restrictions placed on one's speech, even when motivated by religious belief.

27. Further, the approach taken by Holmes, J. would have a chilling effect on professionals speaking out on matters of public interest especially if they wish to speak out on the unpopular, or "politically incorrect" side of an issue. Take a current, practical example. Same-sex marriage cases have been argued in many provinces over the past few years and some parties have argued that the definition of marriage should not be changed to include same-sex couples. Suppose a local television station invited lawyers representing both sides of the issue to participate in a panel discussion and one of the lawyers planned to argue, for religiously-based reasons, that relationships between same-sex couples were different in nature from those between men and women and therefore could not be considered the same as a marriage. Under the approach of Holmes J., what steps should the lawyer take to ensure that her statements are protected under ss.2(a) and (b) of the *Charter* and thereby mitigate the threat of professional discipline?

28. Would she have to ask the television station to ensure that she was not identified as a lawyer? If the lawyer is prominent and known in the community to be a lawyer, such a precaution might still not let her speak.

29. Or should the lawyer announce that she was speaking only in her personal capacity and not as a lawyer? Most in the audience would probably regard that as a silly statement – why would the lawyer even be on a panel of lawyers unless she was to speak as a lawyer?

30. Or would the lawyer be driven to the conclusion - which is the logical outcome of the analysis of Holmes, J. – that the safest course would be to decline to participate on the panel lest she incur the wrath of her professional body for "conduct unbecoming a professional"? A chilling effect on public debate would thereby occur.

31. The CRFA submits that a further difficulty exists with the analysis of the section 2 guarantees by Holmes J. It requires individuals with professional credentials to artificially segregate their identities, depending on the context in which they speak. Every individual has a variety of identities: parent, teacher, spouse, citizen, etc. The decision of Holmes J would require each individual to exercise their freedom of religion and freedom of expression only when acting within some, but not necessarily all, of their identities. As submitted above, section 2 does not require individuals to compartmentalize their lives and only maintain religious faith in certain contexts. Free Canadians are permitted to allow their religious faith to permeate their lives and to speak and participate in society accordingly.

A.4 Summary

32. The CFRA therefore submits that Holmes, J. erred in holding that the decision of the BCCT did not infringe the Appellant's freedoms of expression and religion under the *Charter*.

B. SECTION 1 ANALYSIS

33. The CRFA submits that the court below made two key errors in its section 1 analysis:

(a) it mischaracterized the nature of Mr. Kempling's activity and the nature of the expression at issue (see *Thomson Newspapers* v. *Canada*, [1998] 1 S.C.R. 877 at para. 91); and,

(b) it did not require the BCCT to prove the degree of harm necessary to justify an infringement of Mr. Kempling's freedoms.

The CRFA submits that this is not a case of competing rights since there was no finding by the BCCT that Mr. Kempling's statements had a specific or direct impact on public school education in Quesnel. There was no evidence that Mr. Kempling discriminated against the students he taught or counselled, nor was there any evidence that his letters to the editor created a poisoned environment in the Quesnel schools (as in *Ross, supra).* All the BCCT was able to conclude was that, in its opinion, Mr. Kempling "was not prepared to take into account the core values of the educational system…" (**A.B., p. 17**). The CRFA submits that more is required before an infringement of section 2 rights can be justified.

B.1 Nature of the Activity Restricted: Political and Religious Speech on an Issue of Public Importance

34. As part of his section 1 contextual analysis Holmes, J. found that Mr. Kempling's speech was of "low value". That conclusion strongly influenced the proportionality analysis conducted by the court. The CRFA submits that given its religious and political content, the nature of Mr. Kempling's expression was at the core of the ss.2(a) and (b) guarantees and ought not to have been described as being of "low value".

Reasons for Judgment, para. 95

(a) The Political Dimension of Mr. Kempling's Speech

35. Mr. Kempling was disciplined for writing a guest editorial in, and several letters to, the editor of a local paper. The content of all Mr. Kempling's expression concerned issues of sexual morality. Specifically, Mr. Kempling voiced his opinion that homosexual activity is immoral. Some of Mr. Kempling's statements contained a political dimension. As appears from the schedule to the Citation issued by the BCCT, reproduced at paragraph 4 of Mr. Kempling's Factum, some of the statements were comments on municipal, provincial and federal executive decisions or legislative initiatives. The Citation states, *inter alia*:

> 5. On July 27, 1997 an editorial written by Mr. Kempling was published in the Quesnel Cariboo Observer entitled "**NDP try social engineering** – Same sex spouses aren't a stable family unit.
>
> 11. On April 12, 2000 the Quesnel Cariboo Observer published a letter to the editor from Mr. Kempling regarding a **petition at his church against Bill C-23** dealing with the recognition of homosexual relationships.
>
> 13. On July 1, 2000 the Quesnel Cariboo Observer published a letter to the editor from Mr. Kempling which **commented on the decision of Quesnel City Council** to declare August 5th as Lesbian, Gay, Bisexual and Transgender Pride Day.
>
> 15. Between July 22 and August 12, 2000 Mr. Kempling wrote **letters to Quesnel City Council members** regarding sexual orientation matters.
>
> **A.B.,** p.9 [emphasis added]

36. In *R.* v. *Keegstra*, [1990], 3 S.C.R. 697, Dickson, C.J. stated (at pp.763-764):

> The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.

In *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, the Supreme Court of Canada re-affirmed that political speech lies at the core of the guarantee of freedom of expression. (see paras. 11, 12 and 84)

37. The court below ignored the political nature of much of Mr. Kempling's speech. As a result, it ironically (and erroneously) concluded that Mr. Kempling's speech conflicted with one of the core values of s. 2(b) – the promotion of public participation in social and political decision-making. The record clearly shows that Mr. Kempling was participating "in social and political decision-making". He was expressing religiously-founded opinions on an important matter of public debate. His views may not have been shared by all, but the content of his message does not detract from the political nature of much of it.

Reasons for Judgment, para. 95

(b) The Religious Dimension of the Speech

38. In addition to its political aspect, Mr. Kempling's expression possessed a religious dimension, in two respects. First, as noted above, Mr. Kempling expressly linked some of his statements to his religious beliefs. Second, Mr. Kempling wrote on a highly contentious social issue that has strong ties with religious belief: sexual practices.

39. Most religions engage in profound reflection on the moral dimensions of human conduct by asking: what is the right way by which a person should lead his or her life? Since religions reflect upon and speak to the human condition, their teachings and precepts inevitably touch on matters of human interaction that may also be protected under legal human rights guarantees. Marital status and sexual orientation are two examples of areas of human conduct that attract both religious and legal comment and treatment. The labelling of expression on such topics as "discriminatory", and therefore less worthy of respect and protection, derogates from and

undermines the guarantee of freedom of religion. The effect is to create a hierarchy of rights, with the equality guarantee trumping freedom of religion. The Supreme Court of Canada has rejected an approach to constitutional jurisprudence that results in such a hierarchy.

> *Trinity Western University, supra*, at p.811

(c) Cutting Off Debate by Labelling the Speech Discriminatory

40. In her dissent in *Keegstra, supra,* McLachlin, J. (as she then was) warned against the dangers of labelling speech and thereby pre-determining the results of a section 1 analysis (at p.841):

> [I]f one starts from the premise that the speech covered by section 319(2)[of the *Criminal Code*] is dangerous and without value, then it is simple to conclude that none of the commonly-offered justifications for protecting freedom of expression are served by it.

41. That is precisely what the court below did in this case. By first labelling Mr. Kempling's speech as "discriminatory", it paved the way to justify the infringement of Mr. Kempling's freedom of expression by the BCCT. In characterizing Mr. Kempling's speech as discriminatory, Holmes, J. focused on its content, which was critical of homosexual conduct. The CFRA submits that Justice Holmes' characterization of Mr. Kempling's speech fails to take account of the past jurisprudence of the Supreme Court. If this characterization is permitted to stand, it would shut down one side of the public debate over sexual morality and its public policy implications. As Professor Cameron has written:

> In Canada, it seems, expressive freedom is prized when it reinforces conventional views and otherwise limited whenever unpopular views can be dismissed as valueless, and thereby silenced or punished.
>
> Jamie Cameron, *Anticipation: Expressive Freedom and The Supreme Court of Canada in the New Millennium* (2001), 14 S.C.L.R.(2d) 68 at p.70

42. Holmes, J. presumably characterized Mr. Kempling's speech as "discriminatory" because it described the conduct of some in society as immoral. The CRFA recognizes that public debates over moral issues usually evoke strong emotions and reactions on both sides. They often involve religious belief. This is no less true of the debate over the legal treatment of various types of adult, personal relationships based on quite different understandings of sexual morality. Debate about serious issues attracts strong contending views. Debate about moral issues

necessarily sees both sides describing or judging the conduct of the other and its public policy implications. When a court holds that the government is justified in limiting debate because the debate involves statements critical of others on issues of morality, as was the result of the decision of Holmes, J., the court acts to close down serious debate over a serious issue. If all that is left for public debate are uncontroversial issues that evoke little emotion, then freedom of expression becomes a freedom without value and freedom of religion is fundamentally undermined.

43. The Supreme Court has recognized that a healthy democracy requires robust, critical debate on serious issues and that religious belief should not be precluded from that debate. As stated by Dickson, C.J. in *Irwin Toy, supra* (at p.968):

> Freedom of expression was entrenched in our Constitution and is guaranteed in the Quebec Charter so as to ensure that everyone can manifest their thoughts, opinions, beliefs, indeed all expressions of the heart and mind, however unpopular, distasteful or contrary to the mainstream. Such protection is, in the words of both the Canadian and Quebec Charters, "fundamental" because in a free, pluralistic and democratic society we prize a diversity of ideas and opinions for their inherent value both to the community and to the individual.

See also *Chamberlain, supra*, at para. 19.

44. The extent to which the legislatures and courts should extend legal benefits to same-sex couples has been a matter of national prominence and debate for the past decade and remains high on the agenda of public issues. The characterization of speech by the court below would skew public debate on that issue by labelling the views of anyone who opposed the extension of some legal benefits to same-sex couples as “discriminatory”. Debate is based on disagreement. For a court to paint the views on one side of an issue as “discriminatory” effectively terminates public debate by suggesting that one side is acting in an unlawful way and should not be heard.

45. In *Chamberlain, supra*, Gonthier, J. emphasized that an approach that transforms disagreement over sexual morality into unlawful discriminatory statements threatens a vibrant notion of pluralism (at para. 132):

> Beyond this, nothing in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, or the existing s. 15 case law speaks to a constitutionally enforced inability of Canadian citizens to morally

> disapprove of homosexual behaviour or relationships: it is a feeble notion of pluralism that transforms "tolerance" into "mandated approval or acceptance"…. Surely a person's s. 2(*a*) or s. 2(*b*) *Charter* right to hold beliefs which disapprove of the conduct of others cannot be obliterated by another person's s. 15 rights, just like a person's s. 15 rights cannot be trumped by s. 2(*a*) or 2(*b*) rights…

Gonthier, J. pointed out (at para. 150) that to remain true to all *Charter* guarantees, it is important to distinguish between the expression of competing beliefs on moral issues, on the one hand, and discrimination on the other. To label one set of views on sexual morality as discriminatory would result in s. 15 values trumping all others, leaving s.2 freedoms emasculated:

> The moral status of same-sex relationships is controversial: to say otherwise is to ignore the reality of competing beliefs which led to this case. This moral debate, however, is clearly distinct from the very clear proposition that no persons are to be discriminated against on the basis of sexual orientation. The appellants, using the courts, seek to make this controversial moral issue uncontroversial by saying that s. 15 and "*Charter* values" are required to eradicate moral beliefs, because the hypothesis is that possible future acts of discrimination are likely to emanate from such beliefs. This is not, however, necessarily true. As discussed above, many persons are staunchly committed to the principle of non-discrimination and the inherent dignity of all persons, and yet concurrently hold views which disapprove of the conduct of some persons. To permit the courts to wade into this debate risks seeing s. 15 protection against discrimination based upon sexual orientation being employed aggressively to trump s. 2(*a*) protection of the freedom of religion and conscience, as well as s. 15 protection against discrimination based on conscience, religious or otherwise. This would be a reading of the *Charter* that is inconsistent with the case law of this Court, which does not permit a hierarchy of rights, as well as inconsistent with the purpose of the *Charter* itself.

46. Courts should not take sides in political debates if freedom of expression and freedom of religion under the *Charter* are to have any real meaning. Yet that is precisely what Holmes, J. did in this case. By characterizing Mr. Kempling's statements disagreeing with homosexual conduct as "discriminatory", the court permitted a government agency to censor his speech and effectively end his participation in a public debate on a matter of public interest.

47. In sum, Mr. Kempling's statements involved core values associated with political speech and the profession of religious belief. As a result, the CRFA submits that the mere labelling of such expression as "discriminatory" is not sufficient to justify an infringement of Mr. Kempling's ss.2(a) and (b) freedoms. Something more is required: evidence of actual harm such

as was proven in *Ross*, *supra*.

B.2 The Nature and Proof of the Alleged Harm

48. Holmes, J. concluded that Mr. Kempling's statements were harmful because:

(a) Mr. Kempling called into question his own preparedness to be impartial in the fulfillment of his professional and legal obligations to all students, as well as the impartiality of the school system (***Reasons for Judgment,*** para. 46); and

(b) one could infer that the statements might result in "a loss of public confidence in Mr. Kempling as a teacher and in the public school system, a loss of respect by the students for the teacher involved, and other teachers generally, and controversy within the school and the community which disrupts the proper carrying on of the education system." (***Reasons for Judgment,*** para. 47)

From this Holmes, J. concluded that there was a rational connection between the sanction imposed by the BCCT on Mr. Kempling and the objectives pursued by the College in disciplining Mr. Kempling.

49. For the purposes of a section 1 analysis, the Supreme Court has distinguished between cases that involve a balance between the claims of competing groups, and those in which "the government is best characterized as the singular antagonist of the individual whose right has been infringed." (*Irwin Toy, supra* at pp. 993-994) In the latter type of case the courts generally demand a stronger demonstration of proof from a government body that the restriction in question satisfies the requirements of the *Oakes* test. The present case falls into the category of a government entity acting as a singular antagonist of the individual.

50. Holmes, J. did not require the BCCT to adduce evidence of harm, but instead inferred that "there are grounds for a reasoned apprehension that Mr. Kempling's public writings engendered harm to students, the public school system and the teaching profession." The CRFA submits that this does not meet the standard of proof required by section 1 in cases where the government acts as antagonist to the individual.

Reasons for Judgment, para. 104

51. As in *Trinity Western University, supra*, the BCCT wrongly "inferred without concrete evidence" (p.811) that Mr. Kempling's religiously based expression would harm the school environment. As stated in *Trinity Western University* at p. 814:

> Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.

Once again, the BCCT has acted to infringe s.2 rights without sufficient proof of harm.

52. Holmes, J. regarded the harm as emanating from the content of Mr. Kempling's discriminatory statements, not their effect. Holmes, J. characterized the statements as discriminatory because they were critical of homosexuality. As observed above, a debate over sexual morality necessarily will involve disagreements about the morality of certain conduct. To label statements critical of homosexual conduct as discriminatory, thereby giving rise to a "reasoned apprehension" of harm, is to shut down one side of the debate and to essentially undermine freedom of religion and freedom of expression.

53. Additionally, Holmes, J. effectively used the concept of harm to provide one set of listeners with a "veto" over statements with which they do not agree. Professor Jamie Cameron has pointed out how using the concept of harm in this way severely undercuts the guarantee of freedom of expression:

> A constitutional guarantee of expressive freedom cannot be strangled by subjective perceptions of which attitudes and beliefs are good or bad, and the problem is not solved by adding the qualifying language of 'harm' and 'harmful' to what, under this view, contemplates criminalization of socially unacceptable attitudes.
> …
>
> Applying evidence that expressive activity causes harm is one matter, and granting the subjective fears or perceptions of third parties a power to censor unwelcome ideas, attitudes or views is another. A third party prerogative to veto the speaker and control her rights under the Charter is inconsistent with the fundamental assumptions of section 2(b) and Irwin Toy."
>
> Jamie Cameron, *Anticipation, supra* at pp.80 & 81

54. Chief Justice McLachlin, in *R.* v. *Sharpe*, [2001] 1 S.C.R. 45, stressed that "[b]ecause of the importance of the guarantee of free expression, however, any attempt to restrict the right must be subjected to the most careful scrutiny" (p.70). The CRFA submits that the same is true of freedom of religion and has strong concerns that the court below did not scrutinize carefully the evidence about the harm caused by Mr. Kempling's statements. Several facts in the record underpin this concern:

(a) according to Mr. Kempling's Factum (para. 15), the BCCT Panel did not have any evidence of Mr. Kempling's conduct in the classroom;

(b) nor did the Hearing Panel have any evidence of a poisoned school environment in the school in which Mr. Kempling taught or in the larger school district.

55. In *Trinity Western University, supra* (at pp.814-815), the Supreme Court stressed that it is not permissible to take a teacher's off-duty views on sexual morality and conclude, without more, that the teacher will conduct himself in a discriminatory way in the classroom:

> …Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected…
>
> Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings. **This Court has held, however, that greater tolerance must be shown with respect to off-duty conduct. Yet disciplinary measures can still be taken when discriminatory off-duty conduct poisons the school environment…** [Emphasis added]

56. In *Ross*, *supra* there was strong, demonstrable evidence that a poisoned school environment resulted from Mr. Ross's public anti-Semitic campaign (see *Ross*, pp. 856-857). The record in this case does not disclose the kind of evidence of actual harm that was present in *Ross*.

B.3 Summary on Section 1

57. By failing to recognize the political and religious dimension of Mr. Kempling's speech, Holmes, J. improperly characterized it has having "low value". By misconstruing the obligation on the BCCT to provide tangible evidence of actual harm and, instead, relying on the content of

the speech to infer harm, the court below failed to conduct a proper proportionality analysis. As a result, Holmes, J. imposed a "listener's veto" over statements made by teachers off-duty on matters of sexual morality, and presented Mr. Kempling with a simple choice – keep quiet or quit. ***Reasons for Judgment*** Para. 114

58. Whether it is in the best interests of our society to educate young people in a public school environment free of controversy or competing ideas, as seems to be the goal of the BCCT, is a matter upon which the CFRA will not comment. However, prohibiting a teacher from voicing competing ideas off-duty where there is no evidence that such conduct has created a poisoned school environment constitutes, in the submission of the CFRA, an unjustifiable infringement of a teacher's freedom of expression (and in cases where the statements are religiously-motivated, his freedom of religion).

PART 4 – NATURE OF THE ORDER SOUGHT

59. The CFRA seeks no specific order or remedy but submits that this Court should find that the decision and sanction of the BCCT infringed Mr. Kempling's freedoms of expression and religions guaranteed by the Charter, and that such infringements were not justified under section 1 of the *Charter*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

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David M. Brown

_____
Kevin L. Boonstra,

Counsel for the Intervenor, the Canadian Religious Freedom Alliance