Canadian Education: Whose Values? Whose Rights? The Trinity Western University Case, 7(20)

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Abstract

This paper outlines the facts and salient issues surrounding the British Columbia College of Teachers' refusal to certify a Christian-based teacher education program at Trinity Western University, a private university in that province. The key argument revolves around both provincial and constitutional law which protect the public values of non-discrimination and equity, in the gay community (in particular the youth), and the democratic right of the Christian community to freedom of religious beliefs, as espoused in their institution, and while seeking public accreditation of their teacher education program. The decisions of both the majority and the dissent at the Supreme Court of Canada are examined in detail, focusing upon the inherent value differences in their positions from both contractarian and communitarian perspectives. The Court's approach to the balancing of legal rights, and hence values, when in conflict highlights the majority's view that freedom in a democracy is the fountainhead from which flow individual rights and not visa-versa. Moreover, those rights ought properly to be viewed as of equal value not in a hierarchy. Lastly, the Court's approach to values in conflict is proffered as a method which educational policy makers might well consider when dealing with pedagogical values in conflict.

Introduction

In May 2001, the Supreme Court of Canada determined that public values do not take precedence over private rights, as expressed through religious restrictions in a church sponsored private educational institution.

In *Trinity Western University v. College of Teachers* ((2001), a divided Supreme Court of Canada considered how Canadian society should adjudicate between conflicting rights when they are based upon very different value orientations.

This paper a) outlines the facts of the case, b) delineates the salient issues of jurisdiction, principles of constitutional interpretation, and public policy, c) analyzes the value positions of both parties, in terms of both contractarianism and communitarianism, and d) states the

significance of the Canadian Court's approach to the resolution of value conflicts as it relates to the development of educational policies.

The Facts

In 1962, Trinity Western was formed in British Columbia as a private society associated with the Evangelical Free Church in Canada. In 1969, pursuant to the *Trinity Junior College Act,* it became a junior college mandated to provide an education with, "an underlying philosophy and viewpoint that is Christian," and in 1985, Trinity Western University was incorporated under the laws of British Columbia.

Given its mandate, Trinity's students were required to enter into a contract with that institution which required, among other things, that students adhere to certain core values which were clearly spelled out in its students' version of the "Responsibilities of Membership in the Community of Trinity Western University (otherwise referred to as 'Community Standards'). Among those values was the requirement that students, "Refrain from Practices that are Biblically Condemned," which included "homosexual behaviour" (Trinity, S.C.C., p. 17).

In 1985, Trinity began a four-year teacher education program, but, the Province of British Columbia had not yet set the criteria for awarding degree granting status for private institutions such as Trinity. Trinity's education students were required to attend another provincial university for their fifth and final year in the B.Ed. Program in order to become certified to teach by the British Columbia College of Teachers.

In 1988, pursuant to the *Teaching Profession Act*, section 4, the British Columbia College of Teachers (hereinafter referred to as BCCT) was created and given the mandate, among other things, to "establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members," and to approve teacher education programs [emphasis added].

Trinity applied to BCCT for certification of its teacher education program, but on May 17, 1996, the BCCT Council refused that application for certification "on two grounds: TWU [Trinity] did not meet the criteria stated in the BCCT bylaws and policies; and *approval would not be in the public interest because of discriminatory practices of the institution*" (Trinity, S.C.C., p. 17) [emphasis added]. The second ground was restated in detail in the Council's Fall 1996 newsletter (Trinity, S.C.C.),

Both the Canadian Human Rights Act *and the B.C.* Human Rights Act *prohibit discrimination on the grounds of sexual orientation. The* Charter of Rights *and the* Human Rights Act *expresses the values which represent the public interest. Labeling homosexual behaviour as sinful has the effect of excluding persons whose sexual orientation is gay or lesbian. The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour. Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law*. (p. 18)

A reading of the *Trinity Case* evidences that the Council's position was to the effect that the real purpose of Trinity's Community Standards contract was to shut out applicants who were homosexual or lesbian, and further, that it inculcated in its students a bias against those groups. The Council feared that this attitude would manifest itself in Trinity's graduates displaying discriminatory attitudes in British Columbia's public school system. Such actions were illegal under that Province's *Human Right's Act*, the Federal Government's *Canadian Human Right's Act* and the *Canadian Charter of Right's And Freedoms* Section 15 (1) (Canadian Charter) . Having come to those conclusions, the BCCT Council, acting under the Teaching Profession Act, section 4, wherein it was mandated, "to establish, having regard to the public interest, standards for . . . persons who hold certificates of qualification and applicants for membership" (p. 20), denied Trinity's application for accreditation of its teacher education program.

So began a battle of public values versus private rights in Canadian education, which would end up almost five years later being determined at the Supreme Court of Canada.

Trinity took issue with the BCCT Council's ruling and applied to the British Columbia Supreme Court for judicial review, seeking by way of an order of certiorari**[1**] to quash the Council's decision, and by way of a writ of mandamus**[2**] to compel it to accredit its teacher education program. In essence, Trinity argued that the Council did not have the jurisdiction to decide a matter of religious beliefs under the empowering Teaching Profession Act.

At trial, Mr. Justice Davies found that the BCCT Council had indeed exceeded its jurisdiction and granted the writs, subject to certain conditions, ordering the Council to exercise its statutory authority and to accredit Trinity's teacher education program, "he was of the view that matters of public interest in the Act [Teaching Profession Act] relate to teaching standards and could not be extended to cover religious beliefs . . .[and] that there was no reasonable foundation to support the decision of BCCT [Council] with regard to discrimination" (Trinity, S.C.C., p. 18).

On appeal, a majority of the British Columbia Court of Appeal agreed with Justice Davies, whereupon the Council appealed to the Supreme Court of Canada to overturn the trial court's decision.

The Supreme Court was asked to consider three matters: jurisdiction, constitutional interpretation, and public policy.

Jurisdiction

Speaking for the majority of eight, Justices Iacobucci and Bastarache delivered a mixed judgment holding that, for various reasons, the BCCT Council's decision was subject to judicial review and further, among other things, that although the Council had jurisdiction to consider discriminatory practices in accrediting teaching institutions, the Council "should have based its concerns on specific evidence . . . . [and] there is no evidence that this instruction is in any way related to the problem of apprehended intolerance . . ."
(Trinity, S.C.C., p. 45).

The Court differentiated between belief and conduct, saying,

absent concrete evidence that training teachers [at Trinity] . . . fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain beliefs should be respected . . . . For better or worse, tolerance of divergent beliefs is a hallmark of a democratic society. (p. 44)

In her dissent, Madame Justice L'Heureux-Dube agreed that the BCCT Council had jurisdiction in the matter, but held that the decision was not subject to judicial review.

At its simplest, the *ratio decidendi***[3]** of the case is that a statutorily created administrative body, acting within its jurisdiction, must have evidence upon which to base its decisions. Indeed, that decision could have ended the appeal. Yet, in *obiter dictum***[4]**. , the Court went on to deal with issues of both constitutional interpretation and public policy and it is to those areas that this paper now turns.

Constitutional Interpretation

Constitutionally, the Court sought (Trinity, S.C.C.) "to determined the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society" (p. 35). The majority believed that,

at the heart of this appeal *is how to reconcile the religious freedoms of individuals wishing to attend TWU [Trinity] with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally. (p. 40)* [emphasis added]

On this issue of interpretation of constitutional rights, the court was divided. The majority held that "one right is not privileged at the expense of another. . . . and that a hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law" (pp. 40, 41).

In dissent, Madame Justice L'Heureux-Dube, strongly disagreed, stating that "*at its core*, this case is about providing the best possible educational environment for public school students in British Columbia" (p. 49), she stated, it was, "the Code of Community Standards that is at issue" (pp.63,64).

In Justice L'Heureux-Dube's opinion, referring to several Canadian cases and citing with approval the United States Supreme Court decision in *Bob Jones University v. United States* (1983), "there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary justice" (p. 63).

Essentially the Court was divided on whether constitutional rights, when in conflict, should be viewed as varying in value or equal in value. The majority was of the latter view that, "one right is not privileged at the expense of another" (p. 40) and quoted former Chief Justice Lamer, in *Dagenaise v. Canadian Broadcasting Corp.* (1994) when he said, "when the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights" (p. 877). It was clear that the right to freedom of religion and conscience, as stated in Trinity's argument, would be affected by the Council's

denial of accreditation and could not therefore be disregarded, because what was at stake, in the majority's view, was the matter of freedom in a democratic society. The majority said (Trinity, S.C.C.),

Freedom, in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is forced to act in a way contrary to his beliefs or his conscience. (p. 39)

The Majority then went on to balance the rights of freedom of religion and conscience against the right to equality. Its approach was that "this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case" (p. 40).

Justice L'Heureux-Dube, in dissent, disagreed, arguing that it was a,

misconception to characterize the . . . [Council's] decision as being a balancing or interpretation of human rights values, an exercise that is beyond the tribunal's [Council's] expertise. The [Council's] decision employed one relevant and undisputed Charter or human right's value, that of equality, in the narrow context of appraising the impact on the classroom environment of . . .[Trinity's teacher education] proposal . . . . The [Council] was not acting as a human rights tribunal and was ***not required to consider other Charter or human rights values such as freedom of religion, which are not germane to the public interest*** *in ensuring that teachers have the requisites to foster supportive classroom environments in public schools. (pp. 56, 57) [emphasis added]*

In other words, Justice L'Heureux-Dube's position was that the BCCT Council had a statutory duty to decide matters within in its expertise while considering the public interest as a major factor in its decisions. It was not required, nor did it have the expertise, to decide other matters such as religious rights and thus, they were not to be a factor in its decision making. Moreover, she argued that even if she was not correct with the latter point, it was her position that the Council, once having determined that Trinity's admission policies and practices espoused private rights which were contrary to public values, as expressed in legislation and the constitution, accreditation had been properly denied. Her argument did not prevail.

Public Policy

The Court was divided on the public policy issue involved in their decision. The majority determined that when any rights collide, clarification is required of what is fundamental to a free and democratic society. The majority in Trinity (S.C.C. p. 39) quoted Chief Justice Dixon, as he then was, in *R. v. Big M Drug Mart* (1985), wherein he stated,

a truly free society [presumably a democratic society] is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct . . . . Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled

by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and cannot be said to be truly free. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limits as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his or his conscience. . . . The Charter *safeguards religious minorities from the threat of the "tyranny of the majority." (pp. 336-337)*

Justice L'Heureux-Dube in a strong dissent, took the position that freedom from discrimination, as a corner stone of public policy, was a precondition to the exercise of other rights. In the alternative, if freedom from discrimination was not a precondition, then in any event, religious rights must be considered as subordinate to the general, public values in Canadian society as espoused in law, and which prohibit discrimination based upon sexual orientation. She argued that to hold otherwise would imperil the mental health of young children whose sexual orientation ran contrary to the religious beliefs of a particular religious or individual group, members of which were public school teachers. Arguing by analogy, she proffered cases where parents' religious beliefs had deleteriously affected their children's' health and welfare. Those examples arguably provided a compelling interest for the courts to intervene. Moreover, the possibility that Trinity's teacher education program which categorized homosexuality and lesbianism as sinful, could arguably result in a Trinity graduate acting in a discriminatory manner towards public school students, and "a religiously based risk [to children should not] fall on children" (Trinity, p. 59).

In essence, Justice L'Heureux-Dube was arguing that certain beliefs in the private realm can affect the public sphere. She sought a pro-active and *pre-emptive* policy for the protection of public values over private rights and thus public values over private values.

As a matter of public policy, the distinction between the majority and dissent is that the majority allowed for the holding of private values expressed in constitutional rights, which were contrary to public values as long as they did not deleteriously and manifestly affect the public sphere. The dissent was of the view that public values always trump private rights, and thus private values, when expressed in the public realm, if there is the possibility of jeopardy to others, especially the most vulnerable in society. The majority saw this view as contrary to freedom in a democratic state where conflict of rights was inherent to the nature of a social democracy. It was not argued expressly, but the majority may have been saying that the *Charter* itself subjects all rights, with a noteworthy exception, to the presumption that both public and private rights flow from the existence of that type of society. Rights are not the fountainhead from which that type of society emerges but are rather the expression of that society's values. The dissent took a conceptually different approach, where the protection of individual rights is the source of the creation of a free and democratic society. This is the crucial conceptual difference between the majority and minority on the Court. The majority seems to be correct as Section One of the *Charter* holds all of its enumerated right, with a noteworthy exception, subject to the "demonstrably justified in a free and democratic society" test.

In a strongly worded comment, Justice L'Heureux-Dube stated that the majority's position was tinged with paranoia.

Two Political Approaches

From both contractarian and communitarian points of view, the majority of the Court got the decision right. In this section, a few key contractarian and communitarian concepts will be used to examine the majority and dissent opinions. This analysis may be of use to Canadian school administrators who face conflicts in their schools where public values and private right are in collision.

Contractarian Concepts

Contractarianism is both a theory of political legitimacy and a theory of the formation of ethical norms. Excepting one, the theories all begin within a theoretical State of Nature wherein humankind finds personal reasons to enter into a societal arrangement by mutual agreement (i.e.: Hobbes (1651), self-preservation (paras. 15-20), Locke (1952), self benefit in the commonwealth (Ch.XI, para. 136), Rousseau (1978), self benefit through organization and thus a moral and legitimate equality with the protection of property). Rawls' (1971) *original position* is similar, as it postulates individuals who at their meeting to form a society do not know their personal stake in decisions. It is as they are ignorant of any benefits, power, education, wealth, and family status which they might have at that time: the *veil of ignorance*. Thus, each participant in the meeting acts reasonably to ensure that fairness or justice results. Once the agreement has been struck among the parties, it is legitimated in the eyes of the participants. It is through the desire to benefit one's self that one enters into the agreement.

Most contractarians would agree that in order to have a legitimate agreement three elements must be present (Stanford, n.d.). First, there must be pre-existing norms which ensure that there is no coercion or force or fraud and to have rules regarding the formation and content of the contract. These pre-existing accepted norms assure that fairness will accompany the agreement and can be used to determine the terms of the agreement should ambiguity arise. Second, both parties will benefit from the agreement. Third, both parties are assumed to be acting rationally as they have an interest in an agreement and desire the benefit of the social interaction.

Once the agreement is made, citizens obey the terms of the agreement due to Kantian duty or simply because, as with Rawls, the agreement was freely entered into by the parties. In today's world, "contractarianism is not intended as an account of the historical origins of current social arrangements, but instead, as an answer to, or framework for answering, questions about legitimacy and political obligation" (Stanford, n.d.). It is therefore reasonable to look at the Court's decisions using contractarian terms.

Pre-understandings

At the time of Trinity's application for certification of its teaching program, it had every reason to believe that it would be certified. As the majority said (Trinity, S.C.C.), "it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU [Trinity] between 1969 and 1985" (p. 43). The legislature had legitimized Trinity's right to function as a private university which espoused particular religious values, notwithstanding that those values were not in accord with public values expressed in human rights legislation. It was not only the official

recognition of Trinity's existence but in the specific partial exemption from human rights legislation, and the public values underlying that legislation, that created Trinity's claim to its reasonable expectation of certification of its teacher education program.

Consideration
The agreement between the Province of British Columbia and Trinity benefited both parties. The government provided the legitimization desired by a certain section of the citizenry and Trinity received legitimization as a private university and thus recognition for its courses, instructors and student programs, in so far as that was available at the time. Consideration or benefit flowed both ways.

Rational Action
At the time of passage of the legislation, both parties acted for their mutual benefit. Neither party was forced to enter into the implied contract. The government could have refused to recognize the legitimacy of a university which espoused private values which were distinct from the values inherent in the Province's human rights legislation. Trinity would therefore have remained an unaccredited university, and not applied for an exemption from that legislation. But both parties entered into the agreement willingly. Their successors, legislatively and academically, could reasonably have been expected to abide by the terms and conditions of the agreement even though the attitude of subsequent individuals or groups which comprised either of the parties, changed.

There was a reasonable contractual expectation created by the Provincial Government that, if Trinity abided by the terms of the implied agreement, it would be able to pursue its interests with neither legislative interference, nor interference from creatures of statute. This appears to have been at least part of the reasons why the majority of the Supreme Court of Canada found in favour of Trinity's application for certification.

The dissenting view of the Court appears to have been based upon Rawl's (1971) concept of distributive justice. Justice L'Heureux-Dube's view was that to label homosexuals and lesbians as sinful brought down social opprobrium upon that class, or classes of citizens, and effectually made those persons unable to participate in that University's educational programs. Further, the Code of Conduct was perceived as institutionalizing a moral culture which, through Trinity's graduates, endangered those of a tender age, young gay students, and non-gay students who would be learning ideas contrary to what provincial legislation and the constitution, through judicial interpretation, held was the common good. As a matter of distributive justice, the principle of equality of access and treatment, required that the original agreement would not have been, and should not have been, entered into by reasonable people, and thus, Trinity's expectation of certification was unreasonable and should not be part of the contract.

Simply put, from a contractarian point of view, the majority believed that, as in Rawl's reflective equilibrium, justice demanded the enforcement of the reasonable expectations of the parties. The social good demanded that the parties live by the actual and implied terms and conditions of the freely entered into agreement (Brown, 1986, p. 75). The key here is that the process by which the agreement was reached between the parties was determined to be just. The individuals who come

after crystallization of the contract's terms and conditions, were, in effect, the trustees of the same.

The majority of the Court would have considered rescinding the implied contract if they had determined that there was a clear danger to the youth of British Columbia. However, there was no evidence, proffered to the Court, to show an actual danger to others created by Trinity's policies and practices. Thus, the implied contract was enforceable and Trinity had a reasonable expectation of accreditation for its education program. As the majority said (Trinity, S.C.C.), " there is no evidence before this Court of discriminatory conduct by any graduate [and]. . . . there is no evidence that the particularities of TWU [Trinity] pose a real risk to the public educational system" (p. 47).

It appears that in order for the Supreme Court to overturn a freely entered into contract between a government and a group of its citizens, there must be a compelling social justification with evidence of grave risk. In this case, as the Appellant Council could not point to any evidence of actual risk to others, other than oral argumentation, the implied social contract remained valid, and the trial judge's *certiorari* to quash the Council's decision, and the writ of *mandamus* compelling BCCT to accredit Trinity's teacher education program, on certain other conditions, were confirmed.

Communitarianism

The Trinity case is politically, a fundamental disagreement between two communitarian perspectives. The dissent argued strongly for a unitary set of public values, enforced by the law, in order to ensure protection from an unacceptable private value, discrimination on the basis of sexual orientation. The argument was based upon a communitarian perspective that there are basic public values which transcend the individual or any portion of society and which must be upheld in order to ensure the public concept of "good" within that society.

The majority accepted the communitarian idea of common societal values and the public good but argued that it is expressed in a "plurality within unity" which guarantees freedom within a society ,and is at the heart of a free and democratic community.

With the above said, it is necessary to briefly examine a few basic concepts of communitarianism.

Communitarian Concepts

Communitarianism is not a theory of the collective but is, fundamentally, a theory of people in relation with each other. Similar to the Aristotelian view that man *qua* man lives within the polis not outside and alone as the beasts, communitarians posit that society exists prior to the individual and that it creates the social self. Indeed, because society pre-exists the individual, it provides continuity of the *life-world* allowing the individual a place and time within which to function and exercise his or her capacities through the interaction with others resulting in interdependence. It is from this interdependence that the "primordial sources of obligation and responsibility" flow (Selznick, 1986, p. 5). To be sure, the *me* exists as a separate entity from the collective but the other part of the person, the *I* exists as the agent of "reflective morality" (p. 3).

This presupposes that the *I* has a morality which learns from the community through interactions with others. It is this sense of morality or of what is good, held as a community value, that distinguishes, and indeed can transform, a community from a mere association or grouping of individuals. It is the community which defines the common good, the *authoritative horizon*, and seeks it. Communitarians believe that it is this "feeling of commitment to a common public philosophy which is a precondition to a free culture" (Kymlicka, 1990, pp. 122-3). It is thus the responsibility of those in the community to defend the common values when under attack by others from within as to fail to do so would result in the "debasement and decay" of the community values and ultimately the community itself (Dworkin, 1985, p. 230). In general, it is fair to say that communitarians believe that the freedoms and rights enjoyed by individuals, which are not denied but are circumscribed by society, flow from the common understandings or values accepted by the community. The enforcement of social values within the communitarian ideal is not physical force but rather persuasion and social opprobrium. Such an approach is possible as interrelationships are the grist to action within society and to be an outcast is so restrictive to the individual that he or she will, theoretically, stop the offending behaviour (Etzioni, 1998, p. xii).

Communities then share common meanings and values within their language and actions. The legitimization of the community's values rests not on consent but from what sociologists call the *implicated self* which postulates that "our deepest and most important obligations flow from identity and relatedness, rather than from consent" (Selznick, 1986, p. 7). Surely, relatedness entails duties to others and it is within that context there arises the duty to respect the rights of others (Selznick, 1986, p. 11). Thus unlike liberalism which posits the primacy of autonomy and individual rights with few social restrictions, the *thin social order*; communitarianism states that a necessary precondition to freedom and rights is a society of common values which justifies many reasonable restrictions on the individual in order to protect those values, the *thick social order*. In other words, the real world is composed of interrelationships, which to function with any degree of consistency, require order and common values as preconditions. These relationships justify social rules to promote cohesion and the furtherance of its communal values.

Communitarians do not steam-roll over the individual, as the individual is respected and valued as an end in him or herself, and not simply a means to a collective end. Nor do communitarians seek to produce automatons to the collective will. Bellah (1998) states,

A good community is one in which there is argument, even conflict, about the meaning of the shared values and goals, and certainly about how they will be actualized in everyday life. Community is not about silent consensus; it is a form of intelligent, reflective life, in which there is indeed consensus, but where the consensus can be challenged and changed- often gradually, sometimes radically-over time. (p. 16)

Beiner (1992) describes the purpose of the communitarian society:

The central purpose of a society, understood as a moral community, is not the maximization of autonomy, or protection of the broadest scope for the design of self-elected plans of life, but the cultivation of virtue, interpreted as excellences, moral and intellectual. (p. 14)

In summation, communitarianism is about the individual living in community where the individual maintains his or her free will but where personage is formed through a common language, values and concepts which in turn frame the individual's reality and cause him or her to relate to that world, and the people in it, with the values of the community.

The Supreme Court of Canada applied two communitarian views to the case before it. The majority approached the values conflict from a "unity in plurality" position while the dissent argued for a "unity of community" approach.

In communitarian terms, the challenge to the Supreme Court was, as Etzioni (1996) suggests, "to point to ways in which the bonds of a more encompassing community can be maintained without suppressing the member communities" (p. 191). The Court had rejected what they feared as the tyranny of the majority, the idea that Canada is a "melting pot" of values, and preferred a mosaic of values. It is that ideal that Etzioni (1996) speaks of when he says, "as I see it, the image of a mosaic, if properly understood, best serves the search for an intercommununity construction of bounded autonomy suitable to a communitarian society" (p. 192). He goes on to say,

A good communitarian society . . . requires more than seeing the whole; it calls on those who are socially aware and active, people of insight and conscience, to throw themselves to the side opposite that toward *which history is tilting. This is not because all virtue is on that opposite side, but because if the element that the society is neglecting will continue to be deprived of support, the society will become either oppressive or anarchic, ceasing to be a good society, if it does not collapse altogether*. (Etzioni, 1996, pp. XIX-XX)

It was the fear of majoritarianism, in effect, a dictatorship of values espoused by the majority in society, which caused the Supreme Court to say, in effect, show us the damage, and then we will consider a remedy.

Implicit in the majority of the Court's argument is that there is no hierarchy of values in the Charter. They believed that to hold otherwise would make law less certain; in that choosing a particular right as predominate today, leaves open the possibility of choosing another right as predominate in the future. In other words, the Court recognized that the priorization of Charter rights could vary according to the historical period in which the Court views them. Such a decision would put all rights at risk or subject to the judicial Zeitgeist of the times. However, if the judicial rule is to recognize all rights as equal, then regardless of the time at which the Court viewed an alleged conflict, it would be required to balance rights based upon concrete evidence of conflict and not what may be the predominate value or right as viewed by society or even legislation at that time.

The difficulty with Justice L'Heureux-Dube's view is that whereas today equality may be the dominant right or value to be protected, but what of tomorrow? The majority answered that acceptance of the dissent's position would, by stare decisis**[5]**, lock (at least for the foreseeable future) the Court into judicial positions which might not be tenable in the changing times. The majority found that a much more flexible judicial approach in such cases and in a constitutional approach to interpreting the rights in the *Charter*, was to give equal authority to all of the Charter rights and thus, when in conflict, to balance them.

Balancing rights is a difficult process. The Supreme Court, although finding that the equality provision of the *Charter* did not apply in the Trinity case, stated, as aforementioned, that there was no evidence that any Trinity graduate had ever discriminated against homosexuals or lesbians in a school. In colloquial terms, it amounted to, "show me the money," and, failing to find such danger their decision was, arguably, predictable.

In our postmodern society, one can reasonably expect that groups in society will claim their particular values as, *just* and *good* and so the "melting pot" analogy, as it applies to public values, fails. As Etzioni (1996) states,

The concept of a community of communities (or diversity within unity) captures the image of a mosaic held together by a solid frame. "E pluribus unum" may not be equal to the task; it implies that the many will turn into one, leaving no room for pluralism as a permanent feature of a diverse yet united society. (p. 197)

In balancing rights, and thus the values which underlie them, decision makers must refer to some common core elements which transcend the particularities of the various contending groups. In the Trinity Case, the Supreme Court of Canada determined that the core public values which enable a balancing of rights are democracy and freedom. It was with reference to those core values that the Court was able to navigate its way through the multi-dimensional labyrinth of jurisprudence, politics and philosophy.

If democracy is by definition composed of heterogeneous individuals and groups, and if freedom is the exercise of rights, subject to reasonable democratic limits without coercion, and if there is no clear and present danger to others in evidence, then a balancing of rights is both appropriate and reasonable. So suggests the majority's decision.

This approach is suggested by Etzioni (1996) when he indicates that several core elements in balancing the rights of sub-communities within a society involve, a) considering democracy as a value rather than a process, b) fundamental legal rights (in his example the United States Constitution and Bill of Rights), c) the layering of loyalties such that a community is willing to acknowledge core values which are respected by all citizens, d) respect for the values of others while maintaining one's own group values, e) the unacceptability of stereotyping by one group to another, f) the acceptance of ongoing civility in dialogue among groups so as to avoid "culture wars" (pp. 200-202).

Although members of the Supreme Court may not have read Etzioni's writings, there is no doubt that the ideas expressed in their judgement ring with Etzioni's concept of society being a community of communities, for the purposes of this paper, a mosaic not only of cultures, but of values underwritten by the key values of democracy and freedom.

Etzioni (1996) correctly characterizes the judicial decision making process as " ongoing societal moral dialogues . . . couched in legal terms, regarding the proper place to draw the line between the societal set of values and the particular ones, those of the community of communities and those of the constituting communities" (Etzioni, 1996, p. 202). *Prima facie*, the Trinity Case represents just such a dialogue of values.

Implications for Education in Balancing Public Values and Private Rights

The significance of the Trinity approach to the resolution of rights in conflict is its decision that without clear evidence of actual damage to others, the rights of all citizens must be protected. Underlying the question of legal rights in conflict is, of course, the values which are implicit therein. In Trinity, the Supreme Court's decision was that except for the fundamental values of democracy and freedom, within reasonable limits as may be demonstrably justifiable in a free and democratic society, all values in Canadian society are of equal worth, be they public or private. Moreover, minority values must be protected from the majority's claim to value primacy. It is no small point, as Canada, which has always considered itself to be a cultural mosaic, has judicially accepted a values dimension to that metaphor.

In education, the formation of policy often involves balancing the rights of parents, students, and educators. The Supreme Court approach suggests that, absent evidence of actual damage to others, all of these rights and the values which underlie them should be viewed as of equal importance regardless of the Zeitgeist of the times. Educational policy making is not an *us-them* exercise, but an *us together* experience. The latter approach necessitates that pedagogical policymakers eschew what some may see as the politically correct position of value relativism in education and espouse the *a priori* position of freedom of beliefs, even if that is unpopular with a majority, or politically vociferous minority. Freedom in a free and democratic society means, according to the Supreme Court, not just that society must protect a minority's right to hold unpopular views *vis-à-vis* the majority, but also from other vehement minority groups.

Plato observed, that it is not the good that we value, but rather, it is what we value that we consider the good. Our views today may be that one right is more important than the other. Tomorrow, our opinion may change. The "golden mean" or balance is what must be sought by educational policy makers.

In practical terms, the key for educational policy makers is to first determine those core values which provide for the existence of their institution, freedom and democracy, and then to balance the remaining values, which may be conflict, without preferring any one of them over others. This seems at odds with the postmodern view that there are no fundamental values except as seen from the eye of the community espousing them. Education takes place within communities espousing a variety of values. Those communities are part and parcel of a wider community where to foster the democratic ideal, each community must be free to hold and espouse its values, notwithstanding the political or social Zeitgeist of the times. This is, of course, Etzioni's point of unity within plurality in conjunction with the lesson of the Supreme Court of Canada in the Trinity Case.

Closing

This paper outlined the facts and the salient issues surrounding the British Columbia's College of Teachers' refusal to certify Trinity Western University's teacher education program. The decisions of both the majority and the dissent at the Supreme Court of Canada were examined focusing upon the differences in their value positions from both a contractarian and communitarian perspective. Lastly, the Court's approach of balancing rights and hence values

when in conflict, was proffered as a method which educational policy makers might well consider.

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[1] An order to "bring up" to a court on the basis of lack of jurisdiction the record of a statutory tribunal or lower court to be quashed . . . . The prerogative writ adopted to quash a decision based upon an error of law which is apparent from the record. Dukelow, D. A., & B. Nuse (Eds.). (1995). The dictionary of Canadian law (2nd ed.). Barrie, Ontario: Carswell.

[2] The name of a writ, the principal word of which when the proceedings were in Latin, was mandamus, we command. It is a command issuing in the name of the sovereign authority from a superior court having jurisdiction, and is directed to some person, corporation, or, inferior court, within the jurisdiction of such superior court, requiring them to do some particular thing therein specified, which appertains to their office and duty, and which the superior court has previously determined, or at least supposes to be consonant to right and justice. Dukelow, D. A., & B. Nuse (Eds.). (1995).The dictionary of Canadian law (2nd ed.). Barrie, Ontario: Carswell.

[3] The grounds or reason for deciding. Dukelow, D. A., & B. Nuse (Eds.). (1995).The dictionary of Canadian law (2nd ed.). Barrie, Ontario: Carswell. (p. 1022).

[4] An opinion not required in a judgement and so not a binding precedent. Dukelow, D. A., & B. Nuse (Eds.). (1995). The dictionary of Canadian law (2nd ed.). Barrie, Ontario: Carswell. (p. 819).

[5] A principle by which a precedent or decision of one court binds courts lower in the judicial hierarchy. Dukelow, D. A., & B. Nuse (Eds.). (1995). The dictionary of Canadian law (2nd ed.). Barrie, Ontario: Carswell. (p. 1189).