Colliding Rights in the Schools: Trinity Western University v. The British Columbia College of Teachers

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ABSTRACT: The Supreme Court of Canada's 2001 adjudication of the *Trinity Western University v. British Columbia College of Teachers* case established a framework for resolving disputes involving colliding *Canadian Charter of Rights and Freedoms* rights. The Court held that administrative bodies may consider discriminatory practices, but that their decisions must be fully and correctly justified using actual evidence, and give due regard to religious rights. The Court ruled that religious belief alone may not be the basis to deny the right to a government benefit or to full participation in Canadian society. However, the Court broadened the application of the *Charter* by allowing administrative tribunals to consider *Charter* values in making rulings about institutions that are not subject to *Charter* scrutiny but do prepare professionals to serve in the public square. The paper concludes by discussing the implications of this decision for a pluralistic democracy.

RESUMÉ: En 2001, l'arrêt de la Cour Suprême du Canada, a mis en place une infrastructure pour résoudre les dissensions sur des droits empiétant «Les Droits et Libertés de la Charte canadienne» et ce, pour le cas de l'Université ouest de la Trinité opposée au Collège des Enseignants de Colombie Britannique. La Cour a soutenu que le corps administratif peut envisager des pratiques discriminatoires mais que ses décisions doivent être entièrement et correctement justifiées par une preuve réelle et doivent être données en respectant les droits religieux. La Cour a déclaré que la croyance religieuse seule, n'était pas suffisante pour exclure des droits gouvernementaux ou de l'intégration complète dans la société canadienne. Cependant, la Cour a élargi l'application de la Charte, en permettant aux tribunaux administratifs d'interpréter certaines de ses valeurs et exécuter des lois pour des institutions (qui ne tombent sous l'examen minutieux de la Charte) qui préparent les professionnels à travailler dans la société. Le papier termine sur un débat concernant les conséquences de cette décision pour une démocratie pluraliste.

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From time to time Canadian education situations involve clashing views about values and rights that are legitimately held and promoted under Canadian law. In a recent case where religious beliefs and values played a part in the dispute, it was unclear who had the right to make educational decisions. In this case, the Supreme Court of Canada eventually agreed to adjudicate the conflicts and delivered judgment in May 2001 (*Trinity Western University v. British Columbia College of Teachers*). This case deals with an underlying question: *To what extent may government-empowered administrative bodies impose regulations that promote a particular view of public morality and belief but exclude competing lawful perspectives?*

This paper describes and analyzes the context, judgment, and implications for administrative bodies, for teacher education, and for Canadian society in general of the *Trinity Western University v. the British Columbia College of Teachers* case. After describing the general background and particular context of the case, we describe the legal arguments made on both sides and the decision rendered by the Supreme Court of Canada. We then discuss the implications for the role of administrative bodies and education in general. What are the consequences for cases where some *Charter* and provincial rights for religious organizations seem to be at odds with other rights? How can competing interests be resolved so that diverse viewpoints can flourish and contribute to a healthy democratic society? Further, what does it mean to be a pluralistic society where differing views are not only tolerated in theory but may be reflected in action? Finally, we point to some areas of continuing uncertainty that will need to be clarified in the future.

The Canadian Cultural Context

Since its establishment as an independent nation in 1867, Canada has become an increasingly pluralistic society. Canada's 19th century leaders attempted to forge one nation out of two distinctly different cultural perspectives, the British Protestant and the Quebec Roman Catholic ones, suppressing the worldview of the aboriginal First Nations people. Gradually, however, the dominance of Protestant and Catholic beliefs in guiding the ethos of Canadian society crumbled. As elsewhere in the western world, the forces of secularization affected both English speaking and French speaking Canada, particularly since the mid-20th century. Also, Canada's immigration policies have contributed to the development of a nation that has become increasingly diverse. Today,

Canada's population has as wide a spectrum of ethnic and religious backgrounds as any nation on earth.

While the majority of Canadians are still at least nominally Christian, Canada's government promotes a secular society where religious views are deemed solely a private concern. This was demonstrated, for instance, in the ceremony held in the nation's capital to commemorate the victims of the September 2001 terrorist attack in the United States. Pointedly, no reference was made to any deity, and no religious music was played or sung. The Prime Minister later that week refused to attend an interreligious service organized by leaders of a wide spectrum of religions. The Federal Court in *Reed v. Canada* (1989) has correspondingly stated, "Canada is a secular state, with freedom of religion."

Schooling in Canada has followed a similar path towards secularization. Egerton Ryerson in the 1840s and 1850s established a public school system in Ontario that upheld the basic tenets of the Christian faith. Ryerson (1847) asserted "the *absolute necessity of making Christianity the basis and cement of the structure of public education*" (p. 32). He introduced the *Irish National Readers* into the public schools in part because they contained "admirable introductions to the study of the Holy Scriptures" (Ryerson, 1847, p. 45). Ryerson's public schools were often referred to as "Protestant" schools since they promoted Protestant faith and values. While for the next 100 years public schools still promoted Christian values, an emphasis on a personal faith based on the Bible gradually decreased (Van Brummelen, 1986). By the 1980s, the last vestiges of the Christian roots of Canadian society – reading Bible passages and saying the Lord's prayer at the start of the day – had disappeared in most public schools. In the 1990s, the province of Quebec restructured its schools from religiously based to language based ones, and the province of Newfoundland and Labrador scrapped its publicly funded denominational system in favour of a unified secular school system. Canada's courts over the last 15 years have also held that the "secular nature [of the public school system] is itself mandated by s. 2(a) of the *Charter*" (*Adler v. Ontario*, 1996, par. 705).

Uniformity and Diversity in Canadian Schools

Educational leaders in Canada often state that one uniform, secular public system of schooling is necessary to promote understanding and tolerance in a pluralistic society. For instance, Sheldon Chumir, a late

prominent member of the Alberta legislature, led a campaign in the 1980s against alternatives in public schools because he held that isolating children in segregated schools would cause intolerance: "The public schools were designed to mix children of different ethnic and religious groups and eliminate those differences" (Bateman, 1980, p. 8). Philosopher Elmer Thiessen (2001) has documented both on analytic and empirical grounds, however, that religiously based schools do not promote divisiveness or foster intolerance any more than secular public schools. Indeed, Thiessen argues that views such as Chumir's lead to intolerance and discrimination against those who disagree with the desirability of secularization in Canadian society.

The often successful attempts to preserve uniform and secular provincial school systems have frequently led parents with strong religious beliefs to seek or establish educational alternatives. Particularly in the 1980s and 1990s, many evangelical Christians, disenchanted with public education, followed the examples of earlier immigrant groups such as the Mennonites and Dutch Calvinist Christians in starting independent Christian schools. During the past decade, Islamic and Sikh schools have joined them. All these religious groups as well as some Jewish communities hold that secular public schools undermine their beliefs by neglecting religion as an important dimension of life. In British Columbia, for instance, 8.8% of the student population in 2000-2001 attended independent schools, most of which are religiously based (Government of British Columbia, 2002).

A number of Canadian provincial governments have made provisions for acceding to parental demands for educational diversity. The Alberta, British Columbia, and Manitoba governments have given increasing financial support to independent schools (Van Brummelen 1996, p. 3), subject to curriculum and teacher certification regulations as well as stipulations that they will not promote racial or ethnic superiority or social change through violent action (*Independent School Act*, 1996, c. 216). The Province of Ontario in 2001 announced provisions for more educational choice by giving tax credits to parents sending children to approved private schools. It also set up an accreditation agency that could, for the first time, authorize the provision of university-level education in Ontario by private institutions. More choice has also been provided within public education, including schools based on "fundamental" values or, in Alberta, on religious beliefs.

While the pluralism inherent in Canadian society has had a growing impact on Canada's schools, public school leaders often continue to oppose diversity in schooling. Teacher unions and associations, for

instance, have fought the establishment of "traditional" alternatives within the public school system as well as government financial support for non-public schools. Not surprisingly, therefore, disputes have arisen about who can or should pull the levers of educational power in a democratic society. In 1996 the Supreme Court of Canada ruled, for instance, that while the province of Ontario had the legal right to fund Catholic but not other religiously based schools, the province could, if it chose, extend funding to other religiously based schools (*Adler v. Ontario*, 1996). In the same year it also declared that teachers, at least in public schools, must promote civic virtue and responsible citizenship, and may not transmit values that undermine the fabric of Canadian society (*Ross v. New Brunswick School District No. 15*, 1996).

The Background to the Legal Case

This societal and educational context resulted in Trinity Western University (TWU) challenging a decision of the British Columbia College of Teachers (BCCT). The BCCT had ruled that TWU's proposal to offer its own final year of its teacher education program was not in the public interest because the University required its staff and students to refrain from "homosexual activity."

The Evangelical Free Church of America founded Trinity Junior College in 1962 (except for the current enrollment figure, the information in this section is taken from the *Statement of Facts in the Chambers Brief of the Petitioners in the Supreme Court of British Columbia* and the *Statement of Facts in the Chambers Brief of the Respondent in the Supreme Court of British Columbia*, 1997). In 1979 the province changed TWU's charter to enable it to grant baccalaureate degrees. It became a member of the Association of Universities and Colleges of Canada in 1984 and gained university status in 1985. In the fall of 2001, Trinity Western University, as it is now called, enrolled just over 3,000 students. TWU's staff and faculty members represent a wide range of denominational backgrounds but are required to sign a common statement of faith. While students do not have to adhere to a particular faith, they, like all employees, must agree to comply with certain core values and standards while they are enrolled ("Community Standards"). TWU considers those standards to be "one aspect of a larger commitment by students, staff, and faculty to live together as responsible citizens, to pursue biblical holiness, and to follow an ethic of mutual support, Christian love in relationships, and to serve the best interests of each other and the entire community." The standards emphasize, for instance,

"total respect for all people regardless of race, gender, location, status, or stage of life ... making a habit of edifying others, showing compassion, demonstrating unselfishness, and displaying patience." More controversially, the standards also prohibit "sexual sins including premarital sex, adultery, homosexual behaviour, and viewing pornography" (Trinity Western University, 2000, pp. 189-190). It was the prohibition of homosexual behaviour that resulted in a protracted legal battle.

TWU began a Bachelor of Education program in 1985. In a joint arrangement with Simon Fraser University (SFU) that was endorsed by British Columbia's Ministry of Education, TWU students who successfully completed 38 sem. hrs. of education courses at SFU, including two major practica, would graduate from TWU with a B.Ed. degree and receive teacher certification from the Ministry of Education. It was expected that TWU would operate its own complete program once its enrolment became sufficiently large.

In 1987 the Government of British Columbia enacted the *Teaching Profession Act* (1996), which gave authority for approving teacher education programs and teacher certification to a new regulatory body, the British Columbia College of Teachers. Soon after the BCCT's founding on January 1, 1988, TWU asked the BCCT to approve a complete teacher education program at TWU. However, the BCCT replied that it could not ratify any additional teacher education programs until it determined the processes and criteria for such approval. The BCCT Council approved such guidelines in October 1994, and TWU submitted an updated proposal in January 1995. A BCCT Program Approval Team visited the TWU campus in January 1996. Its report concluded that "the specific nature of the Trinity Western program should not be an impediment to it being approved for certification purposes." In March 1996 it recommended to the BCCT Council that TWU's program be approved for a five-year interim period, subject to a number of conditions. The BCCT's Teacher Education Programs Committee endorsed this recommendation on May 15, 1996.

Nevertheless, two days later the BCCT Council (consisting of 15 members elected regionally by teachers, one appointed university dean of education, and four government appointees) rejected TWU's application because "it does not fully meet the criteria and because it is contrary to the public interest to approve a Teacher Education Program offered by a private institution which appears to follow discriminatory practices that public institutions are, by law, not allowed to follow." The Council refused to give any further reasons for its decision.

TWU appealed the decision at a Council hearing on June 14, 1996. TWU presented a document that noted that "the legislative act that authorizes us to offer Bachelor of Education degrees *requires* our institution to provide university education 'with an underlying philosophy and viewpoint that is Christian' .... Under section 19 [now 41] of the *B.C. Human Rights Code*, Trinity Western University has the full right to restrict admission to students who voluntarily agree to abide by behavioral standards in line with our Christian viewpoint. It is a logical fallacy to assume that because an institution makes certain requirements of its faculty and students, it cannot therefore prepare prospective teachers for situations where such requirements are not demanded." The BCCT Council deferred a final decision until June 29, 1996. In the meantime, TWU's lawyer wrote the BCCT pointing out that the BCCT had neither sought nor obtained evidence to justify its assumptions that TWU's behavioural standards result in graduates who are intolerant or incapable of dealing with homosexual students in the classroom.

On June 29, 1996, the BCCT Council passed a motion denying TWU's appeal "because the Council still believes that the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its mandate as expressed in the *Teaching Profession Act*." Both the discussion in public session, the motion, and the subsequent BCCT *Report to Members* made clear that the only obstacle barring program approval was alleged discrimination "against persons entitled to protection according to the fundamental values of our society." The BCCT *Report to Members* added that "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." The Acting Registrar of the BCCT stated in a radio interview, "The main issue that caused denial was this issue of discrimination and the teachers' ability to support students with homosexual orientation."

In a news release, TWU stated that "The central question has been whether the B.C. College of Teachers is willing to allow a distinctive voice – a voice that represents a significant portion of the population of the province – to participate fully in schooling, as it has every right to do in a democratic society. The issue has been whether the BCCT is willing to extend tolerance to points of view with which some of its members disagree" (Trinity Western University News Release, 1996). The TWU

Board of Governors subsequently held that the BCCT decision, if allowed to stand, could undermine the ability of accredited private post-secondary colleges and universities to offer professional programs. It therefore asked the Supreme Court of British Columbia to review the decision, emphasizing that "this case is *not* about homosexuality or sexual orientation however those terms may be defined .... This case is about the liberty of Christian individuals to form an educational community based on their beliefs and not to suffer from any punitive measures or the withholding of public benefits on account of those beliefs" (Petitioners' Reply Chambers Brief, 1997, p. 1).

The Legal Issues and the Supreme Court of Canada Decision

On October 18, 1996 TWU filed a Petition under the *Judicial Review Procedure Act* (1996) in the British Columbia Supreme Court. A five-day hearing in that Court occurred in May 1997 before Mr. Justice Davies. In his subsequent judgment, Mr. Justice Davies held in favor of TWU finding that the BCCT had no jurisdiction to consider whether TWU's program had discriminatory practices and that there was no evidence to support the BCCT decision (*Trinity Western University v. British Columbia College of Teachers*, 1997). The BCCT proceeded to appeal that decision to the British Columbia Court of Appeal. Mr. Justice Goldie, Mr. Justice Braidwood, and Madam Justice Rowles of the Court of Appeal heard a three-day appeal in June 1998. In a two to one split decision the majority found in favor of TWU affirming the decision in the British Columbia Supreme Court (*Trinity Western University v. British Columbia College of Teachers*, 1998). The BCCT then sought leave to appeal further to the Supreme Court of Canada. This Court hears only a limited number of cases a year (usually fewer than 100) and will only grant leave to appeal if a case is considered to be of national importance. In this case such leave was granted and a one-day hearing before the nine judges of the Court occurred on November 9, 2000.

The Supreme Court of Canada decision has implications for the extent to which governments or regulatory bodies can impose regulations that may, either directly or indirectly, affect the education of children and young people, particularly when such decisions involve basic beliefs and values. For this reason the legal arguments made to the Court in lengthy factums by each of 11 parties were extensive and complex. The case included three primary parties: TWU and TWU student Donna Lindquist who originally commenced this litigation and

were the Respondents at the Supreme Court of Canada and the BCCT, the Appellant at the Supreme Court of Canada. There were also eight interveners: the British Columbia Civil Liberties Association; the Canadian Civil Liberties Association; the Evangelical Fellowship of Canada; the Canadian Conference of Catholic Bishops; the Christian Legal Fellowship; the Seventh-Day Adventist Church; EGALE Canada Inc.; and the Ontario Secondary School Teachers' Federation. The first six intervened in support of Trinity Western University and the latter two in support of the British Columbia College of Teachers. It is beyond the scope of this paper to fully list and describe all of the arguments made by the 11 parties. However, the following three legal issues are particularly germane to the future of diversity in education in Canada's pluralistic society:

- Did the BCCT have jurisdiction to consider discriminatory practices?
- What standard of review will the Courts apply to decisions of agencies such as the BCCT?
- Was the BCCT correct in its decision?

Jurisdiction of the BCCT

The BCCT is a statutorily created administrative body pursuant to the *Teaching Profession Act* (1996), which establishes the following object for the BCCT:

> It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters. (Section 4)

The meaning of the words "public interest" was central to this dispute. The BCCT argued that these words provided it with a broad jurisdiction to consider discriminatory practices when reviewing TWU's application. TWU, on the other hand, argued that the BCCT was not given the power under the Act to "render judgment on the acceptability of religious beliefs ... [nor] was it created to enforce human rights legislation in an attempt to eradicate perceived discrimination or unilaterally undertake the protection of minorities" (Trinity Western University *Factum*, 2000, par. 40).

The Supreme Court of Canada concluded that the BCCT did in fact have jurisdiction under the *Teaching Profession Act* (1996) to consider discriminatory practices. (Eight of the nine judges ultimately found in

favour of TWU, but all nine judges agreed that BCCT did have jurisdiction to consider discriminatory practices.) Section 4 of the *Teaching Profession Act* is not to be interpreted narrowly as set out in the following statement of Mr. Justice Iacobucci and Mr. Justice Bastarache (authors of the majority decision):

> Our Court accepted in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, that teachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program at TWU. We agree with Rowles J.A. that "it is clear from the terms 'professional responsibility and competence of its members' that the College can consider the effect of public school teacher education programs on the competence and professional responsibility of their graduates" (para. 197). The power to establish standards provided for in s. 4 of the Act must be interpreted in light of the general purpose of the statute and in particular, the need to ensure that "the fulfillment of public functions is undertaken in a manner that does not undermine public trust and confidence" (*Ross, supra*, at para. 84). Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge. (*TWU v. BCCT*, 2001, par.13).

Standard of Review of the BCCT Decision

Having concluded that the BCCT had jurisdiction to consider discriminatory practices, the Supreme Court of Canada then conducted an analysis of the proper standard by which the BCCT decision should be reviewed. In a key 1994 case the Court had described a spectrum for determining the appropriate standard of review for an administrative tribunal decision (*Pezim v. British Columbia*, 1994). While this spectrum has been subsequently refined by numerous Supreme Court of Canada decisions it still ranges from a standard of patently unreasonable, where high deference is given to the tribunal and a decision will only be struck down if it is patently unreasonable, to correctness where the tribunal is afforded little deference and must be "correct" in its decisions. Of

particular importance in determining the level of deference owed to a tribunal is the expertise of its members.

The BCCT and the Ontario Secondary School Teachers' Federation argued that the BCCT has great expertise in the field of education and should be given wide discretion in deciding on the factors to take into account when approving a teacher education program. TWU on the other hand argued that the BCCT has no particular expertise with respect to human rights issues or the balancing of competing rights in society. The Supreme Court of Canada agreed with TWU and decided that no deference should be given to the BCCT and a correctness standard should be used. Mr. Justice Iacobucci and Mr. Justice Bastarache made a number of instructive statements:

> Therefore the BCCT is not the only government actor entrusted with policy development. Furthermore, its expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights. It cannot be seriously argued that the determination of good character, which is an individual matter, is sufficient to expand the jurisdiction of the BCCT to the evaluation of religious belief, freedom of association and the right to equality generally. As mentioned in *Pushpanathan*, the expertise of the tribunal must be evaluated in relation to the issue and the relative expertise of the court itself. The BCCT asked for a legal opinion before its last denial of the TWU application; it relied on someone else's expertise with regard to the issue before us. It has set standards for teachers, but this has never included the interpretation of human rights codes. The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all favour a correctness standard.
>
> The existence of discriminatory practices is based on the interpretation of the TWU documents and human rights values and principles. This is a question of law that is concerned with human rights and not essentially educational matters.
>
> The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our view, very little to do, if anything, with the particular expertise of the members of the BCCT.
>
> More importantly the Council is not particularly well equipped to determine 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.

> Even if it was open to the BCCT to base its decision on perception rather than evidence of actual discrimination or of a real risk of discrimination, there is no reason to give any deference to that decision. (*TWU v. BCCT*, 2001, par. 17 to par. 19)

Was the BCCT Correct in its Decision?

The majority of the Supreme Court of Canada viewed this case largely as a reconciliation of *Charter* rights. Mr. Justice Iacobucci and Mr. Justice Bastarache summarized this reconciliation of rights as follows:

> The issue at the heart of this appeal is how to reconcile the religious freedom rights of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society in general. (*TWU v. BCCT*, 2001, par. 28)

The Supreme Court of Canada affirmed the well established principle that equality guarantees enshrined in section 15 of the *Charter* are fundamental to Canadian society and that such guarantees include protection against discrimination based on sexual orientation (see, for example, *Egan v. Canada*, 1995; *M v. H*, 1999; *Vriend v. Alberta*, 1998; and *Little Sisters Book and Art Emporium v. Canada*, 2000). Even though TWU is a private university and not subject to *Charter* scrutiny the Court held that the BCCT was entitled to consider the *Charter* equality guarantee in its decision. The Court held however, that because section 2(a) of the *Charter* equally guarantees freedom of religion, the BCCT was required to also properly consider such in its decision. The majority specifically stated that a hierarchical approach to *Charter* rights must be avoided (*TWU v. BCCT*, 2001, par. 31).

The Supreme Court of Canada held that the BCCT had failed to properly consider the impact of its decision on the religious freedom rights of TWU students and to properly reconcile the rights at issue. The majority held that religious freedom pursuant to section 2(a) is more than just freedom from state coercion with respect to religion. TWU students also have the right to "entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious beliefs by worship and practice or by teaching and dissemination" (*TWU v. BCCT*, 2001, par.28). The judges referenced a well known quote by Dickson J. in *R. v. Big M Drug Mart Ltd.* (1985) by stating that TWU students were held to have the right to "adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others" (*TWU v. BCCT*, 2001, par. 35).

The Supreme Court of Canada held that the BCCT should also have considered that section 19 [now 41] of British Columbia's *Human Rights Code* (1996) recognizes the value of religious institutions like TWU. Pursuant to section 19 a religious institution such as TWU is not discriminatory and in breach of the *Human Rights Code* simply because it grants preference to persons within its religious constituency. The Court concluded that it would be unreasonable to provide protection to TWU itself pursuant to section 19 but then penalize graduates for having attended TWU. The Court also held that the BCCT should have recognized that the British Columbia Legislature itself had chartered TWU to be a university with a Christian worldview (*TWU v. BCCT*, 2001, par. 35).

The Supreme Court of Canada determined that a key factor in reconciling the various rights in this case was the distinction between belief and conduct. The BCCT does not screen graduates from public universities for particular religious beliefs or even for racist or homophobic beliefs. If discriminatory conduct occurs in a classroom the BCCT can then appropriately take disciplinary action but should not do so on the basis of belief alone. The Court held that the BCCT incorrectly based its decision on the religious beliefs of TWU graduates as set out in the Community Standards document without any specific evidence that such beliefs translate into discriminatory conduct in the classroom. The BCCT at no point in the legal proceedings was able to provide any specific evidence that the Christian worldview of TWU graduates would lead to any discriminatory conduct in the classroom. (TWU throughout the proceedings argued that if the BCCT had the jurisdiction to review the Community Standards of TWU then it should have done so in entirety. The Community Standards of TWU mandate that the human dignity of all persons must be respected.)

To summarize, the Supreme Court of Canada concluded that "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system." Because the BCCT failed to provide any specific evidence, "the BCCT acted on the basis of irrelevant considerations. It therefore acted unfairly" (*TWU v. BCCT*, par. 43). The Court ordered the BCCT to approve TWU's education program under the conditions initially stipulated by the BCCT's Teacher Education Program Committee.

Implications of the Ruling for Administrative Bodies and Education in General

As indicated above the Supreme Court of Canada did reverse the British Columbia Court of Appeal finding that the BCCT did not have jurisdiction to consider discriminatory practices. The Supreme Court indicated that in a pluralistic society schools must ensure that they provide an environment free of bias, prejudice, and intolerance. The strong wording on this issue by the Supreme Court, as set out above, indicates that the BCCT did have the jurisdiction to consider discriminatory practices to the extent that they might impact on the education environment. While the ruling of the Court with respect to jurisdiction was specific to the context of the BCCT and its creating legislation, the *Teaching Profession Act,* the strong wording by the Supreme Court with respect to the pluralistic nature of schools and the educational environment suggests that educational administrative bodies will generally have this jurisdiction. In other words, educational administrative bodies in the future seem to be entitled to be arbiters of colliding rights.

A second implication of the Supreme Court of Canada decision is that while educational administrative bodies have been given the right to resolve issues of competing rights, they will likely be shown little deference by the Courts. That is, the decisions of administrative bodies will need to be justified in a manner determined correct by the courts. They will have to give due regard for all rights, including religious ones. The BCCT was held to a correctness standard of review because it lacked expertise in interpreting human rights or reconciling competing *Charter* rights. With the pluralistic nature of schooling increasing there will likely be a corresponding increase in the incidence of rights based educational issues. While the Court decision sanctions administrative bodies to consider issues involving competing rights, they will likely be shown little deference and have to be correct in any decisions made. The lack of deference afforded the BCCT in its case against Trinity Western University will likely encourage those who are unhappy with decisions involving rights made by administrative tribunals to challenge such in court. The clear implication of this is that the decisions of administrative bodies, when they attempt to resolve colliding rights, can and likely will be challenged through litigation in the future. (Note that the nature of the BCCT does not exactly parallel the nature of a board of trustees all of whom are elected by the public. It is likely that the Courts would draw

a distinction between the two and afford greater deference to such an elected body.)

A third significant implication is that decisions on competing rights cannot be made on strictly philosophical grounds but must include an examination of the actual effects and outcomes of beliefs. After stating that there was no evidence before the Supreme Court of discriminatory conduct by any TWU graduate, the Court concluded that:

> Instead the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected .... For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society. Acting on those beliefs, however, is a very different matter. (*TWU v. BCCT*, 2001, par. 36 and par. 37)

The BCCT attempted to assert that examination of evidence of actual behaviour was unnecessary (and also impossible since TWU graduates until that time had taken their last year at Simon Fraser University). The Court responded, however, that these issues cannot be decided on the basis of theoretical arguments or conjectures about possible or likely consequences, but must take into account actual evidence of such consequences. The process of reconciliation of rights, in other words, must take into account real life situations. Ideologues of all persuasions may try to resolve colliding rights within the framework of intellectual debate without considering actual consequences and realities. This is not possible given the Supreme Court decision.

A quick reading of the Supreme Court of Canada decision would likely miss a fourth implication. The following one sentence statement in the majority decision, however, may have profound implications for all administrative bodies, not just those in education:

> While the BCCT was not directly applying either the Charter or the province's human rights legislation when making its decision it was entitled to look to those instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU. (TWU v. BCCT, 2001, par. 27)

The BCCT argued throughout the proceedings that its decision to deny TWU a teacher education program was grounded in *Charter* values. Notwithstanding its own admission that TWU is not subject to the *Charter* (or provincial human rights legislation), the BCCT argued that it was entitled to use *Charter* and human rights values when making its

decision. The above statement by the Supreme Court of Canada suggests that it agreed with the BCCT on this point. The result is that the scope of the *Charter* may have been significantly increased by this decision. Administrative bodies such as the BCCT now seem to be able to use the *Charter* (or at least the values that emanate from the *Charter*) as a sword, applying such to private persons and organizations not otherwise subject to *Charter* scrutiny, at least if such persons or organizations participate in activities in the public square. This aspect of the decision has the potential of limiting active participation in Canadian society to those who are willing to work within the framework of values established by the *Charter* and interpreted by the Court.

A fifth implication of this case is that administrative bodies should now have at least a somewhat clearer understanding of the meaning they must give to the guarantee of freedom of religion set out in section 2(a) of the *Charter*. Prior to this decision there was considerable debate as to place that religious belief has on decisions impacting the public domain. David M. Brown (Brown, 2000) concludes his recent summary of the development of religious freedom in Canada with the following statement on this debate:

> Religion, however, also displays a very public face. The major religions in Canada each, in their own way, make transcendent claims by which to judge the Canadian policy, whether it be on matters of social justice or morality. Many Canadians shape their opinions on public matters in part through the filters of their religious beliefs which provide an overarching framework in which they assess all matters, political and nonpolitical. Yet, as the 'freedom from' cases discussed above show, the judicial approach to religion in public contexts differs markedly from the accommodation seen in private spheres of activity .... Whereas before the enactment of the *Charter* the Supreme Court of Canada had regarded freedom of religion as one of the 'primary conditions of ... community life within a legal order,' some recent lower court decisions have sought to transform that freedom into a mere 'freedom to stand on the sidelines' of public debate. (p. 551)

The Supreme Court of Canada has now in part settled this debate by stating that the TWU students' "freedom of religion is not accommodated if the consequence of its exercise is the denial of *full participation* in society" (*TWU v. BCCT*, 2001, par. 35). Administrative bodies must be cognizant that religious belief alone cannot be the basis to deny any citizen the right to a government benefit or to full participation in Canadian society. The British Columbia Court of Appeal recently

summarized this principle in *Chamberlain v. Surrey School District* (2001):

> Moral positions must be accorded equal access to the public square without regard to religious influence. A religiously informed conscience should not be accorded any privilege, but neither should it be placed under a disability. (Par. 28)

In summary, while the Supreme Court of Canada ruled that administrative bodies such as the BCCT have the right to consider colliding rights questions when making decisions, it also held that such decisions may be held up to close scrutiny to determine that all sides of such conflicting rights are given due consideration. Also, while the Court decision has expanded the scope of the application of *Charter* rights, the Court also made clear that religious freedom rights may not be considered subsidiary to other *Charter* rights. Indeed, the decision affirmed that for pluralism to be meaningful, Canadian society must accommodate a broad spectrum of beliefs, including religious ones, and that when rights collide, one such right may not arbitrarily override others that are embedded in law.

Competing Interests and Rights in a Pluralistic Society

Beneath the veneer of the homosexuality question in the *Trinity Western University v. British Columbia College of Teachers* case lie issues that are not easy to resolve. Candace De Russy argues that today "we are witnessing the widespread rejection of the liberal idea itself: the belief that education and wisdom thrive best when competing truth claims can be advanced in an atmosphere of freedom and tolerance" and that "the arrogant rejection of the creeds of Christians, Jews, and Muslims as unworthy of respect" has resulted in secularism serving "to distort the accuracy, coherence, and completeness of all knowledge" (2002, p. B11). Certainly the Supreme Court of Canada agreed that in this case the BCCT acted arbitrarily and unfairly. It is this type of action that leads De Russy to call for a renewed and genuine commitment to pluralism, tolerance, and diversity. But how do we define and exercise pluralism, tolerance, and diversity? How do we negotiate difference in a pluralist society? How can Canada's Supreme Court ensure that the *Charter* is used to protect freedoms in a pluralist society rather than as a sword that threatens those holding to minority vales and beliefs?

Our Canadian society is composed of many religious, ethnic, linguistic, and cultural pluralities. Ken Badley (2000) points out that we can respond to features of such pluralities (and to the pluralities

themselves) in any of a continuum of ways ranging from eradication, to assimilation, to tolerance, to respect, and finally to celebration (pp. 53-54). Yet even ardent proponents of ideological pluralism have difficulty tolerating, for instance, the practice of female genital mutilation, let alone celebrating it. Nor will they accept the belief that terrorism is a legitimate means to attain political goals. As a society we cannot and do not accept all pluralities. There are limits to pluralism and to tolerance. But we also have to avoid assuming, as has so often been done in Canadian society, that the public square must therefore be reserved only for those things that we all hold in common (p. 55). In a society that is dominantly secular, that restriction would then exclude all religious beliefs from being relevant for public policy discussions and action. Moreover, it would eventually lead to a society characterized by a gray homogeneity that expunges whatever happens to be not politically correct at a certain point in time.

Genuine pluralism not only tolerates differences but also respects persons and communities propounding those differences. Indeed, it will accommodate such persons and communities to be fully involved in the public square. There must, of course, be some provisos. First, tolerance needs to be defined as allowing those who hold views that differ from your own to promulgate and act on such views. Tolerance involves respecting persons holding such views, and expressing such respect. Tolerance is not assimilation; it presupposes disagreement and differences. But neither is it necessary for persons to celebrate views that they tolerate. They can consider the views false but nevertheless respect and love the person who holds them (Thiessen, 2001, pp. 45ff.). Second, we need to define limits to pluralism and tolerance. A democratic society cannot function without certain values being upheld. At a minimum, we can tolerate only those positions and actions that support respect for all persons and their dignity, veracity in all dealings, responsibility towards self and others, and compassion for the disadvantaged. While there may be disagreements about the precise definitions of these criteria, they do describe some broad parameters within which a democracy can allow pluralities to flourish, including educational ones.

Trinity Western University's "community standards" support these basic criteria, ones that serve as a value framework for democratic pluralism. That is one reason that the Supreme Court of Canada upheld the right of the university to offer a teacher education program that led to certification of its graduates. The Court agreed with TWU that asking students and staff to refrain from homosexual behaviour does not

necessarily result in TWU graduates treating homosexuals unfairly or disrespectfully. Denying TWU the right to offer a complete teacher education program, the Court decided, would prevent persons from "expressing freely their religious beliefs and associating to put them into practice" (*TWU v. BCCT*, 2001, par. 32). The Court recognized that beliefs and views that disagree with certain behaviours do not necessarily lead to discrimination against those who practice those behaviours. Unless there is evidence that institutions or individuals are breaking Canadian laws, administrative tribunals may not deny them participation in the public square. More specifically, governments, institutions, and boards may not withhold authorization and privileges on the basis of religious beliefs: "Freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society" (*TWU v. BCCT*, 2001, par. 35).

The issue before the Supreme Court of Canada was not to what extent persons may act on their beliefs if those actions might be contrary to a Canadian law. The Court did state, "The freedom to hold beliefs is broader than the freedom to act on them," adding that discriminatory conduct, especially when it poisons the school environment, can be subject to disciplinary proceedings (*TWU v. BCCT*, 2001, par. 36 and 37). That does not mean, however, as M.H. Ogilvie and others have claimed, that this decision restricts the freedom of minority groups such as Christians (Ogilvie, 2002). Rather, the Supreme Court upheld the right of ideological pluralities to co-exist and play a meaningful role in Canada as long as they do so within certain parameters. And in this case the judges chose not to clarify the parameters – they did not define, for instance, what is meant by "discriminatory conduct." The Court did make clear that it held that "there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully" (*TWU v. BCCT*, 2001, par. 35). That is, the Court in essence concluded that a personal decision to abstain from homosexual behaviour does not *ipso facto* mean that the person discriminates against persons of homosexual orientation. At the same time, administrative bodies now appear to have broader powers to take into account *Charter* values when making decisions.

Public schooling is no longer the universal and uniform educational establishment that Western liberalism assumed to be able to serve all sectors of society. The pluralities of Canadian society have put pressure on decision makers not only to allow but also to fund a diversity of educational options. Increasingly, non-public institutions are also becoming involved in preparing professionals for their careers, including

teachers. While the government and its designated agencies have the authority to demand that such institutions uphold certain standards, the Supreme Court has made clear that neither the government nor such agencies have unlimited authority, and that they must give room to religiously based organizations as well as individuals to hold religious beliefs without the disallowance of public privileges. The decision, therefore, while not clarifying to what extent persons can act on their beliefs in public settings, does broaden the scope for diversity in Canadian society: it took away the right of a regulatory body to withhold participation in the public square due to internal religiously based behavioural standards at odds with a majority point of view. Thus the Court, at the very least, has recognized that a democratic society must allow the voices of the broad range of pluralities and the spectrum of depths of convictions in Canadian culture to be heard. That is encouraging not only for religious communities but for all persons or groups that champion minority views.

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