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Case Comment

***131** Thoughts, Words and Deeds: Limiting Teachers' Free Expression — The Case of Paul Fromm

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Re Peel Board of Education and Ontario Secondary School Teachers' Federation [FN1]

Labour law — Teacher terminated for out-of-school racist activities — Just cause — Freedom of expression — Reasonable limits — *Canadian Charter of Rights and Freedoms*, ss. 2(b), 27, 1

1. INTRODUCTION

As a professor of educational policy who has taught pre-service education students a smattering of education law for twenty years, I have received more than my share of querulous looks from many who could not quite believe, or much less tolerate, some of the things they were being told. Things like: yes, you can be held personally liable for damages for negligence; no, permission slips don't make you immune to such liability; yes, you can use physical force in some circumstances to discipline students and not be guilty of assault; and no, the fact that your board has loaded up your class with students with an array of exceptionalities doesn't excuse more lax supervision of the whole class. But one particular question is always guaranteed to "stir up the troops". "When is a teacher not a teacher?" I ask. A variety of replies ensue, invariably relying on spatial and temporal rationales to carve out a safe haven. But horror of horrors when they hear that my view of the correct answer is "never." In other words, because of the highly public and normative nature of the employment they are choosing they will always be considered under the ***132** law to be on duty to some extent. Just like Dian Cromer, who could not, at will, remove her teacher's hat and don that of a parent to speak critically about another teacher and educational policy at a school meeting; [FN2] or the husband and wife teaching team, the Shewans, who could not explore the sexuality of their relationship through publishing nude pictures in a publicly available magazine; [FN3] or Malcolm Ross, who could not publish views that ran counter to his board's policies and provincial and national legal norms about equality and multiculturalism, [FN4] the students had to know that simply being "off-duty", in the sense of being outside school hours and off the school premises, did not place them beyond the reach of their employers' discipline. Cases where the teachers' behaviour also constituted a breach of the law, especially the criminal law, engender less reaction, except from a few who want to explore the reasonable objection that surely there are some crimes that impact teachers' roles more than others and that this ought to count for something (which indeed it does, if perhaps nothing more than mitigating the penalty).

Some of the most difficult of the off-duty conduct cases to come to grips with are those in which a variety of basic rights appear to be hopelessly at odds with each other. Not the least of these is the clash of arguably the core democratic right — freedom of expression — with equality rights expressed in human rights legislation, in-

cluding the *Canadian Charter of Rights and Freedoms*, and school policies at the provincial and board levels. This particular conundrum was visited in *Ross* by the Supreme Court of Canada, who attempted to lay down a set of principles for its resolution. While it may have appeared that these principles left little doubt about the relative weight the Supreme Court accorded such competing rights in the context of a teacher who expressed anti-Semitic and other racist views "on his own time," the controversy begged by the state's erosion of a such a fundamental freedom as speech or expression, especially in a political context, has not gone away. Its latest iteration is the grievance of Paul Fromm, an Ontario teacher dismissed by his board for refusing, despite being warned, to desist from associating with racists and making public statements approving of their ideologies.

*133 2. BACKGROUND TO THE GRIEVANCE

(a) A Record of Progressive Discipline

Paul Fromm was employed by the Peel Board of Education for 19 years as a secondary school English teacher. [FN5] In 1993 he was fired from his position as an English teacher at Applewood Heights School because the Board determined that he had failed to abide by its direction that he desist from participating in meetings and conferences sponsored by individuals and groups holding racist views. Although it had never been suggested that Mr. Fromm had promoted or even voiced such views in the classroom he had a history of attending and participating in meetings and conferences in which white supremacy, anti-Semitism and other racist ideas were advocated.

In letters sent to him in 1991 and 1992 Mr. Fromm was reprimanded by the Board's administration for such activities. At the end of the second letter he was warned that additional conduct of the same nature could well result in a recommendation to the Board to terminate his contract. The letter further advised the teacher that the Board intended to provide information to the Minister of Education for a review of his Ontario Teacher's Certificate. In 1993, Mr. Fromm received a third letter advising him that he was to be administratively transferred from his classroom teaching position at Applewood to the Britannia Adult Education Centre. The reasons cited in support of the transfer appeared to arise directly out of the report of J. G. Cowan, the person contracted by the Ministry to review the issue of Mr. Fromm's teaching certification.

The 1993 letter recounted a list of incidents going back to 1989 that had been turned up by the Cowan Report, some of which had been unknown to the Board. In abbreviated form the list included Mr. Fromm's speaking to a crowd about the threat posed by multiculturalism; failing to rebuke or disassociate himself from one of his "'skinhead' supporters" who threatened the Chair of the Toronto Mayor's Committee on Community and Race Relations; writing that the current wave of third world immigrants can never be assimilated with any value to Canadian culture ... but weaken our national direction and value system"; participating as keynote speaker at a meeting organized by the Heritage Front and referring to refugees as "criminals, scam artists and welfare collectors" and criticizing employment equity goals as "anti-white discrimination"; participating in a meeting of the Heritage Front celebrating Hitler's birthday; ***134** making a speech that attacked Canada's refugee program and multiculturalism policy and advocating on behalf of David Irving's right to free speech. [FN6] Some of the events chronicled were covered by the media.

Mr. Fromm was advised in the 1993 letter that his conduct had caused further "damage to [his] employment relationship with the Board" and that "[a]lthough the incidents had taken place outside the classroom, they indicate disrespect for the principles of multiculturalism and ethnocultural equity, which are fundamental values of

the education system and of the Peel Board of Education." In addition, he was told that his presence at Applewood Heights Secondary School had seriously damaged morale among the school's teachers.

Following receipt of the 1993 letter Mr. Fromm sought assistance from the Ontario Secondary School Teachers' Federation (hereafter the "union"). Counsel for the union wrote the Board. While the letter indicated that the union did not grieve Mr. Fromm's administrative transfer [FN7] (as apparently he had been willing to be transferred), it did challenge the propriety of the Board's reliance on the Cowan Report findings as they were not the product of a formal inquiry with the power to subpoena and cross-examine witnesses. Counsel's letter also requested a meeting between Mr. Fromm and the Board in order that Mr. Fromm might gain a better understanding of the threshold between unacceptable and acceptable private activity. The letter closed by confirming Mr. Fromm's position that he had never questioned the Board's right to have a policy on multiculturalism and that he had always treated all students fairly and equitably in accordance with it. Nor did he question the Board's right to have a policy on ethnocultural equity and he reaffirmed his belief that that all employees and students should be treated without regard for personal characteristics such as race, ethnicity or nationality. Having considered its position set out in its warning letter to be clear, the Board did not respond to counsel's letter and did not accede to the request to meet with Mr. Fromm. Apparently no further request for a meeting was made.

The Cowan Report was released on February 9, 1993 and contained a great deal of facts and conclusions ultimately relied on by both the Board of Education and the majority of the Arbitration Board. It is therefore instructive to review briefly Mr. Cowan's terms of reference as well as ***135** the substance of his findings. The terms of reference given Mr. Cowan by the Minister were:

> firstly, to advise and report to the Minister upon whether Mr. Fromm has fulfilled his duties as a teacher under the Education Act; secondly, whether his conduct is such that a reasonable person would apprehend that he could not afford to the pupils of his classes their right to fair and equal treatment free from racial and religious discrimination; thirdly, whether his presence as a teacher has had an adverse effect on the school community; and, fourthly, whether any change in the laws or practices and procedures respecting the duties of teachers are indicated. [FN8]

The report chronicled a substantial number of Mr. Fromm's activities deemed relevant to its terms of reference. The full list is too extensive and detailed to recount here; a sample of those activities the report apparently considered most telling should suffice:

> · Publishing "Crime Watch" which included only negative articles about visible minorities and highlighted the place of origin or colour of the persons targeted in the headlines
>
> · Participation in a "Martyrs' Day Rally" in Toronto sponsored by the Heritage Front and Mr. Fromm's organization (C-FAR), a videotape of which shows a room decorated with white supremacist and racist symbols, including a swastika, and speakers and members of the audience giving Nazi salutes
>
> · Making a speech at the rally in which he characterized as a hero a person who had been eventually jailed for violation of federal anti-hate laws by recording anti-Semitic messages
>
> · Referring to refugee claimants as "hordes of criminals, scam artists and welfare collectors"
>
> · While attending a meeting of the Toronto Mayor's Committee on Community and Race Relations on behalf of the Canadian Association for Free Expression, which he co-founded, uttering the words "scalp him" as a First Nations anti-racist advocate was speaking.

On the basis of these and other factual findings, the Report concluded that although Mr. Fromm had fulfilled his duties under s. 264(1)(a) of the *Education Act*, presumably by teaching diligently and faithfully the classes and subjects assigned, the same could not be said about his duty under s. 264(1)(c) to "inculcate by precept and

example" the core values or virtues set out in that paragraph of the *Act*. After acknowledging that ***136** the section reflected archaic and potentially unconstitutional terminology (in so far as it singles out Judeo-Christian morality), the report concluded that it nevertheless represents the legislature's prescription of society's core values that teachers must teach and adhere to. Despite the section's ambiguity and vagueness, the report argued:

> [i]n today's world, and particularly in this province, international covenants on human rights, the Charter, the Ontario Human Rights Code, the Education Act, the Regulation under the Teaching Professions [*sic*] Act, the policies and guidelines of the Ministry of Education and the Peel Board of Education, and the constitution, by-laws and policies of the OTF and the OSSTF, serve as interpretive guides for s. 264(1)(c) and the normative standards encompassed by such general phrases as "trust, justice, humanity, benevolence ... and all other virtues [*sic*]." [FN9]

The report continued that the listed documents and policies "provide that every individual, regardless of ... colour, race, nationality, religion, age, sex, mental or physical ability, or sexual orientation has the right to equal educational opportunity and to personal dignity and respect. They recognize ethnocultural equity as part of the fundamental nature of our society." [FN10] Moreover, teachers were obliged to model such standards.

In viewing Mr. Fromm's activities in this context the report concluded that he had not fulfilled his duty to set an example consistent with core values expressed or implied in s. 264(1)(c). Despite taking place outside the classroom, Mr. Fromm's actions had an adverse impact on his ability to teach and be a role model as well as on the community at large. Referring to one of the terms of reference provided to him by the Minister, Mr. Cowan specifically concluded that "a reasonable person, in this case a minority student or parent, would apprehend that Mr. Fromm is not committed to the policies respecting ethnocultural equity, multiculturalism and anti-racism that are fundamental to the education system in this province." [FN11] Moreover, it was found that Mr. Fromm's presence as a teacher had adversely affected the school community.

***137 (b) The Culminating Events**

So, by 1997, when the Board decided to terminate him, Mr. Fromm had a disciplinary record involving written reprimands and an administrative transfer, including warnings that repeated behaviour of the same type could well result in his dismissal. When in late 1996 the Board learned of Mr. Fromm's involvement in a November 1994 symposium in Illinois as well as a conference in Vancouver which he had organized, it treated these events as culminating and hence accepted the administration's recommendation that he be suspended without pay as of February 26th, be dismissed for cause, and that his teacher's contract be terminated as of the end of August. The Illinois symposium — held in honour of Revilo P. Oliver, said to be a well-known white supremacist and anti-Semite — had been organized by the National Alliance, which was headed by a former member of the American Nazi party who was also the author of a book banned in Canada as hate propaganda. Mr. Fromm's speech at the symposium praised Oliver's work and ideas, condemned Canada's policy of multiculturalism and included the recommendation that Canadian immigration be closed to all except Europeans. The Vancouver conference was one of several appearances by Mr. Fromm in Western Canada at which he publicly associated with individuals alleged to be racists and anti-Semites.

3. THE SCHOOL BOARD'S EVIDENCE

The School Board led a great deal of evidence from a variety of witnesses representing both the school community and the community at large. Much of the evidence was directed at the question of the impact of Mr.

Fromm's behaviour, especially within the school community. A former school administrator testified that, in his view, Mr. Fromm's continuing employment by the Board would cause a loss of confidence among parents in teachers in both the Peel school system and in general, especially given the highly multicultural nature of the geographic area served by the Board. He also stated that Mr. Fromm's presence had negatively affected the morale of the school in which he had taught. An anti-racism expert testified about the general impact of racism in Canadian society and, in particular, its impact on the members of the groups that it targets. In his view, if racism were not addressed there would be a double victimization; that is, the targets would be harmed by both the racism itself and ***138** the system's failure to deal with it. He summed up the impact of racism on society-at-large this way:

> There is a vast body of research which shows that racism weakens the commitment to democratic values and creates serious divisions within society. Indeed, racism has negative social and psychological effects on all communities and can lead to outbreaks of serious violence. [FN12]

Another expert called on the issue of racism addressed its impact within both a school and the school system. Referring to Mr. Fromm's activities and beliefs, she testified that, in her opinion, he would be unable to meet the needs of students in a system as diverse as the Peel Board. She stated that teachers represent both the power and policy of the Board and that their activities are easily ascribed to the Board. Continued employment of a teacher implies systemic acceptance of his or her behaviour. Moreover, in her view, Mr. Fromm would be unable to carry out his duty to "provide a safe learning environment for any student of colour or minority background who became aware of his views." His speeches would be "destabilizing" and "threatening" for such students. This witness also testified to the provincial government's policies on anti-racism and ethnocultural equity in Ontario school boards, as well as to the normative statements contained in the *Standards of Practice* set out by the Ontario College of Teachers (at the time still in draft form) that expect teachers to recognize and value diversity, treat students equitably and with respect, and help them appreciate their own identity, learn about their own culture and develop self-esteem. She also testified about public expectations and the trust that is required if boards are to be able to carry out their educative functions:

> Expectations held by the community ... have long been the basis on which teachers and administrators work. The responsibility to provide a safe, supportive and encouraging learning environment is assumed—otherwise no parent or guardian would willingly hand over their children to strangers. These expectations would normally include the assumption that teachers respect and show acceptance of the students' whole identity .... There is a reasonable expectation that students of any age should be secure and encouraged to pursue learning without the fear that their success or failure may be linked to their racial or cultural identity. If a community becomes aware that a teacher espouses or supports those who espouse views that denigrate some members of the community based on their race, culture or religion, there would be a loss of faith in the ability of the board to establish and maintain a safe and supportive learning environment. [FN13]

***139** Addressing Mr. Fromm's contention that her claims about the impact of his views and activities were less viable in the adult education context in which he was teaching, the witness pointed out that students in adult education centres are often refugees or recently arrived immigrants who tend to be highly sensitized to "the power of the language of discrimination, and very vulnerable to its impact." [FN14] Moreover, she continued:

> the teacher represents a "cultural interpreter", a kind of guardian who will assist them in adjusting to and participating in the society. To hear that a teacher, who represents the authority of the education system and the values of their new home, thinks that they should not have a [*sic*] equal place in Canadian society, is a fundamental betrayal. [FN15]

A representative of the Canadian Jewish Congress discussed Mr. Fromm's conduct in the context of racism and its impact on Jewish and other minority families. A rabbi active in Peel also gave his opinion that Mr. Fromm's message and conduct amounted to racism and that, notwithstanding the fact that his activities took place out of school, they nevertheless poisoned the school environment because of the impact a teacher has as an authority figure. His continued employment would promote racial hatred and cause a loss of confidence in the Board's commitment to uphold its stated policies.

The head of the English department at Mr. Fromm's former school testified about the impact of Mr. Fromm's presence in the school. The anxiety and fear of the staff culminated in a memo to the principal from the entire department that, in essence, distanced their views from Mr. Fromm's and made it clear that his ideology and notoriety were causing pain and concern in the department about their ability to bear such a burden.

Finally, a Jewish parent who had two daughters attending Peel schools, one of which was Mr. Fromm's former school, testified that she had concluded through media reports that Mr. Fromm was a racist and anti-Semite. His continued employment would send a message that the Board's stated values had no credulity, that a comfortable learning experience would not exist for her children and that it was acceptable to be a racist as long as it was not during school hours.

***140 4. THE EVIDENCE OF PAUL FROMM**

Much of the testimony of the grievor comprised an explanation of his political views. He voiced strong opposition to Canadian immigration policy, which he said created high unemployment by admitting too many immigrants with unmarketable skills and lack of proficiency in English or French. He also contended that immigrants contributed to the spread of infectious diseases and upset the ethnic balance of the nation. He cited public opinion polls to suggest that as many as 80 per cent of Canadians objected to the ethnic reconfiguration of their neighbourhoods. Mr. Fromm also targeted foreign aid, which he contended simply transferred wealth from poor and middle-class Canadians to corrupt, wealthy individuals in the receiving countries. During his testimony, he denied that his views on immigration, multiculturalism and foreign aid were motivated by racism. In fact he contended that they were within the mainstream of Canadians' opinions.

Speaking directly about his involvement in the Illinois memorial symposium for Revilo Oliver and the conference in British Columbia, Mr. Fromm testified that his interest in Oliver's area of expertise, Indo-European language, had motivated his participation. He denied knowing that the National Alliance had been involved in taping the proceedings for distribution. He denied that Oliver was a racist, even though he claimed that he did not agree with ideas expressed by Oliver in his book *Christianity and Survival of the West*. He also denied that his own remarks and behaviour were intended to be racist or celebratory of racism. He acknowledged that as organizer of the B.C conference he was well aware of the list of speakers and who they were. He contended that in speaking out on behalf of individuals widely understood to be racists he was merely defending their right to freedom of speech, not their ideas.

5. THE AWARD

(a) Guiding Principles from the Supreme Court

The majority began its reasons by reviewing three Supreme Court of Canada decisions involving educators

and free speech: *R. v. Keegstra*, [FN16] ***141** *Ross v. New Brunswick School District No. 15* [FN17] and *Trinity Western University v. British Columbia College of Teachers*. [FN18]

In *Keegstra* an Alberta high-school history teacher had been charged with and convicted of willfully promoting hatred against an identifiable group contrary to s. 319(2) of the *Criminal Code* by teaching his students that the Holocaust had been invented by Jews to gain sympathy. He also described Jews as treacherous and subversive and out to destroy Christianity. The Alberta Court of Appeal overturned Keegstra's conviction on the grounds that s. 319(2) violated the teacher's freedom of expression under s. 2(b) of the *Charter*.

On appeal the Supreme Court easily found that Keegstra's s. 2 rights were triggered because his words were spoken in an attempt to convey meaning, and the clear purpose of s. 319(2) was to restrict expression. The difficult issue was whether the restriction was reasonable and justified under s. 1 of the *Charter*. The *Oakes* test required the court to examine the purpose of the law and assess whether it had the object of addressing a pressing and substantial concern, whether the law was rationally connected to addressing the concern and, finally, whether there was an appropriate proportionality between the importance of the state's objective and the seriousness of the infringement of *Charter* rights. In finding that the government's objective disclosed a pressing and substantial concern, the court was influenced by s. 27 of the *Charter* that provides that the *Charter* must be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians." Section 27, the court found, considerably strengthened the legitimacy of the government's objective in prohibiting the promotion of hatred against groups identified by their race, colour or ethnic origin.

The court's consideration of the proportionality branch of the *Oakes* test led it to conclude that while expression should not be judged according to its popularity, not all expression should be viewed as equally crucial to the principles at the core of freedom of expression as a constitutional value. Statements intended to promote hatred against an identifiable group are unlikely to promote either truth or a better society. Expression that worked to undermine democratic principles and deny human respect and dignity on the basis of race and ethnicity was found to be "inimical to the democratic aspirations of the free expression guarantee [in s. 2(b)]." [FN19]

***142** Finally, the court determined that in view of the risk of grievous harm from the hatred fostered by hate propaganda "proof of actual hatred is not required in order to justify a limit under s. 1." [FN20] Moreover, importantly for the purposes of the Arbitration Board in the present case, the court was prepared to depart from the strictness of the proportionality arm of the *Oakes* test by ruling that the historical expectation that the government seek the least intrusive measure to effect its purpose not be required in every case. Rather, "the government may legitimately employ a more restrictive measure ... if that measure is not redundant, furthering the objective in ways that alternative responses could not, and is in all other respects proportionate to a valid s. 1 aim." [FN21]

The Arbitration Board turned next to the Supreme Court's ruling in *Ross*, a more relevant case than *Keegstra* since, like Mr. Fromm, Mr. Ross had not promoted his anti-Semitic views within the classroom. But his continued employment as a teacher by his school board had prompted a complaint to the New Brunswick Human Rights Commission. A Board of Inquiry determined that Mr. Ross's activities, notwithstanding that they had occurred out of school, had poisoned the school environment. Accordingly it ordered that he be removed from the classroom and employed in a non-teaching capacity, if such a place were available, and that he be prohibited from publicly making anti-Semitic statements. After appeals in the New Brunswick courts, the case arrived at the Supreme Court.

In *Ross* the Supreme Court made perhaps its most compelling and frequently cited pronouncements regarding the role of the teacher, specifically as it relates to off-duty conduct. [FN22] Schools and teachers were characterized as being publicly entrusted with the transmission of social values and norms. Teachers, as the essential human "medium" in this process must be perceived by their conduct to uphold the values and beliefs that the system has chosen to inculcate in the students. That the conduct in question occurs out of school was, for the court, beside the point; the real focus of examination is an evaluation of the teacher on the basis of his position as a teacher. Employing its now familiar "hat metaphor" the court made it clear that teachers are not free to "choose which hat they will wear on what occasion" and to determine whether they are acting in any given context *qua* teacher or *qua* private citizen. [FN23] Beyond ***143** the functional task of transmitting values and norms, teachers also were the personal embodiment of the public trust reposed in school boards and the education system as a whole; when public trust was lost in the former, it necessarily impacted negatively on the latter.

The court also reiterated and expanded upon the notion of freedom of expression that had evolved in its earlier decisions. While the court reaffirmed the fundamental importance of free expression as a constitutional value, and restated that it should be given a broad, purposive interpretation and be restricted in only the "clearest of circumstances," it also emphasized that some expressions are more worthy of protection than are others. As it had in *Keegstra*, the court embraced a conceptual model that would endow expression with increasing amounts of constitutional protection as it approached the values at the core of freedom of expression: promotion of truth, political and social participation and self-fulfillment. State curtailment of speech and other forms of expression that lay some distance from these core values — such as the promotion of racial hatred — required a lesser standard of justification within a section 1 analysis. This sliding-scale approach toward applying the "reasonable limits" clause in s. 2(b) cases, then, drew a clear distinction between expression that enhanced "the search for political, artistic and scientific truth, [FN24] the protection of individual autonomy and self-development and the promotion of public participation in the democratic process," [FN25] and that which potentially undermined democracy. It seems the core idea is that racist expression tends to silence the views of others — especially those who disagree or are from the groups targeted by the racism — and hence the free exchange of ideas that traditionally has nurtured the democratic system of government in free societies. In large measure the approach is distinctly Millian: an individual's freedom should be inviolate up to the point where it interferes with the exercise of like freedom by another. In another respect, however, it goes further by introducing the core value of egalitarianism and the notion that our democratic model is founded upon respect for and the accommodation of diversity. The injection of equality rights values, such as, non-discrimination and the necessity of according equal human respect and dignity to all individuals, is crucial. Without resort to egalitarian principles the same reasoning used ***144** to limit hate speech — that it seeks to silence others and hinder the quest for "truth" — is perforce capable of silencing its critics, who would use it to have the state silence the hate speakers.

In the result, in *Ross* the Supreme Court upheld the Human Rights tribunal's order requiring the school board to remove Mr. Ross from the classroom. The court, however, struck down the tribunal's order "gagging" Mr. Ross from making out-of-school anti-Semitic statements while employed by the school board in a non-teaching position because such an order did not impair his freedom of expression as little as possible. [FN26]

In summing up its examination of the Supreme Court's rulings in *Keegstra* and *Ross* the Arbitration Board assembled a useful list of ten guiding principles drawn from the cases. It is worth reproduction here not only for its intrinsic usefulness in appreciating what the two rulings stand for, but also because the Board drew substantially upon the principles in crafting its reasons for decision in the present case.

1. All expression is not equally critical to the core principles that underlie s. 2(b) of the Charter, such

that the suppression of certain expression does not always and unremittingly detract from the values central to freedom of expression.

2. The promulgation of racism and hatred is harmful both to the individual victim(s) and to society as a whole.

3. Racial comment is far from the core values intended to be protected under s. 2(b) such that any suggestion that statements intended to promote hatred are critical to truth or to the betterment of the political or social milieu is misguided. When the form of expression at issue lies further from the core values of freedom of expression, a lesser standard of justification under s. 1 is to be applied.

4. Direct proof of actual hatred is not required in order to support a finding of poisoned environment and to justify a limit under s. 1. Direct evidence of a poisoned school environment is not required but rather an inference can be drawn as to the reasonable and probable consequences of the racist comments of a teacher.

5. Every individual has the right to a school system free from bias, prejudice and intolerance.

6. A school board is a critical institution in society and a teacher, as role model to his/her students and as representative of the ***145** school board, occupies a central position that extends beyond the classroom.

7. The standard of conduct that a teacher must meet is greater than the minimum standard of conduct otherwise tolerated given the public responsibility that a teacher must fulfill and the expectations of the community. In addition, a teacher's freedoms must be balanced against the right of a school board to operate according to its own mandate.

8. It is not sufficient for a school board to take a passive role because it has a duty to maintain a positive school environment.

9. In seeking to limit the freedom of expression of a teacher where the expression at issue is racist, government is not required to employ the least intrusive measure if that measure [the measure it *does* employ] is not redundant, furthers the government objective in ways that alternative responses could not and is in all other respects proportionate to a valid s. 1 aim.

10. Section 27 of the Charter, which stipulates that "[t]his Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians", is to be considered in the interpretation and application of ss. 2(b) and 1 of the Charter. [FN27]

The Arbitration Board also examined the Supreme Court's recent ruling in *Trinity Western University v. British Columbia College of Teachers*. [FN28] In that case the court had held that the B.C. College of Teachers could not refuse to accredit Trinity Western as a teacher education institution because it required its students to sign a contract with the university holding them to a code of behaviour based on what were described as fundamentalist Christian principles. The court ruled that, absent evidence of discriminatory behaviour by TWU graduates who might end up teaching in B.C. public schools, there was no justification for infringing on the freedom of the students to adhere to such beliefs as they wished. Counsel for Mr. Fromm relied on *Trinity Western*, arguing that just as in that case the lack of evidence of discriminatory action by the university's graduates in schools justified non-interference with the students' beliefs and actions in their private lives, the lack of evidence of a poisoned school environment caused by Mr. Fromm's beliefs entitled him to be free from interference with his ability to hold his chosen beliefs and act on them in his ***146** private life. The Arbitration Board noted, however, that the court had stated in *Trinity Western* that the "freedom to hold beliefs is broader than the freedom to act on them," and, while it was prepared to respect the right of the teacher candidates to hold their religious beliefs, acting on them in a discriminatory fashion would be a different matter and justify discipline. The Arbitration Board disagreed that the Trinity Western case detracted from the principles it had extracted from *Ross* and *Keegstra*. It found nothing in the case that retreated from the court's ruling in *Ross* that it was possible

to draw an inference as to the probable effects of a teacher's off-duty conduct on the school system. What is more, the arbitrators observed, they were not concerned in the present case with the *privately* held beliefs of a teacher but rather his very *public* statements and actions.

Without being unduly presumptuous we can perhaps add, then, an eleventh principle to the ten enumerated by the Arbitration Board:

> 11. The freedom to hold beliefs is broader than the freedom to act on them.

(c) The *Charter* Issues

(i) Charter Application and Just Cause

As the Arbitration Board pointed out, the complexity of this case was due almost entirely to the impact of the *Charter*:

> If it was not for the existence of the Charter, this would be a straightforward matter of assessing the off-duty conduct of Mr. Fromm against the standards of off-duty conduct that reasonably apply and ascertaining on the evidence whether a breach has occurred and, if so, whether the penalty is appropriate in all the circumstances. [FN29]

In essence, as the Board noted, the just cause issue was subsumed by the overriding *Charter* issue. In other words, the analysis one might normally expect to take place to determine the issue of just cause necessarily took the form of a section 1 *Charter* reasonable limits analysis employing the components of the *Oakes* test. The Board was prepared to assume, without so finding, that the *Charter* applied to the grievance. And, it wasted little time in acknowledging that the employer's decision to fire Mr. Fromm on the basis of his statements and actions constituted a violation of his s. 2(b) right to freedom of expression. The bulk of the arbitrators' attention, ***147** then, was focused on whether the employer's disciplinary action could be viewed as a reasonable and demonstrably justified limit on this right. [FN30]

(ii) Reasonable Limit Prescribed By Law?

To be saved under s. 1 of the *Charter* the limit imposed by the state must be both “reasonable” and “prescribed by law.” Union counsel argued that the absence of a well-defined and communicated standard of conduct meant that the employer's action was incapable of meeting the standard required under either s. 1 or the concept of just cause. To constitute a limit prescribed by law, and to meet the requirement of minimal impairment, the employer's action (in this case its direction of Mr. Fromm's conduct) must not be so vague as to be “incapable of interpretation with any degree of precision using the ordinary tools” therefor. Counsel for the union argued that the employer's 1993 letter to Mr. Fromm was not specific enough in carving out the territory between permissible and prohibited conduct and that the employer had refused to clarify its demands despite Mr. Fromm's request, through counsel, that it do so.

The Arbitration Board disagreed. While it acknowledged that the letter may have left some “grey areas” regarding whether certain conduct would result in discipline, the Board found that it was not the case in respect of the conduct for which the school board did discipline Mr. Fromm. Having reviewed the Cowan Report in some detail, the letter made it clear that a repetition of the type of incidents described in it would probably result in a

recommendation that Mr. Fromm be fired. Hence, the letter "could have left no doubt in Mr. Fromm's mind" [FN31] that his participation in the Oliver memorial symposium — given his association with and endorsement of the racists involved therein as described in the Cowan Report — was a type of off-duty conduct that was clearly proscribed. Similarly, with respect to the meeting that he organized in British Columbia in 1996, "there could have been no doubt in his mind that publicly consorting with a number of known racists and speaking publicly in support of their right to make racist statements were also activities covered by the warning" in the letter. [FN32]

***148** The Board of Arbitration found Mr. Fromm's claim that he was confused by the letter "disingenuous." He could have inquired further and sought clarification but did not, presumably because he knew the answer he would receive. Hence the Board found that Mr. Fromm "knew full well that his participation in these events constituted conduct in respect of which he had already been disciplined and put on notice." [FN33]

(iii) Putting Fromm's Conduct to the "Oakes Test"

In the balance of their award the Arbitration Board examined Mr. Fromm's conduct and its limitation by the employer under the test established for s. 1 *Charter* analysis in *R. v. Oakes*. [FN34] Under the test, a limit on rights will be "demonstrably justified in a free and democratic society" if it has a *sufficiently important governmental objective* that addresses a pressing and substantial problem, and if *the means chosen to achieve the objective is rationally connected to that objective, minimally impairs the right* in question, and represents a *proportional response* to the problem sought to be redressed.

Union counsel argued that there was no rational connection between the school board's policies and its decision to fire Mr. Fromm, that its actions minimally impaired Mr. Fromm's protected right to freedom of expression and that the response chosen by the Board was not proportionate to its objective.

Before wading directly into the analytical swamp that is the *Oakes* test, the Arbitration Board deemed it necessary to "measure Mr. Fromm's conduct against the reasonable standards that apply to a teacher employed by the Peel Board." This unfortunately meant a long and rambling revisitation of many of the facts and findings it had already discussed, along with a restatement of several of the principles it had isolated from its review of Supreme Court of Canada jurisprudence. [FN35] Amongst all the redundancy, though, were a couple of curious statements. First, the Arbitration Board opined that there was no limit to freedom of expression "so long as an individual does not breach the statutory law", referring specifically to the *Criminal Code* and the *Human Rights Code*. What can this possibly mean? Surely it is utter nonsense. On the one hand, there are assuredly common law limitations on free speech: two obvious examples***149** are the torts of defamation and infliction of nervous shock. On the other, it is an amazing error to imply that a *Charter* right is tied to obeying statute law. The limits on rights imposed by such statutes are usually the very issues at stake in *Charter* challenges; indeed, *Keegstra* was just such a case. Second, the Board reiterated that Mr. Fromm had supported the freedom of others to make racist statements, commenting that "[t]his is not to say that had Mr. Fromm spoken in support of the right of others to voice *legitimate political dissent*, however unpopular, that the same finding would have been made." Once again, what could the Board possibly have meant by "legitimate political dissent": dissent the government deems "legitimate" because it does not offend any statutory prescriptions it has enacted? Such an interpretation, if correct, leaves freedom of expression a rather empty vessel.

It is difficult to understand why the Arbitration Board apparently thought it needed to engage in such repetitious and disconnected "analysis" before applying the familiar *Oakes* criteria. Be that as it may, once the Board

eventually proceeded to a s. 1 analysis, it began as expected by examining the nature of the objective underlying the school board's dismissal of Mr. Fromm. The objective was tied to the Board's multiculturalism policy that mandated a racism-free environment for Peel students. After citing the Supreme Court of Canada's recognition of the evil inherent in racism, the Arbitration Board went on to quote a passage from an article by Richard Gwynn in the *Toronto Star* in which the author discusses the nature and impact of racism. It is less than heartening that a quasi-judicial body should be guided by the opinions of newspaper journalists in determining the issues before them. In any event, the Board stated tersely that it was "axiomatic that this [mandating a racism-free environment] is a pressing, substantial and worthwhile objective" especially in a school board as racially diverse as Peel. [FN36] The decision to fire Mr. Fromm, then, was viewed as supporting the pressing, substantial and worthwhile objective embodied in the multiculturalism policy of the school board.

The Arbitration Board next observed that even if the school board's action were taken in support of a sufficiently important objective, the measures it took would still have to be proportional. Quite so. However, while the ensuing two pages of "proportionality" analysis covered well the question of the inferred impact [FN37] of Mr. Fromm's impugned activities ***150** on the students, parents and teachers of the Peel Board, the education system in general, and society at large, by referring to the evidence discussed earlier, they paid scant — indeed no — attention to the other half of the scale: the relative impact of the Board's violation of Mr. Fromm's s. 2(b) rights. One would have expected here a reasoned balancing of the admittedly pernicious impact of a teacher's public espousal of racist views, given teachers' special social role and status, with the impact — general and specific — caused by firing a teacher for expressing political views. The latter should have considered the severe economic and professional impact the firing undoubtedly had for Mr. Fromm as well as the potential impact on society as a whole insofar as political speech was being silenced. It would then have been appropriate in my view to reiterate the Supreme Court's position that the further expression was from the core values of the right of free expression, the less onerous it would be to demonstrate that limitation of the expression by the state was justified. In other words, it is a question of weight: some types of expression weigh in more heavily than others when it comes to balancing the effects of the evil sought to be controlled against effects of the evil embodied in the remedy used to control it. But no such balancing of the two evils occurred and this portion of the award ended simply with the following finding:

> On our analysis of the law applied to the facts here, it must be found that a disciplinary sanction up to and including termination, even though intended and in fact limiting Mr. Fromm's Charter freedoms, would be proportionate in all the circumstances. [FN38]

To complete its *Oakes* test analysis it remained only for the Board to consider whether the school board's objective could have been achieved by adopting measures that impaired Mr. Fromm's *Charter* rights to a lesser degree — the so-called "minimal impairment test." The Board noted that, in labour law terms, this involved the issue of whether the penalty imposed on Mr. Fromm "was just and reasonable in all the circumstances." Rather than impose what in labour law amounts to "capital punishment" — dismissal for cause — the school board could have suspended Mr. Fromm from his adult education teaching position for a fixed period or transferred him within or outside the bargaining unit. Not surprisingly given the record of warnings and progressive discipline given Mr. Fromm regarding precisely the same behaviour that gave rise to his termination, the Board rejected these contentions of the union's counsel. Moreover, ***151** the Board held, given the seriousness of the issues at stake, that a lesser sanction would not have remedied the harm caused by Mr. Fromm's behaviour. His continued employment would not put to rest the doubts in the minds of members of the community concerning how someone who held his views could carry out the role of teacher with all that it entailed. Anything less than dismissal would also bring into question the Board's commitment to its multiculturalism policy. There were also

pragmatic problems with the union's suggestions: there were no non-teaching positions in the bargaining unit that did not involve a promotion, something that was for obvious reasons out of the question in the case of Paul Fromm. The Board also was of the view that it would be inappropriate to displace a member of another bargaining unit simply to mitigate Mr. Fromm's penalty. [FN39]

Finally, the Arbitration Board drew on Supreme Court *dicta* in *Keegstra* and *Ross* that indicated that

> in seeking to limit the freedom of expression of a teacher where the expression is racist, government is not required to employ the least intrusive measure if that measure [I assume the Board meant the measure *actually employed*] is not redundant, furthers the government objective in ways that alternative responses could not and is in all other respects proportionate to a valid s. 1 aim. [FN40]

In the circumstances of the present case all the components of this modified minimal impairment test had been satisfied.

The Board concluded that even though the Peel School Board had violated Paul Fromm's freedom of expression and association by disciplining him for his political statements and activities, this limitation on his rights was reasonable and demonstrably justified under s. 1 of the *Charter*. It confirmed that the Peel Board had just cause to terminate Mr. Fromm's employment and dismissed the grievance.

In a brief dissent, the minority member took issue with the majority over the requirement of proof of impact of the grievor's impugned conduct. In the member's view, the employer had tendered no evidence to prove the impact of Mr. Fromm's conduct on the schools, students, and parents of the Peel Board or on the community at large. And, given the factual differences between *Keegstra, Ross* and the present case, the member found the two Supreme Court decisions to be of limited value. ***152** Keegstra had been convicted of a criminal offence stemming from proof of the actual promotion of hatred within the classroom, while, in *Ross*, the Court had been influenced by “clear evidence of a poisoned atmosphere within the school system itself.” [FN41] In the member's view, the majority had gone considerably beyond the Supreme Court's finding in *Ross*:

> The Court in Ross concluded, based on clear evidence establishing the existence of a poisoned atmosphere, that a reasonable inference could be drawn to link Mr. Ross' off-duty activities and statements and this poisoned atmosphere. The majority decision in this case, however, ... determines that an inference of a poisoned atmosphere can be made based solely on evidence of the potential impacts on the school environment. [FN42]

The minority member disagreed, moreover, with the majority's interpretation of the *Trinity Western* decision, which the member construed as reinforcing *Ross*'s requirement that proof of a *present and actual* poisoned environment was necessary. [FN43] The only evidence relating to impact led by the Board had been through expert witnesses, who testified only as to the potential — as opposed to actual — impact of Mr. Fromm's conduct. Therefore, the member “would have concluded that the burden of establishing that substantive harm exists and that the least intrusive measures have been chosen to remedy that harm lie [*sic*] with the employer ... and that on the evidence led at the hearing ... this burden had not been met.” [FN44]

6. CONCLUSION

Not surprising, the essence of the legal divergence between the union's and the Board's positions in the Fromm case matches that between the majority and minority members of the Arbitration Board. The elaborateness of the legal tests aside, it is really the evidentiary issue of what suffices to “prove” the teacher's inability to

do his job, that is at the heart of this dispute. Is it the nature of the teacher's conduct (or speech) itself that properly gives rise to an inference of a poisoned environment in which it would be impossible for the teacher to carry out his or her duties ***153** (as defined by statute, common law, contract, policy and public expectations) or is it possible to draw such an inference only from concrete evidence that the conduct actually had such an effect. The former, of course, is the Board's and the majority's position while the latter represents the view of the union and the minority member. It is not clear to me that there is a complete absence, in any event, of the concrete evidence of impact that the union and the minority member would require: while there may have been no evidence from students themselves as to the actual impact on them, there was direct evidence of the impact of the grievor's conduct on his colleagues and the school, as well as on the community, via the introduction of the English department's letter and the testimony of a Jewish parent who had two children attending schools in Peel. Otherwise the evidence was mostly that of experts testifying as to the effect racism could be expected to have on a school community and society at large.

Reading the reasons of La Forest J. in *Ross*, it is difficult to disagree with the position adopted by the school board and the majority. Writing about this aspect of the *Ross* ruling, Clarke supports this view:

> First, although no direct evidence had been proffered, the Court concurred with the Board of Inquiry that it was "reasonable to anticipate" that Ross' unabashed public statements of anti-Semitism contributed to the "poisoned environment" in the school system. [FN45]

It may well be that the union and the minority were drawing too fine a distinction between inferring a poisoned environment and inferring that Mr. Fromm's conduct caused or contributed to such an environment. The Supreme Court of Canada's ruling in *Fraser v. Canada* [FN46] implies that the important inquiry is whether the nature of the expression is fundamentally incongruous with an employee's being able to do his or her job, given the job in question. Moreover, it seems that the court is more likely to accept an inference of impairment in "extreme" cases. Referring to *Fraser*, La Forest J. stated in *Ross*:

> ... Dickson C. J. observed two forms of impairment: impairment to perform the specific job and impairment in a wider sense. With respect to impairment of the first kind, the general rule, he stated, should be that direct evidence of impairment is required. He qualified this rule, however, as not absolute and stated that when the nature of the occupation is important and sensitive, and when the substance, ***154** form and context of the employee's comments are extreme, an inference of impairment may be sufficient
>
> ...
>
> [W]ith respect to impairment in the wider sense, Dickson C.J. stated ...
>
> "It is open to an adjudicator to infer impairment on the whole of the evidence if there is evidence of a pattern of behaviour which an adjudicator could reasonably conclude would impair the usefulness of the public servant. Was there such evidence of behaviour in this case? In order to answer that question it becomes relevant to consider the substance, form and context of [the impugned conduct]. [FN47]

While one might quarrel with this seemingly double standard — whereby the court requires scientific proof in certain cases but may rely on inferences in others where the potential of severe harm is greater — the fact remains that the Supreme Court has made it clear that it is prepared to apply such a standard. For the purposes of establishing rational connection between an impugned governmental measure and its objective the court has stated that "proof to the standard of science [is] not required." [FN48]

One could say that teachers' very role should entitle, if not require, them to speak out against government and employer policies on matters of public interest. After all, in labour law the public interest test has been considered an exception to the rule that employees ought not to publicly criticize their employers or their policies,

subject to the fundamental job-impairment test imposed in *Fraser*. When one considers, however, that the *raison d'etre* for a teacher's employment is to act as an agent of transmission of the cultural messages determined to comprise the formal and hidden curriculum, then it is a short step from permitting public criticism of the message to acknowledging that the medium is in control of the message. With apologies to McLuhan, in this case that cannot be. It surely cannot work in a public system where accountability is via the trust reposed in the board who employs the teacher and whom the teacher is supposed to represent. And, as the medium is supposed to transmit the message not only by precept but also by example, there can be no escape by resorting to the old adage: “do as I say, not as I do”, especially when the medium makes it clear that he is only “saying” it because he is forced to. When the latter is the case, the message is undermined and serious questions arise about the ability of the teacher to fulfill the role for which ***155** he was employed. To put a finer point on what really is a serious pragmatic problem: how can *any* school board — let alone one as ethnically and racially diverse as Peel — that has not only to adhere to but also promote Ministry policies of multiculturalism, ethnocultural equity and anti-racism, and answer to the government and its constituents for its failure to do so, employ a person as a teacher who is notorious for his rejection and denigration of such concepts and policies?

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[FN1]. (2002), 105 L.A.C. (4th) 15 (Ont. Arb. Bd.).

[FN2]. *Re Cromer and British Columbia Teachers' Federation* (1986), 29 D.L.R. (4th) 641 (B.C. C.A.). See, however, *Eggertson v. Alberta Teachers' Association*, 2002 ABCA 262, and the case note on the decision in this issue of the Journal at 165. This ruling, however, may be limited to its own facts given the specific wording of the Alberta *School Act*.

[FN3]. *Abbotsford School District 34 Board of School Trustees v. Shewan* (1987), 2 B.C.L.R. (2d) 93 (B.C. C.A.).

[FN4]. *Attis v. New Brunswick District No. 15 Board of Education*, (sub nom. *Ross v. New Brunswick School District No. 15*) 1996 CarswellNB 125, [1996] 1 S.C.R.825, 133 D.L.R. (4th) 1 (S.C.C.).

[FN5]. The background facts are taken entirely from the Arbitration Award above, note 1.

[FN6]. David Irving is a notorious Holocaust revisionist historian.

[FN7]. Ultimately the failure to grieve resulted in the Arbitration Board's concluding that the discipline had been proven, along with all the alleged misconduct provoking the discipline, including the facts found by the Cowan Report. These facts were subsequently treated as past misconduct leading up to a culminating event or events justifying termination.

[FN8]. Above, note 1 at 22.

[FN9]. *Ibid.* at 25. The correct name of the Act is the *Teaching Profession Ac*t and the correct wording of section 264(1)(c) is “*truth*, justice, ... humanity, benevolence ... and all other virtues.” (Emphasis added). The report's incorrect substitution of “trust” for “truth” is not without irony.

[FN10]. *Ibid.* at 25.

[FN11]. *Ibid.* at 26. In an addendum to his report, filed as the result of a request that the Ministry re-open the inquiry into Mr. Fromm's behaviour, Mr. Cowan noted that Mr. Fromm's attendance at Hitler's birthday celebration organized by the Heritage Front further evidenced his association with organizations, like the Heritage Front, and individuals, like Ernst Zundel, who supported the racist themes featured at such events and reinforced the perception that Mr. Fromm was not interested simply in speaking out for the right of free speech as he claimed.

[FN12]. *Ibid.* at 34.

[FN13]. *Ibid.* at 36-37.

[FN14]. *Ibid.* at 38.

[FN15]. *Ibid.*

[FN16]. 1990 CarswellAlta 192, 1990 CarswellAlta 661, 1 C.R. (4th) 129, [1990] 3 S.C.R. 697, 77 Alta. L.R. (2d) 193, 117 N.R. 1, [1991] 2 W.W.R. 1 (S.C.C.).

[FN17]. [1996] 1 S.C.R. 825, 133 D.L.R. (4th) 1 (S.C.C.).

[FN18]. (2001), 199 D.L.R. (4th) 1 (S.C.C.).

[FN19]. Above, note 16 at 56, quoted in above, note 1 at 49.

[FN20]. Above, note 16 at 65, quoted in above, note 1 at 50.

[FN21]. Above, note 16 at 71, quoted in above, note 1 at 50.

[FN22]. Justice La Forest discusses the ruling in G. V. La Forest, “Off Duty Conduct and the Fiduciary Obligations of Teachers” (1996-98) 8 *E.L.J.* 119.

[FN23]. Writing for the court, La Forest J. stated that teachers “are not able to ‘choose which hat they will wear on what occasion’; 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.” Above, note 17 at 21 (D.L.R.), quoted in above, note 1 at 52.

[FN24]. The court could well be criticized for its epistemological assumption that any such thing as truth has an objective existence. The notion of “artistic truth”, in particular, is strikingly curious.

[FN25]. Above, note 17 at 34 (D.L.R.), quoted in above, note 1 at 55.

[FN26]. The minimal impairment test is thus still an effective part of section 1 proportionality analysis, despite its weakening in *Keegstra*.

[FN27]. Above, note 1 at 56-57.

[FN28]. Above, note 18.

[FN29]. Above, note 1 at 61.

[FN30]. Even if the *Charter* did not apply, as the employer contended, the Arbitration Board held that the analysis it used to decide the s. 1 issue would also be determinative of whether just cause existed.

[FN31]. Above, note 1 at 62.

[FN32]. *Ibid.* at 62-63. The thought that merely speaking out in favour of the right to express a view, no matter how unpopular or opprobrious the content, should attract discipline is troubling although in this case it seems quite clear that Mr. Fromm's statements transcended mere support for the right of free speech *simpliciter*.

[FN33]. *Ibid.* at 63.

[FN34]. [1986] 1 S.C.R. 103 (S.C.C.).

[FN35]. See above, note 1 at 63-68.

[FN36]. *Ibid.* at 68.

[FN37]. The Arbitration Board referred to the Supreme Court of Canada's holding in *Ross* and *Keegstra* that direct proof of a poisoned environment was unnecessary and that a reasonable inference could be drawn under the circumstances in such cases.

[FN38]. *Ibid.* at 71.

[FN39]. It is not at all clear how the Board could even make such a ruling, which, in essence, would purport to require another school board to hire Fromm. This, of course, assumes that this was what was meant by transferring him “out of the bargaining unit,” but it is certainly the clear implication of the Arbitration Board's words.

[FN40]. *Ibid.* at 72.

[FN41]. *Ibid.* at 76.

[FN42]. *Ibid.*

[FN43]. Although the member quoted a lengthy passage from the *Trinity Western University* ruling, presumably the persuasive portion was the Court's statement that “[a]bsent 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.” At *ibid.*, quoting above, note 18 at para. 36.

[FN44]. Above, note 1 at 76.

[FN45]. P. Clarke, “Public School Teachers and Free Speech: Part III” (1998-99) 9 *E.L.J.* 315 at 328.

[FN46]. (sub nom. *Fraser v. Canada (Public Service Staff Relations Board)*) [1985] 2 S.C.R. 455, 63 N.R. 161 (S.C.C.).

[FN47]. Above, note 17 at 859-860 S.C.R., quoted in above, note 45 at 373.

[FN48]. *RJR-MacDonald Inc. v. Canada (Attorney-General)*, sub nom. *RJR-Macdonald Inc. c. Canada (Procureur général)*, 1995 CarswellQue 119, 1995 CarswellQue 119F, [1995] S.C.J. No. 68, 127 D.L.R. (4th) 1,

[1995] 3 S.C.R. 199, 31 C.R.R. (2d) 189, 187 N.R. 1 (S.C.C.).
13 Educ. & L.J. 131

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